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# COBELL VERSUS NORTON LAWSUIT

## HEARING

BEFORE THE

## COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON POSSIBLE MECHANISMS TO SETTLE THE COBELL VERSUS NORTON LAWSUIT

JULY 30, 2003
WASHINGTON, DC

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# COBELL VERSUS NORTON LAWSUIT

**WEDNESDAY, JULY 30, 2003**

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

The committee met, pursuant to other business, at 10:08 a.m. in room 216, Hart Senate Building, Hon. Ben Nighthorse Campbell presiding.

Present: Senators Campbell, Inouye, and Johnson.

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

The CHAIRMAN. We will now move to the hearing to discuss potential settlement of the methodologies in the 8-year-old *Cobell Trust Fund* lawsuit. In recent days, the House Committee on Resources has held a hearing on the *Cobell* suit, and days later a provision to establish a cash buyout to the IIM holders to an accounting was removed from the House Interior appropriations bill.

Now, this case is entering the its year. We have all been involved in it, and we could probably all speak hours and hours on it, the nuances of it, but the bottom line is it has not moved forward. All the court hearings, the cabinet officials held in contempt, the computer shutdowns, the millions of dollars that have been spent, the tens of millions that will be spent in the future, clearly it is in everybody's best interest to bring this to some reasonable conclusion.

The Indian tribes and the Indian people themselves and the Federal Government continue to absorb dollar costs in the tens of millions, opportunity costs preventing us from addressing core trust problems like probate and land fractionation. The morale costs that are driving good people out of the Department is also a secondary concern, but equally important. Second, whatever Judge Lamberth rules in the coming weeks, there are sure to be appeals, motions, and future court actions for months, and probably years, to come. And, last, no accounting has been rendered to the IIM account holders, and the Department has told us that a full historical accounting will cost roughly $2.4 billion and take at least 10 more years.

So we have to collectively ask ourselves whether this lawsuit should continue or not. I think the situation, frankly, is unacceptable for everybody, and as the authorizing of any chairman, my goals are very simple and straightforward, and that is to provide

equitable and timely relief to the IIM holders and, second, to restore to the Department some sense of normalcy, because this is overshadowing literally everything they do in the Department today. We want to look at the alternatives available to us other than the historical accounting route. We want to ask what are the costs of the alternatives, and are the alternatives legally and equitably defensible; and how we collectively should proceed in structuring such alternatives.

I will ask if Senator Inouye has an opening comment.

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

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

For too long this matter has been a cloud over Indian country, and it is about time we do something to resolve it. I wish to associate myself with your remarks.

The CHAIRMAN. Thank you, Senator Inouye.

Now we will go ahead and start with the first panel. One will be James Cason, the associate deputy secretary of the Interior for the Department of the Interior.

Welcome, Mr. Cason.

And, by the way, unfortunately, too many times our committee hearing gets interrupted by votes, and we do have some, at least one, maybe more, scheduled at 11:30. So I asked staff to bring in a light today to remind people to stay within some kind of a parameter of time so everyone has a chance to speak and that we have a chance to ask a few questions. It is on red, but we will turn it on green. When it goes off and red, you might want to conclude your testimony, but your complete written testimony will be included in the record and will be read. Thank you.

**STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC**

Mr. CASON. Thank you, Mr. Chairman. I really appreciate the opportunity to come up and visit with the committee on this really important issue. I have to start off and agree with both of you. I couldn't agree more that this is a very serious problem that is tremendously impacting the Department of the Interior in a very adverse way. And it impacts Indian country in a very broad and adverse way based on the expectations of many, with no answers, that have been ongoing for years. So it is something that we need to take on and try to address.

I wanted to take a second just to introduce Aurene Martin, who is the acting assistant secretary for Indian Affairs; she is with me. Ross Swimmer, who is the special trustee for American Indians, couldn't make it today; he is finishing up the 14th quarterly report to the court today.

The Department of the Interior appreciates the leadership being shown by this authorizing committee, and we certainly agree that efforts need to be made toward settling this long-standing issue. We also appreciate the efforts on the part of the House, mentioned by the chairman, that the House Resources Committee has recently taken up the issue as well to try and fashion some sort of a settle-

ment on this issue. And the Department also appreciates the efforts of the House Appropriations Committee, trying to recognize the difficulties associated with this issue and trying to provide some direction to the Department about how to settle this issue.

I wanted to start, Mr. Chairman, with a very brief history of the issue that we have. And I have asked to have passed out a 1-page paper here that is entitled "1994 American Trust Reform Act." And the thing that I wanted to show, Mr. Chairman, is the provision No. 4 under section 101, which says "determine accurate cash balances," and then provision 102A, which states:

> The Secretary shall account for daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.

That is the root language that brings us here today, that Congress, in 1994, passed this act and gave us this direction. And at the time, in the legislative history, Congress was contemplating doing an accounting prospectively beginning October 1, 1993. That language didn't get incorporated into the final bill, but that seemed to be the discussion that was held in Congress as to what this provision meant and where we were supposed to start.

What has happened now is the district court has looked at these provisions and basically interpreted it as this means a historical accounting, that we are to go back in time to the origins of individual accounts and account for the balances from the day they were started to the present; and that is how we get the term historical accounting. The underlying premise is that we cannot trust the balances that we have in our accounts, and that we have to go back from day one and recreate the balances of every account in order to assure that they are accurate. And this is the root that we need to look at in terms of the accounting claims that we have. This isn't what Congress said to begin with, but this is how the district court has interpreted the job, and that is what prompted the Department to file its historical accounting plan.

We filed the historical accounting plan with the Congress in July, 2002. Mr. Chairman, as you said, that plan was a very comprehensive plan: Basically, all beneficiaries across all time, on a transaction-by-transaction basis, and the estimate we had to do that work was about $2.4 billion, and about 10 years, and that is a best guess at this point. And the difficulty, I would like to illustrate, of trying to do this would be like taking, Mr. Chairman, your personal checking account and having you reconcile your personal checking account for the entire time you have had it, and every other checking account you have ever had, and going back and doing that for your father and your grandparents and your great-grandparents and your great-great-grandparents, and multiplying that by about 500,000 times. It is a huge job to do, and since we have about 130 years worth of potential time that we are required to do that, potentially under the court, we have a very sizeable records management issue that we have to assemble all the records throughout those periods of time in order to do it. It is a very sizeable job.

When we submitted the plan, it was $2.5 billion in 10 years, and the message I got back from the chairman and the vice chairman is that is too long and it costs too much, we need to do something else; that Indian country is waiting too long for the results of your

efforts, and we need to find another way. And that started us down the pathway to talk about settlement of some sort.

We also had a subsequent requirement from the court to provide a historical accounting plan to the court by January 6 of this year. Based upon the feedback that we received from Congress, we constructed another plan that took less time, about 5 years, and less money, about $335 million, and depended upon the use of some statistical verification methods rather than doing verification on a transaction-by-transaction basis. And that plan is currently sitting before the court. We have sought funding from Congress to implement that plan. The funding in the 2004 budget is approximately $100 million that we have requested. And so far the markups on both the House and Senate side are about $55 million less than what we had requested, which sends a signal to the Department that perhaps the $335 million is too much, or that Congress doesn't necessarily agree that accounting is a solution, which may be driving us back to the settlement discussions.

We have done accounting so far, and I would like to just take a moment to share the results that we have had so far in our accounting process. We have done tribal accounting as a result of efforts by Arthur Andersen and other accounting firms. We did some accounting in the late 1980's and early 1990's, and we found that generally we could find 85 to 90 percent of the documents that we needed to do an accounting. We didn't find all documents, as you might expect, because of the time periods that have passed. And the error rates from what we found were generally very low, far less than 1 percent.

We have also done accounting for the named plaintiffs in the *Cobell* lawsuit, and we presented a report to Congress. Essentially that exercise cost approximately $20 million for all the activities associated with it, and in that effort we found one check for $60 that didn't go to the right place; it went to another IIM account holder, but it didn't go to the right account holder.

We have also done approximately 17,000 judgment per capita funds accountings. At this point we are not able to distribute them because we have been embargoed by the court. But in doing the accountings for that, the error rate, again, is essentially zero.

Those may not in total be a statistically valid sample of all accounts, but the point is the accounting that we have done, and there has been a bunch, the error rates generally tend to be very low.

If we don't do accounting and we go to settlement, the Department suggests there are a couple basic questions that we need to ask as part of the process. The first is what are we settling. In the lawsuit we have in front of the *Cobell* court, the issue is to do an accounting, and the accounting is an administrative process which basically leads to a statement like your bank statement that says here is how many transactions you have had, here is the income into your account, here is the checks written on your account, and here is the balances. So the issue before the court is to do an accounting. However, the rhetoric that surrounds this case would suggest that we are looking for is reparations of some sort for some sort of ills, and we are not clear what would be on the table for

settlement, and that is certainly one of the issues that we need to talk about.

We need to answer the question of who we are trying to do a settlement for, and the who is a relatively large size issue based upon the rhetoric that surrounds this case as well. The Department has basically taken the position on who in our plan before the court that it should be all IIM account holders who had funds on deposit when the 1994 Act was passed. The plaintiffs are seeking a who of all current and former, throughout time, IIM account holders and all possible beneficiaries of their interest. It could be even broader, basically all Indians in Indian country. So one of the things we have to answer is who would be the recipient of whatever settlement we would engage in.

And then, finally, how much would Congress pay. And this is a very sizeable issue that makes settlement a very difficult one to embrace, but one I think we nonetheless have to address. The size of the issue is if we approach this as a matter of just pure accounting and what the findings of the Department are, it would be in the very low millions for a very few number of people, based on the errors we have found. However, if you look at what the plaintiffs are seeking, they are essentially saying that they are owed $176 billion. That is billion with a B. That is a very large number. If you looked at the total amount that Congress appropriates every year to run the trust in the Department of Interior, that is about 350 years worth of appropriations.

The premise of this, I believe, is seriously in question, and the premise is both the plaintiffs and the Department seem to agree that we have had approximately $13 billion in income into IIM accounts. However, the plaintiffs seem to be assuming that none of those funds were paid out to Indians, which I find to be difficult, because that would assume that we have had some great conspiracy over the last 100 years of generations of BIA employees, who are also Indians working with their friends and relatives, and 25 successive administrations and 25 successive Congresses all agreeing that we would take in money and keep it, never pay it out. So I think one of the things we have to do is challenge the premise of what is owed and make sure that we are all clear, so that, at the end, if we have a settlement, everybody understands what the premise of the settlement is, what we are trying to solve with it, and everyone should be satisfied at the end.

The Department of the Interior stands ready to assist the committee in any way that we can, and I am prepared to answer questions. Thank you.

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

The CHAIRMAN. Thank you. Well, I found your analogy to my checkbooks very interesting. I have had a checkbook for 50 years, and I have to tell you if I didn't have a wife who knew how to balance the thing, I wouldn't remember what I did last month.

Mr. CASON. I understand.

The CHAIRMAN. So I think I understand the complication of going back literally, you know, decades to try to get an accounting. Let me ask you a couple of questions before I give it to Senator Inouye. Your testimony at the hearing of Mr. Pombo convened 2 weeks ago

is that the real amount owed to the IIM holders totals millions of dollars, not $137 billion. You referenced that here today.

Mr. CASON. Yes.

The CHAIRMAN. What was the basis for that statement?

Mr. CASON. The basis of the statement is if we took the results of the accountings done thus far, that the error rate has been very, very low for the ones done thus far. So if we based it on information we currently have available, it would generate a settlement amount that would be very low.

The CHAIRMAN. How many of those hundreds of thousands of accounts would you say contain less than $100?

Mr. CASON. I don't remember clearly, Senator, but it would be in the tens of thousands.

The CHAIRMAN. The Department of the Interior's July 2 report to Congress said it would take $2.4 billion in 10 years to do a full historical accounting. You referenced that. The revised estimate is $335 million over 5 years. And you did mention the number of years at that rate it would take to make some of the transactions. If we did that, do you think there would be a large number of errors or that would be a wise expenditure to put that much money in it?

Mr. CASON. The approach that we plan to take in the revised plan to the court is one in which we would still prepare a transaction-by-transaction ledger for each individual Indian account holder. The principal differences between the two plans is that in both we were doing a statement of account on a transaction-by-transaction basis; however, in the first plan the set of accounts that we would do was much broader because it included all past beneficiary or IIM account holders, and the plan before the court anticipated a set of account holders who had funds on deposit at the passage of the act.

The statistical portion is basically related to verification; in the verification element essentially what we did, if I can give an example of the post-1985 transactions, there were about 26.5 million transactions that occurred after 1985, which we called the electronic era. And only about one-half of a million of those are over $500. So you have 26 million out of the 26.5 million are less than $500, and you have millions and millions of them that are less than $1. So basically what we did, Mr. Chairman, is we said let us verify all of the transactions that are over $5,000, go get the supporting information to document that transaction, let us take a statistical sample of all of the transactions between 500 and 5,000, and on the statistical sample go get the supporting information; and the same thing for the 26 million at the bottom, take a statistical sample and go get documentation to support those transactions, whether they are 1 cent or they are $100.

The CHAIRMAN. As you know, the cash buyout proposal was removed from the House Interior bill. Did your Department estimate how many IIM holders would have accepted a cash offer if that hadn't been removed?

Mr. CASON. Not to my knowledge, we haven't done that.

The CHAIRMAN. No estimate of what would have cost, then?

Mr. CASON. No.

The CHAIRMAN. Okay, thank you.

Senator Inouye, did you have some questions?

Senator INOUYE. Yes.

In your statement you have suggested that Congress will have to appropriate funds for the settlement. But is it not true that the settlement of claims against the United States are paid out of the claims judgment fund, and not out of appropriations?

Mr. CASON. Senator, it is possible, depending on what sort of settlement we fashion and how big the number is, that the judgment fund may be a possible tool to use. But if we are talking in terms of multiple billions, that is larger than the judgment funds that are available, so some special dispensation may be needed.

Senator INOUYE. But the judgment fund has no limit, does it?

Mr. CASON. I am not as familiar as I ought to be to answer that question. It is my understanding it normally sits at around $700 million of availability and get replenished. So I am not sure what the mechanics would be to do that for a multi-billion dollar settlement.

Senator INOUYE. In your testimony you have suggested that the difficulty that your Department faces stems from the enactment of the 1994 Act. Now, we note that in the 2001 court of appeals statement it says:

> The Indian Trust Fund Management Reform Act reaffirmed and clarified pre-existing duties, it did not create them, and that its enactment did not alter the nature or scope of the fiduciary duties owed by the government to IIM trust beneficiaries.

Now, to what extent do you believe the Department's current potential liability stems solely from the enactment of the 1994 Act?

Mr. CASON. I don't believe that has been explored, Senator, in terms of allotting responsibility for the Department to do an accounting between the 1994 Act and any predecessor possible direction on performing accountings. What we do know is that the lawsuit was brought pursuant to the 1994 Act and the interpretation of these provisions as to what we should do in terms of the accounting. So that is where we focus our attention. As trustees, we recognize that there is a general duty to perform accounting if an individual account holder is interested in finding out what is in their account, and for years the assumption made by the Department is that an accounting would be one that we would respond when an IIM beneficiary came in and said can you tell me what is in my account; and then we provide it at that time, as opposed to doing periodic statements to everyone.

And if you look at the history, there has been, over time, periods of time in which the Department provided some periodic statements, periods of time which it didn't and it assumed it would provide one if asked, and that the 1994 Act finally codified specific direction from Congress that there was an expectation to do periodic quarterly statements to IIM beneficiaries, and the Department started regularly to do it at that time.

Senator INOUYE. What is the Department's position on alternative dispute resolution?

Mr. CASON. I think it is an interesting tool that can be used in some circumstances. In this circumstance it is also something we are willing to consider. However, I would suggest in this case that one of the things that we would all have to strive for if we jointly participated in an ADM process, is that we would have to find

some basis for being in the same ballpark. And the difficulty we have at this point, Senator, is where our ballpark is in the low millions based upon what we know, and the plaintiffs' ballpark is $176 billion. It doesn't seem like we are in the same relative area to do negotiations.

So one of the things that we will need some help and leadership from the Senate in is to try and set reasonable expectations, perhaps for both parties, as to how to go through this process and find a fair and equitable settlement of this issue.

Senator INOUYE. Would you agree that the Indian beneficiaries' rights in the funds and the lands held in trust are vested property rights?

Mr. CASON. Yes; we hold Indian properties in trust for Indians, both land and cash.

Senator INOUYE. Then if that is so, how can Congress diminish the Government's potential liability?

Mr. CASON. Senator, I don't know about the diminish the potential liability. My sense of where we are in this issue is we are trying to clarify what the Government's liability is. And we have a statutory provision that I just showed you that is the root of this particular issue, which, on its face, doesn't appear to suggest that the Department should have undertaken a historical accounting for all current and former IIM account holders; and that if we looked at the congressional intent in history, it appeared to suggest, both in the language adopted in the 1994 Act and the legislative history, a prospective accounting responsibility. So what we are all going through, both in the court and here in these discussions, is an attempt to clarify what the intent of Congress was and how the Department needs to behave with that intent to carry out what Congress was directing us to do. The language seems ambiguous, and it is being interpreted now.

Senator INOUYE. Thank you very much, sir.

Mr. CASON. Thank you.

The CHAIRMAN. Thank you, Mr. Cason. Appreciate your being here.

And we will now proceed to the second panel, which will be the Tex Hall, president of the National Congress of American Indians; John Berrey, chairman of the Quapaw Tribal Business Committee; John Echohawk, the executive director of the Native American Rights Fund; and Harold Frazier, the chairman of the Cheyenne River Sioux Tribe from South Dakota.

If you gentlemen would sit down, we will start just in that order, with Tex Hall first. Okay, I am going to change that and have John Echohawk first. And if you could also kind of observe a time limit so that we give everybody equal opportunity to speak and ask some questions, I would appreciate it.

Go ahead, John.

## STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE AMERICAN RIGHTS FUND, BOULDER, CO

Mr. ECHOHAWK. Thank you, Mr. Chairman, Mr. Vice Chairman. My name is John Echohawk. I am executive director of the Native American Rights Fund. The Native American Rights Fund is co-counsel for the *Cobell* plaintiffs in the *Cobell* v. *Norton* litigation.

We have been involved in this litigation since 1996, and we feel like that we have made significant steps in determining the extent of the Federal Government's trust responsibilities to these individual Indian account holders. We have attempted, on five different occasions, to reach a settlement in this case with the Government, and all of those attempts have been unsuccessful.

The CHAIRMAN. John, can I interrupt you for just 1 minute?

Looking at my notes here, Donald Gray was also supposed to be on this committee, and I didn't call him to the table. If he could come up and sit here too, I would appreciate it.

Okay, go ahead and proceed.

Mr. ECHOHAWK. Our attempts at settlement have not been successful, and so when we received the letter that you and Senator Inouye sent in April, suggesting a mediated settlement, we thought that was good because we thought maybe with your participation, maybe we could have some fruitful settlement discussions and settle this case. At that time, we began preliminary discussions, as you know, about this mediation process that you suggested. We have given that process some thought, and we wanted to share with you today what we think are some of the elements for a sound settlement process. We think these are elements that are a starting point for discussion about how this process gets put together, but we think that it is a process that can result in settlement of this long-standing problem.

The first element is inclusion of all necessary parties. Of course, the *Cobell* plaintiffs, the Government, and as I mentioned, your participation, Mr. Chairman and Mr. Vice Chairman, is very important. I think we would also want to involve the chairman and vice chairman of the authorizing committee in the House as well, because I think that keeps the pressure on all of the parties to reach a settlement. In addition, I think to the extent that tribal interests are involved, and they are involved in this case to some extent, tribes ought to be parties to this mediation as well.

Second, the appointment of a mediator. I think that is a very important element here. It has to be a person of significant political clout who can command the attention of the parties and drive us toward the settlement that we are all seeking.

Third, scope of the settlement discussions. This is something that needs to be determined up front. There are many issues related to the Federal Government's trust responsibility to Native people, but I think the only way we are going to get anywhere here is if we limit the scope of this settlement discussion to the issues in *Cobell,* the Individual Indian Money accounts. I think it is also important to recognize the decisions the courts have made in this litigation, both the district court and the court of appeals; and that would be the starting point for the settlement discussions. This should not be an opportunity for parties to basically re-litigate issues that have already been decided by the courts.

Fourth is timing. We believe this is an opportune time to begin this discussion because we just concluded trial 1.5 in the *Cobell* litigation, and we are filing our post-trial briefs next Monday. That trial will decide many significant issues I think that would facilitate this mediation, including the proper methodology to perform the accounting, the applicability of the statute of limitations, and

the burdens of proof in a trust accounting case. I think with decisions on those issues, the remaining issues to be negotiated out would be limited and I think give us a real chance to reach this settlement that we are all interested in achieving.

Fifth, two separate matters of resolution: We need to recognize that *Cobell* is about two issues, one is the accounting issue, the other is the fix-up issue, the trust reform issue. I think if we can keep this in mind, this would help the mediation process as well. Just like the court has done, they bifurcated those issues and dealt with them as separate issues. If we could do that in this mediation, I think it would facilitate matters.

Sixth, continuation of legal proceedings during settlement discussion. It is important that the litigation not be stalled while this mediation process goes forward, because the party interested in delaying matters could simply drag out the settlement discussions and we would never reach a resolution. The litigation is the sole reason, we believe, why the Federal Government has begun to take these issues seriously, and without that pressure there is no reason for the Government to negotiate in good faith.

Seventh is final resolution. We believe that that would be more easily achieved if certain issues are addressed up front. First of all, the Government should ensure that the claims judgment fund can be accessed to cover the cost of any settlement. It is not fair to appropriate from funds that should rightfully go to Indian country to settle this case. If this case is continued in litigation, we feel like any correction of the accounts would not be separately appropriated, but would be covered by the judgment fund.

Second, any settlement must have judicial approval pursuant to the Federal Rules of Civil Procedure. We must bear in mind that this is an attempt to resolve a case in litigation. Moreover, it is a class action, and due process must be given to all class members, and that is, I think, best handled by the Federal district court here in Washington.

Third, resolution of this case should be on a class-wide basis. It is more expedient and efficient to do it that way, and any attempt to break up the class through side-settling of claims will merely ensure more litigation and also provide less incentive to the Department to reach a settlement.

And, finally, there should be no limitation on the right to litigate issues not resolved in this case. As I said at the outset, *Cobell* doesn't deal with all of the trust issues that are out there, but we need to get a start somewhere, and I think tackling the *Cobell* issues is the place to start.

Mr. Chairman, Mr. Vice Chairman, these issues have been around for over 100 years, and together with your help I think we can finally resolve these individual Indian money account issues. Thank you.

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

The CHAIRMAN. Okay, thank you.

Now we will proceed to Tex Hall.

**STATEMENT OF TEX HALL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC**

Mr. HALL. [Remark in native tongue.]

Thank you, Chairman Campbell, Vice Chairman Inouye, and Senator Tim Johnson. My name is Tex Red Tipped Arrow Hall, president of the National Congress of American Indians. I am very grateful to the committee for two very important hearings today, one on the settlement of the trust and homeland security. When we were playing basketball when we were younger, it was called back-to-back, so we hope we are in shape to testify twice today. But we are very appreciative, again, and looking forward to working with the committee on accomplishing some very important issues, and these two issues today are two of the most notable issues in Indian country, and we support the committee in getting things done, but getting things done right.

NCAI supports the establishment of a process for settling the *Cobell* v. *Norton* litigation. The bottomline is that the Federal Government has not maintained a recordkeeping system that will allow a complete historical accounting. So we should seek a fair and equitable settlement of the trust accounting claims.

We met with tribal leadership last week in Portland and discussed this issue in detail. We are seeking a commitment from Congress to initiate a conflict assessment to begin this fall, with the help of a professional mediator. This mechanism should be used to develop and define a settlement process that can be accepted by the parties.

While tribal leaders have consistently supported the goals of the *Cobell* plaintiffs in seeking a correct trust funds accounting, tribes are also concerned about the impacts of the litigation on the capacity of the United States to deliver services to tribal communities and to support the government-to-government relationship. Significant financial and human resources have been diverted by DOI in response to the litigation, and the litigation is creating an atmosphere that impedes the ability of tribes and the Federal Government to work together to address the needs confronting Indian country. Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the Bureau of Indian Affairs and the Department of the Interior to carryout their trust responsibilities. We believe it is in the best interest of tribes and individual account holders that tribal leaders participate in the resolution of trust-related claims and the development of a workable and effective system for management of trust assets in the future.

Congress should initiate a structured assessment to assist the parties in identifying the appropriate form of conflict resolution. In short, a mediator should work with the parties to design the structure of a settlement process. The assessment should also serve as a consultation mechanism for tribal governments. A structured mechanism will allow for formal acceptance of a settlement process by all parties and move us one significant step closer to a serious settlement proposal.

Some guiding principles I would like to mention should include the following: No. 1, involve all necessary parties in convening this fall to scope and frame the settlement process. The House Resource Committee and the Senate Committee on Indian Affairs should forge an alliance to work on this issue and participate in meetings to keep Congress informed of progress and keep the pressure on for

settlement. Consultation with the elected tribal leadership is essential in the settlement process. Tribes have a number of very important issues in the outcome, including future delivery of trust services and a Federal budget for tribal programs. No. 2, an independent body should play a significant role in the settlement process to ensure fairness and transparency, and that the process moves forward, an independent body should manage the deliberative process. No. 3, establish a process that will keep the pressure on for settlement. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement. No. 4, provide for judicial review and fairness. Many individual Indians do not have access to legal counsel to review settlement documents, and, therefore, review by the courts is necessary to avoid any unfair settlements. Also, tribal native language interpreters, we feel, is necessary to help explain settlement offers and options to the individual Indians. No. 5, ensure that the settlement also addresses the trust systems for the future. So in addition to the account balances, the other major issue in the litigation is the functionality of the trust accounting systems in the future. It would be disastrous to create a settlement that would resolve the past liability and then allow the Federal trust reform efforts to relapse again.

