

**H.R. 4322, THE INDIAN TRUST
REFORM ACT OF 2005**

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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**LEGISLATIVE HEARING ON H.R. 4322, THE
INDIAN TRUST REFORM ACT OF 2005.**

**Thursday, December 8, 2005
U.S. House of Representatives
Committee on Resources
Washington, D.C.**

The Committee met, pursuant to call, at 10:07 a.m. in Room 1324 Longworth House Office Building, Hon. Richard W. Pombo [Chairman] presiding.

Present: Representatives Pombo, Rahall, Duncan, Christensen, Drake, Hayworth, Inslee, Herseth, Kildee, Pearce, and Tom Udall.

STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The Committee on Resources will come to order. The Committee is meeting today to hear testimony on H.R. 4322.

Under Rule 4[g] of the Committee Rules, any oral opening statements at hearings are limited to the Chairman and the Ranking Minority Member. This will allow us to hear from our witnesses sooner and help Members keep to their schedules. Therefore, if other Members have statements, they can be included in the hearing record under unanimous consent.

Today's hearing is on H.R. 4322, the Indian Trust Reform Act of 2005, a bill I introduced with the Committee Ranking Democrat, Mr. Rahall. H.R. 4322 is a companion to S. 1439, a bill introduced this summer by Chairman McCain and Vice Chairman Dorgan. Our work on this issue has occurred on a bipartisan basis and bicameral basis. I should stress that H.R. 4322 is not a done deal. It is a work in progress, and I think it is safe to say all the other sponsors feel the same way.

As the title of the bill suggests, H.R. 4322 makes significant reforms in managing assets and accounts held in trust for Indians. While today's hearing concerns the entire bill, most of the focus will be on Title I, which provides a direct and conclusive settlement of the Cobell v. Norton lawsuit.

This lawsuit is not anything new to the Committee. It has been in district and appeals courts for nine years. As I have said in a previous oversight hearing, the case has taken on almost legendary proportions in its acrimony, which points to a need to settle it. Having said that, I do not wish to dwell on the judicial combat because it does not advance the goal of writing a legislative settlement that is full, fair, and equitable.

Two decisions in the U.S. Court of Appeals for the District of Columbia—one on December 10, 2004, and the other on November 15, 2005—provide us with important information on the laws pertaining to historic accounting of individual Indian money accounts. I expect to hear different interpretations of these decisions from our witnesses today, and the Committee can rest assured we will also seek briefings from neutral experts on these developments.

But the fact remains that continuing to litigate the accounting claims poses risk for both parties. The people at the heart of the case, and I am talking about individual Indians, not trial lawyers or government lawyers, still await a conclusion after nine long years.

Before I turn to the Ranking Member for his opening statement, I want to make one more remark. Title I contains a blank space in the parts dealing with a settlement figure. This is deliberate. It is one of the trickier issues to resolve. It has to be based on a combination of legal realities stemming from the recent Appeals Court decision, of common sense, and of a moral obligation to Indians touched by this case.

The Chairman now recognizes the Ranking Minority Member for any statement he may have.

[The prepared statement of Chairman Pombo follows:]

**Statement of The Honorable Richard W. Pombo, Chairman,
Committee on Resources**

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STATEMENT OF THE HON. NICK J. RAHALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. RAHALL. For more than a century, the Federal government has been the trustee of funds for Indian tribes and individual Indians. Dozens of reports over the years have documented the Department of Interior's inability to accurately account for trust fund money and manage the accounts on behalf of Indian Country.

This Committee has worked with account holders and administrations of both parties to clean up the management problems and atone for inaccurate account balances. Frankly, we have been impeded by the administrations of both parties and undercut by various others who have sought to protect their own interests in this debacle.

For some reason, the Administration, regardless of who is in the White House, is convinced that, if they just move some authority from one office to another, reorganize BIA, or buy another new computer system, it will be fixed. I have watched this happen—and fail—under every president since President Reagan.

The Cobell v. Norton lawsuit achieves its early goals of bringing the problem to a head and getting the attention of all three branches of government. I fear, however, that the case has mutated into something I barely recognize from those early days.

The animosity between the parties is as bad as any I have ever seen. While each side tries desperately to get the other to bend to its will, the Indian account holders still have not gotten a true accounting, and I have come to believe they never will.

I greatly admire Ms. Elouise Cobell and have had the honor of working with her on this issue since the mid-1980's. Her tenacity for justice for Indian account holders and her steadfast focus on correcting decades of mishandling of Indian monies has been the driving force in drawing attention to this issue. I believe her cause is still as genuine as it was the day we first met. Unfortunately, I cannot say the same for all others involved.

From my perspective, the Cobell Plaintiffs, long ago, proved their point that the government has mismanaged the trust fund accounts and the account holders need to be made whole.

Numerous attempts at settlement of the lawsuit have failed, including one sponsored by myself and Chairman Pombo, along with Senators Campbell and Inouye during the 108th Congress. The time and money being spent on this lawsuit is affecting every decision made at DOI with regard to Native Americans, and, as a result, programs are suffering.

Throughout our efforts to bring about settlement, we have been asked by several interested parties to formulate a potential legislative settlement and reform of the management process. In response to these requests, Chairman Pombo and I have introduced H.R. 4322; a companion bill, S. 1439, was introduced in the Senate by Indian Affairs Committee Chairman John McCain and Ranking Member Byron Dorgan.

Today, we will receive testimony on Title I of the bill, which deals solely with settlement of Cobell v. Norton. I hope we have not lost the window of opportunity to gain congressional support for such legislation.

I am, as always, committed to working with Chairman Pombo and Indian account holders to bring about fair compensation to those individuals wronged in the past and to ensure the integrity of the system for the future.

This legislation could be an important opportunity to put the “trust” back in this government’s management of Indian monies. Thank you, Mr. Chairman.

[The prepared statement of Mr. Rahall follows:]

**Statement of The Honorable Nick Rahall, Ranking Member,
Committee on Resources**

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This legislation could be an important opportunity to put the “trust” back in this government’s management of Indian monies.

The CHAIRMAN. Thank you. As I said, all other opening statements will be included as part of the record.

At this point, I would like to turn to our first witness, Mr. James Cason, associate deputy secretary of Interior. He is accompanied by Ross Swimmer, the special trustee for American Indians.

I would like to take this time to remind all of today's witnesses that, under Committee rules, oral statements are limited to five minutes. Your entire written statement will appear in the record. Deputy Secretary, if you are ready, you may begin.

STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS, U.S. DEPARTMENT OF THE INTERIOR

Mr. CASON. Mr. Chairman, I am pleased to be here today to discuss H.R. 4322, a bill that would attempt to resolve the Cobell v. Norton litigation. We appreciate the time and effort the Chairman and the Ranking Member and their staffs have taken to sponsor the legislation in an effort to reach a full, fair, and equitable settlement to this case and to clarify our individual Indian trust duties, responsibilities, and expectations. While many details remain to be negotiated and clarified, the bill represents an important step toward seeking closure on this matter.

On November 15, 2005, the very day this legislation was introduced, the United States Court of Appeals vacated the district court's order reissuing the historical accounting injunction.

The Court said that since neither congressional language nor common law trust principles establish "a definitive balance between exactitude and cost," the district court owed substantial deference to Interior's plan. The Court found that reissuance of the historical accounting injunction was "not properly grounded in either fact or law. What is more, the district court completely disregarded relevant information about the costs of its injunction."

The Court also found that Interior's decision to use statistical sampling was especially reasonable, and the district court had abused its discretion by barring the use of statistical sampling.

So what does this all mean? Interior is no longer obligated to conduct an historical accounting costing billions of dollars. Interior's more reasonable effort is entitled to substantial deference. Interior has expended more than \$100 million to date and has made substantial progress on our historical accounting task. Today, it is abundantly clear that the plaintiffs' public claim that \$176 billion is owed is vastly overstated, to say the least. Such assertions have misled many individual Indians and created expectations that are false. More recently, the plaintiffs' lawyers have offered to settle for \$27.5 billion. This figure, too, is based on assumptions that available evidence simply does not support. What remains to be determined is how much more accounting needs to be done before we can resolve these claims through administrative, judicial, or legislative means.

The accounting work done to date has identified differences between our accounting ledgers and the supporting documentation. These differences tend to be few. They tend to be small. They involve both overpayments to individual Indians and underpayments to individual Indians, and when added together, net out with a net

overpayment. That overpayment principally involves the payment of interest to a broad range of accounts.

Thus, the facts to date are in stark contrast to the rhetoric that surrounds this case. While more accounting work can be done, there is a base of substantial evidence upon which to begin forming conclusions about the merits of the case and the magnitude of any settlement offers that should be considered. The Administration supports the Committee's efforts to bring this matter to a close, provided the terms of the settlement are objective, reasonable, and consistent with the facts.

We stand ready to work with the Committee and the Senate counterparts to seek comprehensive resolution of the case. We understand that there is still risk and uncertainty for the parts of the history that we have not examined yet and that we would prefer, if possible, to bring a complete resolution to this matter rather than continuing down an historical accounting path that ultimately, in the end, will likely prove unsatisfactory to all parties concerned.

So with that, Mr. Chairman, I would be happy to answer questions.

[The prepared statement of Mr. Cason follows:]

Statement of James Cason, Associate Deputy Secretary, and Ross Swimmer, Special Trustee for American Indians on the Cobell Lawsuit, U.S. Department of the Interior

I am pleased to be here today to discuss the legislation before the Committee that would attempt to resolve the Cobell v. Norton litigation. We appreciate the time and effort the Chairman and Ranking Member and their staffs, along with their Senate counterparts, have taken to develop this legislation in an effort to reach a full, fair and final settlement of this case and to clarify individual Indian trust duties, responsibilities, and expectations. The introduction of H.R. 4322 and S. 1439 is the first serious congressional effort we have seen to comprehensively resolve the issues involved in the Cobell lawsuit. While many details remain to be negotiated and clarified, the bill represents an important step towards seeking closure on this matter.

This Administration has appeared before this Committee on this issue numerous times. The landscape for the resolution of this case and the underlying trust challenges changes with each new court decision. We continue to narrow the magnitude and scope of the potential settlement terms as we learn more through our historical accounting work. Today's effort is a critical step in providing statutory guidance. It is important though to understand what the Court of Appeals has done since we testified in July on the Senate bill identical to this one.

On November 15, 2005, the very day this legislation was introduced, the United States Court of Appeals for the District of Columbia Circuit vacated the district court's order reissuing the historical accounting structural injunction.

The Court noted in the opinion that the district court, in issuing a contempt citation against Secretary Norton, disregarded "Interior's affirmative accomplishments on Norton's watch".

The Appeals Court went on to note that while the American Indian Trust Fund Management Reform Act of 1994 (1994 Act) includes an accounting requirement, "its text offers little help in defining the accounting's scope." Even plaintiffs' counsel, the Court notes, conceded some need for practicality when asked hypothetically about spending \$1 million in accounting expenses for a \$1,000 trust. The Court took note of the fact that in the 1994 Act "Congress was, after all, mandating an activity to be funded entirely at taxpayers' expense." Because the Individual Indian Money (IIM) trust differs from ordinary private trusts in a number of ways, the Court said "the common law of trusts doesn't offer a clear path for resolving statutory ambiguities."

The Court also took note of the fact that for two fiscal years in a row, Congress limited Interior's annual expenditures for historical accounting to \$58 million, an amount that includes funding for tribal accounting as well. If that pattern continued with the district court's historical accounting structural injunction in place, it

reasoned, the district court's accounting would not be completed for about two hundred years.

More importantly, the Court said that since neither congressional language nor common law trust principles establish "a definitive balance between exactitude and cost," the district court owed substantial deference to Interior's plan. They said that the district court "erroneously displaced Interior" as the body that should work out compliance with the 1994 Act and erred by reinstating its September 2003 injunction in February 2005 without considering the Court of Appeals' 2003 decision and subsequent developments after 2003. The reissuance of the injunction, according to the Court, was "not properly grounded in either fact or law. What is more the district court completely disregarded relevant information about the costs of its injunction." In summary, the Court said the district court acted "on the ill-founded assumption that the 1994 Act gave it the freedom of a private-law chancellor to exercise its discretion."

The Court did say that this opinion was issued without prejudice to the plaintiffs' argument on appeal that execution of the reissued injunction is impossible or to future claims such as challenges to the correctness of specific account balances. It also addressed the district court's bar on using statistical sampling as part of the accounting. The Court found Interior's decision to use statistical sampling in its proposed plan "especially reasonable" because the cost of accounting for transactions valued under \$500 would exceed the average value of those transactions. They found the district court had abused its discretion by barring use of statistical sampling.