Tribal leaders are very supportive of the proposal from Chairman Campbell and Vice Chairman Inouye that we begin our efforts on trust reform with an attack on land consolidation and fractionalization. If we allow to continue fractionalization, this will eventually overwhelm systems of trust administration and exact enormous costs for both the Administration and tribal nations. We are very appreciative of the continued work on S. 550, and we urge Congress to make a huge investment in land consolidation programs. These will pay much bigger dividends than most any other fix to the trust systems that we see today on the table.

But there are two other issues that Congress should take up at this time: Accountability and standards. It is well known that the Federal Government has mismanaged the Indian trust for decades. The real question for Congress is why decades of reform have produced so little in the DOI's willingness to take corrective action. The real answer is that the DOI and the Department of Justice have never been willing to establish standards of trust management because the standards would subject them to liability if they were not met. The lack of standards has consistently undermined the trust reform. Congress needs to send a clear signal to create a new culture of accountability for Indian trust management. We would greatly encourage the Committee of Indian Affairs to take up trust reform legislation that would hold the Federal Government to the ordinary standards of a trustee.

Indian trust resource and trust fund administration requires accountability in three core trust systems that comprise the trust business cycle: title, leasing, and accounting. Congress should focus its efforts on these core systems. Correcting the DOI's performance in these areas will also require significant and sufficient personnel, training, and an adequate budget to do it. Of course, the most important system is the title. Currently, BIA uses 10 different title systems in the various land title record offices around the country, both manual and electronic. These systems contain inaccurate and

inconsistent information. The inaccuracies result in incorrect distribution of proceeds from the trust and the need to make repeated corrections. Consequently, a large backlog of corrections have developed in many of the title offices, and this has compounded the delays in probate, leasing, mortgages, and other trust transactions.

I can personally attest to this in witnessing last Wednesday in the probate of my father, which I witnessed some records were there that I had no idea were there. You had a document that was 50 pages thick on fractionalization, and you had 30 minutes to do the entire probate, and you had to determine if that should be a part of your father's estate or not; and they took the document back from them after they were done. So you had probably about 3 minutes to review 50 pages of records on fractionated interest.

Congress should also address the problem with appraisals. We need to ensure that account holders are receiving fair market value for their properties.

Finally, and very importantly, NCAI is strongly opposed to the current trust reform reorganization effort that the DOI is engaged in, and the dramatic shift in BIA funding that are proposed in the 2004 budget. We are asking for the assistance of the committee in stopping this reorganization. The reorganization is putting the cart before the horse. The organizational structure must be designed to function within a system that has not yet been developed. Millions of dollars have been invested in the as-is study of trust services, but the Department has only just begun to undertake the critical phase of re-engineering the business processes of trust management. By implementing a new organizational plan prematurely, DOI is running a great risk of wasting the valuable resources that the agency and tribes have already dedicated to understanding systematic problems. Reorganization should only come after the new business processes have been identified and remedies devised through a collaborative process involving tribal leadership.

Again, we would like to thank the members of the committee for all the hard work you and your staffs, and the time and the amount of energy and your commitment for trust reform. We have a big opportunity in front of all of us to resolve the *Cobell* litigation, so we are looking to Congress as tribal nation leaders to commit to participating in the process and assisting a mediation team. This will be a big important step for Indian country, and we stand ready and willing to assist. [Remark in native tongue.]

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

The CHAIRMAN. Thank you.

Now we will move to John Berrey.

**STATEMENT OF JOHN BERREY, CHAIRMAN, QUAPAW TRIBAL BUSINESS COMMITTEE, QUAPAW, OK**

Mr. BERREY. Good morning. I want to thank you all for this opportunity, Chairman Campbell, Vice Chairman Inouye, and Senator Johnson. On behalf of the Quapaw Tribe, I want to express my appreciation for your commitment to Indian country. And I believe I am here to describe a few issues that I think need to be part of your consideration as we embark on the idea of settlement in this historic case, a case that has clearly exposed many of the horrible details related to the mismanagement of the American Indian

Trust Estate. The Quapaw Tribe and its members reflect some of the most horrific examples of this mismanagement we have all heard stories of.

The Department of the Interior managed the largest lead and zinc mines in the history of the United States on Quapaw lands. The Quapaw Tribe currently has a case in the Northern District of Oklahoma, and we also have several members that are members of the *Cobell* class. We recognize that our tribe and its members have suffered over time, but litigation is so costly in terms of cash and human resources, the Quapaw Tribe has entered into a formal alternative dispute resolution process with the Department of the Interior and the Department of Justice.

And I want to make it clear that this is about our tribal claims, and I want to make a clear distinction tribal claims versus the *Cobell* claims. Tribal claims represent 90 percent of the trust corpus; the *Cobell* individual plaintiffs just represent 10 percent of that total trust estate. And I want to make that clear, and I kind of made some charts as part of my testimony.

I also believe that some of the facts about the limited claims in *Cobell* need to be discussed. The *Cobell* claims are the cash collections from natural resource management, either oil and gas, timber, mining, agriculture, grazing, commercial property, and some residual trust fund holdings or judgment fund holdings. It is the posting of the interest, the investments, the distributions, the audits, and the itemization and reporting of all these accounting activities.

And I think it is important to know what it is not. It is not the pre-lease activity; it is not the appraisals; it is not the fair market value; it is not the lease term negotiation factors of the notice and the bids, et cetera; it is not the lease compliance issues of the audits of the well heads, or the run tickets, or the load volumes, stumpage audits, footage audits, all the audits that are necessary to make sure that people are in compliance with their leases and the exploitation of natural resources; it is not the enforcement of trespass, the proper usage of land, the environmental issues and the reclamation issues; it is not issues of idle lands and it is not issues of land stewardship.

So I think we need to concentrate that this is very narrow in its terms, it is just from the collections of the money to the distribution of the money. And there is a lot more liability and a lot more issues out there that I think we need to be cognitive of as we go through this process.

I am concerned that the settlement of *Cobell* may provide or give the perception that it will provide some closure to all the claims associated with the historical mismanagement of the Native American trust, and I think this is totally inaccurate. I think the settlement can satisfy many problems and help provide solutions for the future, and I am very hopeful that the improvement of the service delivery, like Tex has talked about, is very much part of the outcome of any settlement. But a settlement in *Cobell* will settle only the claims related to the IIM accounts, and not other claims. Those claims that are related to the actual management are the types of claims that are being asserted by the Quapaw Tribe and the other 29 tribes that are currently in Federal litigation.

So how do we get to a process similar to what the Quapaw Tribe has entered into? We believe there is a scientific tried and true process of alternative dispute resolution that, if followed, can lead us to the path of settlement, and it starts with an assessment of the conflict. A third party neutral is brought into the picture, they interview all the parties involved, and they make recommendations on how to go forward. We have experienced that in our alternative dispute resolution process, and it has helped set the environment for the ability of the tribe to work with the Justice Department and the Department of the Interior at the table to try to work through a lot of the issues that we believe are part of our claims.

We think that there are some issues that are very necessary as outcomes to any settlement. One is we need to see if we could reduce or begin a consolidation of the fractional interest on individual lands. We need to promote the increase of a tribal land base, we need provisions for future resources for managing the trust estate, and we need the promotion of self-governance.

The DOI takes the blame and the brunt of the complaints regarding the management of the assets belonging to tribes and individuals, but the failure of the Congress to provide adequate funding and resources for the management is glaring. In order for the United States to live up to its fiduciary responsibility to Native Americans, the Congress must give DOI the tools. When the Bureau of Land Management has $140 million 2003 appropriations for information technology, compared to an $11 million IT appropriation for the BIA, there is a problem. Indian affairs has been terribly neglected for 150 years, resulting in this litigation wave that we are facing right now.

And I think there are some things that I would like to point out that the DOI has embarked on, and something that I have been part of in terms of what is going on in the future, and Tex made a reference to it. It is the "to be" re-engineering project that I am very much a part of, and there are hundreds of people within the Department and there are several people in Indian country that are working very diligently on trying to fix some of the processes. We are trying to fix leasing, probate, accounting, appraisals, the title management systems, the ownership records management, surveys, and all the processes that make up the trust services, we are all redesigning them. The process is going to include the standardization of work flows and processes.

In our as-is study we found out they managed probates or they do different processes in leasing in Nashville different than they do in Anchorage, different than they do in Phoenix compared to Minneapolis, and we want to try to find some standard methods to make this process better. We are going to eliminate antiquated tools and redundant business practices. We are going to create a new IT systems architecture. We are going to create policies and procedures, training, risk management, workforce planning, and all the tools that we believe that are needed in order to provide a beneficiary-centric service delivery for Native Americans.

The process is going to need some help, though, from Congress. We are going to need the adequate resources, once we have identified them, for this new improved trust delivery. We are going to need the oversight of the Congress and make sure that the Depart-

ment of the Interior upholds its responsibility as the delegate trustee for the United States. And we also believe there is going to have to be a collaborative process between Congress and the re-engineering team in order to make changes in legislation to make these new processes work so we can create a beneficiary-centric self-governance promoting Department of the Interior.

In closing, I would like to encourage everyone that is involved. I think that we have got a long way to go, and I think the damage to Native Americans is obvious. But we must bring this case to a close and start fixing the trust system. You know, my tribe is suffering terribly. The money that is appropriate in realty is not making it to the people; the money is being spent on litigation, even at the local level. My realty officer spends so much time just working on document production issues. We can't get decisions on FIDA trust because the solicitor's office is so tied up with the litigation. So the people that are really suffering from this case are the very people that the case is about. The burden of this case is now on my people, and my people are suffering. We live in the largest Superfund site in the United States; we have leases that were signed by the Department of the Interior that we haven't had collections on. Some of them are 30 years in arrears in collections, and we can't get anybody to move to get some of these things straightened out.

So what I am really hoping for at the very end of the day, when settlement is done, is not only that will give some sort of compensation to the people that have suffered, but will provide a future trust service delivery system that makes sense, is timely, and reduces a lot of these delays and suffering.

And I have also got some letters that I am going to provide from members of my tribe and also I am a member of the Osage Tribe of people that are really interested in settling, people that have had huge amounts of dollars go through their IIM accounts, and people that want to go forward and quit looking back. It is important to me as a tribal leader to teach my children to look forward and not constantly spend all of their energy looking backward and trying to create a future.

So, with that, if you have any questions, I would be happy to answer them.

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

The CHAIRMAN. Do you want those letters included in the record that you brought?

Mr. BERREY. Yes, please.

The CHAIRMAN. They will be included in the record.

[Referenced documents retained in committee files.]

The CHAIRMAN. We will now go to Chairman Frazier. And you have a person with you, a resource person, Majel Russell, is that correct?

Why don't you come on up to the table too, in case you are needed to help the chairman.

Go ahead, Chairman Frazier.

**STATEMENT OF HAROLD FRAZIER, CHAIRMAN, CHEYENNE RIVER SIOUX TRIBE, EAGLE BUTTE, SD, ACCOMPANIED BY MAJEL RUSSELL, ATTORNEY, INTER-TRIBAL MONITORING ASSOCIATION, ALBUQUERQUE, NM**

Mr. FRAZIER. Thank you.

Good morning, Chairman Campbell, Vice Chairman Inouye, and Senator Johnson. My name is Harold Frazier. I am the chairman of the Cheyenne River Sioux Tribe in South Dakota. I am also an ITMA board member.

Today I am honored to present testimony on behalf of the Intertribal Monitoring Association on Indian Trust Funds. In addition, I am offering specific comments on behalf of the Cheyenne River Sioux Tribe. I will first tell you a little bit about ITMA's membership and our position on the need for a settlement process for IIM account holders, then I will present the organization's suggestions for a fair and workable settlement plan to address the Department of the Interior's mismanagement of IIM accounts. Last, I will give you some concrete examples from back home about the kinds of problems our IIM account holders face everyday and explain how the proposed BIA reorganization will only make these problems worse for these individuals on our reservation.

ITMA has long served as a watchdog over the Department of the Interior's management of Indian trust. The member tribes of ITMA hold significant trust funds and resources, and many have numerous IIM account holders. For example, most Great Plains Tribes and all the Rocky Mountain Region Tribes are members of ITMA. Together, our two regions hold 68 percent of tribal trust assets. In addition, Great Plains tribes have over 68,000 IIM account holders, which is the largest number of any account holders in all of the regions. And the Rocky Mountain tribes have more than 50,000 IIM accounts.

Recently, ITMA's focus has been the protection of tribal government's authority over trust accounts and resources. While ITMA has been seriously concerned about the financial impact of the ongoing *Cobell* litigation on critical tribal program funds, we also question today whether continuous litigation for many more years is in the best interest of all the IIM account holders.

We recognize that the *Cobell* lawsuit was necessary to draw attention to the Department of the Interior's serious neglect of the individual Indian trust accounts. However, we believe that the litigation may outlive some of the IIM account holders who have already waited many years without receiving an accurate statement of their accounts, much less the trust moneys that they may be owed. Therefore, ITMA endorses the development of a settlement process that IIM account holders may choose to utilize. For those IIM account holders who choose not to utilize a developed settlement process, the current legal remedies available should remain intact.

The *Cobell* plaintiffs have argued that adequate records do not exist to conduct a valid accounting of IIM accounts. The Department has provided a plan to the court to reconstruct IIM account records to complete an accounting; however, the recreation of records for IIM accounts with inadequate records will take 5 years to complete, at a cost in excess of $335 million. ITMA supports an

opportunity for individuals to settle their IIM claims short of a complete reconstruction of accounts and completion of an accounting. Such a settlement opportunity will allow an IIM account holder to choose a financial benefit in a timely manner, rather than to await the reconstruction of records and accounting.

The key to a viable settlement mechanism will be the process to value IIM account holder claims. ITMA proposes that accounting experts be utilized to develop a method for valuing IIM claims utilizing generally accepted accounting principles. A second key component for a settlement mechanism will be review and acceptance of the process to value claims. The approval should occur in either existing judicial forms or in a newly created court to specifically address IIM claims. Third, upon an accepted claims valuation method, a settlement may be offered to the IIM account holder. Account holders should be provided access to objective legal advice to decide upon acceptance of a settlement offer. The account holder can then make a knowledgeable decision to accept the offer or resort to continue litigation to obtain an accounting.

However, if an IIM account holder chooses to accept the settlement offer, the settlement should be final except in instances of fraud, material misrepresentation, or concealment. In addition, adequate funding must be guaranteed for settlement with IIM account holders. At this point, the Cobell plaintiffs and the Department are extremely divergent on the cost of settlement. ITMA believes an amount to accomplish settlement remains unknown until an accounting process is developed. We would therefore recommend that a flexible funding mechanism be considered that will take this uncertainty into account. One option would be to make portions of the amount available over time as more information is gained through the agreed upon account valuation procedures. Some ITMA tribal members support an appropriation to fund these settlements, and some ITMA members support utilization of the judgment fund as provided by 31 USC 1304; however, all ITMA members are adamant that settlement funds not deplete existing or new tribal program dollars.

In summary, ITMA proposes that a settlement process be developed via a pilot project consisting of ITMA tribes. Those tribes who choose to participate will determine the scope, form, and process for valuation of claims and appropriate judicial review of the process. Upon determination of tribal participation, ITMA will coordinate with this committee to develop objectives and timeframes and a budget for this project. After completion of the pilot project, a process will be available for all tribes to utilize. ITMA believes that meaningful reorganization of the Department of the Interior cannot occur until the settlement of the *Cobell* lawsuit.

Related to trust management issue, the ITMA tribal membership is concerned about the ongoing reorganization of the Bureau of Indian Affairs. ITMA respectfully requests this committee conduct a hearing on the reorganization in the immediate future. ITMA and the National Congress of American Indians have worked jointly for almost 1 year on the development of a tribal trust reform bill that ITMA has recently finalized. This tribal bill has been reviewed by various regions of Indian country, and all tribes have strongly endorsed the concept. The final draft of the bill has been provided to

numerous congressional representatives for immediate introduction. On behalf of our tribal members, we urge the committee to support our efforts.

ITMA understands that S. 175, now S. 1459, has recently been introduced by Senators Tom Daschle, Tim Johnson, and John McCain to address trust reform. The bill has also been introduced on the House side, H.R. 2189, by Congressmen Nick Rahall and Mark Udall. ITMA worked diligently with congressional staff to influence the rewrite of S. 175; therefore, ITMA believes that S. 175 is also a viable solution to trust reform. We strongly urge the convergence of these legislative efforts.

As chairman of the Cheyenne River Sioux Tribe, I would like to make a few comments on behalf of our people. The Cheyenne River Sioux Tribe believes that the proposed BIA reorganization will make trust management less effective and responsive to all beneficiaries, including individual account holders and tribes. The current BIA reorganization does not benefit Indian country, and it does not benefit our grassroots members, who many of them are IIM account holders. Instead, it creates more upper level bureaucracy, which will in turn create more delays in the turnaround of our IIM account holders' payments. Also, it doesn't provide more resources or authority at the local agency level that is needed to address a lot of our grassroots people's concerns and issues. With the proposal of trust officers located at local BIA agencies, they will be duplicating services and wasting funding that is much needed for our members' needs.

I would like to briefly share several stories about how this reorganization has affected our people's lives on the Cheyenne River Sioux Reservation.

The CHAIRMAN. I have to tell you, Mr. Chairman, that we are going to have to leave and vote in 10 minutes, and we have yet to hear from Mr. Gray, too, and both wanted to ask some questions. We are well aware of how it affects people's lives, but you might put those in the record, if that would be all right.

Mr. FRAZIER. Well, thank you.

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

The CHAIRMAN. Thank you.

Mr. Gray, why don't you proceed.

**STATEMENT OF DONALD GRAY, ESQ., NIXON PEABODY, LLP, SAN FRANCISCO, CA**

Mr. GRAY. Mr. Chairman, Mr. Vice Chairman, I want to tell you how very much I appreciate being invited as an expert on trust administration and reconstruction. I think this is now my third appearance before this Committee, and I appreciate the opportunity.

Four years ago, when I first appeared before the committee, I outlined three basic principles that I thought were very important in terms of trust reform, whether it was future trust reform or historic trust reconciliation. In those four years, in this last 4 years, there has been progress. I believe the progress has been more in the hearts and the minds of most of the players in this drama in terms of the recognition of these key elements. It has not been what I had hoped it would be, which was to be an actual trust fix, either prospectively or historically. That just simply has not been

done. But there has been a change in acknowledgment of what needs to be done.

I want to reiterate what I said some time ago, because it is just as applicable to the task at hand now, which is alternative methodologies for settlement, as it was 4 years ago. The first is expertise. Up until the time I testified, I don't think anybody took seriously the fact that there were out there in the real world and the commercial world people who fixed trusts for a living, historic, long multiple asset trusts that had gone wrong for many, many years. It is a small group, but it is a very important group to the banks in the United States, and it works very hard at it and it is very good at it. And that expertise has got to be brought to bear somehow, some way on this problem. I think the court now understands this, I believe Congress understands it, and I believe Indian country understands it.

The second point I made were conflicts of interest with respect to the DOI. This was the theme that I have harped on a little bit too much, perhaps, and that is the patient can't cure himself. No matter how well motivated, the DOI historically had made the mistakes, and they cannot be fairly put in the position of having to correct those mistakes. Their conflicts of interest are also heightened by the fact that there is highly vicious and sometimes overly-vicious, in my mind, court battle going on, and nobody can do a good job at trust reconstruction when they are in court every day; that makes it very difficult.

The third issue, related to the second issue, was independence. Up until the time that I testified, I am not sure that anybody really took into account the fact that there was not a truly independent body or even one that was considered to be injected into this process; it was the DOI defending themselves and it was the plaintiffs hammering on the DOI, and no independence. And without that independence, which was related to the expertise element, bringing in the expertise, you are never going to get the kind of information that you need to go forward.

This independence, by the way, I took personally. I turned down representation of the DOI, or working for the DOI early on, and for several tribes, because I thought that the positions were polarized, I didn't think there was enough independence, I didn't think there was a body for independence, and, therefore, I did this for free because we weren't there yet; we just didn't have the independent vehicle to bring the expertise to bear, and nobody was going to take it seriously.

I think there has also been progress in the last 4 years, especially in the last several months, in terms of reaching out with respect to all methodologies for IIM trust reconciliation and reconstruction, and for historic reconstruction, and not just limitations to strict accountings, and not limitations by statutes of limitations or other ways that DOI has sought to limit the way that it goes about trying to deal with historic accounting, including the limitation to statistical sampling.

This process has had a lot of names attached to it, and broken trust has been the one that has been the most ubiquitous in the last 10 years. I would suggest that there is another one that everybody take into account. And I don't want to be over-dramatic about

this, but there is also the light in the forest here. And a light in the forest is information. And the thing that is the most frustrating for a professional that rolls up his sleeves and tries to fix these kinds of trusts is that there has been an awful lot of organizational changes, there has been an awful lot of data cleanup, there has been an awful lot of as-is descriptions, but there has been not one significant step in fixing the historical problem or in putting together the proper architecture for a future system; and that is because the expertise has not been brought to bear.

The DOI has engaged in organizational and management reorganizations. Maybe understandably, it has tried to limit the scope. And you heard Mr. Cason today talk about how they have tried to limit the scope of their inquiry in terms of an accounting. But there has been no progress at all with respect to the reconstruction of these accounts. None. This is a little bit like McClellan on the Potomac. You have got an arsenal of records, you have got constant troop reorganizations and supplements, you have got cleanup of data, but, respectfully, it is time to cross the river, roll up your sleeves, and do some work; and that means Congress and it means all the other people involved in this.

There is a frustration factor in this for a professional who has followed this as closely as I have. You have a patient dying on the table. You have IIM holders who are already dead, literally, and who are dying, and you have a lot more who are living at subsistence levels; and that is untenable. It is untenable because the cures are scattered about the operating room and the cures of information are outside the operating room and accessible, but nobody will let the doctor in. That is untenable to me.

You have choices. Here are your choices. You can spend many million more dollars and give the DOI time and years to do statistical sampling and to come up with studies that Indian country will not accept. You can default to the court and have a receiver appointed. The receiver will inherit exactly the same problems that you have now, and will have enforcement issues and constitutional issues that have not yet been looked at that are enormous. And what that means is that it is time for Congress to do something.

The fact of the matter is Mr. Cason is right. There is a creative misunderstanding here about accounting. When somebody wants to fall back on limitation and do as little as possible, they talk about a strict accounting, which in real parlance means tracking transactional accounts very closely and verifying them to supporting data. That is not possible for the 130 years of this trust, and everybody knows it, because we don't have the data. So in order to get to a fair and reasonable solution, you are going to have to use more than the existing data, more than statistical sampling of a minute part of the existing data; you are going to have to look into a wider circle, if there is going to be anything fair and reasonable done to the IIM holders.

I am here today to talk about those alternative methods briefly and give you, in layman's terms, what they mean. The most important of the alternative methods, and when I say alternative, I mean alternative to the actual records that DOI does have right now, some of which has been claimed not to be good, some of which has been claimed to be okay. The most important is the external data

that was brought out in the February filings by the experts for plaintiffs. They are very impressive filings, and in my mind they were the turning point in this entire process. If you look at these filings that go back to independent records of well production, oil and gas well production, grazing land production, timber production kept by local governments, State governments, and Federal governments over years.

Mr. Cason referred to estimating techniques. Historically, these are not estimating techniques. This is an alternative valid direct evidence. It may not be part of the historic trust accounting system, but it is external evidence that bears directly upon the Indian assets.

Now, I don't take these accounts at face value, and they shouldn't be. What I had hoped the DOI would do is hire their own experts and say that is wrong and that is right, that is wrong and that is right. That is how you get to a fair and reasonable solution. But what I do say is that the methodology of those mineral and asset reports as independent direct evidence is one of the most important alternative methodologies used in resurrecting any commercial trust that has multiple assets involved in it.

The second important methodology or alternative is called modeling. And I want to defuse that in terms of it being kind of an esoteric concept. It is not that esoteric at all. What happens is that if you know that you have a well that is on Indian allotted lands and you know from State, Federal, local level exactly what was produced in that well, you have direct evidence. If you don't have that evidence, but you have the same evidence for a well or wells on the same oil reservoir or on similar oil reservoirs for the same time periods, and you have evidence with respect to what market rates were for those natural resources, it is fair and reasonable to use those as analogies; and that is done all the time in the commercial sector. And, in fact, if you read carefully those submissions that were submitted in February by plaintiffs' experts, they are a combination of direct evidence and modeling, they cross back and forth; and, frankly, they need to be countered, because they are not all correct, they are one-sided. The $137 billion, the $170 billion, that is if you take everything that they say is totally correct and assume that nothing ever came out of the IIM accounts to the IIM holders, and I think that is wrong; I think they did, and I think there is independent evidence on that that needs to be used.

The third area, and I know time is limited, but the third area of evidence or methodology that needs to be looked at is very simple, and that is an alternative way of looking at the existing data we have now. DOI has looked at that data, knows there are problems with it, thinks that a lot of it is right and some of it is wrong. It has used statistical sampling techniques to see if they can, from a small population, generalize to a large population. Statistical sampling sometimes works very well in the commercial sector, and has been used, but only, in my experience, when you have a single asset or a single problem or a single trust. When you have multiple assets that have a lot of variables connected to them, it is very, very difficult to do statistical sampling.

One of the examples that I was struck by in Tex' testimony in the House was that if you do statistical sampling, it will pick up

some variables, some mistakes or whatever. He mentioned that there is a real problem of overgrazing in Indian country and the grazing country. No statistical sampling model will pick up a variable like overgrazing, and unless an independent group goes in and uses all of these methodologies and embraces all of these variables that are unique to the assets, you will never get a fair and reasonable transactional or any kind of historical reconstruction of what the IIM holders should have gotten; and I think his example was a very telling one.

Otherwise, what you have was statistical sampling or other things or quick fixes like TAAMS. And I don't want to repeat this too much, but more than four years ago I sat in a room and begged appropriators not to give money to TAAMS, because I knew what it was, it was an oil and gas accounts receivable system, and I knew it wouldn't work for other resources. It didn't. But the answer that I got back was we agree with you, we don't think it is going to work. If we don't appropriate the money, we will be seen as anti–Indian, and we can't withstand that. I don't think that would happen today, but that was a regrettable thing that happened in the past.

I will be very brief. In conclusion, there are lots of methodologies that can be used to find the truth. I advocate using them all; not just one, but using them all. And if one doesn't work, try another one, because there are a lot of them out there. But there are only two conceptual approaches to historical fixes and trusts. One of them is agreed procedures, and statistical sampling is an example of that. That is where you get one set of data, you assume it is correct, you put one methodology to it and you come up with conclusions. Accountants love it because they are protected. They are methodology-limited and they are data-limited.

The other is inelegantly called scrubbing. And what that means is you take your shirt off sometimes, you get down into the boiler room, and you find everything you can. You look at the historical data that the DOI has, not on a sampling basis, but on a holistic basis, and you look for trends that you can then project back into history. And you look at all of it and you see what people of good faith in Albuquerque and in Montana and other places have done or tried to do to account for these leases, and you project that back.

I am a scrubber. I believe that the only way to find out most of these situations is to get in and look at all of this data, use all of these methodologies, and come up with something that is fair and reasonable. And I do not believe that you will ever have a settlement that will be based upon statistical sampling or quick and dirties. You are going to have to look at everything that is out there: extrinsic evidence, modeling, and a reassessment of existing data.

There was something said about independence and how we go forward on this. I have a suggestion, and my suggestion is very simple. There does need to be an independent body. And I actually wrote a proposal for one, as did a number of other people. But this one can be very modest, and it can be a baby step. And what I would like to see Congress do is to put together a team, and that team could be led by somebody like I have in mind. I think William Cohen would be a terrific person because he knows Indian affairs

and because he is well respected on both sides of the isle, if he is available. But you need professionals who are going out and getting information. You need a feasibility study by the best in the country who will, because I have talked to them, give their time to go out, to see whether or not, using all of these kind of methodologies, can you come up with a fair and reasonable historic reconstruction of the IIM accounts, without squabbling about what is an accounting or isn't an accounting, or limitations here and limitations there. Without that, if all you do is to sit around and talk again about structure, then Congress will be doing the same thing that the DOI has been doing in the last four years, which is reams of reports on reorganization and moving the chairs around on the Titanic, and not one iota of expertise applied to the data to come up with what the answers are.

It is time now to get to work, and my suggestion is time-limited, very money-limited, but get the right people and get them into a feasibility study to say can it happen; can you put all this stuff together; can you find this evidence; is there enough evidence; are there too many variables; can you do it. I think the answer is going to be yes, you can. And then I think you take that same group or a similar group and use them as the center core of a mediation settlement process where they are independent, they have no outcome agenda, and the DOI comes in, gives its evidence, the plaintiffs come in and gives its evidence, whether it is extrinsic, whether it is old, whether it is new, wherever it comes from, and you beat it down to something that is fair and reasonable. It happens in the commercial sector all the time; it can happen here. But for the love of heaven, at this point on, get experts in and get information on the table. No more restructuring. No more reorganization. You have got to get to the data and you have got to have somebody you trust turn around and say this is viable, this can be verified, we can do it, or say you can't; but find out. And that is my modest suggestion.

One part of my written testimony that I would ask people, when they have time to take a look at, is entitled "What Is Going On At The DOI?" because I have a lot of respect for a lot of people at the DOI, especially in this Administration. I am not one that looks back and visits all the problems of the past, especially during the bad years on this Administration. I don't think that is fair, I don't think it is reasonable. I think there are a lot of good people who are trying to do the right thing, but something is wrong, because they are stumbling. Instead of joining the issue that was put forward by the plaintiffs in these really telling expert testimonies, they simply fell back on limited records, statistical sampling, statutes of limitations. They keep falling back on that. Why are they doing that? Is it because they don't get it? Is it because they don't understand that Indian country wants more? I don't think so. I think they get it. Is it because they are worried about losing jurisdiction? Yes, I think in part it is. I think that they don't want an independent body involved in this because they think they will lose jurisdiction. The independent body issue is what brought the task force to its knees. The task force worked terribly hard, solved a lot of problems, identified a lot of problems, but the DOI never, in my mind, when it got down to the hard question of independent mon-

itoring, intended for there to be any kind of independent monitoring, and that is what brought it to its knees.

I want to compliment Mr. Cason on something because he went to the third issue of the DOI. First of all, in terms of losing jurisdiction, I don't believe that is a problem. In fact, for a while the DOI will lose jurisdiction if you have independent trust fixers, but I have always maintained that this is the biggest Government in-house training program of all time. If you have the best commercial people in the world come in and fix this problem and train trust officers within the BIA, you are doing them a great favor for their future and you are preserving their jobs. This is not taking away jurisdiction. And sooner or later this problem is going right back to the BIA to administer. The problem is they don't know how to fix this problem. They don't have the expertise. You look in their reports to see if they are going to get it; you can't find it.

Two other things real quickly, because I do not want to overstep my time. This is a common sense fix. I read Tex' testimony in the House only a few weeks ago, and he had a hypothetical colloquy with Senator Norton on grazing land, and Norton was saying, look, we don't have the records, how can we reconstruct this. And Tex kept pushing and saying, well, if you don't have the records, then maybe we look back at independent oil and gas records. If you don't have that, maybe we look at estimations based upon existing records. If you look at his testimony carefully, he has said exactly what I have said. I am an independent trust fixer, but his commonsense approach to how you use a holistic study of all of these methods to get to the end result, if you don't have the records, is far more eloquent than anything I said today or I have said in writing. And I would invite you to look at his testimony, because I think it is important.

My last statement has to do with something that the chairman averted to, and that is the moral cost. You know, it is very hard to get involved in a situation like this and not have your soul affected by it. There is a moral cost to this, and especially if it keeps going on business as usual, where we are just restructuring things and we are moving people around and we are getting new flow charts and we are not going anywhere in terms of fixes. One of them is that good people of good faith who really are first-class people, in the context of a vituperative litigation, like the *Cobell* litigation, get savaged. The day that Neil McCaleb resigned was one of the saddest days for me in the last 4 years. That should not have happened, because he would have been one of the first, I think, internally in the DOI to champion the kind of holistic approach for reconstruction that I am talking about. So that moral cost is not a joke, that is high, and it is hurting the integrity of the entire process.

Sorry to rush through all that. I know time is short. I know you have votes, and I apologize for talking so fast, and I really appreciate the opportunity to be here.

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

The CHAIRMAN. Well, they haven't called us yet, so we can go on for a couple of minutes.

I was particularly interested in your statements. I read it before we came to the committee, but listening to it, too, was really inter-

esting. As you know, in the past, some of us on this committee have been saying for the last three or 4 years that we didn't think the Department of the Interior had the expertise to fix the problem, and I, for one, had recommended that we look to the private sector somewhere for people who have the skills in fixing trust problems or managing money. But it was opposed pretty much by the Administration, both the Clinton administration and the Bush administration, and opposed by the tribes too. And I think what has happened is that both sides, very frankly, have been polarized to some extent, have dug in, and it is making it very difficult to reach any kind of a consensus. Too many issues when we deal with it, when we have hearings or debates, we rehash the same problems, we retell the same stories, we restate the same thing, we deal with, you know, the same structural problems we faced in the past, and not enough people who come before the committee, frankly, look forward to how we find a solution. And, from my standpoint, it doesn't do any good, just keep flogging the thing. Somewhere we have got to get out of that and move forward to some kind of creative way of thinking so that we can find a consensus between tribes and the Administration. And I frankly think that no matter what we actually end up with, it is not going to satisfy everybody; someone will always feel that they were cheated or taken advantage of, or something of that nature.

But I guess one of the reasons I was really interested in your comments is because you don't really have a dog in this fight; you don't have a client in it, you don't have any particular vested interest, you are not a person that is worried about jurisdiction turf to protect or anything of that nature. And maybe that is what we need more of, people that can step back, have a more objective viewpoint, that aren't emotionally involved in it quite so much, because I think it gives us some opportunity to get some fresh air in this system and some new ideas in this system.

Mr. GRAY. Can I reply to two things that you just said, because I think they are important? It is not just me. There are people who have been doing this for years and years in the private sector who are very, very good at what they do, and I have talked to them, and they are more than willing to get into this process, because they think it is important.

The CHAIRMAN. No; I know they are.

Mr. GRAY. Because they spend their days saving money for banks. They would kind of like to do something for the American Indians.

The CHAIRMAN. Sure. Well, that is what I and several other people have suggested, but, as I mentioned, it met with some resistance by tribes.

Mr. GRAY. But that is the second point I want to make. When I said that there was a paradigm shift or a completely different explosion, if you will, in this case, it was when, in February and March of this year, the plaintiffs filed those expert reports. You can listen to an expert like me from the commercial sector about how this is done commercially until the cows come home, and, quite frankly, I don't think anybody is going to take it terribly seriously until they see the results of it, but they won't let me in to do the work to see the results. But the plaintiffs, on their own, commis-

sioned studies on almost every natural resource, and I am not saying that every one of those things is correct, but they are extremely compelling, and that lets the light in. And that is the first time that anybody in the process, a stakeholder, has said, look, there are other ways to find out how to do this, and I think that that ought to be taken seriously. I am sorry the DOI didn't join it head-on; it needs to if there is going to be a legitimate settlement. And that is exactly what the independent people need to key off of if you can do it.

So I think there has been progress, Senator.

The CHAIRMAN. Well, I do too. In hearing the comments of Mr. Berrey and Mr. Echohawk and Tex Hall and Mr. Frazier, the suggestion that we use a mediator, that hasn't been factored in in the past either. I mean, that is a little akin to what some of us have said all the time; we need some outside people involved in this. So maybe we are moving, and I certainly hope so. But today is certainly the beginning of searching for that settlement. We are going to proceed through August into the fall, and I hope we are really going to be able to find a solution to this.

Let me yield to Senator Inouye if he had some comments.

And by the way, I am going to submit most of my questions in writing because I know we are going to run out of time before I can ask a lot of questions.

Go ahead, Senator Inouye.

Senator INOUYE. Mr. Chairman, this has been a very important hearing, and, regretfully, I must leave because I have another hearing. But may I request that some of my prepared questions be submitted?

The CHAIRMAN. Absolutely. Yes, if you would submit yours. I am going to submit my prepared questions too.

Senator INOUYE. And I would like to thank all of you. I thought I was back in law school again. I learned a lot.

Mr. GRAY. Well, send me some questions.

Senator INOUYE. Can you tell me that if all the things that you wanted fell in place, how long would this process of mediation take?

Mr. GRAY. Step by step. I think the first step is the feasibility study. You don't want to just assume you can do this thing. I think you have to have the neutrals that don't have agendas in terms of outcome. I think you have to put together the team, which is not hard to put together. I think you have to put at the head of the team somebody who is politically acceptable on both sides of the isle. I do think you need that. And then I think they are charged with going out and looking at the existing data, whether it is at DOI or anyplace else, and saying, look, do we have enough; is there enough to project out.

Look, it is a little bit like if you have ever looked at paleontology things on the Discovery Channel, where, if you have existing data on one-tenth of a human or a pre-human skull, from that experts are able to construct almost exactly what that entire skull looks like. That can happen here, on the basis of information we already have. I can't tell you that as a surety because you really need to do a feasibility study. That could take as little as 6 months. It could be a very tight one in terms of money. Sooner or later you

are going to have to pay some people for their time, but they are not trying to get rich on this situation. But I think that feasibility study could take up to 6 months.

I think the mediation process, if both sides are coming to the table in good faith with their own experts, and you have a mediation panel that isn't just a mediator, but you have experts on natural resources, Indian rights, forensic accounting, and fixes like I am involved in, accountants, trust administrators from the largest banks in the world, you know, a panel of four or five people who are listening to this, I think that process of information gathering and the counter-information in the adversarial process, you know, here are my experts, here are your experts, now let us winnow them out and find out what is right and what is wrong, I am not going to tell you that that is either cheap or quick. What Tex said is correct. It has taken a long time to get here. Let us not cut the process short. But I do think you are talking about a process of no more than a couple of years. You are not talking about 10 years; you are not talking about a litigation that will drag on forever.

Everybody thinks the panacea in this thing is an appointment of a receiver, and I have to tell you as soon as that poor person, whoever it is, is appointed, they start from scratch and with not a whole lot of power, and it is going to be the same thing all over again. And you and I have talked about this before, we are going to be here 10 years from now, if we live that long, and nothing is going to happen.

So to answer your question, I think it is a 6-month plus very intensive 2-year, at most, could be less, process. It could be less if the plaintiffs and the defendants do their job, and that is get your experts together, put your evidence on the table. The plaintiffs have already done it; the defendants have not. Put it before us, let us see if we can winnow it out, you know, what is good, what is bad. One of the things that I think frightens the DOI legitimately is that it is much easier to use extrinsic evidence to show what should have gone into an IIM account than it is to get extrinsic evidence to show what went out. And what Mr. Cason said is absolutely right. Unless there was a massive conspiracy, you would have billion dollar balances somewhere, unless it was a massive conspiracy and people were stealing money. So money did go out, and there are extrinsic ways to find that out. We have to help DOI do that. We have to help them get the experts to show that. We have to help them use existing data to project back that money did go out. So it is a fair and reasonable process.

Long answer to short question, I think we are talking about a timeframe within that. You know more about Government money than I do, but I think we are talking about tens to maybe $100 million of a process, frankly, a very small fraction of 10 years of an accounting that everybody knows is not going to yield an answer. Or what is worse in my mind, 10 years of a continued litigation with one side beating in the heads of the other, but still no resolution.

Senator INOUYE. May I ask John Echohawk have you discussed a mediation process with all the parties involved?

Mr. ECHOHAWK. No; we haven't, Senator Inouye.

Senator INOUYE. Now, assuming that all parties agree to it, do you believe that the Congress have to enact a law authorizing mediation?

Mr. ECHOHAWK. Well, as I understood the letter that you and Senator Campbell sent, it was an offer for the Congress to fund a mediation process. And I think that is what we are talking about here. As I mentioned in my testimony, we have tried to talk settlement with the Government several times in the past during this case, and it hasn't been successful. And we could again try to do that somehow without a congressional mediation effort, but I don't know whether it would do any more good now than it has done in the past without this congressionally funded mediated effort.

The CHAIRMAN. And if I might interject too, Senator Inouye, it is my understanding that we don't have to pass a law; that the Committee can do the appointment of a commission. But we do have to find the money to be able to finance it, and we would have to deal with the Appropriation Committee for that.

Senator INOUYE. Once again, thank you all very much, but I must leave.

The CHAIRMAN. And we will submit questions from other colleagues. Senator Johnson probably had some and had to leave too.

Thank you very much for appearing. I appreciate it.

This committee is adjourned.

[Whereupon, at 11:54 a.m., the committee was recessed, to reconvene at 2 p.m. the same day.]

# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, thank you for this opportunity for the committee to examine the problem of trust fund mismanagement and recent efforts toward its reform. Trust fund mismanagement marks a significant failure of the U.S. Government's trust responsibility toward tribes and individual account holders. As the chairperson of the Colville Tribes from Washington State framed it, "One of the saddest chapters in American history is the long-term mismanagement of trust resources" which were intended for the benefit of Indians and tribes.

Most recently, the class action lawsuit, *Cobell* v. *Norton,* has brought renewed urgency to the need to reform trust fund mismanagement. I share the dissatisfaction of the court in the failure of the U.S. Government's trust responsibilities, and I echo its calls to reform trust management. However, it is critical that this reform be done with careful calculation and in a way that affirms, not diminishes, trust responsibilities, tribal self-determination, and self-governance.

Numerous tribes from Washington State have expressed serious concerns about the Department of the Interior's proposal to create a new Bureau of Indian Trust Assets Management, and I share these concerns. In fact, several tribal leaders from Washington State are in attendance today, and I would like to thank them for their leadership on this issue.

The tribes agree that there is significant room for improvement in the management of trust functions; however, they are concerned about both the merits of Interior's plans to create a new Bureau and the fact that tribes were not consulted prior to the development of its proposal. Indeed, tribes and individual Indians are the beneficiaries of trust assets, and the United States' has responsibility to honor the government-to-government relationship its has with tribes. Therefore, it is absolutely critical that tribes play a central role in any successful trust management reform.

Representatives from Interior have advised the committee that trust fund management would be improved by removing all trust management duties from BIA, therefore keeping the services BIA provides to Native Americans and trust management completely separate. Washington State tribes have expressed their serious concern that removing trust functions from the BIA would effectively dismantle the agency, which has been the foothold for tribes in the Federal Government. For example, many tribes have partnerships with BIA in the execution of several trust responsibilities, such as natural resource management, and tribes do not want to see their role in the management of their resources diminish if these trust functions are taken out of the BIA. I will ask the witnesses to speak to these concerns today.

I understand that we will have the opportunity today to learn about a few of the proposals for trust reform designed by tribal organizations. In addition, the Tribal Task Force is reviewing these proposals and several others that have been tribally generated.

It is my hope that Interior will seriously consider the concerns, suggestions, and proposals from the tribal community and also take advantage of the wisdom and

insight from the leaders who are working hard to create a viable plan for reform. Again, any successful attempt at rectifying this complex and centuries-long problem must include the experience of the tribes.

Again, thank you Mr. Chairman, and I would also like to thank the witnesses and the representatives from Washington State for being here today. I look forward to hearing the testimony and learning more about what we can do to assist in the effort of meaningful trust management reform.

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PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

Mr. Chairman, thank you for scheduling today's hearing as part of the continuing oversight of this committee on issues associated with the Federal Government's management of individual and tribal trust funds accounts.

Today's hearing topic is one that is a source of considerable controversy, which involves a discussion of alternatives to an historical accounting of individual trust funds in order to settle the class action lawsuit filed on behalf of 300,000 individual Indian money trust account holders. Essentially, we're being asked to consider the fundamental question of whether the Congress should override a previously legislated mandate of a full and accurate accounting of all individual trust funds, as required by the 1994 American Indian Trust Funds Management Reform Act.

As history and the current court case have demonstrated, the Department of the Interior has flagrantly failed to fulfill its trust duties. Hundreds of millions of dollars have been spent on failed efforts to either identify reconciliation efforts, or spent on consultants to evaluate the extent of the Federal Government's liability for mismanagement. Despite these efforts, we are still without a reasonable solution.

Mr. Chairman, as I have stated before, this Indian trust funds mismanagement debacle is one of the worst I have ever seen. And, I can see no end in sight. If this type of egregious action had been inflicted on any other ethic group, there would have been a tremendous public outcry.

I'm continually frustrated that, no matter how many hearings we schedule, or how much money is appropriated to the Department, there is no clearly identified solution that is possible for a fair reconciliation, nor is there one that is truly supported by the tribes. I'm not sure what the solution is, however, if there are mechanisms which can be identified, they can and should be considered. And, most fundamentally, these options must be identified with the full and active participation of the affected beneficiaries—the Native American beneficiaries.

However, any potential settlement solution is only a partial answer to a larger problem. Even if the *Cobell* case can be settled, the Interior Department still retains a trust responsibility to ensure that tribal trust accounts and trust assets are appropriately managed.

My colleagues, Senators Daschle and Johnson, and Representatives Udall and Rahall in the House, have introduced revised trust reform legislation to address the tribes' highest priority areas to improve trust funds and trust assets management. I urge the committee to consider this bill as part of the overall need for legislative reforms and to schedule a hearing as soon as possible.

This committee is the appropriate forum to consider such legislative proposals. The recent attempt by the House Appropriations Committee to include legislative provisions in the fiscal year 2004 Interior appropriations bill was another failed effort to override the Indian beneficiaries and impose a quick remedy. As with any legislative rider to an appropriations measure, I opposed this language, not only on principle but also to object to the clear intent to circumvent an open legislative process.

If the Indian plaintiffs in the *Cobell* case wish to pursue a legislative settlement, I would not object. However, I would object to one that is imposed upon them without their consent.

It is long past time for the Interior Department to own up to its responsibilities and work with the Congress on meaningful steps to return rightfully owed money to Native American beneficiaries and concentrate Federal resources on lasting reforms, not on litigation and expensive lawyers, so the Federal Government can truly work toward improving the lives of Indian people.

John Berrey
Chairman Quapaw Tribe 3/2/2004

**John Berrey, Chairman, Quapaw Tribe of Oklahoma, Vice-Chairman ITMA, Tribal Representative Leader "To Be" Trust Process Reengineering Team**
**Testimony before the United States Senate Committee on Indian Affairs oversight Hearing on Potential Settlement Mechanisms for Cobell vs. Norton**
**7/30/03**

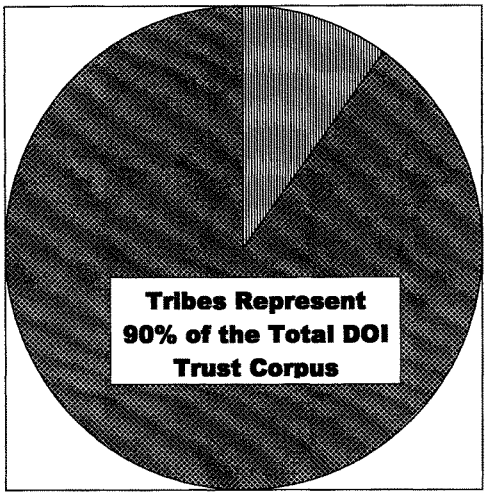
Chairman Campbell, Vice-Chairman Inouye, and members of this vitally important Committee regarding the affairs of Native Americans, thank you for the opportunity to testify today. On behalf of the Quapaw Tribe of Oklahoma, I want to thank you for your public service and commitment to Native American People and to all American citizens.

I am here to describe issues I believe that need your consideration as we all embark on the idea of settlement to this historic case. A case that has clearly exposed many of the horrible details related to the mismanagement of the American Indian Trust Estate. The Quapaw Tribe and its members reflect the most horrific examples of the very mismanagement we have all heard stories of.

The Department of Interior (DOI) managed the largest lead and zinc mines in our nation's history on land belonging to the Quapaw Tribe and its members, resulting in the Quapaw Tribe's current Trust Claims case in the United States District Court for the Northern District of Oklahoma in Tulsa and the reasons so many of my Tribal members are class members of the Cobell vs. Norton lawsuit. We recognize that our Tribe and its members have suffered over time but because litigation is so costly in terms of cash and human resources the Quapaw Tribe has entered into a formal Alternative Dispute Resolution (ADR) process with the DOI and Department of Justice to address our Tribal claims. I want to make it very clear that Tribal claims and Individual claims in the Cobell case are very different and I want to reiterate the clear distinction.

- Tribal Claims vs. Individual claims represented in the Cobell class.
    - Tribal claims are representative of sovereign governments vs. individuals represented in the Cobell class.
    - Tribal governments represent ninety percent of the Trust Corpus vs. ten percent represented by the Cobell class.
    - Tribal claims are much more complex to include resource management claims vs. the difficult (in terms of poor recordation) but relatively simple Individual Indian Money (IIM) claims in Cobell.

# Tribal Claims vs. Individual Claims




Individual Claims, DOI Natural Resource Management and control

Tribal Claims, DOI Natural Resource Management and control

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I believe that we must also consider some facts about the limited claims made by the class in Cobell. The case is about the lack of an accounting of the money collected by the U.S. government and managed by the U.S. government for Individual Indian people. It is a case that begins with the collection of money generated by the development and exploitation of natural resources and some money related to past court judgments and ends with the closing of an account. The claims do not include those related to the Trust management of the United States related to all the activity that leads to a collection.

John Berrey

## What are the claims of Cobell vs. Norton?

- **Cash collections from Natural Resource Management (Oil & Gas, Timber, Mining, Agriculture, Grazing, Commercial property)**
- **Posting of Interest**
- **Investments**
- **Distributions**
- **Audits**
- **Itemization and reporting of all accounting activities**

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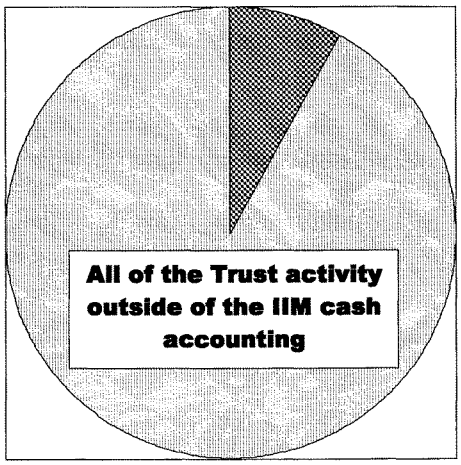
## What are the parameters of Cobell vs. Norton?

- **Only current or living IIM account holders?**
- **All IIM including deceased IIM account holder claims?**
- **Are claims inherited?**
- **How far back in time? 1810? 1880?, 1920? When did the DOI Trust Responsibility begin?**

## What are not the claims of Cobell vs. Norton?

- Pre lease activity (Appraisal, fair market value, etc.)
- Lease terms negotiation factors (Notice, bids, etc.)
- Lease compliance (Well head audits, run tickets, load volumes, stumpage audits, footage audits, ag species, cattle per acre audits, etc.)
- Lease enforcement (Trespass, proper usage, environmental, reclamation, etc.)
- Idle lands
- Land Stewardship

## Cobell vs. Total DOI Individual land management activity




- Individual IIM Cash Accounting (Cobell) Collections, Interest, Investments, Distributions
- Natural Resource Management: Leases, contracts, market value, just compensation, lease compliance, lease enforcement, etc.