So what does this all mean? Interior is no longer obligated to conduct an accounting costing billions of dollars. Interior's more reasonable effort is entitled to substantial deference. Interior has expended more than \$100 million to date and has made substantial progress. Today, it is abundantly clear that the plaintiffs' public claim that \$176 billion is owed is vastly overstated, to say the least. Such assertions have misled many individual Indians and created expectations that were false. More recently the plaintiffs' lawyer offered to settle for \$27.5 billion. This figure is also based on assumptions that the available evidence simply does not support. What remains to be determined is how much more accounting needs to be done before we can resolve these claims through administrative, judicial or legislative means.

HISTORICAL ACCOUNTING: WHAT DO WE KNOW TO DATE?

As we have stated to this Committee repeatedly, as part of the Cobell litigation, Interior collected over 165,000 documents for the historical analysis of IIM trust fund activity through December 31, 2000, for the named plaintiffs and agreed-upon predecessors. Of these documents, about 21,000 documents were used to support the transactional histories, which dated back as far as 1914, and which included a total of about 12,500 transactions.

Pursuant to the requirement in Section 131 of the FY 2003 Appropriations Act, on March 25, 2003, the Department of the Interior provided Congress with a summary of the expert opinion of Mr. Joseph Rosenbaum, a partner in Ernst & Young, LLP, regarding the five named plaintiffs in *Cobell v. Norton*. This report describes the process the contractor went through and also contains a summary of his opinions. These conclusions included:

- The historical IIM ledgers were sufficient to allow DOI to create virtual ledgers that were substantially complete for the selected accounts.
- The documents gathered by DOI supported substantially all of the dollar value of the transactions in the analyzed accounts.
- The documents gathered by the Department of the Interior do not reveal any collection transactions not included in the selected accounts, with a single exception in the amount of \$60.94 that was paid to another account holder, due to a transposed account number entered in the recording process.
- An analysis of relevant contracted payments, evidenced primarily by lease agreements, showed that substantially all expected collection amounts were properly recorded and reflected in the IIM accounts.
- There was no indication that the accounts are not substantially accurate, nor that the transactions were not substantially supported by contemporaneous documentation.

This analysis, including the named plaintiffs and the selected predecessors in interest, found both non-interest transaction overpayments to class members (37 instances totaling \$3,462) and underpayments (14 instances totaling \$244).

As of September 30, 2005, Interior's Office of Historical Trust Accounting (OHTA) had reconciled more than 22,900 Individual Indian Money (IIM) judgment accounts with balances totaling more than \$57.6 million and 25,551 additional judgment accounts with no balance as of December 31, 2000. This accounting effort found non-

interest overpayments (2 instances totaling \$2,205) and underpayments (21 instances totaling \$52).

As of September 30, 2005, OHTA had also reconciled 5,708 IIM per capita accounts with balances of over \$43.9 million and an additional approximately 6,214 accounts with no balance as of December 31, 2000. In this per capita accounting effort, only one individual on a tribal roll did not receive a payment of \$100.

Interest recalculations identified a particular set of IIM judgment transactions (786 instances totaling \$25,000) where principal had been distributed without associated interest amounts (an underpayment). More broadly, interest amounts for judgment and per capita accounts appear to have been overpaid (a net amount approximating \$365,000 on about 13,800 accounts).

Based upon the historical accounting results so far, Interior suggests that Congress consider exempting Judgment and Per Capita funds from any proposed legislation.

The National Opinion Research Center (NORC) at the University of Chicago, a national organization for research and statistics, was contracted in 2001 to assist Interior with interpreting historical accounting data and results. On September 30, 2005, the NORC issued a progress report entitled "Reconciliation of the High Dollar and National Sample Transactions from Land-Based IIM Accounts," looking at land-based IIM accounts that were open on or after October 25, 1994. The goal of the project is to assess the accuracy of the land-based IIM account transactions contained in the two IIM Trust electronic systems (Integrated Records Management System and Trust Funds Accounting Systems) for the electronic era 1985-2000. Accuracy is being tested by reconciling all transactions of \$100,000 or more and a large statistically representative random sample of non-interest transactions under \$100,000. That historical accounting initiative ended in August 2005. The NORC has found:

- Over 99% of the sampled transactions needed for preliminary estimates have been reconciled for all twelve BIA regions as have 99% of all the transactions greater than or equal to \$100,000.
- A completion rate of 99% is extremely high in a sample such as this. The report states: "This very high completion rate for searching and locating documentation should put to rest concerns about the impact that the 1% remaining unreconciled transactions might have on results."
- The reconciliation identified both overpayments (63 instances totaling \$53,797) and underpayments (48 instances totaling \$62,250).
- Reconciliation shows the debit difference rate to be 0.4%.
- Reconciliation results show the credit difference rate to be 1.3%.

As of September 30, 2005, OHTA also resolved residual balances in 9,452 special deposit accounts, identifying the proper ownership of more than \$47 million belonging to individual Indians, Tribes, and private entities.

H.R. 4322, THE INDIAN TRUST REFORM ACT OF 2005

We appreciate the fact that legislation has been introduced to attempt to address the issues in Cobell. We are pleased to see the bill focuses on consolidation of fractionated Indian lands and supports a more aggressive land acquisition program than the one currently under way. We do, however, have some serious concerns with the bill as currently drafted.

Title I. H.R. 4322 would provide a yet undetermined number of dollars to resolve the historical accounting claims of the class members of the Cobell litigation. However, it does not provide for settlement of all of the elements of the Cobell litigation. In addition, in determining what is a reasonable amount, Congress should be aware that the \$27.487 billion requested by the plaintiffs as settlement does not include money to resolve damage claims for potential mismanagement of trust assets that could be filed in the future. Such a future claim may begin by plaintiffs demanding an historical accounting. The legislation therefore should resolve or restrict any claims that might permit the reinstatement of historical accounting litigation comparable to the Cobell case. We also believe that Congress should look carefully at the distribution system provided in legislation for the settlement funds. It would be far better to provide clear guidance as to the amounts to which individuals are entitled, rather than leaving the decision of what individuals receive to a formula developed by the Secretary. Congress should craft a distribution method with as much clarity and direction as possible. Congress should also be aware that 25 tribal trust cases involving similar issues have also been filed.

Indian Trust Asset Management Demonstration Project Act. H.R. 4322 includes provisions allowing for a pilot project for 30 tribes to take over management of Indian trust assets. Many Indian trust assets are already managed by the tribes through PL 93-638 compacts and contracts. In the legislation, it is critical to

transfer the responsibility for results along with authority and funding. We do not believe the United States should remain liable for any losses resulting from a Tribe's management of its trust assets under the demonstration project. This is particularly true because the bill would allow Tribes to develop and carry out trust asset management systems, practices, and procedures that are different and potentially incompatible with those used by Interior in managing trust assets. In a normal trust, this action would be considered a merger of Trustee and beneficiary and thus end the Trust relationship. Of course this would have no impact on the government-to-government relationship.

We look forward to discussing further the following key aspects of this provision. For example, if program reassumption became necessary, how would Interior take back program responsibilities and integrate information back into our trust asset management environment when it has been collected and processed in different systems? What kind of monitoring of tribal activities will Interior have to do to ensure the tribe is living up to the standards in the bill? What performance standard would apply: the imminent jeopardy standard associated with PL 93-638 or the "highest and most exacting fiduciary" standard being required of Interior? Under the 1994 Act, Tribes are permitted to withdraw and manage their trust funds and the Secretary is held harmless for losses or mismanagement that may occur. A similar provision related to other trust assets would be a logical extension of self-governance.

Fractional Interest Purchase and Consolidation Program. The bill also places a priority on developing an aggressive program for the purchase of interests in individual Indian land. The President's FY 2005 budget request included an unprecedented \$70 million request for Indian land consolidation. Congress chose to appropriate \$34.5 million for the program in FY 2005. In light of this, we requested and received \$34.5 million for FY 2006.

As structured, the program in H.R. 4322 provides incentives where a parcel of land is held by 20 or more individuals and where an individual sells all interests in trust land. In cases where a parcel of land is held by over 200 individuals, the bill provides procedures for noticing interest holders and moving ahead with consolidation of the interests. These provisions will greatly help consolidate interests and reduce the costs of management of the individual Indian trust.

Care must be given, however, to ensure that this bill does not work as an incentive to further fractionate land so that individuals can become eligible for the bill's incentives. So far, there has been no lack of willing sellers. In addition, we would like to work with you further on the criteria, thresholds and amounts included in this title. We have some serious concerns as to the cost of the significant premiums provided in the bill. In addition, we would like to explore the possibilities for consolidation sale authority to reduce the associated public financing burden of addressing the fractionation issue. We need to analyze the costs of the new incentives, the mechanisms for funding land acquisitions and the impact of the American Indian Probate Reform Act on the rate of fractionation as a part of our implementation plan.

Restructuring the Bureau of Indian Affairs and the Office of the Special Trustee for American Indians. H.R. 4322 includes a number of concepts that were discussed by the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform in 2002. This task force was formed during the period when the Department was examining ways to restructure the trust functions of the Department in response to the trust reform elements of the Cobell court. The task force ended in an impasse with regard to implementing legislation on matters that were not related to organizational alignment. In the face of no legislation, the Department implemented a reorganization plan that could be achieved administratively.

This title of the bill also extends the Indian preference hiring policy to the new Office of Trust Reform Implementation and Oversight created by the bill and abolishes the Office of the Special Trustee for American Indians. Interior would appreciate the opportunity to discuss these policy choices in some detail.

While Interior is receptive to the concepts of establishing an Undersecretary position and merging Indian programs under new leadership, we would like to discuss the objectives of such a proposal. In Interior's view, such an initiative is unlikely to materially alter Indian trust performance due to the presence of other, more pressing, structural concerns about the trust, such as the lack of a clear trust agreement to guide responsibilities and expectations, appropriations that do not track with all program trust responsibilities, the lack of an operative cost-benefit paradigm to guide decision-making priorities, the challenges of incorporating PL 93-638 compacting and contracting, and the requirements associated with Indian preference hiring policies. These issues have frustrated the beneficiaries, the administrators, and a various times Congress throughout the lifespan of this trust. We encourage Congress to speak clearly in whatever legislative direction it chooses to write, and

carefully consider the impacts the language will have in allowing us to meet the objectives of your constituents.

It is clear that moving from today's organization into a beneficiary services-oriented organization of excellence will demand the highest of financial, information technology and managerial skills. American Indians make up less than one percent of the American public. When we restrict hiring to this small fraction of potential employees, instead of reaching out to whomever may be most qualified, we deprive ourselves of 99% of the available talent pool. While the Indian preference hiring policy does permit the hiring of non-Indians, it serves as a significant disincentive for non-Indian applicants. To improve Indian program performance and results, we would like the opportunity to serve Indian Country by including a broader range of applicants so as to create an applicant pool large enough to ensure we are hiring well qualified employees.

Audit of Indian Funds. The last title of H.R. 4322 requires the Secretary to prepare financial statements for Indian trust accounts in accordance with generally accepted accounting principles of the Federal Government. The Comptroller General of the United States is then required to contract with an independent external auditor to audit the financial statements and provide a public report on the audit. The Secretary is required to transfer funding for this audit to the Comptroller General from "administrative expenses of the Department of the Interior" to be credited to the account established for salaries and expenses of the GAO. For the last ten years, the trust funds have been audited by independent public accounting firms. In addition, Interior encourages additional discussion to ensure that accounting is accomplished under proper fiduciary accounting standards to avoid any conflicts with standard fiduciary accounting practices.

In closing, I want to make it clear that we believe the November 2005 Court of Appeals decision was an extremely important one. As Congress assesses what is a reasonable amount to provide for settlement of the plaintiffs' claims, Congress must consider that we are no longer looking at a \$13 billion accounting cost nor are we looking at an accounting in which statistical sampling cannot be used. Further, Congress should also take into consideration what we have learned so far from the more than \$100 million we have spent looking at IIM accounts to date.

Thank you. I'd be happy to answer any questions you might have at this point.

The CHAIRMAN. Thank you. I will start off, Mr. Cason, and ask, what is the Interior Department's position with regard to reaching a settlement of the claims brought by the Plaintiff? Is the Department prepared to support a legislative solution?

Mr. CASON. Yes, Mr. Chairman.

The CHAIRMAN. Land-based accounts represent about 75 percent of all individual Indian money accounts and hold about half of the total balance of all such accounts. The other accounts are judgment accounts, per capita accounts, and special deposit accounts. Is that accurate?

Mr. CASON. Yes, Mr. Chairman, it is.

The CHAIRMAN. Can you tell me what documentation the Department has for the transactions, including leases, payments, and deposits, in the land-based accounts?

Mr. CASON. Mr. Chairman, we have a substantial base of information regarding all types of accounts that we have. In the historical accounting effort that we have done thus far, we have accounted for around 50,000 of our judgment per capita accounts and, in large part, have all of the information necessary to do those. Those relatively are simple to do. They involve a judgment or a settlement of some type that is paid to numerous accounts from a single core event, and then it is initially deposited in an account plus interest transactions. Those are relatively simple.