- Cobell claims are specific to Individual IIM account cash accounting not:
    - Appraisal, valuation of resources
    - Lease terms negotiations
    - Lease compliance
    - Lease enforcement
    - Land stewardship
    - Environmental protection

I am concerned that there is a perception that a settlement of the Cobell vs. Norton case will provide some closure to all claims associated with the historical management of the Native American Trust. This is most defiantly not accurate. A settlement can satisfy many problems and help provide solutions for the future and I am very much hoping that an improved delivery of service is one of the positive outcomes of any settlement. But a settlement of Cobell will settle only the claims relating to the IIM accounts, and not other claims – those claims related to the actual mismanagement of land and resources – the types of claims that are being asserted by the Quapaw Tribe and other Native American Tribal governments.

How do we get to a settlement process and how do we clearly identify what it is we are settling?

- Necessary Components of a settlement process include:
    - Conflict assessment
        - Selecting a neutral third party assessor
        - Third party neutral identifies and confers with stakeholders
        - Third party identifies preliminary issues
        - Third party makes process recommendations and works a intermediary
    - Develop and design collaboratively a settlement process
    - Provide judicial review and oversight

In our experience, the conflict assessment process has been very effective in developing the environment necessary for a complex settlement to take place. Once you have established a settlement process collaboratively you can begin a more formal settlement discussion. The science of ADR has

a proven track record of success and can be the most cost effective, equitable and expeditious way to end difficult litigation.
After eight years, millions of dollars spent, delayed and diminished services to the Native American beneficiary there are issues that must also be considered as potential outcomes in a settlement:

- Reduction and consolidation of fractional interest in Individual lands
- Promotion of an increase in the Tribal land base
- Provisions for future resources for managing the Trust Estate
- Promotion of self governance

The DOI takes the blame and the brunt of the complaints regarding the management of the assets belonging to Tribes and Individuals, but the failure of the Congress to provide adequate funding and resources for the management is glaring. In order for the United States to live up to its fiduciary responsibility to Native Americans the Congress must give DOI the tools. When the Bureau of Land Management (BLM) has a $145 million '03 appropriation for Information Technology (IT) compared with an $11 million IT appropriations at the Bureau of Indian Affairs (BIA) there is a problem. Indian Affairs has been terribly neglected for 150 years resulting in this litigation nightmare the DOI is facing.

The DOI has embarked on a long overdue project that I am involved with that is reengineering the future Trust management methods. The "To Be" reengineering project is well on its way and will identify and create the most effective, responsive and beneficiary focused Trust business processes for tomorrow.

Trust Processes that are to be reengineering:

- Leasing
- Probate
- Accounting
- Appraisals
- Title management
- Ownership records management
- Surveys
- All of the business processes that make up Trust services are being redesigned.

John Berrey
Chairman Quapaw Tribe 3/2/2004

"To Be" Reengineering will include:

- Standardized work flows and processes
- Elimination of antiquated tools and redundant business practices
- Creation of a new IT systems architecture
- Policies and procedures
- Training
- Risk Management
- Work force planning
- All the tools needed to do the job

The reengineering project will develop the model processes needed to provide quality Trust Service delivery. The models will be provided to Indian Country for comment and consultation. The implementation will need the support, oversight and participation of Congress.

Congressional activity necessary for lasting Trust Reform:

- Resources (adequate appropriations)
- Oversight (ensure that the Trustee Delegate (DOI) upholds the Trust Responsibility of the United States)
- Collaborative legislation develop to make necessary changes

In closing I would like to offer encouragement to anyone involved. The damage to Individual Native Americans is obvious; we must bring this case to a close and begin the process of healing the Trust. It is very difficult to face the past when many of the crimes were so outrages and represent an embracing and shameful chapter in the history of America. It is also time for Native people to teach their children to focus on the future and to respect the past. It is the responsibility of us all to follow a process and ultimately provide a bright future for generations to come. I have attached some ADR specific information. Thank You.

U.S. Institute for Environmental Conflict Resolution
Morris K. Udall Foundation

**Overview of Alternative Dispute Resolution: The Merits, Conditions, and Approaches to Address Environmental Conflicts**

Approaches to resolving disputes outside of formal adjudication are broadly categorized as alternative dispute resolution (ADR). Gradually, over the last thirty years, the use of ADR techniques has expanded from their initial application in the business world to the arena of environmental and public policy conflicts. In general, the popularity of ADR and assisted negotiations stems from a number of factors, including efficiencies in time and costs over litigation, greater control by the parties over the way a conflict is addressed, and by extension, increased commitment of the parties to the outcome of an ADR process.

This overview addresses the key distinctions between the different common methods of dispute resolution that are used in addressing environmental and public policy matters. It also describes some of the preconditions necessary to consider before engaging in an ADR process and outlines what an ADR process might look like. Appended to this overview are several reference documents that provide supplemental information about ADR and environmental conflict resolution, including a few examples of successful ADR/ECR processes. This document is intended to be an informational resource and does not provide recommendations for current or potential disputes.

In the broadest sense, dispute resolution processes can be characterized by several elements including: their degree of formality, the nature of the proceeding, if the process is voluntary or involuntary, the type of outcome, and the role of third party neutrals in the process. In contrast to adjudicatory processes, *mediation*[1] is less formal in structure and provides the opportunity for parties to present evidence, issues and interests with fewer legal boundaries. Mediation and similar dispute resolution processes are typically voluntary. However it is important to note that parties in litigation can be ordered by the court to engage in mediation. A critical distinction between mediation and adjudication is the method by which an outcome is reached. Specifically, parties to mediation work jointly to explore and reconcile differences and develop mutually acceptable agreements and or narrow the range of disagreements. The role of the third party neutral in a mediation is to guide the process by working one-on-one and collectively with the parties to: facilitate communications, provide a structured process that engenders opportunities for the parties to engage each other in constructive dialogue, and may work in caucus to assist the parties in independently analyzing their positions and assess approaches that may evolve into joint gains for the parties. The decision making process and outcome of mediation stand in strong contrast to adjudication processes, as well as *arbitration*, where the outcome is a decision rendered by a third party judge or arbiter.

Alternative dispute resolution processes serve as important methods of addressing and resolving conflicts but also provide structured approaches to managing systems that may inherently

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[1] Italicized terms are defined in the accompanying document, ADR/ECR Process Definitions.

generate conflict. *Dispute systems design* is an approach by which processes are developed with the parties to put in place a system to efficiently resolve a group of similar disputes as they arise.

**Pre-conditions**

A number of pre-conditions should be in place in order to optimize the effectiveness of ADR. It is important to note that despite having key fundamental elements in place, not all dispute resolution processes reach full agreement. Furthermore, externalities can influence the outcome of a dispute resolution process in ways that may not be predictable. The attached document provides a schematic overview of the principles and preconditions that are essential before embarking on a dispute resolution process.

These preconditions or "best practice factors" include: an analysis of the situation to determine the nature and domain of a conflict; the willingness of the parties to participate and their commitment to implement resulting actions or agreements; balanced representation of affected and relevant interests at the table; a structured process to ensure productive and effective engagement; consistency with prevailing laws and regulations or relevant court orders; and access to relevant current information. Complex multi-party disputes require that the parties have established communication channels or procedures in place to ensure clear and accurate information is conveyed at appropriate and agreed upon points in a process.

It is incumbent on all of the parties to a dispute to conduct careful, considered consultation and deliberation of these factors prior to deciding if an alternative dispute resolution process is appropriate. This evaluation includes examination of the incentives and alternatives to negotiating an agreement through an ADR process. Other important factors include appropriate timing (such as critical deadlines), available and needed staff resources, evaluation and comparison of the costs of ADR and litigation, long and short term impacts of ADR or litigation on the parties, the merits or benefits of a decision made by a third party vs. an agreement made by the parties themselves. In addition, in disputes related to the public sector, consideration must also be given to regulatory and legal mandates, agency missions, and other legislated parameters. Key to a process is ensuring that the appropriate level decision makers are fully and genuinely committed to a process and involved or sufficiently informed. Last, each party needs to assess how a third party neutral such as a mediator may be helpful and what skills that person should have to be effective in working with the parties.

**What a Process Looks Like**

The following is a brief outline of the critical steps parties should take beginning with the analysis of incentives and pre-conditions.

1. Internal assessment by the parties to determine the merits of proceeding with litigation or pursuing an alternative dispute resolution process. Factors pertinent to the assessment are identified above.

2. If the internal assessment results in a decision to explore the use of ADR, the parties work to identify an appropriate individual or entity that can serve to convene the process. Convenors can play many roles however, the role as described here is to assist the parties in exploring how a third party neutral can be engaged, and what qualifications the neutral should have in order to work effectively with the parties. The convenor can also assist the parties in defining the preliminary scope of known or anticipated issues to be addressed in an ADR process. The identification and selection of neutrals is most effective if it is a process done jointly by the parties. A convenor can work with the parties to develop interview questions, describe different styles and philosophies of mediation, and assist in coordinating interviews with candidate neutrals.

3. Once a neutral is selected, he or she or a team of neutrals will likely conduct a *conflict assessment* of varying scope and intensity to assess the interests, issues, and needs in order to effectively design an appropriate framework for an ADR process. The neutral(s) may make process recommendations to the parties, possibly identify pre-conditions or actions that should be taken prior to engaging in full mediation. Examples of actions include agreement on how briefings to media should occur, by whom, and at what frequency.

4. The specific design of an ADR process beyond the conflict assessment varies with the issue, its complexity, number of parties, and other factors. Nonetheless, the neutral(s) will typically work with the parties collectively and through caucus as appropriate to create a suitable environment for assisted negotiations to commence. The duration of the process depends on the above factors as well as possible external factors in public policy related matters. Agreements reached are typically documented and can be formalized. Included in the ADR process should be agreement on how actions or joint decisions will be implemented, how the agreement can be amended over time to address unforeseen but related issues, and to ensure mutual accountability to the agreement.

## Guiding Principles for ECR Processes

- **Analysis of Situation** – An assessment of the nature and domain of the conflict is conducted before embarking on a process.
- **Consensual Participation** – All necessary parties are willing and able to participate.
- **Balanced Representation** – All essential interests are represented in the process.
- **Managed, Constructive Interactions** – A structured process exists to facilitate productive and effective engagement.
- **Shared Responsibility for the Process and Agreement Outcomes** – All participants are committed to the process and are prepared to implement the resulting actions or agreements.
- **Consistency with Prevailing Laws and Regulations** – Processes in compliance with regulation e.g., FACA and substantive laws (CWA, ESA, NEPA).
- **Informed by Best Available Information** – All process participants have access to relevant, most up-to-date information available.

## Pre-Conditions for Participants, Convenors, & Neutrals

Has an analysis of incentives, BATNA's occurred?

Are all parties willing and able to participate?

Are sufficient resources available (time, staff, funds)?

Are deadlines known and reasonable?

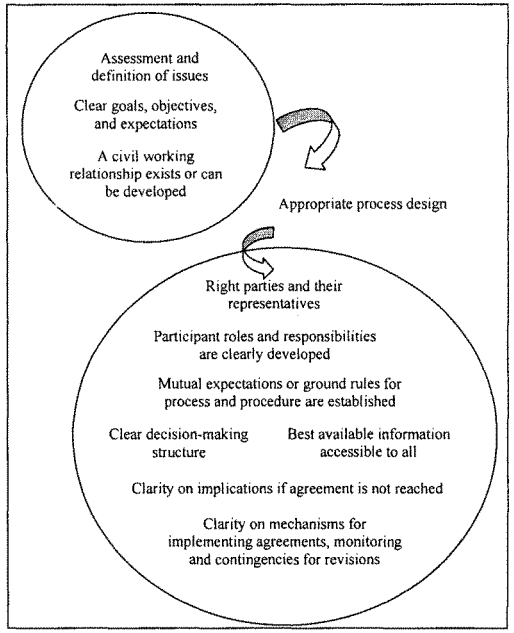
Awareness and understanding of regulatory & legal mandates?

Agency mission, policies, and legislated parameters are clear?

Are the appropriate levels of decision makers involved or delegated responsibilities?

Is third party assistance needed?

## Essential Elements for an Effective ECR Process



**STATEMENT OF**
**JAMES CASON**
**ASSOCIATE DEPUTY SECRETARY**
**DEPARTMENT OF THE INTERIOR**
**BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS**
**FOR THE OVERSIGHT HEARING RELATING TO**
**THE INDIAN TRUST FUND LAWSUIT**

JULY 30, 2003 **FINAL COPY**

Mr. Chairman, thank you for the opportunity to testify today on the issues surrounding the longstanding case that originated in 1996 as *Cobell v. Babbitt* and is now *Cobell v. Norton*. In your letter of invitation, you expressed an interest in exploring resolutions to the case that are creative, fair, and expedient.

As you know, the Department of the Interior manages about 1,400 tribal accounts and over 225,000 individual Indian money (IIM) accounts. Because the *Cobell* case only involves IIM accounts, most of my testimony will focus on the issues related to the management of those accounts. The Committee should be aware, however, that 16 tribes have filed lawsuits seeking an accounting.

Challenges

The challenges in crafting an appropriate settlement to this lawsuit are unique. First, any settlement must address the concerns of the IIM account holders in this case. The plaintiffs in *Cobell* filed the case specifically seeking an accounting. They do not purport to seek an award of any money damages in Court. If Congress wants to address the issues associated with an accounting, Congress can clarify its intent with respect to the accounting requirement in the American Indian Trust Fund Management Reform Act of 1994.

By what we know to date, an historical accounting will cost, at a minimum, several hundred millions of dollars and take years to complete. Concerns have been expressed by your

Committee and others that none of this money will go to Indian people. Instead, it will be spent primarily on accountants and consulting firms. As I point out later in my statement, there was no discussion of accounting costs when the 1994 Act was passed. Finally, at the end of the accounting, many individuals may see very little, if any, additional money in their accounts. Given media and other statements claiming up to $176 billion are owed the IIM account holders, the *Cobell* plaintiffs and many of the individuals they represent are unlikely to be satisfied with the results of any accounting.

Moreover, when looking at our future accounting activities, Congress must recognize that the guidelines it sets for management of the trust must be achievable or we will be in a constant state of litigation. Your Committee and Congress should ask itself:

- Is it Congress' expectation that this trust will be managed like a commercial trust?
- If so, is Congress willing to provide the funding to provide beneficiaries with such a system?
- Can that system be managed in the Bureau of Indian Affairs (BIA)?
- Can we compact or contract out to beneficiaries (Tribes) to operate that kind of a system?
- Should taxpayers' money, coming from the Indian budget through the appropriations process, be spent managing accounts that have very little money flowing through them?

These are important questions for the legislative branch. The Individual Indian trust is a creation of Congress through various statutes, including the General Allotment Act of 1887, the Indian Reorganization Act of 1934, and the Act of June 24, 1938, authorizing the deposit and investment of Indian monies. The 1994 Reform Act was intended to further define the Department's obligations. Private banks avoid situations such as the one we face now by charging maintenance fees and liquidating small accounts.

In our case, small accounts never close, and the Department ends up spending significant sums managing small accounts and small land interests. It is not unusual for the cost of managing these interests to far exceed the value of the interests. Funding for these activities is made available by Congress each year in the Interior appropriations act, and must compete for budgetary resources against other program and project priorities during the annual appropriations process.

The Tribes have argued that strict trust standards, which would apply to Interior's trust operations, to be included in any trust legislation. If Congress chooses to consider such standards for the future, the Committee must consider what these standards will mean for the Individual and tribal beneficiaries, the BIA, the Office of the Special Trustee, the Department, and the American taxpayers. If Congress wants to impose new standards, it must provide clarity regarding the roles and responsibilities of the Department. Most importantly, the Authorizers and Appropriators together must ensure that the Department has the needed funds to meet these roles and responsibilities. How will Congress ensure that the needed funding is available to the Secretary if new standards are adopted? If Congress provides that the common law trust standards applicable to private trustees are applicable to the United States as trustee for Individual and tribal accounts, is it prepared to require that Native American interests be given preference over all other responsibilities of the Federal Government – e.g., allocation of taxpayer dollars and other scarce resources, national security, etc.?

Alternatively, the plaintiffs have argued that a receiver should take over. At the trial, their expert witness testified that BIA employees engaged in trust operations "would all have been replaced" if operations were moved "lock, stock and barrel into a GSE."

During this administration, the senior leadership of the Department has spent more time on this issue than any other. We are committed to trust improvement. Our employees, however, are wearing down over the strain of the contentiousness and tension associated with this single case.

Past Congressional Actions

Over the past 100 years, Congress has reviewed the issue of Indian trust management many times. In 1934, the Commissioner of Indian Affairs cautioned Congress that fractionated interests in individual Indian trust lands cost large sums of money to administer, and left Indian heirs unable to control their own land: "Such has been the record, and such it will be unless the government, in impatience or despair, shall summarily retreat from a hopeless situation, abandoning the victims of its allotment system. The alternative will be to apply a constructive remedy as proposed by the present Bill." The bill under discussion at that time, ultimately led to the Act of June 18, 1934, the Indian Reorganization Act, which attempted to resolve the problems related to fractionation. We now know it did not do so.

In 1984, a Price Waterhouse report laid out a list of procedures needed to make management of these funds consistent with commercial trust practices. One of these recommendations was to consider a shift of the BIA disbursement activities to a commercial bank. This recommendation set in motion a political debate on whether to take such an action. Congress stepped in and required BIA to reconcile and audit all Indian trust accounts prior to any transfer of responsibility to a third party. BIA contracted with Arthur Andersen to prepare a report on what would be required in an audit of all trust funds managed by BIA in 1988. Arthur Andersen's report stated it could audit the trust funds in general, but it could not provide verification of each individual transaction.

In 1992, the House Committee on Government Operations filed a report entitled "'Misplaced Trust: the Bureau of Indian Affairs' Management of the Indian Trust Fund.'" That report listed the many weaknesses in the BIA management of Indian trust funds. It pointed out that the General Accounting Office's audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 found fault with management of the system. The report noted that Arthur Andersen's 1988 and 1989 financial audits stated that "some of these weaknesses are as pervasive and fundamental as to render the accounting systems unreliable."

Arthur Andersen stated it might cost as much as $281 million to $390 million in 1992 dollars to audit the IIM accounts at the then 93 BIA agency and field offices. The 1992 Government Operations Committee report describes the Committee's reaction:

> "Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken."

The Committee report then moved on to the issue of fractionated heirships. The report noted that in 1955 a GAO audit recommended a number of solutions including eliminating BIA involvement in income distribution by requiring lessees to make payments directly to Indian lessors, allowing BIA to transfer maintenance of IIM accounts to commercial banks, or imposing a fee for BIA services to IIM accountholders. The report stated the Committee's concern that BIA was spending a great deal of taxpayers' money administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances of less than $50.

On April 22, 1993, the late Congressman Synar introduced H.R. 1846. On May 7, 1993, Senator Inouye introduced an identical version, S. 925. It was in these bills that Congress first included a statutory responsibility to account for Indian trust funds. Section 501 was entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds." Senator Inouye's bill included an effective date provision that stated:

> "This section shall take effect October 1, 1993, but shall only apply with respect to earnings and losses occurring on or after October 1, 1993, on funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian."

The Senate Committee on Indian Affairs held a hearing on S. 925 on June 22, 1993. Eloise Cobell in her capacity as Chairman of the Intertribal Monitoring Association testified in strong support of the bill. The only amendment Ms. Cobell recommended in her oral statement, as well as her written statement, was to allow Tribes to transfer money back into a BIA-managed trust fund at any time if they so wanted. Ms. Cobell mentioned "[W]e have amendments, and we are willing to work with the committee on these particular amendments. I am not going to devote any more of my time in my oral presentation to the provisions of the bill because we feel it is an excellent bill."

The Navajo Nation and the Red Lake Band of Chippewa Indians were the only tribes to submit testimony. They supported the bill, and did not object to the prospective application of the accounting section in their testimony.

The Director of Planning and Reporting of the General Accounting Office also testified. He was asked if he agreed with the Arthur Andersen estimates I mentioned above. He stated the following:

> "In my statement I talked about how there are a lot of these accounts that maybe you don't want to audit, that maybe what you want to do is come to some agreement with the individual account holder as to what the amount would be, and make a settlement on it. We had a report issued last year that suggested that, primarily because there are an awful lot of these accounts that have very small amounts in terms of the transactions that flow in and out of them. Just to give you some gross figures, 95 percent of the transactions are under $500. One of our reports said there that about 80 percent of the transactions are under $50. So in cases where you have the small ones, maybe there's a way in which we can reach

> agreement with the account holders and the Department of the Interior on how much we will settle for on these accounts rather than trying to go back through many many years, reconstructing land records and trying to find all of the supporting material. It may not be worth it." [page 29 of S. Hrg 103-225]

On July 26, 1994, Congressman Richardson introduced H.R. 4833, which ultimately became the American Indian Trust Fund Management Reform Act of 1994. The House report on H.R. 4833 notes that H.R. 1846 was the predecessor bill to H.R. 4833. There was one legislative hearing held on H.R. 4833 by the House Committee on Interior and Insular Affairs on August 11, 1994. There is no printed record of that hearing. There was no Senate hearing or report on this bill.

H.R. 1846 and H.R. 4833 were similar in many places. H.R. 4833 did not, however, include the effective date provision explicitly making the accounting requirement prospective only. While the report notes in a number of places why changes were made to the H.R. 1846 provisions, it is silent with respect to this omission.

It may surprise Members of this Committee to note that there is no mention of the costs associated with either complying with the Act, or completing the accounting in the Committee's report. Moreover, no analysis from the Congressional Budget Office was included in the House Committee's report. The Department sent a letter on H.R. 1846 and amended S. 925 that was placed in the Committee report on H.R. 4833. Its only mention of cost is the following sentence: "We wish to note that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs." Given the lack of cost analysis contained in the legislative history, one could assume that Congress in enacting the 1994 Reform Act had no idea it may have required a multi-million or billion dollar accounting.

Interior's Historical Accounting Plan

The *Cobell* court ruled that the 1994 Reform Act requires the Department to provide IIM trust beneficiaries an accounting for all funds held in trust by the United States that are deposited or

invested pursuant to the Act of June 24, 1938, regardless of when they were deposited. The Court of Appeals noted that the statute does not make clear how to conduct such an accounting, and it is properly left up to the Department what accounting methods to use.

In the Department's FY 2001 Appropriations Act, Congress directed the Department to submit a comprehensive report to the Appropriations Committees as to the costs and benefits of a comprehensive historical accounting. That report was submitted on July 2, 2002. It looked at the costs associated with doing a transaction-by-transaction accounting and transaction-by-transaction verification for the IIM account holders. The estimate for such an accounting and verification was $2.4 billion, and that would take ten years to complete. The feedback received from various Congressional members and staff suggested little support for this plan given its cost, the length of time required, and the fact that such a huge sum of money would go to accountants and lawyers, not Indian people.

In September 2002, Judge Lamberth ordered the Department to submit to the court by January 6, 2003 a proposed historical accounting plan. He also allowed the plaintiffs in the case to submit their own proposed accounting plan.

Our proposal is to compile a transaction-by-transaction accounting with transaction verification based in part on various statistical sampling verification methods. But all IIM account holders will receive transaction-by-transaction account histories. By using these different methods, we believe IIM account holders will receive their accountings much sooner. Interior plans to separate the historical accounting into three distinct types of IIM accounts.

- Judgment and Per Capita accounts
- Land-based IIM accounts
- Special Deposit Accounts

For the approximately 42,200 judgment and per capita accounts, we plan to reconcile 100 percent of the transactions in each account and verify all transactions.

For the approximately 200,000 land-based IIM accounts, we intend to provide a complete transaction-by-transaction history going back to the Act of June 24, 1938, or the date of inception of the account and verify those transactions using a combination of transaction-by-transaction and statistical methods. We plan to verify all transactions that are equal to or greater than $5,000. For transactions that are less than $5,000, we will verify transactions using statistically valid sampling technologies. The statistically valid sampling methodology is expected to result in our being able to determine the accuracy rate of the historical accounting with 99 percent confidence.

For the 21,500 Special Deposit accounts, which are in effect holding accounts, we intend to distribute the funds to the proper owners and then close those accounts.

The historical accounting described in our plan covers all IIM accounts open as of October 25, 1994, the date of the Act, or opened thereafter. The historical accounting period ends on December 31, 2000; transactions occurring thereafter are addressed in current accounting activities. Interior engaged 14 consulting firms to assist in the development of this plan, including five accounting firms (four of which are among the five largest firms in the United States), the largest commercial trust operator in the United States, two historian firms that have specialized in Indian issues for many years, and firms to assist in statistical matters, trust legal matters and other areas pertaining to historical accounting.

Under our plan, at the end of the Department's proposed historical accounting process, we intend to be in the position to provide each IIM account holder with a Historical Statement of Account. This statement will provide information on how much money was credited to each account, and the disbursements made from the account. It is expected to provide an assessment of the accuracy of the account transaction history. In addition, we intend to be in a position to provide land-based IIM account holders with information regarding their land assets. This information will be prepared by the BIA Land Title and Records Offices as a separate package to be provided to IIM account holders.

The cost of our historical accounting plan is approximately $335 million over five years. The President's proposed FY 2004 budget for the Department of the Interior includes money for this accounting. Our $9.8 billion budget request is the largest in the Department's history, and represents a net increase of $344.1 million over the FY 2003 enacted appropriations. Nearly one-half of the proposed increases will fund trust reform improvements. Included within the total, is $100 million to support the Department's plan to conduct an historical accounting for IIM accounts and $30 million to account for funds in tribal accounts.

The court has not yet ruled as to whether it believes our accounting plan is adequate. Plaintiffs have argued vehemently that it is not. Plaintiffs argue that the 1994 Reform Act requires a full verification for all transactions since the 1880s, and that such an accounting is "impossible" because the historical records are not complete – something Congress was obviously aware of when it passed the 1994 Reform Act. In the trial, plaintiffs have offered an alternative methodology, which uses various estimating techniques to approximate the amount they contend should have come into the IIM accounts since the 1880s. Their plan will, admittedly, not provide an accounting to even one IIM beneficiary, but will – like a damages model – come up with an amount of money to which plaintiffs as a class claim they are entitled.