In the case of land-based accounts, we have a substantial record of those as well. Depending on the time period involved, the availability of the records varies somewhat, but the experience that we

have had so far is generally we have somewhere between 85 percent and 99 percent of the records necessary to do the reconciliations that we are doing in our accounting project.

The CHAIRMAN. Is the accuracy of the accounting in the other accounts at all likely to be repeated in an accounting of the land-based accounts?

Mr. CASON. It is my understanding, Mr. Chairman, that we do have difference that involve both our judgment per capita accounts and land-based accounts, but as I said in my opening statement, they tend to be few, they tend to be small, and they tend to net near zero when you add both overpayments and underpayments together.

So a conclusion is there are errors or differences between what is in our ledger and what the supporting documents say, but there are not many of them. I have asked our Office of Historical Trust Accounting to inquire with the firms that are actually conducting the accounting, and it is my understanding these represent four of the five largest accounting firms in the country that are involved, to ask the question whether there appears to be any evidence of systemic error in our accounting processing system or whether there has been any evidence of fraud or whether there has been any evidence of our electronic data being altered by hacking or other intrusions in our systems, and the answer to those questions so far has been no, that what we have identified in error so far appear to be random errors associated with just human work as opposed to any systemic problems with our system.

The CHAIRMAN. How do you respond to the argument that a statistical sampling analysis does not consider missing documents? Specifically, does a statistical sampling just confirm the existence of documents already in the possession of the Interior Department?

Mr. CASON. Well, the way we approach the statistical sampling process is, in our land-based accounts, we have basically gone through a process of looking at the 1985-to-2000 tranche, which represents approximately \$5.5 billion of throughput through these accounts, and in so doing, using the electronic information, we had a statistical accounting firm select a statistically based set of accounts and then within those accounts select statistically selected transactions to do further evaluation of. In that particular tranche, we basically identified all of the documents we needed to do the reconciliation that we were undertaking.

It is my understanding, Mr. Chairman, that we basically had 99 percent plus of all of the documents that we sought to do the reconciliation, and the document types that are involved are checks, incoming checks or copies of checks; the internal transaction documentation that we use to deposit checks and distribute the checks to where they belong.

As an example, what I mean by that is if I have a tract of land that is leased and has 500 different owners on it due to fractionation, we have to have documentation of how we distributed one common check to the 500 recipients of the check.

We also have documentation when we are making disbursements from accounts, and that is used as part of the reconciliation process for looking both at the incoming and the outgoing transactions in an account. In that particular tranche, in land-based accounts, we

have virtually all of the documents that we needed. I think it is fair to say, if you go further back in time, the further back you go, the more likelihood that you will have to find that there are missing documents, and it would be up to the statisticians in this case to make an interpretation of how significant the missing information is.

The CHAIRMAN. Thank you. I am going to recognize Mr. Rahall.
Mr. RAHALL. Thank you, Mr. Chairman.

Deputy Secretary Cason, let me ask you, how do the error rates that you have calculated in a judgment and the per capita accounts compare to the error rates in other programs that are run by the Federal government?

Mr. CASON. I am sorry, Congressman Rahall. I am not aware that we have actually gone through an exercise of trying to calculate error rates of program performance across the Federal government to do that kind of comparison. When we have done the historical accounting process, the focus has been on the differences that we identify between ledger amounts and supporting documentation in our historical accounting effort. I imagine that it would be possible to cobble together some sort of comparison to other programs, but I am not aware of that.

Mr. RAHALL. Could you do any of that cost comparison?

Mr. CASON. Yes. I imagine that is possible.

Mr. RAHALL. If it is not too much time and effort involved, if you could have somebody do that and just submit it for the record.

Mr. CASON. Sure.

Mr. RAHALL. OK. Is it reasonable to assume that modern accounting accuracy is a good proxy for what took place for the first 50 to 75 years for the trust?

Mr. CASON. Congressman Rahall, I cannot really give you a good answer on that. What I can tell you, we are attempting not to speculate about what will happen in older time periods without actually having gone to look at the them through the accounting process.

Our experience so far in the historical accounting effort is very limited in the older time periods, so what information we have available right now would suggest that there is not a materially higher rate of error for the older time periods, but it is completely insufficient to draw an accurate, fact-based conclusion on.

We have more information about a more current time period that represents about \$5.5 billion of the throughput, and before we could really give you an accurate answer, we would actually have to go do some work in that area, and we have not done that work yet. So we are trying not to speculate one way or the other as to what the error rate would be with older periods.

Mr. RAHALL. In your testimony, you state: "What remains to be determined is how much more accounting needs to be done before we can resolve these claims through administrative, judicial, or legislative means."

Mr. CASON. Yes.

Mr. RAHALL. My final question would be, how do we determine how much more accounting is needed?

Mr. CASON. Congressman Rahall, I do not think there is any one specific definition that would get there, and from our standpoint as we are going through this, it will be a combination of effort

between what is occurring in the judiciary system, what is occurring here on Capitol Hill, and the discussions we have within the Administration.

What is happening right now is, if you look at where we were four or five years ago, we basically had no historical accounting effort or facts that had been completed at that time, and now we are \$100 million into the process. We have done 50,000 judgment per capita accounts and found very few errors. We have done a statistical sampling of the data base for the last 15 years and found relatively few errors. We have a body of evidence associated with the Arthur Andersen accounting and tribal accounts from 1972 to 1992. So if you go back another 15-year tranche, basically back to 1972, the error rate associated with the tribal accounts was very, very low.

So we are having a growing body of evidence that suggests to us we do not have, at least, so far, any appearance of a systemic problem with our accounting system or any evidence of systemic fraud involved with our employees who account for these monies, and at some point in time, we will get to a point where Congress, as an institution, will say, "OK. I have enough evidence to draw a conclusion," or the Administration will come to Congress and say, "We think we have enough evidence to draw a conclusion about where this is all headed."

We are hopeful that the efforts to settle this will actually precede that level of accounting, that we can actually bring this thing to close because we think it is more positive if we can actually reach a mutually acceptable solution to this process through legislation and bring the issue to a close. In the absence of that, then it looks like we have years more of accounting that we will need to do and years more of constant to'ing and fro'ing in court.

Mr. RAHALL. Thank you for your response.

Mr. CASON. You are welcome.

Mr. RAHALL. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Duncan?

Mr. DUNCAN. Thank you, Mr. Chairman, and I appreciate and understand and respect what you and Mr. Rahall are trying to do because this, as I understand it, has been in the courts for nine and a half years, and we want to bring this to some type of conclusion. I believe that you probably feel the same way that I do that because this does involve probably many billions of dollars, that we need to be very careful of this legislation. Right now, we do not have enough information on how many legitimate claimants there are, how much they would get per claimant, and what is the total cost of the bill. The bill, as you said, is a work in progress, but it contains more blanks than any bill I have ever seen. Section 103 says blank billions on the initial deposit, also blank percentage on attorneys' fees, blank percentage on the cost of administration. Section 104 has blank billions on the general distribution and share of the claim. In Section 108, blank per hour on attorneys' fees.

That is what concerns me the most, I think, because I was a lawyer and a judge before I came to Congress. Sadly, we have sent so many millions of good jobs to other countries for so many years, we have half of the kids in the country either going to law school or thinking about it. We have such a surplus of lawyers out there,

we have really good lawyers who would come in and work on this for \$100 an hour, and yet these Washington law firms charge just ungodly fees, and we have to put some kind of limits on these attorneys' fees. I know, in the early nineties, in the savings and loan scandal, there were firms up here charging \$650 and \$850 an hour, and that was in the early nineties. I hate to think what some of them might charge now if we do not put some limits on it.

In addition, in many of the major bankruptcies, the bankruptcy trustees and the bankruptcy lawyers have been awarded almost all of the money in some gigantic bankruptcies where the creditors got very little. This blank on the cost of administration concerns me, and I think we need to put some real strict limits on these things, or there are going to be some scandalous "60 Minutes," "20/20," "Dateline"-type shows out of this legislation.

I do not have any questions, but I did want to, at least, put those remarks on the record. Thank you.

The CHAIRMAN. Thank you, Mr. Duncan. I know that Mr. Rahall and I agree with much of what you said in terms of the concerns about the overall cost, which is why when this bill was drafted, we did look at addressing those specific areas. I think when we get into filling in some of those blanks, hopefully you will be more comfortable, and I know I will be more comfortable where we are going with the legislation, but that is a very legitimate point you bring up.

Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman. Thank you again for your efforts in this very difficult question.

I have been involved in legislative attempts to bring justice to our Native Americans for 41 years next month, and I would like to back up just a bit for maybe some of the newer Members here. We have been at this nine years, I think, in this Committee here.

Generally speaking, what led to where we are today is a combination of nonfeasance, misfeasance, and malfeasance, just to give an historical background to the cause for this.

Mr. CASON. Well, Congressman Kildee, I would take a different position. There is certainly lots of public rhetoric about the lack of feasances, all three of those, within the Department of the Interior and the implementation of this program. I think there is a different causal factor that is associated with this than that, and it is my sense that if you take a look at the statutory history of this trust, there has never been any instruction from Congress regarding what sort of accountings needed to be done at any point prior to 1994.

So when you take a look at the operation of this trust over time, there has not been any instruction from Congress that said do this kind of accounting provided in this time period and have this kind of information involved. That first happened in 1994. Where we are with this litigation is that the Plaintiffs have made a point with the court, and the court agreed, that there is some inherent obligation to do accounting that the Department had not complied with and that we have been in nine years' worth of effort to try and define what exactly that accounting requirement is. Even after nine years of litigation, it is still not clear exactly what is required of the Department to do an accounting.

What we have at this point is the Department's plan, which we submitted to Congress and to the court, and Congress thus far has not decided to even fund that plan. We also have the district court's plan that has been vacated now by the Court of Appeals twice. That was a much more expensive, much more exacting plan that Congress equally was unwilling to fund.

So I would say the root of it is not so much malfeasance, misfeasance of the case; it is, rather, there has not been any clear direction over the last 100 years as to what the expectations are, and that is one of the fundamental flaws or problems associated with managing this trust.

Mr. KILDEE. I thank you for your response, and I think, too, also we have to recognize here in the Congress that the trust responsibility toward the Native Americans is with the entire Federal government.

Mr. CASON. That is correct.

Mr. KILDEE.—not just the Department of the Interior. It is the Congress also, and, therefore, we cannot dodge maybe our nonfeasance, if that be that.

So the trust responsibility certainly is not just in the Department of the Interior or the BIA; it is also here with the Congress. We are trying to ferret out all of the facts and trying to get justice in this.

Let me ask you this question. Judge Lamberth feels that the comprehensive accounting would cost about \$12 billion, and I think the Department figures that can be done for about \$335 million. How do you account for the wide disparity between Lamberth's costs for the accounting and what you feel the cost of the accounting will be?

Mr. CASON. That is a great question. The principal differences that lead to the dollar figure differences: first, is the class for whom you would do an accounting. In our case, we basically defined the class of who we would do an accounting for as those individuals who had an account open on or after the date of the 1994 Act. So we would be doing around 275,000 to 300,000 accounts.

The Judge Lamberth plan basically is an accounting for all accounts that have ever been since 1887, so there is a much wider panoply of accounts that needed to be done.

The second major driver is the approach used to do the accounting. The big driver for money is in the land-based accounts, and it is particularly a problem due to fractionation of Indian individual allotments, and in that particular case, for land-based accounts, what we had proffered to do was to use a statistical sampling process for reconciling transactions with the underlying supporting data. So we would not attempt to do every transaction. We would do a statistical sample of them to do that reconciliation. In Judge Lamberth's plan, reconciliation way exceeds the value of the transaction. So those are two principal drivers.

There was also a requirement to do an accounting for all land-based transactions that occurred since 1887. That materially added to the cost as well.

Mr. KILDEE. Thank you very much, Mr. Cason.

Mr. CASON. You are welcome.

Mr. KILDEE. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Hayworth?

Mr. HAYWORTH. Thank you, Mr. Chairman. Mr. Cason, thank you and my colleagues. When I was listening to my good friend from Michigan, I thought back to the Trust Fund Task Force that he and I co-chaired nearly a decade ago, and listening to both his comments and those of our friend from Tennessee, this challenge of trying to get our arms around this is considerable, to say the least, and I commend the Chairman and the Ranking Member, as well as Senator McCain in the other body, for trying to make order—we really cannot call it order out of chaos; it is, to a large degree, order out of the unknown.

Mr. Cason, you pointed out, again, historically, the difference in the assessments of Judge Lamberth, going back to the 19th century. A point more recently as you take a look, there is a lot to get our arms around.