Indian country argues that the money for this accounting or any judicial or congressional settlement should all be new money and not come from Indian program money. In reality, appropriators are faced with funding this accounting out of the Interior allocation, and have openly stated that funding a multi-million, potentially multi-billion, dollar accounting will mean a reduction in money for other Indian program priorities.

Interior Trust Reform Efforts

The Department has developed a comprehensive plan for the management of Indian trust funds. The Secretary established both the Office of Historical Trust Accounting and the Office of Indian Trust Transition. The Office of Indian Trust Transition engaged in a meticulous process to develop an accurate, current state model to document trust business processes. The Department,

after the most extensive consultation ever held with Indian country, is well down the road of putting in place a reorganization of trust functions in response to widespread criticism of the former trust management structure.

Previous Settlement Attempts in this Case

Mr. Chairman, recently you and Senator Inouye sent letters to the parties urging a fair and equitable settlement of the *Cobell* case. We welcome your involvement in this dialogue. We also welcome such a settlement. However, the parties are far apart on the issue of what is fair and equitable. Although I did not work at the Department of the Interior during the previous administration, I understand that, despite assertions of the plaintiffs, the Federal Government has made a number of efforts to engage in settlement talks in *Cobell* with no success. From June 1996 to July 1997, the Department engaged in negotiations with the *Cobell* plaintiffs on the issue of development of an acceptable accounting mechanism. The Department tried again in early 1999 before the July 1999 trial and again right before the trial. Those negotiations failed.

After the July 1999 trial, Judge Lamberth asked the parties to work toward a settlement. The parties were unable to agree on an acceptable mediator, so the Judge appointed Stephen Saltzburg, a professor at George Washington University who has served as a special master in two class action cases in the District of Columbia District Court, and serves as a mediator for the U.S. Court of Appeals for the District of Columbia. The mediation ended with no resolution in November 1999.

Near the end of the previous Administration, then Special Trustee Tom Slonaker talked directly to plaintiffs' attorneys. While agreement was reached on a number of issues, other overarching issues went unresolved, and ultimately this effort failed. At the beginning of this Administration, the Department once again tried to enter into settlement talks in *Cobell*. The discussions became mired in a variety of issues surrounding the conduct of the negotiations. No resolution was reached on those issues.

Last year, the House Appropriations Subcommittee on Interior included language in the Interior FY 2003 appropriations bill that would have limited the historical accounting to the period from 1985 forward. That language was removed by amendment on the House floor. The debate on that amendment, which was more extensive than the debate on the actual 1994 Reform Act, centered on the point that this matter should be addressed by the authorizers, not the appropriators.

The appropriators urged the authorizing committees to step in and come up with a legislative settlement. Congressman Dicks explained on the House floor that it was the intent of the appropriators to try to resolve this issue so that the vast amounts of money involved could go to Indian programs instead of accountants. More precisely he said:

> "This thing is broken; and somehow all the people that are here today expressing their wonderful concern, there is going to be a tomorrow, and we will see if anybody really wants to stand up with the majority side obviously having to be involved and work on this. This has to be done. We have got to get something done here." And then later in the debate, "What we are trying to do is get them money in a reasonable period of time without decimating the Interior appropriations bill every single year. I want that $143 million to be used for other programs that will help Native Americans. I do not want to waste $1 billion in going out and trying to do accounting that is not going to give us the information pre-1985."

He also invited the authorizers to develop a settlement compromise -- "[N]ow if these gentlemen who have come to the floor today to help us, if their committees would get busy and develop a compromise and do a settlement on this issue, it could be coming from Congress. Somehow we have to resolve this, because we do not have enough money."

The House authorizers who spoke on the floor in July 2002 all stated their beliefs that settlement language should come from the authorizing committees, not the Appropriations Committee.

Over a year has passed since that debate in the House. We are now facing another appropriations cycle, and there has been no movement toward a settlement of the *Cobell* case. During that year, the court has issued a ruling and required plans for a historical accounting to be submitted; we have developed a plan for our accounting and are moving forward with our trust reform plan. A 44-day trial was recently completed on our accounting plan, plaintiffs' "accounting plan," our plan to bring ourselves into compliance with our fiduciary obligations, and plaintiffs' compliance plan.

Both the House and Senate Appropriations Committees have provided in their FY 2004 bills $55 million less for a historical accounting than we requested in our FY 2004 budget. The House bill, as reported from Committee, also included language requiring the Secretary to develop a voluntary settlement program, and required that statistical sampling be used in conducting the historical accounting required by the 1994 Trust Reform Act. That language was removed at the request of the House authorizers.

On April 20, 2003, Eloise Cobell sent a letter to all class members in the *Cobell* case. Ms. Cobell urged them not to support any effort by Congress to authorize a voluntary settlement for their accounting claims. Ms. Cobell told them, many of whom own a minute share in one parcel of land and accounts with throughputs under $15 annually, that the plaintiffs are about to receive "a huge many billion dollar judgment in favor of us — all Indian trust beneficiaries." The letter also said if the voluntary program is enacted, "tens of thousands of Indian people will again be cheated by the United States government." Plaintiffs' attorneys have stated they expect to receive up to $176 billion.

As a result, expectations are high in Indian country. Given what we have seen as a result of the reconciliations and accountings done so far, we do not believe we can justify to the American taxpayers a settlement offer in the billions of dollars.

Mr. Chairman, on June 13, 2003, both you and Senator Inouye sent a letter to Tribal leaders asking for their help in tackling 3 major tasks that would improve the management of Indian trust:

- Stop the continuing fractionation of Indian lands and focus on the core problems of Indian probate by swiftly enacting legal reforms to the Indian probate statute.
- Begin an intense effort to reconsolidate the Indian land base by buying small parcels of fractionated land and returning them to tribal ownership.
- Explore "creative, equitable, and expedient ways to settle the *Cobell v. Norton* lawsuit."

We would like to work with you and the House Committee on Resources on all three of these tasks. Addressing the rapidly increasing fractionation on Indian land is critical to improving management of trust assets. Properly done probate reform could be very helpful. When land is leased, BIA has the responsibility to deposit receipts from the land into the appropriate IIM account.. This involves probating estates, finding heirs, and holding money for unknown heirs. These tasks are all funded through the Department's budget.

The purchase of fractional interests increases the likelihood of more productive economic use of the land, reduces recordkeeping and large numbers of small dollar financial transactions, and decreases the number of interests subject to probate. The BIA has conducted a pilot fractionated interest purchase program in the Midwest Region since 1999. Through FY 2002, the program has acquired 47,188 ownership interests in over 25,000 acres.

We have learned there is a high level of interest and voluntary participation by willing sellers and large numbers of owners are willing to sell their fractionated ownership interests. The President's FY 2004 budget request proposes $21.0 million for Indian land consolidation, an increase of $13.0 million for a nationally coordinated and targeted purchase program. Interior believes that a national purchase program can be administered in a very cost-effective manner to target acquisitions that reduce future costs in trust management functions, such as managing land

title records, administering land leases, distributing lease payments to IIM accounts, and processing probate actions. We are developing a strategic plan and necessary infrastructure to support a major expansion of this program in 2004. Where appropriate and to the extent feasible, the Department plans to enter into agreements with Tribes or tribal or private entities to carry out aspects of the land acquisition program.

With respect to the third task, the settlement of the Cobell lawsuit, I can honestly say I don't think we can get there without the involvement of Congress. This does not mean we will not continue to try. Contrary to Ms. Cobell's letter to the class members, this case is not on the verge of being over. Even if the district court were to adopt the plaintiffs' accounting plan -- which the Administration argues is fundamentally improper given that this is a lawsuit ostensibly brought under the Administrative Procedure Act -- there are more steps before the district court, and before other tribunals, that will be required before the class members receive any money. The district court has said that it does not have the jurisdiction to compel payment of money damages. It has made clear that the reason it, rather than the Court of Federal Claims, can hear the case is that the plaintiffs have stated many times that they are not seeking money damages. Without a settlement, considerable hurdles remain before anyone other than the lawyers or accountants can see any money from this suit.

Circuit Court Opinion

On July 18, 2003, the D.C. Circuit Court of Appeals found the district court in *Cobell* erred when it held Secretary Norton and Assistant Secretary McCaleb in contempt last September. The Circuit Court also ruled that the district court erred when it reappointed Joseph Kieffer as Court Monitor in April 2002 over the objections of the Department, and that the district court compounded this error by elevating him to "Special Master-Monitor" in its September ruling. The July 18 opinion states:

> "The Monitor's portfolio was truly extraordinary; instead of resolving disputes brought to him by parties, he became something like a party himself. The

> Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system. . ." [page 17]

The Circuit Court went on to address the contempt citations by pointing out that "a sanction for one's past failure to comply with an order is criminal in nature" [p. 25] and that "one person cannot be held criminally liable for the conduct of another. We further note that a finding of criminal contempt 'requires both a contemptuous act, and a wrongful state of mind.' [p.26] Assistant Secretary McCaleb's contempt charges were deemed in error because the district court did not identify "any specific act or omission whatsoever on his part."

Secretary Norton's contempt charges were found to be in error for a number of reasons. First, the district court said the Secretary committed "litigation misconduct" because she failed between December 21, 1999 and July 10, 2001 to take any steps toward completing an accounting. The Circuit Court pointed out that more than a year of this period was not on her watch, and that "the district court's findings clearly indicate that in her first six months in office Secretary Norton took significant steps toward completing an accounting." [p. 27]

The district court also held the Secretary in contempt for committing a fraud on the court. This "fraud" was for "filing false and misleading quarterly status reports starting March 2000, regarding TAAMS and BIA Data Cleanup." *Contempt Opinion* 226 F. Supp. 2d at 124. Four were filed prior to the Secretary taking office, and, according to the Circuit Court, the remaining four "do not rise to the level of fraud on the court." [p. 28] In fact the Circuit Court stated "[W]e find the reasoning of the district court mystifying" with regard to this holding.

Finally, with respect to the district court finding that the Secretary committed a fraud on the court by making false and misleading representations regarding computer security because of representations made by the Secretary in April and May 2001, the Circuit Court stated:

> We see no finding of fact in the Report on IT Security, or in any opinion of the district court, that directly contradicts the statements in the Department's April Opposition, which the court identified as part of a fraud on the court. Absent a direct contradiction, the facts of this case do not support the implicit inference that Secretary Norton "has acted with an intent to deceive or defraud the court."

> *United States v. Buck*, 281 F. #d 1336, 1342 (10th Cir. 2002). With respect to the statement in the Department's May Opposition, we think it is inconceivable that a departmental secretary may be held to have committed a fraud on the court because an attorney representing her Department argued in an adversarial proceeding that an adversary's motion critical of the department was "without merit."

We are pleased with the findings of the Circuit Court. Much of this litigation has focused on matters that are not moving us forward with regard to trust management improvement. The Federal Government has spent a huge amount of time and money on this litigation and on issues that get us no closer to resolution of the case.

Secretary Norton and former Assistant Secretary McCaleb are not the only ones who have had to fight for their reputations as a result of this case. To date, dozens of employees and past employees of the Department of the Interior and Department of Justice have been charged with civil or criminal contempt by the plaintiffs. Plaintiffs refer to them as "Contemnors" even though not one has yet to be found in contempt of anything. As of April 30, 2003, the Department of Justice had authorized the retention of private counsel by 80 present and former officials and employees of Interior, Justice, and Treasury, in connection with this litigation. The co-workers of these individuals know them in a different way. They know many of them as dedicated civil servants who have devoted themselves to careers of public service. Many of the named individuals are attorneys who handle or have handled Indian affairs issues. Rarely do individuals give up the benefits of private practice to come to the Department and handle Indian issues unless they have some innate dedication to making the lives of Indian people better. These individuals now all must engage attorneys, and have been removed from Indian trust issues, not because the Department believes they are culpable in any way, but because we will not jeopardize them any further by keeping them on this case.

In addition, Mr. Chairman, in my opinion, the employees of the BIA are quite frankly tired of constant allegations from the plaintiffs that they are incompetent or unfit to perform their duties. As you might imagine, morale in the BIA is seriously affected by uncertainty as to what the future holds for its employees.

That concludes my prepared statement. Thank you again for giving me an opportunity to testify. I would be happy to answer any questions you might have.

# AMERICAN INDIAN TRUST FUND MANAGEMENT REFORM ACT OF 1994

## TITLE I—RECOGNITION OF TRUST RESPONSIBILITY

SEC. 101. AFFIRMATIVE ACTION REQUIRED.

The first section of the Act of June 24, 1938 (25 U.S.C. 162a), is amended by adding at the end the following new subsection:

"(d) The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

"(1) Providing adequate systems for accounting for and reporting trust fund balances.

"(2) Providing adequate controls over receipts and disbursements.

"(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

"(4) Determining accurate cash balances.

"(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

"(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

"(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

"(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.".

SEC. 102. RESPONSIBILITY OF SECRETARY TO ACCOUNT FOR THE DAILY AND ANNUAL BALANCES OF INDIAN TRUST FUNDS.

(a) REQUIREMENT TO ACCOUNT.—The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a).

(b) PERIODIC STATEMENT OF PERFORMANCE.—Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a). The statement, for the period concerned, shall identify—

(1) the source, type, and status of the funds;

(2) the beginning balance;

(3) the gains and losses;

(4) receipts and disbursements; and

(5) the ending balance.

(c) ANNUAL AUDIT.—The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a), and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) after the completion of the audit.

**John E. Echohawk, Executive Director**
**Native American Rights Fund**

**Committee on Indian Affairs**
**United States Senate**
**July 30, 2003**

Good morning, Chairman Campbell, Vice-Chairman Inouye, Members of the Committee – thank you for inviting me here today to begin an earnest discussion with members of Congress, with tribal leaders, and with Administration officials regarding methodologies for settling the *Cobell v. Norton* class action lawsuit.

I am here today on behalf of Dennis M. Gingold, Keith M. Harper and myself, as counsel to the plaintiffs in the *Cobell v. Norton* (96-1285 (RCL) case which is before the United States District Court for the District of Colombia. First and foremost, on behalf of the 500,000 individual Indian trust beneficiaries, we express our deep gratitude for your sincere interest in the *Cobell* litigation and your willingness and desire to see that it is resolved fairly and expeditiously. Be assured that the *Cobell* plaintiffs are now, and always have been, willing to engage in frank and honest discussions for a fair resolution of this case. However the executive branch – with the exception of Treasury – has been steadfast in its unwillingness to negotiate such a resolution. Without your direct and active participation in the settlement process, we have no hope that the Administration will discuss these matters in good faith.

On five previous occasions, we have engaged the executive branch in fruitless settlement discussions. Each time, government officials broke promises they had made to the *Cobell* plaintiffs and rejected settlement of matters that the negotiators had resolved. And, they have never made a good faith offer to resolve the accounting matter. In fact, plaintiffs, in an effort to move settlement forward, took extraordinary action in litigation and provided their expert's financial model to Interior and Justice under a confidentiality agreement, relying on the representations of defense counsel that the government would honor the confidentiality agreement and would honor its commitment to provide to plaintiffs information of equal importance. Unfortunately, Interior and Justice failed to produce the information they had promised and they misappropriated plaintiffs' confidential information, offensively using it in their preparation for Trial 1.5.

Given this disturbing history, plaintiffs are skeptical that Interior and Justice are prepared to resolve the *Cobell* case in good faith and in a fair manner. Earlier this month, Ms. Elouise Cobell, lead plaintiff in the lawsuit, was invited to testify before the House Committee on Resources regarding *"Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit."* The *Cobell* plaintiffs believe that the answer to this question is self-evident: Of

course, such a process can be developed. However, as she testified:

> It is important to note that this case has been in litigation over seven years. It is a matter of record that time and time again the case has been unconscionably delayed as a result of government litigation misconduct. * * * We, the IIM beneficiaries, on the other hand have pursued expedited resolution of this case. We have vigorously contested each and every government-sponsored delay tactic. That is the record of this case. We want resolution (more than anyone) because each and every day trust beneficiaries are dying without receiving justice.

Moreover, she made the plaintiffs' position on one matter unmistakably clear: We are now – as we have been since the commencement of this litigation – prepared to engage in a fair settlement process and resolve these longstanding trust mismanagement issues. The key word is of course, is "fair." With your involvement, with the involvement of other senior Congressional leaders, we hope that this is possible.

Mr. Chairman, many people are under the mistaken notion that the *Cobell* case is just about money. It is not. In fact, the *Cobell* case has always been about three things: (1) fixing the IIM trust system; (2) providing the IIM beneficiaries with an accounting; and (3) correcting the IIM account balances to reflect their true value. In your recent correspondence to Tribal leaders, you outlined a course of action which includes: legal reforms to the Indian probate statute; an intense effort to reconsolidate the Indian land base; exploring creative, equitable and expedient ways to settle the *Cobell* case; and reforming the Federal trust management apparatus. We strongly believe that the objectives of the *Cobell* litigation are consistent with the course of action you have proposed.

**Elements for a Sound Settlement Process**

Mr. Chairman, Mr. Vice-Chairman, in your letter dated April 8, 2003 to counsel for the plaintiffs in the *Cobell v. Norton* lawsuit, you stated your strongly held belief that the parties to this case should pursue a mediated resolution rather than a course of continued litigation. You stated your belief that the most effective and equitable way to resolve this matter is to engage in some type of settlement process that includes a mediator or mediation team. Plaintiffs believe that such a process, with certain appropriate elements may very well lead to positive results and resolution of this case.

In consideration to your proposal, we have developed a preliminary, non-exhaustive list of appropriate elements for a sound settlement process. Obviously, this is a very general list and is intended to commence a dialogue that will aid development of a structure and process for positive discussions and ultimately, perhaps, resolution. In other words, these are issues that are important to consider and hopefully will offer a starting point.

**1. Inclusion of All Necessary Parties**

First and foremost, this process has to include all necessary parties. It is obvious that since this is litigation, representatives from each of the ***Cobell v. Norton* parties** must be at the table. Moreover, we believe that it is critical that senior members of the authorizing committees of both houses of **Congress** must be personally involved to ensure that all parties come and discuss resolution in good faith. This may very be the element that makes a difference and set the foundation for a successful settlement process. Finally, tribes have made clear that there are aspects of the *Cobell* case that impact their interests, especially regarding trust reform, and thus, to the extent tribal interests are involved, tribes should participate as well.

**2. The Mediator**

We believe that a mediator may serve a number of helpful purposes and would support Congress providing resources for that purpose. It is essential that the mediator be a person of significant political clout that can hold all parties to a high standard of good faith. Moreover, this mediator must be a person known to be able to work in a non-partisan manner. The mediator can have a team of individuals and experts to aid in the process, but their should be one person with the ultimate responsibility.

**3. Scope of Settlement Discussions**

The scope of the settlement discussions should be determined up front. Moreover, it is imperative that the settlement not re-open matters and questions already settled by judicial determinations. The District Court and Court of Appeals have already rendered numerous critical decisions in the *Cobell v. Norton* case. It is appropriate that these prior decisions provide the necessary legal parameters for any settlement discussions. In other words, a settlement process is not the place to "re-litigate" issues already determined by court rulings. In our view to permit re-evaluation of judicially determined matters, would open up a Pandora's Box and ensure no settlement will occur.

**4. Timing**

Plaintiffs believe this is an opportune time to begin the discussion of the settlement process. Trial 1.5 has very recently concluded and next Monday, August 4, 2003, the parties will submit their post-trial briefs (*i.e.* Proposed Findings of Fact and Conclusions of Law). The Court's Trial 1.5 decision, which will likely be rendered in the immediate future will determine many significant issues, including the proper methodology to perform the accounting; the

applicability of statute of limitations; and burdens of proof in a trust accounting case. It is axiomatic that when there are fewer legal uncertainties and obstacles, the chances of a successful resolution are enhanced materially. And, the Trial 1.5 decision will remove significant uncertainties and obstacles. Therefore, we believe that this is an opportune time to begin the dialogue in determining the settlement process including its shape, structure and scope, as well as to ensure that resources for a process are in available. If we do these things now, then we will be postured to begin the actual and fruitful settlement process as soon as the Trial 1.5 decision is rendered.

**5. Two Separate Matters for Resolution**

The *Cobell* case is not merely about money – an accounting and determination of accurate account balances. It is also about ensuring that reforms are in place and that the United States brings itself into compliance with its fiduciary duties owed to 500,000 individual Indian trust beneficiaries. Plaintiffs believe that consideration should be given to dividing the settlement process into two distinct discussions, perhaps with a separate mediator:

1. **Accounting** - correction of the individual Indian trust accounts
2. **Fix up issues** - reforming the trust system

The *Cobell* case has been bifurcated in this manner and has worked well because the two aspects of the case raise significantly distinct issues. Both aspects of the case raise consequential and nuanced issues which will require considerable attention.

**6. Continuation of Legal Proceedings During Settlement Discussions**

It is important that the litigation not be stalled during the pendency of resolution discussions. If the litigation were stayed during settlement talks, then a party interested in delaying matters further could simply drag out the settlement discussions – wasting valuable resources – and in the end refuse to agree to a fair resolution. Furthermore, the litigation has been the sole reason the government has taken trust reform seriously, by their own repeated admission. It continues to motivate the government to seek resolution. Without that pressure, there will be no reason for Interior to negotiate in good faith.

**7. Final Resolution**

Plaintiffs believe that a final resolution will be more easily achieved if certain issues are addressed up front; they include:

A. The federal government should ensure that the **claims judgment fund** can be accessed to cover the cost of any settlement. It is not fair nor appropriate to fund a settlement through funds that should rightfully go to Indian Country through the ordinary appropriations process. If this case continued in litigation, plaintiffs believe that any correction of accounts would not have to be separately appropriated. Consequently, if this matter is resolved through a settlement process, these century old problems should not be paid through ordinary budgetary processes. We must avoid the "robbing Peter to pay Paul" scenario.

B. Any settlement must have **judicial approval** pursuant to the Federal Rules of Civil Procedure. We must bear in mind that this is an attempt to resolve a case in litigation. Moreover, this is a class action, and therefore due process must be ensured for **all class members**. In other words, settlement must include, among other things, fairness hearings so that each beneficiary has an opportunity to be heard. These matters should be handled in the ordinary judicial avenues – here, before the Federal District Court for the District of Columbia.

C. Any resolution of this case should first be on a **class wide basis**. Class actions are far more expedient and efficient than individualized litigation and offer significant due process protections for class members. Any attempt to break up the class through "side-settling" of claims will merely ensure more litigation. Moreover, Interior will have less incentive to negotiate in good faith if given such an opportunity.

D. There should be **no limitation** on the right to litigate issues not resolved through a settlement process, a suggestion made by the Intertribal Monitoring Association.

Again, these are plaintiffs initial views. We come to the table with an open-mind in formulating the settlement process.

## Closing Remarks

The mismanagement of the Individual Indian Money Trust is a huge problem that has been around for over one hundred years. Together with the help of the Committee we can finally settle this issue and make history.

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November 14, 2003

Chairman Ben Nighthorse Campbell
United States Senate
Committee on Indian Affairs
836 Senate Hart Building
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Dear Chairman Campbell:

Thank you again for your attention to this critical issue of attempting to formulate a fair resolution of the *Cobell v. Norton* case. Below are the Committee's follow up questions and my answers.

1. In your written testimony you quoted from the April, 2003, letter that Senator Inouye and I sent to you and the Federal defendants but you only quoted a small part of it, so let me quote from it as well:

> "We believe the most effective and equitable way to resolve this threshold matter [i.e. the accounting] is to engage the services of an enhanced mediation team that will bring to bear trust, accounting, and legal expertise to develop alternative models that will resolve the Cobell case fairly and honorably for all parties."

*Q. Your testimony implies that the concepts in S.1770 are somehow "out of the blue" and deviate from what we have been proposing now for more that 6 months. But doesn't the expert team concept sound a lot like the Indian Money Task Force proposed in S. 1770?*

**NARF ANSWER:** As stated in my May 23, 2003 letter to you and confirmed both in my testimony on July 30, 2003 and testimony of October 29, 2003, plaintiffs strongly believe that the *Cobell* case can be resolved through mediated resolution if there is incentives to ensure the government negotiates in good faith. And to the extent that your letter suggested mediation, we welcomed then as we continue to welcome now the opportunity to do so.

As to the specific paragraph you quote, I agree that you suggested to us involvement of an "expert

team" and we do not now nor did we then object to the concept of having experts involved in the process. Parenthetically, I will note that we believe it best for the chosen mediator to have authority to choose the experts he believes he needs to properly mediate and resolve the case. But the fundamental notion that independent expertise should be brought to bear on the issues is not a concept we find objectionable (nor did I object to in our October 29, 2003 testimony).

But S.1770 goes far beyond utilizing an "enhanced mediation team" and introduced many new concepts that were not part of your letter and we believe inconsistent with the central idea of "resolv[ing] the Cobell case fairly and honorably" since such provisions would have the effect, however unintended, to undermine the fundamental rights of trust beneficiaries that we have secured though over seven years of litigation. Perhaps most fundamentally S.1770 purports to redefine the term "accounting" and further it permits the redefinition unmoored from settled and foundational principles of trust law. As we read your May 2003 letter, there is not a hint that your "mediation" approach would have as its centerpiece the redefinition of a term with settled meaning in the law and which is central to this case – "accounting." But S.1770 does precisely that. As I stated in my testimony, it is a matter of record that "the government argued for nearly five years that it did not even have a duty to account" and much of this litigation has been focused on the whether the nature and scope of that accounting duty is the same here as for any other trustee. The Court of Appeals on February 23, 2001 resolved that issue – that is a final judicial determination. Yet, S.1770 purports to unsettle that question once again.

As outlined in my testimony, the redefinition of the accounting problem is not the only one with S.1770 that would serve to disadvantage Indian trust beneficiaries and not lead to "resolv[ing] the Cobell case fairly and honorably" in my view – the stated goal of your initial invitational correspondence.

*Q. What objections do you have to developing alternative other than an $9 billion accounting, which I fundamentally believe will not be funded by the Congress?*

**NARF ANSWER:** We believe that there are two potential options which can "resolve the Cobell case fairly and honorably" – which is our shared goal. Both these alternatives could avoid having the government fulfill its $9 billion legally determined duty to account. The first that we have outlined in our testimony and thus need not be fully reiterated here is, of course, mediation on a global basis.

The second option is a declaration that the accounting is impossible. As many in Congress have repeatedly stated – and consistent with the views of the two former Special Trustee's and plaintiffs – a full and accurate accounting of the Individual Indian Trust is impossible because of destroyed records and trust data. Given this known reality, the trustee – here the United States – should admit that it is unable to fulfill its duty to account. Once that occurs, then the Court cannot require the trustee to do the impossible and would have no choice but to exercise its equitable powers and restate the accounts utilizing the best alternative methodologies consistent with trust law. Since these alternative methodologies are largely developed, only few additional resources will be needed to determine the accurate account balances of the IIM Trust. Parenthetically, we note that the courts have determined that the trustee is the United States acting through Congress, not the Interior Department which is the "trustee-delegate." Therefore, it would

be wholly appropriate for Congress to enact legislation which admits they cannot perform the accounting which would commence this cost-effective, quick and fair alternative process.

*Q. Aside form the wholesale criticisms of this bill in your testimony, what alternative would you propose?*

**NARF ANSWER:** We believe that the two best alternatives are (1) mediation as outlined in our July 30, 2003 testimony or (2) admission of the impossibility of the accounting and appropriate restatement of accounts consistent with trust law as outlined above.

2. I have to tell you that I think Indian people are rational people and if give the chance, would rather have some measure of immediate relief in the form of a payment rather than wait for 5 or 10 more years of court-room gymnastics. But let me ask you some questions.

*Q. As counsel for the Individual Account Holders, how often do you communicate with the 500,000 members you claim are in the class action? What obligation do you have to communicate with them regarding developments such as S.1770 or other efforts to resolve the case?*

**NARF ANSWER:** First, let me agree with you Mr. Chairman that we believe that despite how the government has and continues to paternalistically treat individual Indian beneficiaries, they are indeed as rational as any other Americans and if asked whether they would want a **fair** amount now or a **fair** amount later, they would take the money now. But I would also submit that Indian people are also rational in the sense that they do not want a process that would inevitably lead to the payment of pennies on the dollar now, instead of adequate relief later. Justice later is better than injustice now. Many people have expressed the view to us that we have waited a long time for justice (a century) and would be waiting a lot longer if not for the *Cobell* case.

Second, even rational decision-makers must be provided adequate information to make a knowledgeable, informed and rational decision. One of the issues that concern us about S.1770 is that like Section 137, it does not have provisions ensuring in any meaningful way that individuals are provided sufficient and **accurate** information to make a sound decision regarding their rights.

As class counsel, we have fiduciary responsibilities and ethical duties to the members of the class to act in their interest at all times. As part of that responsibilities we must take reasonable efforts to inform the class to the extent practicable of their rights. Once a class has been certified, class counsel can and should look to the class representatives to discuss any proposal, like S.1770. Class representatives are kept fully abreast of the developments of the case. They make the initial judgment on whether to support any settlement effort.

As a matter of practice, plaintiffs have developed numerous methods beyond those required by law to keep class members informed of the *Cobell* case and its developments. Among other things, we have a website which contains informational material, we have had and continue to have numerous meetings each

year with beneficiaries all over Indian Country yo get their perspective, guidance and direction and we keep in regular contact with numerous allottee associations.

Moreover, it is important to recognize that the federal rules include numerous protections for absentee class members. Among these protections are fairness hearings which provide such class members an opportunity to be heard and make objections to any settlement proposal. It is our view that such due process protections are constitutionally required.

We have heard from many alottees, the vast majority of which have expressed grave concerns about any break-up-the-class type settlement approach like S.1770 or Section 137. For example, Ervin Chavez Chairman of *Shi Shi Keyah* – the largest Navajo allottee group recently testified before the House Committee on Resources and wholly rejected the S.1770 approach. In considering any legislative proposal to resolve *Cobell,* we believe that allottees and allottee associations have and will continue to support the plaintiffs' approach. If the Committee is concerned that we are not representative of these views, there should be additional field hearings with aloottee associations as witnesses.

3. There has been a fair amount of comment about the kinds of methodologies that would be used to conduct an historical accounting. Understandably, that's a important concern to the plaintiffs and to the Government too.

*Q. I assume that, as the plaintiffs' lawyer, you would oppose any methodology that would substantially understate the true balance of your clients' IIM accounts. Am I correct in assuming that?*

**NARF ANSWER:** Yes.

*Q. I would also assume that the Government would oppose any methodology that would substantially overstate the balances of your clients' IIM accounts. Do you agree with that?*

**NARF ANSWER:** I presume so.

*Q. Your testimony strongly indicated that what the plaintiffs want is legislation that promotes a mediated settlement that is fair and equitable to the plaintiffs' but you are not asking for legislation that would have that has the effect of overcompensating the plaintiffs are you?*

**NARF ANSWER:** No, we have **never** asked for anything other than what is owed to us by the government. Moreover, we believe that Indian trust beneficiaries have the same rights as any other non-Indian trust beneficiary in any other trust. *Cobell* fundamentally is about securing these essential rights. So in fact, we are not seek "compensation" at all but merely a correction of the account balances in a manner consistent with the law and concomitant rights of all non-Indian American citizens when they are beneficiaries of a trust. Our presumption is that this Committee in seeking "fair" resolution would not in any way support a legislative approach that has the effect of treating Indian beneficiaries lesser than other trust beneficiaries.

*Q. So if the Committee were to adopt legislation calling for some sort of mediated settlement, don't you agree that the ultimate goal of the legislation should be to come up with a settlement that reflects the true balances of your clients' IIM accounts?*

**NARF ANSWER:** Yes. And the best way to derive the "true balances" is to do so by utilizing a methodology that is faithful to the basic precepts of trust law.

*Q: You ask in your written testimony, "What Happened To Mediation?" If it is mediation that you want, do you agree that mediation would address not just global issues, but also the balances of each and every IIM account?*

**NARF ANSWER:** Yes. We believe that a mediated solution can lead to the best possible result. To reach resolution, there must be incentives **for both parties** to engage in good faith. Further, we believe that mediation should first resolve the global issues (*e.g.* for the correction of accounts an agreement as to the aggregate correction) and then certainly there should be a resolution as to how much each beneficiary is entitled to. So, yes, we believe "balances of each and every account" can be an acceptable part of the mediated resolution.

*Q: Are the plaintiffs willing to commit substantial time and resources to working with my senior Committee staff in a good faith effort to produce settlement legislation that is fair and acceptable to all parties?*

**NARF ANSWER:** Yes. Mr. Chairman, the plaintiffs are committed to resolving this case and we believe that mediation is the best way to do it and will be successful **if the government will come to the table to negotiate in good faith**. And we are willing to put substantial time into that endeavor.

Sincerely,

/s/

John E. Echohawk

**INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds**
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# TESTIMONY

**OF THE**

## THE INTERTRIBAL MONITORING ASSOCIATION

**BEFORE THE**

## SENATE COMMITTEE ON INDIAN AFFAIRS

**ON**

## "POTENTIAL SETTLEMENT MECHANISMS OF THE *COBELL v. NORTON* LAWSUIT"

## July 30, 2003

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The **Intertribal Monitoring Association on Indian Trust Funds** (ITMA) is a representative organization of the following 58 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 Community, Fort Bidwell Indian Community, Ewiiaapaayp Band of Kumeyaay Indians, Hoopa Valley Tribe, Yurok Tribe, Soboba Band of Luiseno Indians, Southern Ute Tribe, Coeur D'Alene Tribe, Nez Perce Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Lac Vieux Desert Band of Lake Superior Chippewa, 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 Tribes, 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 Tribe, Cherokee Nation, Kaw Nation, Kiowa Tribe of Oklahoma, Muscogee Creek Nation, Osage Tribe, Quapaw Tribe, Thlopthlocco Tribal Town, Confederated Tribes of Umatilla, Confederate Tribes of Warm Springs, Cheyenne River Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, Chehalis Tribe, Confederated Tribes of Colville, Quinault Indian Nation, Forest County Potawatomi Tribe, Oneida Tribe of Wisconsin, Eastern Shoshone Tribe, and the Northern Arapaho Tribe.**

Good morning. I am honored to present testimony today on behalf of the Intertribal Monitoring Association on Indian Trust Funds. In addition, I am offering comments on behalf of the Cheyenne River Sioux Tribe. I will first tell you a little bit about ITMA's membership and our position on the need for a settlement process for IIM account-holders. Then I will present the organization's suggestions for a fair and workable settlement plan to address the Department of Interior's (DOI's) mismanagement of IIM accounts. Last, I will give you some concrete examples from back home about the kinds of problems our IIM account-holders face every day, and explain how the proposed BIA reorganization will only make these problems worse for these individuals on my reservation.

ITMA has long served as a watch-dog over the Department of Interior's management of Indian Trust. The member Tribes of ITMA hold significant trust funds and resources, and many have numerous IIM account-holders. For example, most Great Plains Tribes and all the Rocky Mountain Region Tribes are members of ITMA. Together our two regions hold 68% of tribal trust assets. In addition, Great Plains Tribes have over 68,000 IIM account-holders, which is the largest number of any region, and Rocky Mountain Tribes have more than 50,000.

Recently, ITMA's focus has been the protection of Tribal government's authority over trust accounts and resources. While ITMA has been seriously concerned about the financial impact of the ongoing Cobell litigation on critical tribal program funds, we also question today whether continuous litigation for many more years is in the best interest of all the IIM account-holders.

We recognize that the Cobell lawsuit was necessary to draw attention to the Department of Interior's serious neglect of the individual Indian trust accounts. However, we believe that the litigation may outlive some IIM account-holders who have already waited many years without receiving an accurate statement of their accounts, much less the trust monies they may be owed. Therefore, ITMA endorses the development of a settlement process that IIM accountholders may choose to utilize. For those IIM accountholders who choose not to utilize a developed settlement process, the current legal remedies available should remain intact.

The Cobell plaintiffs have argued that adequate records do not exist to conduct a valid accounting of IIM accounts. The Department has provided a plan to the Court to reconstruct IIM account records to complete an accounting. However, the recreation of records for IIM accounts with inadequate records will take five years to complete at a cost in excess of $335 million. ITMA supports an opportunity for individuals to settle their IIM claims short of a complete reconstruction of accounts and completion of an accounting. Such a settlement opportunity would allow an IIM accountholder to choose a financial benefit in a timely manner rather than to wait the reconstruction of records and accounting.

The key to a viable settlement mechanism will be the process to value IIM accountholder claims. ITMA proposes that accounting experts be utilized to develop a method for valuing IIM claims utilizing generally accepted accounting principles.

A second key component for a settlement mechanism will be review and acceptance of the process to value claims. The approval should occur in either existing judicial forums or in a newly created court to specifically address IIM claims.

Third, upon an accepted claims valuation method, a settlement may be offered to the IIM accountholder. Accountholders should be provided access to objective legal advice to decide upon acceptance of a settlement offer. The accountholder can then make a knowledgeable decision to accept the offer or resort to continued litigation to obtain an accounting. However, if an IIM accountholder chooses to accept the settlement offer, the settlement should be final except in instances of fraud, material misrepresentation or concealment.

In addition, adequate funding must be guaranteed for settlement with IIM account-holders. At this point, the Cobell plaintiffs and the Department are extremely divergent on the cost of settlement. ITMA believes the amount to accomplish settlement remains unknown until an accounting process is developed. We would, therefore, recommend that a flexible funding mechanism be considered that would take this uncertainty into account. One option would be to make portions of the amount available over time as more information is gained through the agreed upon account valuation procedures. Some ITMA tribal members support an appropriation to fund these settlements and some ITMA members support utilization of the Judgement Fund as provided by 31 USC 1304. However, all ITMA members are adamant that settlement funds not deplete existing or new tribal program dollars.

In summary, ITMA proposes that a settlement process be developed via a pilot project consisting of ITMA Tribes. Those Tribes who choose to participate will determine the scope forum and process for valuation of claims and appropriate judicial review of the process. Upon determination of tribal participation, ITMA will coordinate with this Committee to develop objectives and timeframes and a budget for this project. After completion of the pilot project a process will be available for all Tribes to utilize.

The ITMA tribal membership believes that meaningful reorganization of the DOI cannot occur until the settlement of the Cobell lawsuit. ITMA respectfully requests that this Committee conduct a hearing on the reorganization in the immediate future. ITMA and the National Congress of American Indians have worked jointly for almost a year on the development of a Tribal trust reform bill that ITMA has recently finalized. This Tribal bill has been reviewed in various regions of Indian Country and all Tribes have strongly endorsed the concept. The final draft of the bill has been provided to numerous congressional representatives for immediate introduction. On behalf of our tribal members, we urge the Committee top support our efforts.

ITMA understands that S 175, now S 1459, has recently been introduced by Senators Tom Daschel, Tim Johnson and John McCain to also address trust reform. The bill has also been introduced on the House side (HR 2189) by Congressman Nick Rayhall and Mark Udall. ITMA worked diligently with Congressional staff to influence

the rewrite of S 175. Therefore, ITMA believes S 1457 is also a viable solution to trust reform. We urge the convergence of these legislative efforts.

As Chairman of the Cheyenne River Sioux Tribe I would like to make a few comments on behalf of our Tribe. The Cheyenne River Sioux Tribe believes that the proposed BIA reorganization will make trust management less effective and responsive to all beneficiaries, including individual IIM account-holders and tribes. The current BIA reorganization does not benefit Indian country and it does not benefit our grass roots members who many of them are IIM account-holders. Instead it creates more upper-level bureaucracy, which will in turn create more delays in the turnaround of our IIM accountholders' payments. Also it doesn't provide more resources or authority at the local agency level that is needed to address a lot of our grassroots people's concerns and issues. With the proposal of trust officers they will be duplicating services and wasting funding that is much needed for our members needs.

I would like to briefly share several stories about how this reorganization has affected our peoples lives on Cheyenne River Sioux Reservation. First, it already means less program funds for our existing services. BIA general assistance for needy families is one of those programs. We were just informed that we will have a $33,000 shortfall for this year. Our BIA agency office is forced to cut 50 families beginning August 1st. Also, we have 31 families on a waiting list for this benefit. This means that 81 families will go without this assistance. It is not much -- $300 per month if the family owns a home, less if they live with a family member, but to us it can be the difference between getting by and going hungry.

In every so called consultation meeting the Department held last year, tribal leaders opposed taking existing program funds to support this reorganization, so we question their actions.

My second story shows how impossible it is for IIM account-holders to get services at the local agency level in a timely manner with OTFM fractionated from the main line of BIA authority. Last week one of our tribal members came into my office who has a supervised IIM account. This means that she has a "payee" who supervises her spending. This account-holder and her payee wrote a payment plan for her to purchase a few new clothes and submitted it to the Albuquerque OTFM office, but two

weeks later, she has still not received any response. This woman has over $800 in her account, but she has to wait on a bureaucracy that responds very slowly and that is 1,500 miles away from our reservation. We need to eliminate OST and give the local agency superintendent back his authority to approve of these plans and also return all of the IIM records back to their respective agencies.

In the consultations the Department held last year, Tribes said they wanted more unified line authority in the Bureau and more control at the local level. This is absolutely necessary to improving services to Tribes and individuals on the reservation.

The Cheyenne River Sioux Tribe supports ITMA's request for a hearing on the BIA reorganization, because settlement is meaningless without true trust reform, and solutions must come from Indian country at the grassroots level.

I appreciate the opportunity to be here. I would be glad to answer any questions. Thank you.

**TESTIMONY**
**OF**
**DONALD T. GRAY**
**BEFORE THE**
**UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**
**REGARDING**
**METHODOLOGIES FOR HISTORIC TRUST RECONSTRUCTION**

**JULY 30, 2003**

Mr. Chairman, Mr. Vice Chairman and distinguished Committee members:

My name is Donald Gray, and I am very pleased that the Chairman has asked me to appear before you today to speak as an expert on methodologies that might be used to reach a settlement of the 120-year old problem of the IIM accounts; a settlement achieved on a comprehensive, as well as a fair and reasonable basis, in which all parties can have confidence. I believe I can be of assistance.

I have described my credentials as a legal expert in the areas of trust administration and historic trust reconstructions in earlier testimony before this Committee and will not repeat them here. If you would like, I can provide a description of the extensive work in this field performed by the Trust and Financial Rehabilitation Group of my firm, which I helped to found more than a decade ago, along with a list of references from some of the nation's largest financial institutions.

## INTRODUCTION
### The Environment for Meaningful Trust Reform

During the last four years I have, at the invitation of Congressional leaders on both sides of the aisle, testified as a forensic trust expert before this Committee, the House Resources Committee and the Senate Energy Committee. I have also made my views, as an independent, unpaid professional, available to the Tribal Task Force, individual Indian tribes, Congressional staff, and many others interested in this compelling issue. During that time, I have drafted and submitted very detailed testimony describing trust administration and trust fix procedures, both in the public and private sectors, submitted a comprehensive plan for the structure and functions of a truly independent, well-expertised body to tackle both the historic and future asset/trust reform issues, read every major report of the Department of the Interior and the former Court Monitor, and studied hundreds of pleadings, including expert submissions, deposition transcripts, court orders and findings and public statements and communications on these issues.

It would be more than legitimate to question why any busy finance lawyer in his or her right mind would expend so much time, cost and energy without remuneration, no matter how compelling the issue. I trust my testimony, along with hopefully being enlightening as to trust reconstruction methodologies, and their applicability to this issue, will answer that question.
Although various tribes and the DOI have asked to retain me during the past four years, I respectfully declined. I did so because I wanted to maintain my independence, and a neutral stance on these important issues, without being identified with only one approach. Up to this

point, the time was not right for a truly independent, neutral program that could best use my services. Hopefully, that time will come soon.

In spite of the vitriolic nature of the *Cobell* class action proceedings, which has employed various negative characterizations of the entire historic process, the most apt of which being "broken trust," I see extraordinary ***PROGRESS*** during the last four years. The progress has not come in the form of asset trust reconstruction or the development of a viable ongoing trust system as I had originally hoped. The progress has been in the hearts and minds of some of the key players in this drama, as they all have come to recognize and embrace the elements necessary for trust reform.

They may vehemently disagree on process, but significant parties – the class plaintiffs, the key members of Congress, the tribal leaders and, I suspect, the Court and its officials – all now agree that often-used private sector trust rehabilitation expertise is essential, and that there must be some kind of independent team, advisors or entity, free from the conflicts-of-interest that so hamper the DOI, to review the feasibility, and to perform many of the tasks, some quite intricate and specialized, of a fair and reasonable historic reconstruction of the IIM accounts. I would refer you especially to the minutes, reports and testimony of the tribal leaders, and DOI officials, concerning the long, hard work of the Task Force on these issues.

Rhetoric and litigation positions aside, anyone who has ever been involved in a true paradigm shift, a real revolution in how participants view the changing standards and procedures required as a result of scandalous revelations of error and wrongdoing in both business and public settings, whether Enron or Indian Trust, cannot but be impressed with the broadening of thought and the expansion of knowledge that takes place when long festering problems come to light, and people of courage attempt to remedy to the problems.

Sometimes such subtle progress is lost in the vitriol of adversary proceedings. It should not be. These subtle but lasting changes in hearts and minds establish the environment and create the platform for true reform.

Four years ago, although I naively wanted to use my more than a quarter century of trust fix experience gained through working with some of the nation's and the world's largest financial institutions and with Alaskan native corporations, by immediately plunging into the data and external information and methods that would reach a real solution, the time was not right. The foundation of knowledge and willingness to look at things in a different way had not been established.

My first testimony, almost exactly four years ago, although not leading as I hoped it might to the immediate work of reconstruction, might have helped to lead to that end. That testimony stressed three things which, until that point, had not been talked about or taken seriously.
One was that this problem required highly specialized ***EXPERTISE*** that had been used successfully countless times in the private commercial sector to solve similar problems, even though such expertise and procedures required modification given the special status of American Indians under law and treaty.

The second was that the DOI, and specifically the BIA, no matter how positive one believes their motives, were engaged in hopeless ***CONFLICTS-OF-INTEREST.*** Primarily this was the result of the psychological and legal impossibility of a party responsible for vast errors, deliberate or inadvertent, fixing those errors (the "patient should not be operating on himself" theme). This extreme conflict situation was exacerbated by the DOI's increasing preoccupation with defending itself and its officials in a time consuming and occasionally vicious and increasingly personal lawsuit that would totally sap the energy and creativity of any person or organization.

The third point I made at the time, very much related to the conflict-of-interest issue, was the desperate need for ***INDEPENDENCE***, so that independent fixers, free from conflicts and with no outcome agenda, could work to fix the problem, with proper Indian country, Congressional, DOI and Court input. In doing so, such trust fixers would, as they do in the private sector, help to both immunize those BIA officials who may have made mistakes but are not responsible for any conscious wrongdoing, while consulting with those officials who possess a vast body of knowledge. The entire process may be returned to the doorstep of the BIA in the future, but not until fixed in this way, a way used in the commercial sector for many years.

I honestly do not know if my initial, and subsequent, testimony to the same effect helped this essential change in hearts and minds, or whether it was a change that was inevitable given the terrible years of frustration during the 1990's, the change in the cast of characters in the new administration or the maturation of thinking brought about by the *Cobell* suit, or a combination of all of these. Ultimately, it does not matter. But change there has been. Significant change, strong enough on which to build a real reconstruction effort on. So, as strange as it may sound, I believe a more appropriate, and more helpful, and perhaps even more accurate characterization of the process at this point, rather than "broken trust" (which we all acknowledge there has been) is "a light in the forest." If a hardened financial lawyer can believe this, after significant efforts and disappointment in the last four years, I suggest that some of you might also find this characterization appropriate.

All of this positive change will be wasted, and the situation will remain the same ten years from now, if the only solutions are a few billion more dollars spent on ill-advised procedures by the DOI, or a Court-appointed receiver coming up with a methodology and conclusion for something approaching an accounting or reconstruction that yields an amount owed, but which he or she may not be able to enforce. Meanwhile, more IIM beneficiaries will die without receiving even a modicum of their just due.

There is a third way, and I sincerely recommend it to you. What is needed is a holistic, comprehensive fix effort; employing any and all methodologies that can truly help reconstruct what is owed to the IIM beneficiaries. And Congress should act, in coordination with the *Cobell* Court to do this immediately. We can clean up existing data until we are all old and gray, place the information in neat but isolated silos, ignore what those extant but imperfect records tell us about the past, ignore independent asset data regarding actual trust assets, or helpful data on similarly situated assets, for which no records exist, and squabble about what an accounting means. Or we can get to the task of reconstructing what is owed to the IIM beneficiaries.

I suggest the latter, and attempt, avoiding unnecessary jargon, to explain a few of the more important methodologies that could get us to the goal post in a fraction of the unconscionable time periods and cost that have been suggested by the DOI.

**TERMINOLOGY AND GOALS**

Terminology is key here. The *Cobell* Court has ordered an "accounting" of the IIM accounts. Quite frankly, even for a seasoned financial professional, the term "accounting" means different things to different people. What is critical is to look closely at the Court's description of how it construes the Trust Reform Management Act of 1994, and common law trust principles, with respect to what is really required to be done in any historic reconstruction.

The Court has said that the second phase of the trial will involve "defendants' *rendition* of an accounting" (emphasis added), and the government bringing forward "proof of IIM trust balances." The Court has made clear that such balances mean "all funds" relating to those accounts at any time. But the Court was very careful not to "prescribe the precise manner in which the accounting should be performed." Rather, the Court "explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling *or something else,* would be appropriate." (emphasis added). The overriding concern of the Court was that the defendants develop a plan for "bringing themselves into compliance with the fiduciary standards that they owe to the IIM beneficiaries."

I believe it is fair to say that the Court was and is asking for viable proof of any kind that will show the world amounts that, under law, should have accrued to the benefit of these beneficiaries. I do not believe the Court intended to get hung up or split hairs on the meaning of an accounting, temporal limitations on proof or any limitations on methodology, as long as the actual methods used could be verified and found to be fair and reasonable.

The most common meaning of the term "accounting," when applied to a reconciliation of established accounts, is the verification of recorded transactions by supporting data and, if possible, the balancing of inflow and outflow. There are obvious problems with this usage of the term in the IIM context, problems that are evident from the goals of any reasonable reform process. If the "proof" is limited to transaction records and supporting documentation, we now know that very little existed before the early 1970's, that there are huge gaps in the existence of such records even after that time and that the correctness and integrity of at least some of the extant data has been called into serious question. Even during the time when systematic records were maintained, such a narrow approach would only key off actual transactions.

What if there should have been transactions that never took place – oil and gas leases, timber cutting contracts and other IIM asset sales or leases mandated by law that simply never occurred? Given such a transactionally narrow approach to an accounting, or even one that is much narrower using statistical sampling of dubious data, a solution might be easier, but it would defeat the real purpose of a meaningful historical accounting – that is – what should these Indians have been paid?

Frankly, if the defendants persist in adhering to narrow definitional arguments to prolong true historic trust reform, I respectfully suggest that Congress help the Court here and amend the 1994 Act to make it clear that what is required is the best feasible historic reconstruction of what monies should have flowed through the IIM accounts, using the most appropriate means of historic reconstruction. Some of the most important of those means and methodologies are discussed below.

## HISTORIC RECONSTRUCTION METHODOLOGIES

What follows is a description of the most frequently used private sector trust reconstruction methodologies that could, I believe, be brought to bear on the historic IIM fix effort. But if there is only one thing any reader takes away from my testimony, my hope is that it is the strong belief that there is not one magic bullet among these techniques. Indeed, to obtain a truly holistic, comprehensive and defensible showing of amounts owed to the IIM beneficiaries, ***all*** of these methodologies, plus others discovered along the way will have to be assessed and possibly employed. Just as TAAMS was not the single magic fix to current account processing, there is no single answer here.