Let me take something that is of great importance to a tribe in the Fifth Congressional District of Arizona. I represent the Salt River Pima-Maricopa Indian community as part of what is known as the “Section 122 tribes,” the Tribal Trust Reform Demonstration Project. One of the concerns the tribe has mentioned to me is obtaining some of the funding it is entitled to under this demonstration project. Could you give me an update as to where the Department is with regard to funding the Section 122 tribes?

Mr. CASON. Sure. Congressman, I, personally, meet periodically with the 122 tribes. I think it used to be 139 tribes and 131 tribes before that because it has been going through a succession of appropriations bills and being placed in different sections. But we go through a periodic meeting schedule with the tribes to talk about what is involved in their demonstration project, what sorts of accommodations they want from the Department of the Interior.

The principal core funding that comes to these tribes is in the form of compacts or contracts that they get through our Indian self-determination process, and each of these tribes is given those funds that they are entitled to under self-determination and have been for the last several years and would be under 2006. We also had requirements through those sections to do audits of each of those groups to make sure that they were implementing their programs properly. The OST—Ross could comment on—has done that, and, in large part, we found that they were doing a job that was equally as proficient as what we were doing.

So I think that the process is ongoing and that they are getting the funding to which they are entitled, and we are looking to ensure that there is a good, solid relationship to facilitate and enable their ability to make more decisions for themselves.

Mr. HAYWORTH. So, again, just to make sure I understand, this is being funded through the compacts and contracts commensurate with self-determination.

Mr. CASON. Right.

Mr. HAYWORTH. By and large, the audits are showing a proficiency equal to what is transpiring.

One other question. Gosh, we are always dealing with money up here.

Mr. CASON. It is a problem.

Mr. HAYWORTH. To say the least. How much funding do you anticipate distributing to these tribes?

Mr. CASON. I am sorry. I do not know off the top of my head. I have not added up how much that particular subset of tribes gets. I know, overall, in our appropriations, for instance, for 2006, we are anticipating sending out on the order of \$760 million through compacts and contracts to all tribes that fit there, but I do not know about this particular subset.

Mr. HAYWORTH. And when these Section 122 tribes are, in fact, funded, do you intend this to be a one-time appropriation, recurring appropriation, phased in?

Mr. CASON. The intent of the program is it is basically recurring appropriations, as we do with a wide variety of other tribes that are subject to Indian self-determination compacting and contracting. So each year, we are passing out funds through those programs.

Mr. HAYWORTH. All right, sir. Thank you very much.

Again, Mr. Chairman, Ranking Member, and colleagues on the Committee, it is a challenge, to say the least, putting it euphemistically. I thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Ms. Christensen?

Ms. CHRISTENSEN. Mr. Chairman, I would pass on to my colleague to my left, if that is all right with you, and come back later.

The CHAIRMAN. OK. Mr. Inslee?

Mr. INSLEE. Thank you. There is such a sour history here, I can understand why settlement discussions may be difficult. I am wondering if you can suggest some positive actions to help to increase trust, to the extent that that is possible, on either side. What can the Federal Government and your Department specifically do in the next 90 days that could help restore trust with the claimants that it has not done, even if not compelled by Congress or a court, but that you could take on your own merits?

That is my first question, and, second, what do you think the claimants could do in that same direction that have not been compelled by law or statute?

Mr. CASON. A good question, and one thing I would like to challenge just a little bit is the opening premise about the animosity stuff. Certainly, this is a very difficult issue, and it is very complicated and has been complicated with nine years' worth of history in litigation and 100 years' worth of history of the Federal government implementing our trust. There is certainly lots and lots of rhetoric and lots and lots of real experiences associated with how the trusts have been implemented over time.

What I think we in the Department have attempted to do is to not personalize the issues that are involved and to actually be open and candid and forthright in what we are trying to do and what we think is reasonable under the circumstances, and I would suggest we would continue to do that. But I would also suggest that there is a very wide gap in perception about what is reasonable in this field.

For example, based on the facts that we have collected so far—

Mr. INSLEE. Can I interrupt you just for a second?

Mr. CASON. Yes.

Mr. INSLEE. I usually do not like to interrupt, but—

Mr. CASON. No, go ahead.

Mr. INSLEE.—I really am looking for a positive statement here. When you say there is maybe not emotion on this or anger, I want to tell you there is a lot of anger about this because I am very angry about this. I am very angry that the Federal government treated these people like Enron treated its shareholders for years and decades, in a continued pattern with a people that underwent a lot of this for centuries. And I want to tell you, I am very angry about this, so I do not want you to explain to me why people are not angry about this. I would like you to explain to me what you can do to try to get this off dead center to do more than you have done to date, if there is anything that could possibly get this thing moving forward, and the same thing with the claimants, and if there is nothing, just tell us, and we will just take it from there.

Mr. CASON. OK. Well, I think the reason that we are here is to try to find some amicable solution to this and that we in the Department of the Interior have been active participants, at least in this Administration while I have been involved in the process, active participants in a variety of efforts to try to find solutions to this. Those have not been successful so far, not because of personal rancor but because of the differences of opinion about what is fair and reasonable.

We have gone through a very exhaustive process during the last four years to do historical accounting to actually build the fact set so that we could properly inform Congress and properly inform the Department of Justice, who is managing this litigation, as to what the facts are.

So what I was suggesting to the panel is that we try to divorce personal feelings about it, and I am sorry you are angry about the process. There are lots of people in the process who are angry for a variety of reasons on both sides of the fence, but the anger does not solve any problem, and what we are trying to do is be reasonably dispassionate about what are the facts, what is reasonable under the circumstances, and what can we find common ground on, and that is what we have been doing, what we would continue to do, and that is what our plan would be, to work with the Committee to try to find that common ground.

I would suggest that the Plaintiffs have the same sort of obligation, if we are going to bring it to settlement, because I think there is a reasonable point in the middle somewhere, and what we need to do is define what that reasonable point is in a way that both Congress is willing to settle there and that the Plaintiffs and the Administration are willing to settle there, and that is a big, undefined area that has risk and uncertainty for all parties. We are at the table trying to do that, and we appreciate the fact that the Committee is at the table trying to do that.

Mr. INSLEE. I listened very carefully to what you said, and I failed to hear a single thing suggested that you could do to go in the directions that I requested. Did I miss something?

Mr. CASON. What direction are you requesting?

Mr. INSLEE. Well, I am sorry to go over my time, Mr. Chairman, if you would give me another minute, if that is permissible, thank you.

What I am asking you about is, is there anything you think that your Department could do that you have not done to date to increase the level of trust that exists in the hopes that we can continue this ball rolling and to ask what the claimants could do in that direction? What could you do? What additional thing could you do to increase the trust level of the people on the other side of this dispute?

Mr. CASON. Do you want to comment on that?

Mr. SWIMMER. If I might, I think, as Mr. Cason has stated before, there has been a lot of disagreement in the past about the level of responsibility in this trust and how it has been administered. One of the things that I believe has been lacking in that sense is what I call and we have coined as a "beneficiary focus."

For many, many years, this trust was treated as a program. In the early years, it was treated as the agency, BIA, being the banker on the reservation for individual Indian people, collecting the money, giving them money for their house, for their horse, for whatever it might be, and the ledger is replete with that kind of information.

In more modern times, because of the fractionation issue, it has been extremely difficult to have personal contact with the beneficiaries. It is not unusual to have 200 to 300 or 1,000 owners of an 80-acre or 160-acre parcel of land. So that distance between the manager of the trust and the beneficiary, I think, has caused a lot of the animosity that we see today outside from the accounting issue.

What we have tried to do, certainly in the last three years, is, through a comprehensive study of how this trust is administered to how it should be, how we think it should be, administered, with the help of the beneficiaries, with the help of lay people and lots of resources in the field, to reform the trust and to do it with a sense of a beneficiary focus, setting up, for instance, trust administrators and trust officers.

One of the things the court mentioned in the beginning is that there was no one at the Department of the Interior that had a fiduciary trust background. It is not something you would normally find in a Federal agency unless they were dealing with banking matters or trust matters, as such. What we have done is made it a conscious effort to bring people into this program with a trust background. We made a conscious effort, then, to reach out to beneficiaries by setting up a call center where, not unlike other trust companies, an individual can call, identify themselves, and get information almost immediately on whatever matter it is they want to know about: What is in my account? When was the lease issued? When does the lease expire? When do you expect the oil and gas payments to be made? What about my probate? What is the status?

So we are trying to set up a mechanism where instead of someone walking into an agency and trying to button hole someone to get information and then being routed to a dozen different people, they have a phone number they can call. They have a trust officer whose sole responsibility at that agency is to the beneficiary. That is all they have to do is work with the beneficiaries trying to find, for instance, "whereabouts unknown," as we call them. We have 46,000 people with about \$60 million in their accounts, and we

cannot locate them. We are making a conscious effort, an extremely strong effort, with tribes, with relatives, with newspapers, with the Internet, any way we can, to locate those people to get that money out there.

We have made many adjustments in the way that the trust is operated itself in bringing new software in, coordinating systems, bringing the title systems current, working on getting probates brought up to date, bringing a state-of-the-art accounting system so that when a person receives their quarterly statement, they know what they own, they know what came in on their income, and they know what went out on their income.

So those are the kinds of things that we are trying to do now with the beneficiaries to make a difference, and that is all in addition, really, to the lawsuit issue over the accounting, and the accounting is to go back and, of course, provide them with a history of what they have received in the past. But going forward, it is the beneficiary focus, I think, that is going to make a difference in how the relationship works between the individual Indian beneficiary in the field and the Department of the Interior.

Mr. INSLEE. Thanks for your courtesy, Mr. Chair.

The CHAIRMAN. Ms. Drake?

Ms. DRAKE. Thank you, Mr. Chairman. Certainly, as a new Member of Congress, I have not heard this every extended debate on this issue, and as a representative from Virginia where we do not have federally recognized tribes or Indian lands, my first question, sitting here, that I really do not want you to answer is, how in the world did we ever get here?

I thought it was interesting, Mr. Cason, when you talked about defining the inherent obligation, since there was no instruction from Congress, I would think that you would have an absolute obligation to account for someone else's money, whether it is something that is very informal like helping a relative or something that is very formal with the Federal government managing people's money.

So all that said, I have two questions, and the first is, are we continuing to have problems from 1994 on, or is everything that we are talking about now 1994 and before?

And the second question is, you have explained that you have found very little error in what you have looked at so far, yet this has been in court for nine years. You mentioned \$176 billion in a claim and a proposed settlement of \$27.5 billion. Have you or someone in the Department reviewed why do they think this amount of money is owed, and why do you think it is not, and what is going on in between that the Department would think this is probably not a lot of error, yet there are people who receive the money who think there is, obviously, a very glaring error. So those are my two questions.

Mr. CASON. Good questions. As you said, I won't explain the history because it is long and complicated.

Regarding the \$176 billion and why the Plaintiffs think that is owed, they are going to be up next, so I would suggest that you just ask them to explain.

Ms. DRAKE. I think that is where Mr. Inslee is coming from. I mean, obviously, if someone thinks you owe them \$176 billion, I

would have hoped you would have gone to look and say, is there any reason for this? If someone told me I owed them a month's rent that I had not paid them, I would go see if I made that payment, and did they not get my check.

Mr. CASON. Yes.

Ms. DRAKE. So, to me, if you are not willing to look at that question—

Mr. CASON. Well, that is exactly what we have been looking at.

Ms. DRAKE. You have looked at it. We will get them to explain why they think they owe so much.

Mr. CASON. Good.

Ms. DRAKE.—but, I guess, my question is, I would think, if I were in that department, and someone thought I owed that amount of money, and I do not think I owed it, I would at least have an explanation why I thought there was a discrepancy in the two numbers.

Mr. CASON. Yes. That is fine, and that is exactly what the historical accounting process is all about. There is an assertion that the funds that have come into the Department have not been accurately managed. There is an assertion that opening balances of all of the accounts that we currently have on the books does not reflect an accurate opening balance.

The historical accounting process is basically designed to go back and take a look at the transactions that have occurred in those accounts to see if that opening balance carried on from 1994 represents an accurate opening balance. So what we have is an assertion that there is not accuracy, that the funds have been mistreated over time. What we are doing in the historical accounting process is basically going account by account looking backwards and saying, "Well, tell me about the transactions that have occurred in this account." It is a fairly complicated process in that when you take an account by account, you find an opening balance, you find all of the transactions that occurred in that account, both incoming checks and outgoing checks, and you go to an ending balance, just like your bank statement. So that is basically what we are going through.

Our assessment of the \$176 billion issue is it is entirely specious, that the assumption, as we understand it, is that the assertion is that \$13 billion came in, never a penny was paid out, and then you put compound interest on it for 100 years, and that is how you get the \$176 billion. I think that completely is inconsistent with the facts. But the assertion is there, and it is my understanding of the \$27.5 billion is instead of assuming that 100 percent of the money did not go out, you just assume that 20 percent of the money did not go out, and then you add compound interest on that, and that is how you get the \$27.5 billion.