Although historic reconstruction from extrinsic records and analogue modeling, where there are no BIA records, is very helpful, an approach just from the asset side is not the entire answer to the question. As criticized as they have been, it is very doubtful that the records that are extant and maintained by the BIA are totally spurious or worthless. There are hundreds of BIA field officials who tried very hard to record transactions correctly. This data needs to be reassessed. To the extent, even with known errors, that such data does accurately reflect transactions and past procedures, the data can be used to project back potentially valid procedures into the pre-electronic record days. Such extrapolations have to be done carefully and always with a mind to verifiability. But in the end, these records are no less a part of a universal reconstruction that has integrity, if not perfection, than any other reconstruction method.

## INDEPENDENT GOVERNING PROCEDURES AND ASSET-BASED EVIDENCE

In many long-term trusts which are set up to collect and disburse monies, whether or not those monies are derived from specific revenue producing assets, trust officers will set up transactional recording and separate parallel control procedures at the outset to account for and verify such in/out transactions. These record-keeping procedures are interpretations of the usually rather general requirements of governing documents, like trust indentures or master trust documents, or of statutory law. Sometimes these procedures are a correct reflection of the intent of the governing contract or statute, but sometimes, through human interpretive error, they are not.

In very long-term trusts, the procedures start out as manual records. Over time, and given new technology, these procedures are included in an off-the-shelf or customized computer system. It is not unusual over the course of 30 to 40 years for there to be as many as three to four separate systems. If the original procedures were faulty, the changes from system to system can compound the problem. One reason for this is that financial accounting and trust systems promise the moon, but rarely precisely fit the procedures. Every time there is a systems change,

the inabilities of the system to accommodate the procedures and data compound the errors made at the time of procedure set up. Also, regrettably, these systems are touted as self verifying, a nice way of saying that the trust officer need not 'think" any longer about what the processes should be and what the goal of the trust is. Of course, the good trust officers, after many years of experience with trusts that are highly complex as to the financial assets they hold, and the processes of allocation, interest attribution and the like that occur between the in and out events, usually mimic the new systems for a time manually or on simple Lotus spreadsheets because they have learned to be wary of "don't think, do it all" systems.

A real world example here may be more helpful that general description. A $400,000,000 "pooled" municipal bond transaction was set up on the basis of a trust indenture. There were over 20 municipal borrowers who the trustee billed on a monthly basis for their respective shares of debt service on the muni-bonds, and approximately a dozen other charges relating to such things as appraisal costs for the municipal properties and costs of credit enhancements like letters of credit. Over 30 years, the "billing" procedures and systems used did not, in some critical ways, comport with the governing documents, and there were charge allocations and computation errors in a majority of the monthly bills from the trustee to the participants. In this case, the trust officers built their own billing system that was eventually computerized. After several months of identifying errors of real magnitude on a great many of almost 400 invoices, it was realized that correcting these errors, to the satisfaction of the municipal borrower participants would be impossible. It was suspected that some were owed several millions of dollars, and that some had been overpaid (or under-billed) to the same magnitude.

It was concluded that the only way to come to a conclusion as to what was owed and to whom, every dollar of every transaction had to be reconstructed in the transaction, in strict accordance with the governing documents, or in accordance with sound and accepted trust administration procedures where the documents were silent (which was often the case). After constructing a very detailed legal synopsis that laid out hundreds of rules that, if followed, would redirect each dollar to where it "should have gone," some very able forensic accountants reconstructed the movement of every dollar based on this legal analysis. This was a monumental task and took over a year and half. But at the end it was close to a perfect reconstruction, far superior to a retrofitting fix based on correcting thousands of one-off errors. The legal synopsis was 100 pages long and the accountants calculations of reconstructed transactions were over 200 pages long.

The participants studied the correctness of the legal document directives and general legal principles where the documents gave no guidance. The transaction had been reconstructed on the basis of governing procedures and law completely independent of the original set up procedures. This produced different data input based on independent evidence, in this case a governing document and universally accepted trust procedures. As suspected, some participants owed millions of dollars, and some were owed similar amounts. The indisputable detail and exactitude employed in using independent guidance/evidence was so compelling that all participants agreed to the findings, and years of extremely expensive litigation were avoided.

The expert reports submitted by plaintiffs in February of this year to flesh out their program of starting with the original assets, and what should have been the IIM income derived from the sale or lease of such assets, is simply another iteration of using independent evidence to derive amounts that should have been credited to the IIM accounts, especially during the earlier years of the trust where there are no transactional or supporting data at all. Using oil and gas as an example, these expert reports cited local, county and state records of production from oil fields, and in some cases specific oil wells that are claimed to be on IIM tracts. I can give no opinion as to the correctness of this alternative evidence because I have not seen the original alternative records. Nor can I verify that the mapping procedures used to coordinate production data with wells on IIM tracts. But these are verifiable. The point here is not to take these independent alternative productions of resource records at face value. The point also is that, once verified, and where needed to be corrected, hopefully by experts engaged by the defendants, and then overseen by an independent neutral panel of experts in a settlement/mediation process (a team consisting of legal and accounting trust fix, trust administration, mineral and resource and complex settlement/mediation experts), numbers of what should have flowed through the IIM accounts can be established with significant reliability.

I believe these expert reports submitted by plaintiffs were perhaps the most helpful aspect of seven long years of litigation. For the first time, additional data collection methodologies were proposed as an alternative, or at last an augmentation of the "as is" records maintained by the DOI. The importance of this, especially where there are no trust transaction records at all, is critical if a fair and reasonable reconstruction is to be forged, rather than an endless debate on the impossibilities of a transaction-by-transaction accounting. Again, these submissions need to be countered and tested. But the methodology is sound, and its introduction to the case releases all the parties from being shackled by incomplete and partially incorrect trust data.

There may be those who do not want these windows of independent, but verifiable evidence open. But they have now been opened. For defendants to ignore such methodologies is essentially an admission of unwillingness to settle on a substantive, quantitative basis, rather than just a numbers game. I have to believe that many in the DOI, and especially account officers in the BIA might welcome this new light. It may mean abandoning easier methods of statistical sampling, or attempting to cut off reconstruction for periods before records exist, but it also signifies an effort, a long, hard, difficult one to be sure, but an effort that can yield numbers in which people, including hard-working officials at the DOI and BIA, can have faith.

## MODELING

Modeling, also sometimes called analogue or comparison modeling, is another important methodology used for the rehabilitation and reconstruction of long-term, complex trusts, especially those that are established to capture the income from the exploitation of natural resources. It has been used successfully to reconstruct the value of assets such as oil and gas in Texas, Oklahoma, Alaska and California, coal and other minerals throughout the United States, and even in determining what fishery extraction should have been.

Modeling is used when there is limited or no direct data regarding resource exploitation, either in the form of transaction-by-transaction records or independent extrinsic evidence. In fact, some of the expert reports submitted by plaintiffs are actually combinations of direct independent evidence reconstruction and modeling. For instance, if, using Geographic Information Systems ("GIS") data overlays, the researcher can actually identify a well situated on Allotted Lands, and there are local, county or state records of the output of that well for relevant time periods, and both the geographic location methodology and the independent records can be adequately verified, that is an example of historical reconstruction by means of direct independent evidence.

But if the geographic location methodologies and official records are able to identify oil and gas fields or reservoirs which may only partially include Allotted Lands, or which do not include such lands (with respect to which, for this example, there is no direct transactional or independent evidence), and the studied lands and resources can be shown with a high degree of confidence to be very much like the Allotted Lands, then legitimate comparisons can be made. Specifically, if non-IIM wells can be shown to have yielded X barrels of oil per well, and were sold or leased at Y price for a given time period, and there is an IIM well situated on the same oil field, or a comparable field in close proximity to the studied field and wells, then using such comparable data to give an estimate of the IIM well production and earnings value may have a high degree of reliability (again, if the methodologies and evidence for the studied fields are shown to be legitimate and verifiable).

This same method of "like kind" modeling can be used as well for grazing land, timber land, other minerals, water rights and conglomerates. I suspect that both direct independent reconstruction evidence, as well as verifiable modeling information may be more difficult to locate in these natural resource categories for several reasons. One is that the relative intrinsic value of the commodity in question may not at the time, or ever, have been as high as oil and gas, so that the extent and detail of independent government or contractor records, as well as such evidence relating to comparable but non-IIM tracts, may not have been as high as in the oil and gas field.

Also, I suspect that the leasing procedures for such resources were not as standardized, in terms of temporality or specificity, as was the case in oil and gas. Where an oil and gas royalty arrangement might call for monthly payments with a high degree of specificity as to volume extracted, a grazing exploitation arrangement might have called for payments at longer intervals, and might have been based on gross use (time) rather than specific quantity extracted.

These critical variances in leasing and accounts receivable histories was, by the way, the reason I pleaded with the Congressional Committees, including Senate Appropriations, not to fund TAAMS as the panacea for all Indian trust assets. TAAMS is basically an OTS oil and gas accounts receivable system that could never accommodate the enormous variety of data included in IIM assets and accounts. But the response I received was that, even though the appropriators pretty much knew they were throwing good money after bad, not to appropriate money for TAAMS (a clearly politically motivated "quick fix") would have been seen as anti-Indian. I do not believe that would be the case now.

Notwithstanding these potential issues for non-oil and gas resources, I would make an educated guess that if non-Indian private or governmental entities were exploiting adjacent or comparable lands for any of these surface or subsurface assets, there may very well exist in such land owners' records (including records of the U.S. Government for non-Indian supervised land), or exploiting contractor records which would yield significant data that is relevant and verifiable. Indeed it may be essential to a universal reconstruction.

Another reason why independent direct proof, or analogue proof may be more difficult to obtain or interpret for such non-oil and gas resources is the Indians' own attitude towards these resources. I am not an expert in historic Indian land use. But after reading thousand of pages of Indian testimony relating to the various acts of Congress regarding Indian lands and self-determination, dozens of conversations with Indians who work closely on land use issues, and representing an Alaska native corporation relating to trust lands on the Pribilof Islands, it is somewhat clear to me that Indian country has a different view toward subterranean assets than it does toward surface assets. This difference in view will have to be taken into account if any comprehensive reconstruction effort, using all identified methodologies, is to be undertaken.

Indians, I have learned, do not generally think of land in ownership terms. Rather, they view their ancestral lands as gifts bestowed upon them by God, to live off of and maintain for future generations. Where a non-Indian entrepreneur or government might maximize the use of grazing land, perhaps to the point of land exhaustion, or cut timber without regard to replacement techniques for such an otherwise non-replaceable resource, an Indian would take, lease or sell what he or she needs (not just for subsistence, but for profit and economic growth), and conserve the rest so that the assets are reasonable and always available to the Indian inhabitants in a kind of perpetual sacred trust. Further, Indians are very mindful of sacred sites, for which other may have little sympathy, but which Indians would leave untouched or would work around.

All of these variables, some subtle but very important to Indian country, must be taken into account in any meaningful reconstruction.

If I am correct that such important variables do exist between IIM asset classes, such variables must be taken into account in any comprehensive reconstruction.

Again, it would take a considerable, concentrated feasibility study to determine whether modeling, or for that matter, direct independent evidence will yield adequate results as to what should have been deposited in the IIM accounts, but my experience generally, and my extensive reading about the extant records and the nature of the Allotted Lands, leads me to believe that not to give these methodologies a thorough study, and perhaps use them in a universal settlement environment where all valid methodologies are embraced, would itself be a serious abnegation of responsibility by the DOI and the Congress.

**EXISTING DATA**

I have, of course, not had direct access to the transactional and supporting documentation that is in the possession of the DOI and its Bureaus. However, I have read all publicly available reports of the Agency and EDS regarding the status of that data, the status of the clean-up project for that data, and the rather derogatory description of the status of that data and the programs which support it by plaintiffs and the former Court Monitor.

The defendants' Historical Accounting Plan for Individual Indian Money Accounts, filed in response to Court order, implies, and one of its chief experts who filed a report at plaintiffs' request has said in so many words that "there is no indication that the IIM accounts are not substantially accurate, nor that the transactions recorded are not substantially supported by contemporaneous documentation." That Plan is essentially to reconcile transactions to supporting documents, when support can be found, using a combination of transaction-by-transaction *and statistical sampling methods.* On the other hand the lead attorney for the plaintiffs has stated that the IIM data maintained at the DOI has been corrupted and that information pertaining to such data has been distorted and deleted, that there is no accounts receivable system relating to the IIM accounts and that serious questions have been raised with regard to the integrity of the IIM trust data in the IT system.

As an experienced attorney practicing in the financial field for 29 years, I strongly suspect the truth about the integrity and validity of the DOI data lies somewhere in between these polar statements. But the fact that there are errors, even a great number of them, should not lead plaintiffs to the conclusion that all of these records are worthless, nor should it continue to lead the DOI to the position that they are almost perfectly valid. In fact, my guess is that these records, no matter how many mistakes they contain, also contain a wealth of information that could be used by an independent reconstruction team looking for a comprehensive, very good but not perfect reconstruction of the IIM accounts.

Statistical sampling might help "size" the problem somewhat, but it really only tells you, on a statistical percentage basis, that certain aspects of the data, whether relating to transactions, documentation or even the occurrence of errors will likely reoccur in a larger population than the sampled data. That is simply not enough. This data will also demonstrate how account officers in various field offices attempted to account for leases, receivables, trust deposits, and how central authorities dealt with disbursements. This may not sound like exact science, but it is not. If the data is extensive enough, over a long time period, it is definitely possible to extrapolate findings back in time, some good and some bad, to periods when there are no records or when records were missing. To take the largely good faith efforts of hundreds of BIA field officers, attempting to account for assets belonging to family and friends, and either throw it out completely as totally corrupted, or belittled and underutilized by statistical sampling, does not seem very appropriate to an independent trust fixer.

One example of this very much in the defendants favor has to do with disbursements from IIM accounts. Not surprisingly, given the adversarial nature of the *Cobell* case, the submissions by plaintiffs' experts were all about what should have gone in, leaving all methodology and

calculations as to what actually came out to the defendants. Aside from the fairness, or lack thereof, of this approach, it is undeniable that defendants face a much more difficult proof problem with "should have been" outflows than plaintiffs do with "should have been" inflows. While independent asset records and analogue modeling assets appear available as an alternative means of historic reconstruction for plaintiffs, it is likely that not very much independent evidence exists as to payouts. If the transaction or supporting records are not there, one would have to search records of receipts of individual Indians, many of whom are no longer living. At least for the very early years of this trust, such extrinsic evidence is unlikely to be extant. However, the use of the *entire body* of existing records, not just a random or even specialized sample, could be studied to establish trends, possibly very reliable trends, regarding outflows. In fact, one of the things found in some initial testing on the data was that there were errors resulting in over withdrawals. The defendants need this data, the plaintiffs need this data, and most importantly, the IIM beneficiaries need this data to extrapolate therefrom any fair and reasonable, if not perfect, piece of the big puzzle of a comprehensive reconstruction.

**SCRUBS, AGREED PROCEDURES AND INDEPENDENT PROCEDURES**

There are dozens of historical financial and asset trust reconstruction methodologies that can be employed, depending on time, resources, the major problems encountered along the way and the duration of the trust. Above I have attempted, hopefully in common sense terms, to describe a few such methodologies that might be especially salient given what I have learned about this matter during the past four years. My own feeling is that a meaningful reconstruction may indeed be feasible, but it will be a monumental task, will require the above and other methodologies, and could take at least two years. But if the right independent feasibility and mediation team is assembled, and the parties to the case fully cooperate, I believe there is a good chance that a fair and reasonable settlement figure could be reached based upon verifiable data, although some conclusions will necessarily be reached by intelligent estimations and extrapolations from existing DOI and independent evidence.

Although there may be many methodologies to be employed, there are essentially only two strategic plans that can be employed. One is what accountants call "agreed procedures," the other irreverently called "a scrub." For the record, I am a scrubber. With agreed procedures, accountants and other professionals limit their inquiry to a specific set of data, and employ one or more specific methodologies. The results may yield no more than "test case" data, but in some cases that is sufficient to settle some complex trust and financial matters. This method is also undeniably safer for the professional, because his or her task is data and method limited. The kind of statistical analysis described by plaintiffs' expert, Mr. Lancaster, is a kind of "agreed procedure." These are means to yield expedient, and in some cases largely valid results, especially if the mistakes are of a known and defined type, and there is a great extent of homogeneity as to trust assets.

The other basic strategic approach is a scrub, or more elegantly, a comprehensive data and methodology unlimited reconstruction that may not be perfect, but which is undeniable fair and reasonable. In very long-term trusts, with multiple asset classes, numerous pieces of system and non-system evidence, and a number of revealed mistakes, inadvertent or intentional, full

reconstructions are almost always preferable, simply because they are more exhaustive, more inclusive and generally more accurate. Also, in a hotly charged political environment, the parties simply will not settle for less than such a comprehensive reconstruction effort. If one methodology does not work, try another. The goal is not a pretty statistical package that hangs together well, but may not reflect reality. Rather, the goal is truth, using whatever means are reasonably at one's disposal.

I strongly suggest that Congress, in coordination with the Court, embark upon a feasibility study, with a relatively short time fuse, to assess whether this preferable, but difficult means of total reconstruction is doable.

My suggestion is to engage a relatively small team of neutral professionals, including experts in natural resources, legal trust fixes, forensic accounting, trust administration, systems analysis, complex mediation and settlement and Indian law to perform the feasibility study, and possibly serve as the nucleus of a mediation team. Much has been discussed about the importance of independent experts and oversight in the trust reform process. For the first time I believe it safe to say that some form of neutral body is the consensus of the tribes, although it is my belief that DOI's resistance to anything of this kind was the principle reason why the Task Force's work came to a halt.

But starting with such a modest team of true experts, extremely time limited, to assess feasibility and facilitate settlement seems to me the least offensive or intrusive means of injecting a modicum of independent expertise into this problem. The world of first class trust and financial vehicle fix experts is not a wide one. The same excellent people bump into each other in just about every major fix effort. I can absolutely assure you that these otherwise very busy people would do everything in their power to assist on such a team. I know this because I have asked them. Small bites. No magic bullets. Hard work and independence. And most of all, a high degree of the ephemeral quality so much at stake here – trust. This is the approach I urge on Congress and the *Cobell* Court in establishing such a team and its mandate.

To depart from business as usual, like judicial deference to federal agencies known as the "Chevron defense" (which I certainly do not accuse the *Cobell* Court of), DOI's continuing delaying tactics and emphasis on form rather than reconstruction content, or default to a receiver who will face exactly the same need for independence and expertise with questionable enforcement authority, do not seem like attractive options.

**WHAT IS GOING ON AT THE DOI?**

I found a recent read of the DOI's Comprehensive Trust Management Plan of March 28, 2003 a bit chilling. For a first time reader, the plan sounds logical enough, chocked full of noble goals and tasks. But to anyone sophisticated in this problem, reading that report is a bit like going back to the empty generalities of former Secretary Babbitt's High Level Implementation Plan, the piece that effectively trumped the valid, even visionary report ordered by Congress from Paul Homan, the first Special Trustee.

The March 2003 plan, just to use the major subheadings of what the DOI thinks its tasks are, reveals a total inadequacy of expertise and, for trust reform, a potentially lethal bureaucratic mindset. The prime elements of the Comprehensive Trust Management Project Schedule include: Expand Project Planning and Management, Change Organizational Structure, Create Vision and Strategic Plan, Organizational Development, Trust Reengineering and Establishing Performance Management Program. Very little time is devoted to the intense training in trust administration and fiduciary management, which must be conducted by outside professionals. Instead of first looking to extremely well trained outside professionals to size the task and identify efficacious methodologies to fashion a meaningful reconstruction that is the heart of the historic task, the DOI, perhaps in good faith and unconsciously, seems content to rearrange the chairs on the Titanic.

The March Plan pays very little attention to ongoing trust administration training, citing such things as one-day intensive seminars. It totally misses the point that for both future trust administration and historic reconstruction, the Agency cannot educate itself, and in the case of historic trust fixes, one of the most complex tasks in all of law and accounting, even outside consultants cannot teach internal personnel the intricacies of the task. And if they could, internal personnel would be put in the completely untenable and inhumane position of attempting to fix errors they, their brothers, sisters, fathers and mothers may have made. These people need to be immunized and safeguarded throughout this process, and engaged as the great repositories of information that they are. They should not be brutalized by being asked to do the undoable, and to expose errors made by them, family members and friends. Again, at the risk of sounding like a broken record, there must be independent expertise applied to both the historic and future problems, or we will be in the exact same position a decade from now and all the hard work of the *Cobell* litigants in the last seven years, Congress in the last decade, and, to my mind, a basically honest and earnest (but very poorly advised) DOI during the past two and one half years, will have been a complete waste.

I personally believe that there are a number of people at the DOI, perhaps a great number, who would like to see a fair and reasonable resolution to the historic problem, and the construction of a sound ongoing system that the BIA, with proper training, can adequately administer in the future. One of my saddest days in the last four years was the day I learned that Neil McCaleb, a man of impeccable honesty and integrity, and a man of Indian blood who forewent lucrative opportunities in the private sector to do something meaningful for American Indians by becoming Assistant Secretary for Indian Affairs, resigned in exhaustion and dismay under the relentless, and extremely personal invective of the plaintiffs. Knowingly or not, the plaintiffs lost a powerful ally, and one, I believe, who would have fought hard for the type of reform program outlined in this testimony.

If I am even near correct, why does the DOI simply appear not "to get it" when it comes to trust reform?

The March Plan is a prime example of an agency creating organizational and managerial solutions, at significant expense, completely "around" the real problem – how do you fix a badly broken trust, and how do you learn from that fix effort to fashion a truly viable system for the

future? I humbly submit that this is a strong message that the DOI, although it does other things, especially with American Indians, quite brilliantly, still does not get it when it comes to trust reform. They still do not understand that they have a problem that will never be solved without the application of truly independent, non-conflicted expertise.

To the outside world, now increasingly familiar with this exigent problem, the Agency and their top personnel seem like denizens of an old, ornate building which, although they know nothing about architecture or building, they built themselves over many decades, but which is now literally crumbling around them. Instead of hiring expert building maintenance crisis managers, professional builders and architects, they spend vast amounts of tax dollars studying the problem and coming up with new internal organizational and management structures to eventually devise a totally internal fix by people who do not know anything about badly built, crumbing buildings. This situation might not be so tragic, and I dare say there may be real life examples of stubborn but proud people who actually live in such buildings, were it not for the fact that in this case there are, metaphorically, hundreds of thousands of subsistence-level tenants living in the basement of this deteriorating edifice who were promised by law and treaty that they would be safely housed and protected – the IIM beneficiaries.

Or perhaps they do, in fact, get it. The DOI realizes that it will have to give up at least some jurisdiction over the vast problem, at least for a time, and no agency ever wants to lose jurisdiction. I think we all have some sympathy for this. My own feeling is that the current administration at the DOI are honest people who believe they can fix the problem in a bureaucratic environment, riddled with conflicts, so that jurisdiction is not lost and BIA officials, many of them Indians, do not risk losing their jobs. I do not agree with this position, but I understand it.

In fact, one of the things I have continually harped on is that a trust fix, by real professionals, not only does not signal the end to BIA trust jobs, but in fact presents one of the best on the job training opportunities for Government officials of all time. To date, I have not been persuasive on this.

## A COMPLEX BUT COMMON SENSE FIX

What I have suggested is a complex, comprehensive fix effort unrestrained by limitations to particular data or methodology. There will, of course, be realistic limitations of time and money. But within those restraints, the effort is to uncover the truth, by any means, down any avenue, rather than to settle for "agreed procedures" or small set samplings. Make no mistake. It is a monumental effort, and you need the best in the industry to accomplish it, assuming they, in an initial feasibility study, conclude that such a valid reconstruction can be done. Those experts are available.

But as complex and comprehensive as such a fix may be, and as complicated as some of the methodologies may seem (although I have attempted to describe them in understandable terms), my proposal is based on simple common sense.

I was very impressed by the recent testimony in the House by an Indian leader who has become a colleague in the Indian trust reform effort during the past few years, Tex Hall, President of the National Congress of American Indians. His testimony, as an IIM beneficiary, in the form of a hypothetical colloquy between him and Secretary Norton, was nothing other than a common sense, straightforward request for just the kind of multi-methodology, comprehensive historic reconstruction effort described above. In the end, this Committee and the Executive branch should follow the wishes of intelligent stakeholders. In fact, Tex may have put forth the case I espouse more directly and more eloquently than I ever could. Some of his remarks bear repeating here.

First, Tex set forth the guiding principles he believes must govern any settlement effort, an effort that may require multiple methodologies. Those are, in part: (1) take the time to do it right, (2) establish a process that will keep the pressure on for settlement, (3) Congress should be involved in developing a settlement process, (4) ensure that settlement also fixes trust systems for the future, (5) an independent body should play a significant role in the settlement process, (6) one size does not fit all, (7) move quickly to bring relief to elder account holders, (8) do not allow the settlement process to prey on the most vulnerable, and (9) funds for settlement must not deplete funding for other federal Indian programs. I heartily agree with all of the above.

Tex then goes on to have a hypothetical discussion with Secretary Norton regarding settlement of historic IIM accounts, specifically his own, and those of his immediate family. He states that, as an IIM holder he does not know what leases have been let out, or the rate they received, or whether the full amount was correctly collected, invested and distributed. He wants a listing of all the tracts of land in which he has an ownership interest, the lease activity on those lands and copies of all leases.

Along the way, as Tex asks for program documentation, the Secretary cautions that it might not exist. But Tex persists. He states that if the Agency cannot perform a full accounting, "I could see my way clear toward a settlement if I had ***some other kinds of information*** to make an educated estimation." For this he would need access to local BIA officials with years of asset experience, professional and independent opinions on what assets IIM lands "should" have produced, using available extrinsic/independent evidence of production and market rates and comparisons of output and market rates on similar properties for the same time periods. He specifically states that there could be ***"any number of valid methods used"*** to calculate the value of assets that should have been leased or sold. He ponders whether the Secretary's rather narrow proposal for a statistical sampling will take into account the fact that continued overgrazing on IIM lands has resulted in only half the value of the resources accruing to the benefit of the grazing land IIM holders. A very good question, and one I doubt a statistical expert, working under agreed procedures, would be adequately able to answer.