What we are trying to do is get beyond the rhetoric and get to actual accounting facts. On an account-by-account basis, what are the facts about this account? Are there errors in this account? Does the ending balance represent what should be in the account? And in large part, what we have found is the answer is yes, so far. We have not done all of the accounting. It is possible that as we go further and further back in time, we will find some issue of fraud or find some issue where the accounting system was not working

properly, but so far, after \$100 million worth of accounting, we have not found that. We found a few random errors.

Ms. DRAKE. How about the 1994 question? That should be easier. Are there still problems alleged, 1994 on, or is this all before 1994, other than the account balance in 1994?

Mr. CASON. Yes. The way I would answer that is, since 1994, we use that as how we define the class of who we would do the accounting for, and we basically, in our plan, said we would account for anybody that had an open account from 1994 forward. In terms of the accounting process, we were using electronic means to account 1994 and after, and we have actually converted about 1999 into a new system called SEI, and they do a lot of the trust accounting in the country, and we use their system from 1999 forward.

So it is arguable whether there was any issue between 1994 and 1999. We have not found any material issue there, but it is arguable. Since about the year 1999-2000, we have been putting out periodic quarterly statements to people, and we have balanced the accounts down to the penny every day. So we think that there is no issue there at all.

The CHAIRMAN. Mr. Udall?

Mr. TOM UDALL. Thank you, Mr. Chairman.

Secretary Cason, in the course of this case, the judge made a ruling that shut down your computer system, and you were unable to pay many people, and many out in my district were hurt by that. Has that been completely resolved now? Is that system up and running and people getting paid?

Mr. CASON. Yes, at the moment. The issue is not completely resolved. We just finished a 59-day, evidentiary trial in the district court. The district court judge issued a decision on that. We appealed. The decision was basically an order for us to disconnect from the Internet and the Intranet any computer that housed or provided access to individual trust data. We asked for a stay from the court, and within about 18 hours got an administrative stay from the Court of Appeals. It is being briefed right now in terms of getting a permanent stay, and the appeal documents are being filed now.

So the issue is not completely resolved at this point. We are up and running right now. We are able, with the administrative stay, to keep our computer systems up and collect the information necessary to actually make payments to Indians, and we are doing that right now was a routine part of business, but the issue itself has not been resolved.

Mr. TOM UDALL. But as far as you know, the Indians are being paid—

Mr. CASON. Yes.

Mr. TOM UDALL.—on their accounts, and there is not anybody that is not being paid.

Mr. CASON. Not that I am aware of, no.

Mr. TOM UDALL. OK. Because that was a situation where many people, as you probably know, were living on those checks on a monthly basis, and it is very, very important to them and their families and their livelihood and all of that, so we appreciate you getting it up and running.

Has the Department or you taken a position on terminating the trust?

Mr. CASON. Are you talking about on individuals or overall?

Mr. TOM UDALL. Yes.

Mr. CASON. I think there is a pretty consistent opinion within the Department of the Interior that no one is talking about terminating the trust. There is a lot of discussion, Congressman, about the character of the trust, that there are elements of this trust that do not make any sense, and we would sure like to work with Congress and continue to work with Congress to try to amend some of those. And what I mean by that is we have a terrible problem with fractionation, that individual Indian allotments that passed on over time are passed down on divided interests, and we have circumstances where we have individual allotments that have more than 1,000 owners on them. So no one ends up with real beneficial use, and the property gets devalued as a result of having multiple owners. So we would like to have a better way of consolidating those interests together so that some Indian individual would be able to have beneficial use of their property.

Ross has circumstances where he has thousands of accounts that have less than a dollar in them that we end up having to pay an administrative fee to keep track of in trust on an amount that is less than a dollar, for thousands of accounts. That does not make any sense. In the banking world, you would close those out through administrative fees.

So there are certain elements of the trust that do not make a lot of sense in terms of trying to produce a dollar's worth of benefit for a dollar's worth of invested appropriations, and we would like to see if there is some way that we can address some of those. But it is not a repudiation of the trust that we are really talking about; it is more of how can we ensure that we spend money wisely to actually produce material benefits where we do it?

Mr. TOM UDALL. Congressman Inslee asked the question about settlement and how you were moving forward on settlement.

Mr. CASON. Yes.

Mr. TOM UDALL. Is it your sense that in the next six months or a year, you would be able to bring to us a proposal with regard to settlement, something that will give us something to work on and to bite into on this? Are those kinds of discussions going on?

Mr. CASON. The discussions certainly have been going on for quite a while, and it is our intent to work with this Committee and the Senate counterparts, Senators McCain and Dorgan, to see if there is some way we can actually define a common ground for settlement. We need to develop together some sort of paradigm of how you would actually construct a number and how you would construct a payout from that number to get it down to the individuals that feel like they are aggrieved in the process.

We stand ready to do everything that we can to help with that. We have been exploring it for a long time. We have proffered different methodologies that could be used to approach developing a number and a settlement, but so far, we have not found one that has actually gained traction where everybody says, "Oh, yeah. That is the right way."

So we plan to work with this Committee in looking at all of the options that the Committee would like to explore. We certainly have ideas on it, and we would like to share those as well.

Mr. TOM UDALL. Thank you, and if you come up with something, we would like to work with you on it.

Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Herseth?

Ms. HERSETH. Thank you, Chairman Pombo and Ranking Member Rahall, for the opportunity to discuss the Indian Trust Reform Act of 2005. This is obviously an issue of great importance for communities within South Dakota and the entire region. Roughly one-third of the individual Indian money account holders reside throughout the Great Plains region.

I want to talk through a little bit with you about grappling with this problem of fractionation.

Mr. CASON. Yes.

Ms. HERSETH. Chairman Pombo had a hearing—I believe it was either early this year or at the end of last year in which one of my constituents, Charlie Pallone, testified about this problem in particular, and then, in July, this Committee held a joint hearing with the House Financial Services Committee on improving land-grant title procedures for Native Americans, and Mr. Arch Wells, acting director of the Office of Trust Services, testified about DOI's efforts to modernize and improve its trust records.

Now, in particular, he referred to an effort to clean up data used to process title status requests in the trust asset and accounting management system. Can you tell me this morning how close this project is to completion, Mr. Cason?

Mr. CASON. Well, we have a plan that we are operating against right now that it is our hope to get all of our title records up to date in the computer system by November 30, 2007. There is a substantial amount of backlogged information that has not been put in the computer systems, and as Arch probably explained to you, we have gone through a process here recently during the last four years of moving from the legacy system, the Land Record Information System, to a new system called TAMS, and we have converted all of the software. It is available to all of our regions now, so that has been done. The data base has been converted over from ELWES to TAMS, so that is done. What we are doing right now is basically all of the records that have not been entered into either system that is backlogged right now; we have a plan for bringing all of that up to date, and the due date is November of 2007.

Ms. HERSETH. And at this stage, do you feel you have adequate funding to fully implement the system?

Mr. CASON. That is a good question. We are hopeful that the resources we have available and that we would anticipate as part of the 2007 budget would be adequate to get the job done. We are actually partnering with OST and BIA together to utilize funds in both houses to make sure that we get the resources on the ground to do the job, and we are hopeful that those resources will be adequate.

Ms. HERSETH. And do you have any concerns that the personnel dedicated to the conversion and implementing the plan fully take

away from the office's ability to do the accounting under the process that you have set forth?

Mr. CASON. Well, I would say yes and no. I am sorry to be ambiguous. We do have an issue, and that is our land title records office is a nexus point for a number of efforts that we have ongoing. One of those efforts is getting all of the information into our TAMS system so that it is current. Part of it is our probate process where we need to get records from them to conduct probates, and we have four or five different efforts like that that all have a nexus point, the LTROs. It is one of the things that we are watching very closely to make sure that we do not overwhelm the system at that nexus point, and if we are getting to that point, we will be looking fairly routinely at adding more resources or prioritizing the workload so we can get the most important stuff done within that organization.

Ms. HERSETH. OK. I appreciate your responses. It is an issue of particular concern, so I will be working with you to monitor the progress.

If I could just switch gear with another question, I think you replied to a question from Mr. Kildee that under the accounting process that DOI prefers that would cost roughly the \$335 million, you are looking at accounts after 1994, and so you would be analyzing approximately 275,000 to 300,000 accounts.

Mr. CASON. Yes.

Ms. HERSETH. How many individual Indian money accounts does the Department manage overall?

Mr. CASON. That would include all that we manage right now, so if you pick \$300,000, it includes all of the ones that we do right now. Those would be part of the process, and then the differentiation is we are considering the historical accounting period to be those accounts that were open in the year 2000 plus all of the ones that had been opened as of 1994 and closed prior to 2000. Those are in the historical accounting period. Then we have a current accounting process that does all of the ones that were open after 2000, and all of those individuals get a quarterly statement routinely.

Ms. HERSETH. May I follow up with one more question, Mr. Chairman?

I will seek a little bit further clarification from you on that. As you described the differences between the accounting process that Judge Lamberth set forth that I understand, on appeal, questions have been raised, but then as you described the differences from that process versus DOI's process, the \$335 million, talking about the differences, did DOI ever consider a more expensive accounting procedure? In other words, when you decided upon the one that you would prefer, did DOI examine, say, three or five alternatives and estimate what they would cost, and where did the \$335 million accounting process fall in that category? I am just wondering the breadth of DOI's evaluation, dealing with various factors that would be fair to the Plaintiffs as well as the costs to DOI.

Mr. CASON. Yes, we did. If you would like, I will get you a copy of the plan that we submitted to the Court because part of what we looked at is what were the relative variables associated with an accounting, and it had variables for whom do you an accounting,

over what time do you do an accounting, how much information you would need to constitute an accounting? Do you look at land as well as cash or cash only? So there were a number of variables that we looked at, and the considerations that we built into that process were things like how much will it cost, how long will it take to reach a conclusion, what is the relative level of accuracy that would be the output of this product or process?

So we looked at those variables in line with the variables of what would constitute an accounting and drew a conclusion about what we thought was the most productive way to go about this between cost and time and accuracy, and that is where we ended up with the plan that we have. Clearly, it is subject to debate. Other people who look at that have other opinions about how it ought to be done, but that is what we were trying to get to is a point of reasonable accuracy with reasonable time and reasonable cost to provide an assurance that the accounting system either was working reasonably well, or there were systemic flaws, and we needed to do a much broader, grander effort. So that is how we got to where we were.

Ms. HERSETH. And the process is the last expensive, the one that you—

Mr. CASON. No. I would not say it is the least expensive. Certainly, you could find an accounting that would cost less than \$335 million, but it was one that we thought was a reasonable plan under the circumstances. And part of it is right now the balance for individual accounts as of that 2000 time period was \$400 million, so what we were proffering as a plan cost \$335 million to assure that the opening balance of \$400 million was reasonably representative of what should have been there.

So, at some point, when we are introducing the cost element into it, you go, there is a balance of \$400 million. How much do you want to spend on ensuring that \$400 million is an accurate representation of what should have been there?

Ms. HERSETH. I appreciate it, and, Mr. Chairman, thank you for extending additional time. I will look forward to seeing the document you submitted to the Court, as well as what Mr. Rahall had requested in terms of putting together an assessment of different error rates and different programs and processes. So, Mr. Chairman, thank you.

The CHAIRMAN. Thank you. I want to thank the witness for the testimony. Members of the Committee may have additional questions. Those will be submitted to you in writing, if you can answer those in writing so that they can be included as part of the hearing record. I know several Members have asked you for additional information. I am sure other Members will have additional questions as well.

Mr. CASON. That is fine, Mr. Chairman. Thank you for the opportunity to be here.

The CHAIRMAN. Thank you very much.

I would like to now call up our second witness. Welcome, Elouise Cobell, a Blackfeet Indian from Montana and the lead Plaintiff in the Cobell v. Norton litigation. She is accompanied today by Keith Harper of the Native American Rights Fund and a member of her legal team in this litigation.

Ms. Cobell, welcome back to the Committee. Although I think we are all happy to see you today, I wish we were not and that it was over with, but it is nice to have you come back. Thank you again for giving us your time to be here. Again, I will remind you that your entire statement will be included in the record. If you could limit your oral testimony to five minutes, it will help us move along. So thank you, and when you are ready, you can begin.

STATEMENT OF ELOUISE COBELL, BLACKFEET RESERVATION DEVELOPMENT FUND, BROWNING, MONTANA; ACCOMPANIED BY KEITH HARPER, ATTORNEY FOR THE NATIVE AMERICAN RIGHTS FUND

Ms. COBELL. Good morning and thank you for those statements, Chairman Pombo and Ranking Member Rahall and distinguished members of this Committee. First, let me say how much I appreciate the work you and your staff have done on this important issue. I welcome your continued involvement and leadership. We join with you in the hopes that this will point the way toward a resolution of this, thus far, intractable problem.

I know that I am not telling you anything new when I say that the mismanagement of individual Indian trusts has been one of the biggest injustices ever perpetrated by the representatives of our government. Study after study by Congress itself, the GAO, and many others, as well as now nearly 10 years of judicial findings and opinions in both district and appellate courts, confirm that the injustice is pervasive, longstanding, and continuing and that the financial loss to hundreds of thousands of Native Americans has been incredibly large.

Let me read you just one statement. Secretary Norton has admitted and urged the court to adopt the undisputed facts in this statement: "Indian trust data is wholly unreliable and utterly useless as an accurate measurement of anything except to confirm the manifest negligence and malfeasance inherent in Indian trust management." I would like to just read that one more time. "Indian trust data is wholly unreliable and utterly useless as an accurate measurement of anything except to confirm the manifest negligence and malfeasance inherent in Indian trust management."

For the record, I have submitted a list of just some of these studies and reports that confirm the magnitude of this problem. I hope you agree with me that this is the time; study and reflection is well in the past. It is time to do something. You are well-acquainted with this injustice, and we applaud you for moving to try to do something constructive about it. I hope you share my frustration that the United States government has not been similarly constructive.

In thinking about how to settle this case, we must bear in mind certain salient considerations. First, it is the government that has caused this problem. In a fit of paternalism, they imposed this trust on us. They mismanaged our assets. They lost billions of dollars. Our only role was to suffer the consequences of their mistakes. The Cobell case is about saying no longer will we tolerate this abuse.

Second, we must always bear in mind that this is our money, and this is our land. This is not a Federal handout. This is not a

Federal program. We are asking for a full accounting of our money and restitution of any of it that is missing. Over 500,000 Indians have had their assets mismanaged. In the total amount of financial loss and the total number of victims, this scandal dwarfs all of the corporate misdeeds we have heard so much about. Enron, WorldCom, and others are petty crimes in comparison.

Third, settlement is entirely possible. There is an impediment to settlement: the Departments of Justice and Interior. We have participated in complete good faith. They have not. Consider this: This Committee and the Senate Indian Affairs Committee, early in 2005, requested that Indian Country work together to develop a comprehensive plan to resolve this case. We did exactly that. In a united effort, we worked closely with leaders throughout Indian Country. The product was a detailed set of 50 principles with specific explanations for why each is important.

Then Senators McCain and Dorgan introduced their settlement bill. We continued to work in good faith. We provided specifics on what we liked and what we needed to be revised. We have engaged the Senate and presented detailed comments on its draft. We regularly met with the staff. We have come forward with proposed settlement numbers.

The government's response to your effort stands in stark contrast. Oh, they certainly pay lip service to cooperating, but what proposals have they put on the table? They have never said, not once, what they believe specific terms and their acceptable settlement amounts. They have refused to take a position on the bill.

Members of the Committee, if you wish to exert leadership, you must call the government to account. Do not allow their foot dragging to continue. Call them to task. Demand that they participate in the legislative process. Demand that they inform you of the specific contours of a settlement they will support. If there is hope for a legislative settlement, they must no longer be allowed to simply sit back and say no to all settlement offers without members of this Committee denouncing their objections. If not, a legislative settlement will never occur.

Use your influence to raise the profile of this issue to call their continued delays what they are, a continuing slap in the face to Indians and to innate sense of justice of all Americans. That magnifies the underlying wrongdoing. By failing to acknowledge the problems and refusing to work to resolve it, government officials continue the more than century-old tradition of kicking the problem to the future as victims die off. Meanwhile, beneficiaries who have been mistreated their entire lives do not see a resolution as even possible in their lifetime. Many have given up hope after so many false starts.

As you proceed, I cannot, in good conscience, fail to remind you that the government's behavior in this matter has gone well beyond delay and obstruction. It includes a sad history of misrepresentation and deceit. That sorry record includes a glossy progress report put out this summer that is deceptive, misleading, and inaccurate from beginning to end. Sworn testimony before the courts and Congress and, more recently, a complete misrepresentation of the Cobell XVII decision; after 10 years of litigation, we have been forced to the sad conclusion that the word of the government

officials is not trusted. The government has seized on some language in Cobell XVII that is not relevant to the issue at hand, and, more importantly, not controlling in this case.

They will not tell you about something called “the first-in-time rule.” This rule, a very basic rule in the D.C. Circuit and virtually all other circuits, says that when there is discrepancy between the language of appellate panels, the first in time controls. The rule makes clear that Cobell VI, Cobell XII, and Cobell XIII remain the controlling law in this case and that the words that the government has so fondly seized upon and that we heard so much from Mr. Cason are not important. This is a legal matter I have covered more thoroughly in my written testimony. More importantly, it would be a serious mistake for the members of this Committee or anyone else to be persuaded by government officials who have been repeatedly cited by the courts for misrepresenting judicial decisions that anything in Cobell XVII lessens by one penny the government’s huge liability in this case.

I want to talk about H.R. 4322 as a starting point. We are encouraged that you have said that H.R. 4322 is a starting point and a placeholder and that dialog, discussion, and negotiations are encouraged. I hope that we will be able to begin a constructive dialog with this Committee similar to the one we have engaged in with Senator McCain and Senator Dorgan.

I believe there are some critical shortcomings to the bill as presently drafted. There are two sources of guidance that should inform any appropriate legislative settlement: first, the 50 Principles for Settlement, which present a consensus roadmap to resolution from Indian Country; second, the decision that the courts have issued in Cobell litigation over the past nine and a half years, which must be honored. We believe the bills should better reflect the ideas and legal concepts encapsulated in these two sources. We appreciate that you are actively soliciting our input on the bill.

With that in mind, we offer a number of additional specific comments on the bill in our written testimony. I would like to highlight three of the most important. The Treasury Department should not be in charge of the settlement funds. It is one of the historic wrongdoers in the case, and putting it in charge of the settlement is like letting the fox guard the hen house. Treasury is not only a Defendant but has also been held in contempt of court for violating court orders. Moreover, it has routinely and intentionally destroyed trust records to hide its malfeasance. In one documented instance, the Treasury Department destroyed 162 boxes, untold millions of pages of irreplaceable data. Simply put, it cannot be trusted any longer and should not be involved in any way with the distribution of funds.

The courts have the greatest institutional competence to make distributions in a fair manner and are the appropriate institution to do so. Importantly, the Indian Land Working Group, the largest national association of allottee groups, has specifically said that they do not want Treasury involved. As we do, they have endorsed the Federal courts as the appropriate body to handle any distribution.

The Cobell case is far more than the past mismanagement. It is also about the trust lands and monies of Indian people and how it

will be managed in the future. Quite obviously, a settlement of this case requires cessation of the persistent and continuing wrongdoing; in other words, a real trust reform.

My written submission has detailed what we believe it must include. The settlement that Native American leaders proposed is a good deal, especially for taxpayers. The proposed amount of \$27.5 billion is a large number, but large crimes incur large consequences. Moreover, it is a bargain for a government that has acknowledged its responsibility for a 118-year-old mess.

First, it would resolve a dispute that Members of Congress have said has run too long and cost too much. It is estimated that the government alone has spent more than \$100 million on this lawsuit. Those expenses grow every single day. The government's liability is growing. The courts have declared that Indian trust beneficiaries are entitled to both the principal amounts that should have been recorded in their accounts plus compounded interest. A fundamental principle of trust law confirmed by the Court of Appeals is that the government is liable for any funds that it cannot prove with appropriate and competent evidence that it paid to the beneficiaries.

Since both sides agree that the government should have paid roughly \$13 billion into the individual Indian trusts since 1887, that means that the government must be able to prove each of those transactions. Any amount not proven to have been paid plus interest is what is owed. This puts potential liability of the Federal government well in excess of \$100 billion.

The historical accounting will continue to be costly. The Interior Department is now telling you that it will cost at least \$12 billion to try to reconstruct those records. That is far too expensive for an accounting. Well before the Court of Appeals reached that conclusion, we were saying that in court.

A 2002 study conducted by the Interior Department and made public in our lawsuit places the liability for the government on trust accounts at anywhere between \$10 billion and \$40 billion. These are the government's own experts. That is why Indian Country's \$27.5 billion proposal is a bargain. I would argue that it is far better for the taxpayers to be spending this money directly on giving Indian account holders what is rightfully theirs than wasting money on what we and the courts regard as a highly questionable accounting and delaying exercise.

We have put out a settlement number in good faith for all to see. We encourage the government and the Congress to do the same.

On a final note, the Court of Appeals recently remanded the case of the district court, as we had requested. The court made clear that the district court was well within its authority to hold a trial on whether it is impossible for the government to perform an accounting required by law. We will now proceed to ask for an evidentiary hearing on the impossibility of doing an accounting. We believe that this will lead to a more expedited resolution than we had previously expected.

Make no mistake about it: We think a settlement will be good for everyone, but if this process of looking for a just settlement fails, we will continue the litigation, and we will expect to win and

prevail. Any statements to the contrary by the government are nothing more than wishful thinking.

Finally, I would like to say that I do not just speak for myself; I speak for a class of 500,000 victims of this travesty. The largest allottee group, the Indian Land Working Group, specifically endorses the decisions I have made and trusts my judgment and that of my team. I have attached the Indian Land Working Group's recent resolution of support to the written submission, and I ask that it be made part of the record. I also ask that my total written statement be made part of the record at this time.

I would like to thank you very much for your leadership on this important issue, and we look forward to working with you in the coming weeks. Thank you.

[The prepared statement of Ms. Cobell follows:]

**Statement of Elouise C. Cobell,
Lead Plaintiff in Cobell v. Norton**

The Trust Debacle has Gone on for Too Long

Good morning, Chairman Pombo, Ranking Member Rahall, and distinguished Members of the Committee on Resources. First, let me say how much I appreciate the work you and your staffs have done on this important issue. I welcome your continued involvement and leadership. We join with you in the hopes that this will point the way towards a resolution of this, thus far intractable, problem.

The mismanagement of the Individual Indian Trusts has been one of the biggest injustices ever perpetrated by representatives of our government. As the Court of Appeals has said, "the trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long." Study after study by the Congress itself, the GAO, and now nearly ten years of judicial findings and opinions in both the district and appellate courts confirm that the injustice is pervasive, longstanding, and continuing—and the financial loss to hundreds of thousands of Native Americans has been incredibly large. For the record, I'd like to submit a list of just some of these studies and reports that confirm the magnitude of this problem. (See Appendix A.) It truly is amazing how many times and for how many years there has been a recognition of this massive problem, going back to the very inception of the Trust, in 1887. "Fraud, corruption and institutional incompetence almost beyond the possibility of comprehension" is how one bipartisan report characterized it. I hope you agree with me that the time for study and reflection is well past. It is time to do something about it. You and your staffs are well acquainted with this injustice, and we applaud you for moving to try to do something constructive about it. I hope you share my frustration that the U.S. Government has not similarly been constructive.

Quite the contrary. The U.S. Government is responsible for this outrage. Lands and resources—in many cases the only source of income for some of our nation's poorest and most vulnerable citizens—have been grossly mismanaged. The Government forced this trust on Indian peoples in 1887 because it thought it knew better than we how to manage our own property. Adding injury to insult, the Government then completely failed to faithfully discharge even the most basic trust responsibilities. A couple of examples are helpful. Although since the late 1970s, reports from all corners—including internal auditors—have stated that a lack of an accounts receivable system is an intolerable material weakness, even now, decades later, Interior has not even instituted this most basic reform. Further, they cannot tell beneficiaries how much they have in their accounts. Indeed, they cannot even produce an accurate list of beneficiaries. The Government itself is responsible for bringing us to this sorry state by failing to maintain and even destroying records. What is even worse, government now utilizes every possible mechanism of bureaucratic and legalistic delay, obfuscation and misrepresentation to prevent the wrong it did from being made right. This is shocking behavior, and as long as we work on this issue, none of us should ever lose sight of that fact. It is one thing to look at the sorry state of the trust and think that this is a wrong from the past. It is quite another to see that the wrong persists up to the present day and is magnified and perpetuated by the government's continued failure to do the right thing.

If you went to your personal bank to ask how much you had in your account, and the bank could not tell you how much money you had, what interest you were owed,

what would you do? How would you feel? And if you were to find that the bank itself had deliberately destroyed the records of your account and continued to destroy your records even after you had asked for an accounting, and if your bank then tried to duck responsibility because of lack of records, what would you do? That's just what has happened for over a hundred years. We have come to the courts and to you, our elected representatives, to seek justice.

Over 500,000 Indians have had their assets mismanaged. In total amount of funds mismanaged, this scandal—and let's call this what it is—a scandal—dwarfs all of the corporate misdeeds we've heard so much about. Enron, WorldCom, and others in the headlines are truly petty crimes next to the magnitude of this century-long and continuing injustice.