Tex is right. These are the guiding principles and goals, and all methodologies must be used, if a comprehensive, historic reconstruction, that can serve as a basis for a fair and reasonable settlement, is to occur. I hope Congress will help this to occur.

**Tex G. Hall**
**President, National Congress of American Indians**
**and**
**Chairman, Mandan, Hidatsa & Arikara Nation**

**Testimony before the United States Senate**
**Committee on Indian Affairs**

**Oversight Hearing on**

**Potential Settlement Mechanisms for *Cobell v. Norton***

**July 30, 2003**

**Introduction**

Chairman Campbell, Vice-Chairman Inouye, and members of the Committee, thank you for your invitation to testify today. On behalf of the member tribes and individuals of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

We firmly believe that the time has come for Congress to establish a fair and equitable process for settling the *Cobell v. Norton* litigation. The bottom line is that the DOI has not maintained a record keeping system that will allow a complete historical accounting, and the two parties to the Cobell litigation are very far apart in their views as to what redress the beneficiaries should receive. We are very appreciative that the Committee on Indian Affairs understands the need to develop a process that would lead to settlement, rather than trying to settle a complicated and contentious matter of historical accounting in one fell swoop. The more difficult question, of course, is what that settlement process should be. After spending a few hours discussing this matter with tribal leadership last week, we cannot give you a definitive answer on the details of a process that can be universally supported in Indian Country. But we do think that Congress should initiate a conflict assessment with the help of an experienced and professional mediator, and that this mechanism should be used to develop and define a settlement process that can be accepted by the affected interests.

As the settlement process develops, we believe that Congress should continue to attack the root causes of trust mismanagement, including the problem of land title fractionation, the absence of standards for trust management, and the lack of functioning and integrated systems for title, leasing and accounting. Finally, we also ask Congress to defer the currently proposed reorganization of the Bureau of Indian Affairs and the Office of Special Trustee, as it is strongly opposed by Indian country.

**Objectives of a Settlement Process**

Tribal leaders have consistently supported the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting fiasco that has lingered for too long at the Department. At the same time, tribes are concerned about the impacts of the litigation upon the capacity of the United States to deliver services to tribal communities and to support tribal sovereignty within unique, legal-political tribal-federal relationships.

From the beginning, the DOI has operated with the primary interest of protecting itself from liability rather than complying with its statutory duties. *See, e.g., Cobell v. Norton*, 226 F. Supp. 2d at 11. This has had a direct impact on the BIA's ability and willingness to provide the services that are so vital to tribes and individuals. Significant financial and human resources have been diverted by DOI in response to the litigation. The BIA has become extraordinarily risk averse and slow to implement the policies, procedures and systems to improve its performance of its trust responsibility to Indian tribes and individual Indians. Perhaps most significantly, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship to promote tribal self-determination and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Because of this, NCAI believes that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX-03-040, attached.

It is critically important that the scope of any settlement process be determined clearly at the outset. Should the settlement:

- be limited to equitable resolution of liability for the failure to properly account and disburse the proceeds of Individual Indian Money accounts?
- provide for equitable resolution of claims for mismanagement of trust assets that generate income processed through trust accounts?
- attempt to address issues raised in tribal litigation?
- ensure efficiency and accountability in future trust administration?
- address fractionation?
- accept court determinations of issues already litigated?

These key questions will have to be answered. At this point, however, the focus should be on developing a process for settlement that will have sufficient legitimacy that it can be accepted by the litigants.

We believe that there should be a structured assessment to assist the parties in identifying the appropriate form or forms of conflict resolution. This is known as a "conflict assessment" or a "convening" and it typically involves: conferring with potentially interested persons in order to assess the causes of the conflict; identifying the entities and individuals who would be substantively affected by the conflict's outcome; identifying a preliminary set of issues that they believe are relevant; evaluating the feasibility of using a collaborative settlement process to address these issues; educating interested persons on collaborative processes to help them consider whether they wish to participate; and working with the interested parties to design the structure of a settlement process.

Conflict assessment has proven valuable as a first step in consensus building processes such as negotiated rulemaking and in finding constructive approaches to resolving complex environmental conflicts. The structured assessment should also serve as a consultation mechanism for tribal governments. This structured mechanism would allow for formal acceptance of a settlement process by the parties, and move us one significant step closer to a serious settlement proposal.

**Guiding Principles for a Settlement Process**

I would like to suggest a number of principles that I believe should be taken into account in developing any settlement process:

1) Involve all necessary parties in a convening this fall to scope and frame the settlement process. A professional mediator should be employed to facilitate discussions involving the parties to *Cobell v. Norton*, Tribal leadership, and senior members of Congress. Timely and good faith consultation with the elected tribal leadership is essential in the settlement process. Tribes have a number of very important interests in the outcome:
    a. Tribal lands are often co-owned or co-managed with individuals' lands.

b. Future delivery of all trust services is a key issue in the case.

c. Tribal regulatory authority, self-determination programs, and natural resource management could be affected.

d. The federal budget for tribal programs could be affected.

e. The settlement for individual account holders could set precedent for tribal claims.

I believe that the House Resources Committee and the Senate Committee on Indian Affairs should forge an alliance to work on this issue and participate in meetings to keep Congress informed of progress and keep the pressure on for settlement.

Formal consultations should be held to enable those not directly involved in the discussions to have an opportunity to comment before the settlement process is finalized.

3) Take the time to do it right. NCAI has witnessed the trust reform efforts since the 1980's as one quick fix after another has been proposed, implemented, and eventually fallen to the wayside. We have wasted over 20 years looking for a quick fix. A structured conflict assessment should take place as soon as possible, but we should allow the affected parties, to define the settlement process rather than quickly impose a process that may not be well received and will spell failure for the development of a settlement process.

4) Provide for judicial review and fairness - Settlements should be judicially approved pursuant to the Federal Rules of Civil Procedure. The settlement process must ensure that Indian people are situated in an equitable position to evaluate the fairness of any settlement offer. The settlement process should require full disclosure of all material facts – the government has the burden of providing beneficiaries with all records from government agencies and contractors pertaining to their trust claims. Many individuals do not have access to legal counsel to review settlement documents; therefore review by the courts is necessary to avoid any unfair settlements. The settlement of claims should be final absent fraud or failure to disclose material facts.

5) Establish a process that will keep the pressure on for settlement. The parties to the litigation have tried several times to resolve the case but have been unsuccessful in reaching agreement. I believe that this has been due in large part to a failure to establish a structured process to support settlement discussions. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement. While settlement deliberations are in process, I believe the litigation should continue until the historical accounting has been settled, and the Department has successfully implemented the necessary reforms to ensure sound trust management in the future.

6) Ensure that the settlement also fixes trust systems for the future. The historical record has shown that DOI will only move forward in improving Indian trust systems if there is exterior pressure from the courts or from Congress. There are two critical issues here that need to be addressed: (a) the establishment of account balances (historical accounting); and (b) the functionality of accounting systems. It would be disastrous to create a settlement that would resolve the past liability and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and accounting.

7) An independent body should play a significant role in the settlement process. The parties to the litigation have a significant financial stake in the outcome. The tribes and the IIM

account holders will distrust any process where the Secretary of Interior is in control of all aspects of the settlement. To ensure fairness and transparency and ensure that the process moves forward, an independent body should play a significant role in scoping, fact finding, framing, and management of deliberative processes. Consideration should also be given to: (a) having the Independent Body perform structured evaluations of proposed settlement processes using a consistent set of components and criteria – these evaluations could be used to provide the informational basis for tribal consultation; (b) authorizing the Independent Body to provide recommendations to Congress for a settlement process in the event that parties are unable to reach agreement within a pre-determined time frame.

8) One size will not fit all. There is a great deal of diversity among account holders. Some have large stakes in very valuable natural resources, such as oil, gas, or timber. Others have only a small fractionated interest that is worth less than a dollar. Any settlement process must be able to deal with different classes of accounts and interests.

9) Account holders should have the opportunity to negotiate and make a choice. You cannot force a "settlement." In today's world, the hallmark of fairness is the ability to negotiate an arms length agreement based on a reasonable knowledge and understanding of the underlying facts and circumstances. Indian account holders must also have this ability. The settlement process should, however, contain incentives that would encourage participation.

10) Move quickly to bring relief to elder account holders. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to improve their financial conditions without delay.

**While the Settlement Process Develops, Congress Should Attack the Causes of Trust Mismanagement**

Tribal leaders are very supportive of the proposal in recent letter from Chairman Campbell and Vice Chairman Inouye that we begin our efforts on trust reform with an attack on land consolidation and fractionation. This is the root cause of the problem. But there are also several other issues that we believe Congress should take up at the same time.

Land Consolidation - Maintaining accurate ownership information is made exceedingly difficult by the ever-expanding fractionated ownership of lands divided and redivided among heirs. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands, and these four million interests could expand to 11 million interests by 2030. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest.

Addressing fractionation is critical to improving the management of trust assets and reducing the administrative costs of maintaining IIM accounts. Fractionation promises to greatly exacerbate problems that currently plague the DOI's efforts to fulfill its trust responsibilities, diminish the ability to productively use and manage trust resources, and threaten the capacity of tribes to provide secure political and economic homelands for their members. If allowed to continue unabated, fractionation will eventually overwhelm systems for trust administration and exact enormous costs for both the Administration and tribal communities.

Reduction of fractional interests will increase the likelihood of more productive economic use of the land, reduce record keeping and large numbers of small dollar financial transactions, and decrease the number of interests subject to probate. Management of this huge number of small

ownership interests has created an enormous workload problem at the BIA. In addition to the development of amendments to the Indian Land Consolidation Act (S. 550), Congress needs to put funding directly on the problem. We believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system.

Accountability and Standards - It is well known that DOI has mismanaged the Indian trust for decades. The real question for Congress is why decades of reform efforts have produced so little change in DOI's willingness to take corrective actions, to reconcile accounts, and to put adequate accounting and auditing procedures and policies in place.

The real answer to this is that the DOI and the Department of Justice have always viewed their primary role as ensuring that the U.S. is not held liable for its failure to properly administer trust assets. For this reason, they have never been willing to put standards into regulations that would govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new culture of transparency and accountability for Indian trust management. Once the DOI understands that mismanagement will no longer be tolerated, the system will change and true reform will begin. In effect, the DOI is acting as a bank for Indian trust funds -- and just like every other bank in the U.S., the DOI must be subject to standards and accountability.

NCAI believes that it is critical for Congress to substantively address the underlying issues of transparency and accountability in fixing the trust system. We would greatly encourage the Committee to take up trust reform legislation that would hold the DOI to the ordinary standards of a trustee, and we would be pleased to work with you in developing that legislation.

Core Business Systems - Indian trust resource and trust fund administration requires accountability in three core systems that comprise the trust business cycle: 1) Title; 2) Leases/Sales; and 3) Accounting. NCAI believes that this Congress should focus its oversight efforts on these core systems to ensure that reform efforts meet requirements for fiduciary trust fund administration. Once these processes have been developed, an organizational structure can be developed to ensure their proper implementation. Correcting the DOI's performance in these core functions will also require the DOI to employ sufficient personnel, provide staff with proper training, and support their activities with adequate funds.

> Title - Currently, the BIA is using ten different title systems in the various Land Title Record Offices around the country, both manual and electronic. These systems contain overlapping and inconsistent information. The inaccuracies result in incorrect distribution of proceeds from trust resources, questions regarding the validity of trust resource transactions, and the necessity to repeatedly perform administrative procedures such as probate. Consequently, a large backlog of corrections has developed in many of the title offices, and this has compounded the delays in probate, leasing, mortgages, and other trust transactions that rely on title and ownership information. In turn, each of these delays compounds the errors in the distribution of trust funds. Cleaning up the ownership information and implementing an effective title system that is integrated with the leasing and accounting systems is a primary need for the Indian trust system.

Leasing – Most Indian trust transactions take the form of a lease of the surface or subsurface of an allotment, permits to allow the lessee to conduct certain activities in return for a fee, or a contract for the sale of natural resources such as timber or oil. Although leasing records are vital to ensure accurate collection of rents or royalties, there are no consistent procedures or fully integrated systems for capturing this information or for accurately identifying an inventory of trust assets. Currently, BIA has no standard accounts receivable system and many offices have no systems to monitor or enforce compliance, or to verify and reconcile the quantity and value of natural resources extracted with payments received. The accounting system most often begins with the receipt of a check that is assumed to be accurate and timely. Implementing an effective lease recording system that is integrated with the title and accounting systems is a primary need for the Indian trust system.

Accounting - The DOI needs to develop accounting systems that will integrate and verify information from one function into another (from title to leasing to accounting). The DOI should also set out what oversight capabilities are planned into the system (verification and audit) as well as a plan for document retention and ease of access to facilitate audit and internal verification procedures. Furthermore, the DOI system needs a built-in crosscheck between BIA entries to its control account and Treasury's entries to its control account. This system should automatically produce a daily exception list that would be examined and remedied in a timely manner.

**Opposition to Current BIA Reorganization Efforts**

NCAI is strongly opposed to the current trust reform reorganization effort that the DOI is engaged in, and to the dramatic shifts in BIA funding that are proposed in the FY04 budget. We would like the assistance of the Committee in stopping this process. NCAI Resolution PHX-03-040 regarding this issue is attached.

Tribal leaders understand better than anyone that the Bureau of Indian Affairs needs to change, that it has significant difficulty in fulfilling its responsibilities in management of trust funds, and that some of the problems relate to the way that the Bureau is organized. We want to see successful change and improvement in the way the BIA does business. We are not opposed to reorganization per se; we simply want to do it right. We cannot afford to squander the opportunity we have before us.

In our view, effective organizational change to effectuate trust reform must contain three essential elements:

(1) Systems, Standards and Accountability—a clear definition of core business processes accompanied by meaningful standards for performance and mechanisms to ensure accountability

(2) Locally Responsive Systems—implementation details that fit specific contexts of service delivery at the regional and local levels where tribal governments interact with the Department

(3) Continuing Consultation—an effective and efficient means for on-going tribal involvement in establishing the direction, substance, and form of organizational structures and processes involving trust administration.

These elements are lacking in the current proposal of the Department of Interior (DOI) for reorganizing the BIA.

The organizational charts which accompanied the DOI's plan show the establishment of newly created Trust Officers, potentially placed at every BIA local Agency Office. These Trust Officers are to be funded under the Administration's budget request for FY2004 for a significant initiative to increase funding for trust management within the Office of Special Trustee (OST). OST would receive a $123 million increase – to $275 million – which is partially offset by a $63 million cut to the BIA Construction and an $8 million cut to Indian Water and Claims Settlements.

Of BIA Construction accounts, Education Construction will lose $32 million—despite a terrible backlog of new school construction needs that everyone agrees must be addressed. Tribal leaders have repeatedly emphasized that funding needed to correct problems and inefficiencies in DOI trust management must not come from existing BIA programs or administrative monies. It is critical that the DOI request additional funding from Congress to correct the internal problems created through administrative mistakes rather than depleting existing, insufficient BIA program dollars for these purposes. Increased funding for trust reform has the potential to be money well spent—but it is an empty promise if it comes at the costs of diminished capacity to deliver services to tribal communities, and is implemented without clear standards for federal accountability, a plan to put the money at the local level where it is most needed, and consultation with the tribes and individuals whose accounts are at stake.

We are extremely concerned that the lack of definition of the responsibilities and authorities of new OST offices will cause serious conflicts with the functions performed by the BIA Agency Superintendents and/or Indian tribes. The authority and role of the proposed Trust Officers need much more explanation. Moreover, we believe that the funding and staff needs to flow directly to the agency and regional levels—not just to new Trust Officers—to address long-standing personnel shortages needed to fully carry out the trust responsibility of the United States. Before DOI begins the process of establishing an entire new mini-bureaucracy, the financial and management impact of such an action must be thoroughly examined by the Congress and by affected tribal governments.

We believe that any attempt by DOI to implement its proposed reorganization without addressing the three essential elements we have identified above for trust administration will prove to be ill advised, premature, and ultimately disastrous. We fear that the DOI is on the verge of repeating the classic mistake that has ruined the majority of its efforts to reform trust administration in the past – a small group of executives get together and simply draw up a new organizational chart. The preoccupation with moving or creating boxes on a chart is the antithesis of how effective organizational change can and should be brought about.

*We also firmly believe that this reorganization is putting the cart before the horse.* Organizational structures must be aligned with specific business processes and they must be designed to function within a system where services are provided by the DOI and tribal governments. DOI has not yet figured out its new business processes. Millions of dollars have been invested in an "As-Is" study of trust services, but the Department has only just begun to undertake the critical "To-Be" phase of reengineering the business processes of trust management. By implementing a new organizational plan prematurely, DOI is running a great risk of ignoring the findings of its own study and wasting the valuable resources that the agency and tribes have already dedicated to understanding systemic problems. DOI will most likely refer to the recent "consultation" sessions that have occurred throughout the regions. I would note the tribal leaders strongly object to these so-called "consultations," as the DOI representatives were informing the tribes about how the re-organization would proceed, and not discussing whether it adequately addresses tribal concerns regarding

meaningful trust reform.

Reorganization should only come after the new business processes have been identified and remedies devised through a collaborative process involving both BIA employees and tribal leadership. We must include the input of tribes and BIA employees so that the great numbers of people who must implement changes in trust administration understand and support necessary reforms. Only then, as a final step, can we design an organizational chart to carry out the functions of trust management without creating conflicting lines of authority throughout Indian country. The history of trust reform is filled with failed efforts that did not go to the heart of the problem and do the detailed, hard work necessary to fix a large and often dysfunctional system.

At this time, Congress should prevent the DOI from proceeding with its proposed reorganization plan and focus instead on funding land consolidation that will in time reduce the cost of trust administration, and on developing good systems for the core trust business processes: land title, leasing and accounting. Without adequate land title, leasing and accounting systems, reorganization, especially as proposed by DOI, does little to effectuate true trust reform and the cost of reform of trust administration will continue to escalate.

**Conclusion**

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into the trust reform effort. If we maintain a serious level of effort and commitment by Congress, the Administration, and Tribal Governments to work collaboratively together to make informed, strategic decisions on key policies and priorities, we can provide the guidance necessary to bring about true reform in trust administration.

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U.S. Institute for Environmental Conflict Resolution
Morris K. Udall Foundation

**Overview of Alternative Dispute Resolution: The Merits, Conditions, and Approaches to Address Environmental Conflicts**

Approaches to resolving disputes outside of formal adjudication are broadly categorized as alternative dispute resolution (ADR). Gradually, over the last thirty years, the use of ADR techniques has expanded from their initial application in the business world to the arena of environmental and public policy conflicts. In general, the popularity of ADR and assisted negotiations stems from a number of factors, including efficiencies in time and costs over litigation, greater control by the parties over the way a conflict is addressed, and by extension, increased commitment of the parties to the outcome of an ADR process.

This overview addresses the key distinctions between the different common methods of dispute resolution that are used in addressing environmental and public policy matters. It also describes some of the preconditions necessary to consider before engaging in an ADR process and outlines what an ADR process might look like. Appended to this overview are several reference documents that provide supplemental information about ADR and environmental conflict resolution, including a few examples of successful ADR/ECR processes. This document is intended to be an informational resource and does not provide recommendations for current or potential disputes.

In the broadest sense, dispute resolution processes can be characterized by several elements including: their degree of formality, the nature of the proceeding, if the process is voluntary or involuntary, the type of outcome, and the role of third party neutrals in the process. In contrast to adjudicatory processes, *mediation*[1] is less formal in structure and provides the opportunity for parties to present evidence, issues and interests with fewer legal boundaries. Mediation and similar dispute resolution processes are typically voluntary. However it is important to note that parties in litigation can be ordered by the court to engage in mediation. A critical distinction between mediation and adjudication is the method by which an outcome is reached. Specifically, parties to mediation work jointly to explore and reconcile differences and develop mutually acceptable agreements and or narrow the range of disagreements. The role of the third party neutral in a mediation is to guide the process by working one-on-one and collectively with the parties to: facilitate communications, provide a structured process that engenders opportunities for the parties to engage each other in constructive dialogue, and may work in caucus to assist the parties in independently analyzing their positions and assess approaches that may evolve into joint gains for the parties. The decision making process and outcome of mediation stand in strong contrast to adjudication processes, as well as *arbitration*, where the outcome is a decision rendered by a third party judge or arbiter.

Alternative dispute resolution processes serve as important methods of addressing and resolving conflicts but also provide structured approaches to managing systems that may inherently

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[1] Italicized terms are defined in the accompanying document, ADR/ECR Process Definitions.

generate conflict. *Dispute systems design* is an approach by which processes are developed with the parties to put in place a system to efficiently resolve a group of similar disputes as they arise.

**Pre-conditions**

A number of pre-conditions should be in place in order to optimize the effectiveness of ADR. It is important to note that despite having key fundamental elements in place, not all dispute resolution processes reach full agreement. Furthermore, externalities can influence the outcome of a dispute resolution process in ways that may not be predictable. The attached document provides a schematic overview of the principles and preconditions that are essential before embarking on a dispute resolution process.

These preconditions or "best practice factors" include: an analysis of the situation to determine the nature and domain of a conflict; the willingness of the parties to participate and their commitment to implement resulting actions or agreements; balanced representation of affected and relevant interests at the table; a structured process to ensure productive and effective engagement; consistency with prevailing laws and regulations or relevant court orders; and access to relevant current information. Complex multi-party disputes require that the parties have established communication channels or procedures in place to ensure clear and accurate information is conveyed at appropriate and agreed upon points in a process.

It is incumbent on all of the parties to a dispute to conduct careful, considered consultation and deliberation of these factors prior to deciding if an alternative dispute resolution process is appropriate. This evaluation includes examination of the incentives and alternatives to negotiating an agreement through an ADR process. Other important factors include appropriate timing (such as critical deadlines), available and needed staff resources, evaluation and comparison of the costs of ADR and litigation, long and short term impacts of ADR or litigation on the parties, the merits or benefits of a decision made by a third party vs. an agreement made by the parties themselves. In addition, in disputes related to the public sector, consideration must also be given to regulatory and legal mandates, agency missions, and other legislated parameters. Key to a process is ensuring that the appropriate level decision makers are fully and genuinely committed to a process and involved or sufficiently informed. Last, each party needs to assess how a third party neutral such as a mediator may be helpful and what skills that person should have to be effective in working with the parties.

**What a Process Looks Like**

The following is a brief outline of the critical steps parties should take beginning with the analysis of incentives and pre-conditions.

1. Internal assessment by the parties to determine the merits of proceeding with litigation or pursuing an alternative dispute resolution process. Factors pertinent to the assessment are identified above.

2. If the internal assessment results in a decision to explore the use of ADR, the parties work to identify an appropriate individual or entity that can serve to convene the process. Convenors can play many roles however, the role as described here is to assist the parties in exploring how a third party neutral can be engaged, and what qualifications the neutral should have in order to work effectively with the parties. The convenor can also assist the parties in defining the preliminary scope of known or anticipated issues to be addressed in an ADR process. The identification and selection of neutrals is most effective if it is a process done jointly by the parties. A convenor can work with the parties to develop interview questions, describe different styles and philosophies of mediation, and assist in coordinating interviews with candidate neutrals.

3. Once a neutral is selected, he or she or a team of neutrals will likely conduct a *conflict assessment* of varying scope and intensity to assess the interests, issues, and needs in order to effectively design an appropriate framework for an ADR process. The neutral(s) may make process recommendations to the parties, possibly identify pre-conditions or actions that should be taken prior to engaging in full mediation. Examples of actions include agreement on how briefings to media should occur, by whom, and at what frequency.

4. The specific design of an ADR process beyond the conflict assessment varies with the issue, its complexity, number of parties, and other factors. Nonetheless, the neutral(s) will typically work with the parties collectively and through caucus as appropriate to create a suitable environment for assisted negotiations to commence. The duration of the process depends on the above factors as well as possible external factors in public policy related matters. Agreements reached are typically documented and can be formalized. Included in the ADR process should be agreement on how actions or joint decisions will be implemented, how the agreement can be amended over time to address unforeseen but related issues, and to ensure mutual accountability to the agreement.

## Guiding Principles for ECR Processes

- **Analysis of Situation** – An assessment of the nature and domain of the conflict is conducted before embarking on a process.
- **Consensual Participation** – All necessary parties are willing and able to participate.
- **Balanced Representation** – All essential interests are represented in the process.
- **Managed, Constructive Interactions** – A structured process exists to facilitate productive and effective engagement.
- **Shared Responsibility for the Process and Agreement Outcomes** – All participants are committed to the process and are prepared to implement the resulting actions or agreements.
- **Consistency with Prevailing Laws and Regulations** – Processes in compliance with regulation e.g., FACA and substantive laws (CWA, ESA, NEPA).
- **Informed by Best Available Information** – All process participants have access to relevant, most up-to-date information available.

## Pre-Conditions for Participants, Convenors, & Neutrals

Has an analysis of incentives, BATNA's occurred?

Are all parties willing and able to participate?

Are sufficient resources available (time, staff, funds)?

Are deadlines known and reasonable?

Awareness and understanding of regulatory & legal mandates?

Agency mission, policies, and legislated parameters are clear?

Are the appropriate levels of decision makers involved or delegated responsibilities?

Is third party assistance needed?

## Essential Elements for an Effective ECR Process

Assessment and definition of issues

Clear goals, objectives, and expectations

A civil working relationship exists or can be developed

Appropriate process design

Right parties and their representatives

Participant roles and responsibilities are clearly developed

Mutual expectations or ground rules for process and procedure are established

Clear decision-making structure

Best available information accessible to all

Clarity on implications if agreement is not reached

Clarity on mechanisms for implementing agreements, monitoring and contingencies for revisions