Yet the Government has not been constructive at all in trying to find a fair and final resolution. Time after time in the litigation, they have proven to be obstinate, difficult, and foot-dragging. But don't take my word for it—the Court of Appeals has criticized:

[the] “record of agency recalcitrance and resistance to the fulfillment of its legal duties” and “intransigent” conduct. *Cobell v. Norton*, 391 F.3d 251, 255, 257 (D.C. Cir. 2004).

Time and again, both the district court and the appellate court have called out the government for its bad behavior. When anyone complains that this process has gone on too long and been too complex, they have only to look at these unfortunate tactics pursued by the Government in this case to see why this has been so.

A mediator was appointed to try to find common ground and work toward a settlement of this case. Our side worked in good faith with the mediator for a year and a half. In that time, the Government did not make one proposal for resolving the case. Not one: not even a counter-offer. Ultimately, the mediation process collapsed under the weight of the Government's arrogance and intransigence.

Now, as committees of jurisdiction in both houses of Congress have taken up the matter, the Government is still actively countering progress. We have done our part in furthering this legislative settlement effort. We worked with Indian Country to develop 50 Principles for settling the case—including specifics on the amount of a fair resolution. After the settlement bill was introduced in the Senate, our side continued in good faith. We made clear what we agreed with as well as our concerns. We came to the table to negotiate and discuss. We have heard nothing from the Government that suggests it will approach this process any more constructively than it has approached the litigation and mediation. They have not provided any specific suggestions whatsoever. They have yet to say specifically what a fair number for resolving the historical accounting is or what they believe is an acceptable amount. In short, they have taken no position and offered no guidance.

Members of the Committee, if you wish to exert leadership in bringing this terrible injustice to an end, you must call the Government to account. Do not allow their foot-dragging to continue. Call them to task. Demand that they participate in the legislative process. Demand that they inform you of the specific contours of a settlement they will support. If there is hope for a legislative settlement, they should no longer be allowed to simply sit back and say “no” to all settlement offers without members of this committee denouncing their recalcitrance. If not, a legislative settlement will never occur. Use your influence to raise the profile of this issue to call their continued intransigence what it is—a continuing slap in the face to Indians that magnifies the underlying wrongdoing. For by failing to acknowledge the problem and working to resolve it, they continue the more than a century old tradition of kicking the problem to the future with no justice for anyone in sight. Meanwhile, beneficiaries who have been mistreated their entire lives do not see a resolution as even possible in their lifetimes. Many have given up hope after so many false starts in the past.

H.R. 4322 is a Starting Point, But More Work is Needed

We are encouraged that you have said that H.R. 4322 is a starting point and a placeholder and that dialogue, discussion and negotiation are encouraged and welcomed. We have been engaging in a very constructive dialogue with Sen. McCain and Ranking Member Morgan on their bill, and we look forward to a similarly constructive process with you, Chairman Pombo and Ranking Member Rahall.

We are encouraged by some aspects of this preliminary bill. The fact that any settlement would be paid out of the Claims Judgment Fund is indeed necessary so that fixing this problem will not diminish the Interior Department's budget. This would further punish the victims by reducing funding for vital Indian programs.

We are also encouraged that the bill recognizes that the settlement amount must range in the billions of dollars, although we also believe it is time for those in Congress to put forward a specific proposed settlement amount.

Further, since any settlement would be a return of the victims' own money, we are pleased that the bill insures that beneficiaries will not be disqualified from any other benefit for which they are eligible and that it will not be treated as taxable income.

However, I believe there are some critical shortcomings to the bill as presently drafted. There are two sources of guidance that should inform any appropriate legislative settlement. First, the 50 Principles for Settlement which present a consensus roadmap to resolution from Indian Country.

The 50 Principles for Settlement represent an unprecedented coming together of Indian Country at the request of both the leadership of this Committee and the Senate Indian Affairs Committee to offer guidance. The result was an extraordinary product that set out detailed principles and the rationale for each Principle. No longer can it be said that Indian Country does not—in the main—agree on the proper approach to fixing this century of malfeasance and mismanagement. To the extent that a resolution followed the roadmap set out by the owners of the land and assets in question, it would be a success.

We are disappointed that the vast majority of the Principles have not, at this point, been included in this bill and request that you take another look at this historic document and the ideas it puts forward.

The second source of guidance for an appropriate settlement is the rulings in the Cobell case itself. Plaintiffs have waged a long and hard battle against difficult odds, and have achieved a remarkable record of success. The plaintiffs cannot accept a settlement that fails to honor the many victories won at the District Court and the United States Court of Appeals.

We appreciate that you are actively soliciting our input on the bill before us. Candidly, we believe the bill needs a lot of work. We are heartened by your commitment to this process and also by your comments that this bill is intended to mark a starting point on a possible road to resolution. With that in mind, we offer these specific comments on the bill. These are not intended nor should they be construed as a comprehensive list of the areas of concern. But these are the areas of greatest concern and require serious consideration and modification.

Any Settlement Should not be Overseen by One of the Wrongdoers

One of the most disturbing aspects of H.R. 4322 is the placing of the Secretary of Treasury—a defendant in the Cobell lawsuit and one of the parties principally responsible for the historic and continuing victimization of Indian trust beneficiaries—as the person in charge of the settlement funds. While it is certainly true that the Treasury Department is better than the Interior Department as far as failed trustee-delegates, frankly, that is not saying much. The Treasury Department has been Interior's partner in crime for far too long. It has been found in breach of trust. It has failed to reform. Is it reasonable, given the history of this case, to ask trust beneficiaries to accept their victimizer as the entity to provide for a fair distribution? Of course not.

To make matters worse, the Department of Treasury has had a record of bad faith in the Cobell litigation. In February 1999, after a three week trial, the Secretary of Treasury along with the Secretary of Interior was held in contempt of Court for flouting Court orders, orders that they had consented to. See *Cobell v. Babbitt*, 37 F.Supp.2d 6 (D.D.C. Feb 22, 1999). Adding insult to injury, the plaintiffs and the district court learned months afterwards than during the contempt trial itself, Treasury Department employees, in violation of court orders and in contradiction of representations made to the Court, destroyed 162 boxes of disbursement related documents—including untold numbers of IIM account related information. Treasury Department lawyers waited over three months to report the destruction to the Court. See, e.g., *Cobell v. Babbitt*, 91 F.Supp.2d 1, 60 (D.D.C. Dec 21, 1999) (determining that the destruction of the 162 boxes and the government's failure to report the incident "misconduct").

Simply put, the Treasury Department has a record of cover-up, malfeasance, breach of trust, lack of candor with the Courts, spoliation of evidence and contempt of Court. The suggestion that any settlement fund be handled by such an entity cannot be acceptable to the beneficiary class.

I routinely go out to Indian Country to speak with members of the beneficiary class. Virtually every time, I am asked whether we will agree to have the government—meaning the Executive Branch—handle the monies when we prevail. Always, I promise, we will never agree to that to cheers from the allottees I speak with. I can say with confidence that an Executive Branch entity will not be acceptable to the beneficiary class.

Equally infirm is the appointed Special Master who answers to the Administration. Bear in mind that Indian Country has considerable experience with

this Administration appointing individuals that are to serve a salutary function on behalf of the Indian Trust. Take by way of example the experience with the 1994 Indian Trust Fund Reform Act.

Mr. Chairman, I along with many other Indians sought for nearly a decade legislation to remediate the government's failure as trustee for our assets. We worked hand-in-hand with both the Houses—in particular, Representative Mike Synar and his distinguished colleague Bill Clinger and the Senate. Finally, in October of 1994, the Trust Reform Act was enacted. One of the core aspects of the law was to establish the Office of the Special Trustee. Indian Country representatives wanted the Special Trustee to be independent. But the Interior Department vigorously objected to that. So the Act was watered down and the Special Trustee reported to the Secretary of Interior. That was the first problem—inadequate independence. One of the principal rationales for supporting the establishment of the OST was to get proper direction and guidance in the management from individuals with considerable applicable reform and trust experience. Also, it was to keep people who did not know what they were doing—like Ross Swimmer who was so disastrous as Assistant Secretary for Indian Affairs for beneficiaries—as far away from our money as possible.

Then to my utter dismay, in 2003, Secretary Norton fired then Special Trustee Thomas Slonaker and replaced him with none other than Ross Swimmer. Imagine all our hard work just to have our trust, our assets, and trust reform put in the hands of a person universally recognized by Indian Country as hostile to Indian interest and a failed trustee-delegate. That, of course, is not the only example. After all, Jim Cason as we speak is acting as Assistant Secretary for Indian Affairs.

It is with these considerations in mind that we analyze whether it makes sense to work hard for nearly a decade to get a settlement and then have the settlement put under the control of a person appointed by an Administration that has put Mr. Swimmer in charge of trust reform. Under what rationale would that make sense to us? I struggle to comprehend why anyone would think it would.

Worse than who the Bill empowers—namely Treasury Department and the Special Master appointed by Administration—is who the Bill disempowers—the Court. Over the century of mismanagement, one entity has stood up for trust beneficiaries—the Court. Even detractors from our lawsuit—Steven Griles, Jim Cason, Kevin Gover, Bruce Babbitt and many others—have admitted under oath that this lawsuit has been the impetus for any improvements that have been made. Under this legislation, the only ameliorative entity—the Court—would be eliminated from the picture entirely.

That makes no sense for a number of reasons. Courts have the greatest institutional competence to make distributions in a fair manner. They are often called upon to do just that. Courts are armed with Rule 23 and related case law that provides sound guidance in resolving difficult distribution issues. Courts are best at providing an opportunity to be heard and other due process protections to the beneficiary class and weighing the evidence presented to it through well-settled rules of procedure and evidence. More importantly, unlike the “political branches” (i.e. the Executive Branch and Congress), Courts make judicial and not political determinations. A court sitting in equity—like the Cobell court—is charged with considering the evidence and acting equitably in fashioning appropriate remedies. That is precisely the type of institution that should be figuring out how to divide the funds among the beneficiary class. It is the most competent to do so.

And what possible justification is there to eliminate the Court's role? Because the Executive Branch doesn't like this Court? The Administration has no legitimate interest in dictating how the settlement funds are distributed. None. If there is a settlement, their liability for the agreed-to period for the accounting claim would cease. Who gets what after that is an issue for the beneficiary class and the court to determine. Nobody wants the involvement of the malfactor in that process; they have done quite enough damage in their century of mismanagement.

At bottom, this is an issue of trust. We cannot trust the people who have abused us for a century. We can trust the courts and the judicial process.

Importantly, the Indian Land Working Group, the largest national association of allottee groups has specifically said that they do not want Treasury involved. Specifically, they have said that they “support the named representatives of the class and their counsel in making decisions on what is a fair settlement and a fair manner to distribute the funds.” As we do, they have endorsed the federal courts as the appropriate body to handle any distribution. (See Appendix B)

A Settlement Must Include Real Trust Reform

The Cobell case is far more than merely about the mismanagement of our assets in the past. It is also about the future—how the trust lands and monies of Indian people will be managed in the future. Quite obviously then, a settlement of this case

requires cessation of this persistent and continuing wrongdoing, in other words, real trust reform. If the underlying problems with administration of the trust are not corrected, then much of our effort to ensure that our children will not suffer the same indignities and abuse as their parents and grandparents will have been for naught.

I have called for the appointment of a receiver during the period of reform. I continue to think that is the most effective way to make sure that the needed changes are made, and we don't all find ourselves with a trust problem needing your attention again in a few years and additional lawsuits in the future.

I understand that the government has resisted the receivership approach. While we will continue to press for a receivership in the litigation, I believe that some other measures may be sufficient for reliable and meaningful trust reform. Chief among them is to codify in statute the trust duties and standards, provide for enforceability in courts of equity with meaningful remedies against a trustee breaching its responsibilities, and independent oversight with substantial enforcement authority to ensure that beneficiary rights are protected. Right now, the Individual Indian Trust is missing all of these elements, and that is part of the reason that this problem has persisted for so long. These missing elements of accountability are the sole germane distinctions between this trust and all other trusts throughout this nation that are safely and soundly managed. Without these elements, there is no accountability. If Congress truly wants to fix this problem once and for all, it must fundamentally reform the trust. Anything less will invite the same problems and abuses we are all too aware of.

Without a resolution of these three issues, there is no use in moving forward with settlement negotiations, since these three positions are critical to the beneficiary class who are counting on me to make sure this problem gets resolved in a full and fair manner.

A Fair and Just Settlement for Taxpayers and Indians

We have supported the 50-point settlement proposal that was developed by Native American leaders this summer for several reasons. First, we believe it is in the best interests of all Americans to resolve this dispute. Secondly, we would like to end this unhappy chapter in our history in a spirit of compromise. Third, we want to see the trust reorganized now to prevent a continuation of this massive failure.

Our lawsuit has dragged on for almost 10 years, largely because of the government's policy of delaying any resolution. In truth, we stand ready to end this costly litigation with the fair and just settlement proposed by Indian Country. Simply put, too many of our Trust beneficiaries are dying while this case remains in the courts. I want to get them access to their money—or at least a portion of it—now—in their lifetimes.

The settlement the Native American leaders proposed is a good deal—especially for taxpayers. While the price tag comes to nearly \$27.5 billion, it is a bargain for a government that has acknowledged its responsibility for this 118-year-old mess.

Here's why:

First, it would resolve a dispute that Members of Congress have said has run too long and cost too much. It is estimated that the government alone has spent more than \$100 million on this lawsuit. Those expenses will only grow as Attorney General Gonzales presses ahead with plans to hire even more lawyers for trust litigation.

Secondly, the government's liability is growing. That's because the courts have declared that Indian Trust beneficiaries are entitled to both the principal amounts that should have been recorded in their accounts—plus compounded interest on that money.

A fundamental principle of trust law, confirmed by the court of appeals, is that the government is liable for any funds that it cannot prove with appropriate and competent evidence that it paid to the beneficiaries. Since both sides agree that the government should have paid roughly \$13 billion into the individual Indian Trust accounts since 1887, that means that the government must be able to prove each of those transactions. And amount not paid plus interest on what is owed. This puts potential liability of the federal government well in excess of \$100 billion.

The historical accounting will continue to be costly. The Interior Department is now telling you that it will cost at least \$12 billion to reconstruct those records. That's far too expensive for an accounting. Well before the court of appeals reached that conclusion, we were saying that in the district court.

A 2002 study conducted for the Interior Department—and made public in our lawsuit—places the liability for the government on trust accounts at anywhere between \$10 billion and \$40 billion. That's their internal number.

That's why Indian Country's \$27.5 billion proposal is a bargain. After all, I would argue that it is a far better bargain for the taxpayers to be spending this money directly on making Indian account holders than wasting money on what both we—and the courts—regard as a highly questionable accounting.

The proposed settlement makes a generous assumption on behalf of the government. It assumes for purposes of calculation that the government has enough records to prove that it accurately made 80 percent of the payments it was supposed to have made to trust beneficiaries and that it made them on time. That's an exceedingly kind estimate considering that independent assessments of the "accountings" the government has completed to date plainly demonstrate that in actuality they can account or prove less than 1% of the transactions that have occurred. In other words, while they, as trustee-delegate, have the unconditional obligation to prove each transaction, they can prove almost none of them, yet our proposal still would presume they made the vast majority of them properly.

Moreover, these funds would not have to be appropriated. They would come from the Treasury Department's Judgment Fund. The funds would be disbursed by the courts over several years based on provisions and guidance set forth in the settlement bill.

Remember, too, this is not welfare, a social program, or reparations for past abuses and discrimination. This is money that all along belonged to the individual Indians. It was never properly recorded to their accounts because of the government's continuing inability to serve as a proper trustee. The government repeatedly has acknowledged this failure and that failing has been documented in scores of reports. Now, the government has a chance to settle this issue for all time and at a price that is far less than the account holders are entitled to by law.

Government Has Repeatedly Acted in Bad Faith

It is especially regrettable that the government's unwillingness to deal in good faith with the courts, the Congress, mediators, and the plaintiffs has been matched by a continuing, persistent pattern of deception and misrepresentation. Two recent examples are worthy of this committee's attention.

Last month, the Court of Appeals granted a request from both sides of the Cobell case that a structural injunction requiring a detailed accounting methodology be set aside. We also requested that the case be returned to the district court for further proceedings including the district court considering the issue of "impossibility" of doing a traditional and fair accounting, and determining an alternative equitable restitution methodology. The Court of Appeals, in its recent decision, opens the door to just such a determination.

In essence, the Court of Appeals recognized that it is appropriate for the district court to adjudicate whether the loss and willful destruction of records by government officials has made an historical accounting impossible. For years, we have consistently argued for and the government has vigorously opposed such a determination. This appellate mandate has set the table for an early and fair resolution of the Cobell case by the district court. With the weight of an uncontested record of evidence and the government's admissions that a complete and fair accounting is futile, impossibility will be conclusively demonstrated. At that point an alternative to an historical accounting must be selected to decide what is a fair equitable restitution. We will be seeking such a proceeding at the proper time.

The government however, would have you believe that this decision was a victory. It has seized on some comments or "dicta" from Judge Williams to suggest that this decision has a favorable legal impact on procedural matters not even at issue before this court. As you know, commentary, not necessary to the holding of the court on issues before it is not binding on the district court or indeed any court. This dicta, as lawyers call it, has no precedential impact. Moreover, where, as here, the judicial commentary contravenes the decisions of prior appellate panels, it is entitled to no weight whatsoever. The clear rule in this and almost every other federal judicial circuit is that when there is a conflict between panels of the circuit, the decision of the panel that first decided the issue prevails over the later decision. This "first-in time rule" applies with great force in this matter since the language upon which Interior Defendants rely directly contravenes at least three prior appellate panel decisions. To illustrate what this means, we submit the following:

FIRST-IN-TIME DECISION PREVAILS IF THERE IS INTRACIRCUIT CONFLICT

Cobell VI (2001)

APA Deference
<ul style="list-style-type: none"> • “Chevron deference is not applicable in this case. (p. 1102).”
Duty to Account
<ul style="list-style-type: none"> • “Therefore, the 1994 Act reaffirms the government’s preexisting fiduciary duty to perform a complete historical accounting of trust fund assets.” (p. 1102).
Scope of Accounting
<ul style="list-style-type: none"> • The 1994 Act makes clear that T-Ds must account for <i>all</i> funds, “irrespective of when they were deposited” and “All funds means <i>all funds</i>.” (p. 1102).

Cobell XVII (2005)

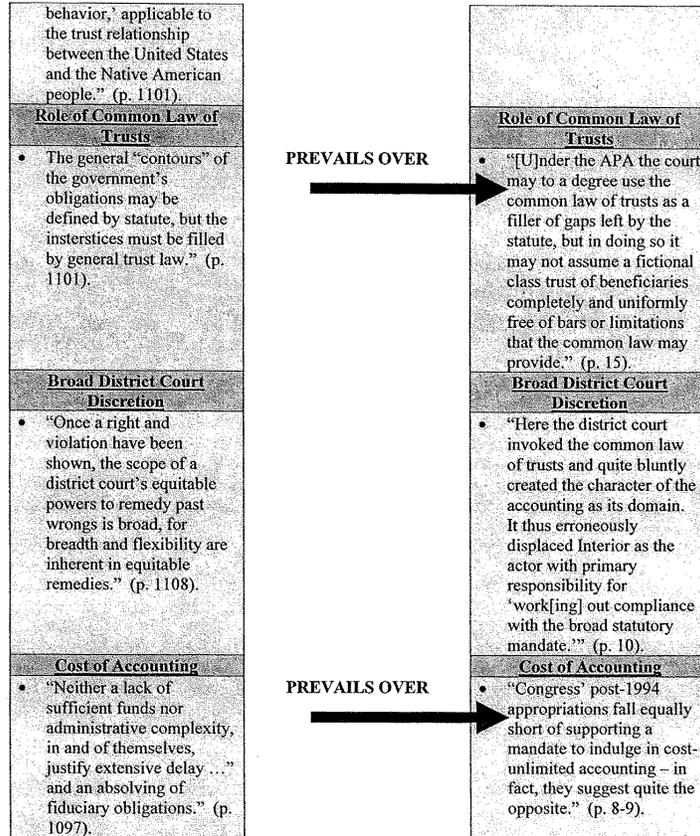
APA Deference
<ul style="list-style-type: none"> • “[T]he district court owed substantial deference to Interior’s plan. (p. 10).
Duty to Account
<ul style="list-style-type: none"> • The 1994 Act “clearly reaffirms the requirement that the Secretary complete an accounting.” (p. 7).
Scope of Accounting
<ul style="list-style-type: none"> • “While Congress in the 1994 Act plainly faulted the United States’ management . . . the Act’s general language doesn’t support the inherently implausible inference that it intended to order the best imaginable accounting without regard to cost.” (p. 8).

PREVAILS OVER



Fiduciary Trust Case
<ul style="list-style-type: none"> • “This departure from the <i>Chevron</i> norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but “from principles of equitable obligations and normative rules of

Fiduciary Trust Case
<ul style="list-style-type: none"> • “The choices at issue required both subject-matter expertise and judgment about allocation of scarce resources, classic reasons for deference to administrators.” (p. 10).



For further illustration of this point, see Appendix C. At the proper time, we intend to seek a ruling from the court that will make this explicit. In short, don't believe what you may be hearing from the government about their legal victory. Like so much else that they have said to the Courts, the Congress, and the public, it is simply not the truth.

“Progress Report” is No Progress

The second example is equally stark. In September, the government put out a self-congratulatory “progress report” on its handling of trust issues. I am sure it was made available to members of the Committee. It is deceptive, misleading and inaccurate from beginning to end. It would have you believe that the management of Indian Trust accounts has been and is satisfactory, availability of financial records is good, and losses suffered by Indians insignificant. None of that is true. Hundreds of reports, findings, and studies from the Congress, the GAO, Inspectors General, Federal Courts, and the Government’s own experts have concluded that the handling of these accounts has ranged from incompetent to fraudulent. And, the damage to Native Americans has been massive.

Mr. Chairman, we have called on the government to allow the Court to examine this document for accuracy. They have, thus far, refused. And, there is good reason for their reluctance. Ask government officials who come before you if they are prepared to swear to the truthfulness of this document in a court where sanctions for perjury are available.

We have prepared a brief rebuttal to the Government’s brochure and I would like to make it part of the record. (See Appendix D.) It clearly demonstrates that the “Progress Report” is just one more attempt to deceive the Congress and the public.

If the Government wants to test their report against our rebuttal, we would welcome it. Let's see who is telling the truth.

Conclusion

Thank you very much for this opportunity to testify and your leadership on this important issue. We look forward to working with you in the coming weeks to address these concerns and remain hopeful that a legislative settlement can be reached that will best serve the interests of the government, the American people, and the beneficiaries who have been victimized for far too long. But, we remain mindful that should a legislative settlement that is fair to the beneficiaries not be reached, we must and we will continue to press our case in the courts and we fully expect that we will, in time, prevail.

NOTE: Attachments to Ms. Cobell's statement have been retained in the Committee's official files.

The CHAIRMAN. Ms. Cobell, the recent appeals court ruling explicitly acknowledged the Department's right to conduct an audit using a statistical sampling. Should the Department have a chance to complete that accounting?

Ms. COBELL. No. The Department knows it cannot do an accounting. There are too many missing documents, and the procedure that was described by Mr. Cason today is not an accounting, and you have to understand that. I think that the Department continues to mislead Congress by saying that the recent decision by the appellate court does not provide for them to do an historical accounting. As I explained in my oral testimony, first-in-time rule prevails, and in Cobell VI and Cobell XII and Cobell XIII, the government is obligated to do an accounting from 1887 forward.

If the government feels that it can actually do an accounting, then we ought to go to Court and let them prove it.

The CHAIRMAN. Can you describe the method by which you calculated the amount of money that should be restored to the individual money account holders, and what is the data you used to arrive at that number?

Ms. COBELL. Well, both the Plaintiffs and the government agree that \$13 billion flowed through these accounts. The appellate court ruling provided that compounded interest has to apply. If you take that into consideration, that brings us up to \$176 billion.

What we did in calculating the \$27.5 billion is that we assumed, just assumed, and gave the government the benefit of the doubt that they had paid out 80 percent of that particular amount of money, and taking that into calculation and then actually deducting certain issues such as waiving the taxes that would be applied on this particular amount of payment and making sure that people's payments, such as Social Security, were not affected by this payment—so taking all of those calculation into effect, we came up with \$27.5 billion.

Let me tell you that the appellate court ruling where compounded interest applies is very important because the \$176 billion continues to grow. The liability of the government continues to grow. So taking in that particular discounted amount and why we discounted it is why we came up with \$27.5 billion. I think maybe Keith might want to add something.

The CHAIRMAN. Before he does, just so I understand this, the \$176 billion is making the assumption that none of the money was paid out, and then you add interest on top of that. The \$27 billion

is based on 80 percent of it was paid out and 20 percent was not, and you add the compounded interest on that.

Ms. COBELL. That is correct. We have to remember that the Ernst & Young report, the only accounting report that has been made public, verifies that 99 percent of the transactions cannot be verified at all. They cannot account for 99 percent of the transactions. So we could actually go up to 99 percent, but we gave them the benefit of the doubt of 80 percent.

The CHAIRMAN. But none of that is based on any kind of accounting of the actual accounts.

Ms. COBELL. Yes, it is. It is based on the amount of money that has flowed through those accounts.

The CHAIRMAN. Wait a minute. You are confusing me even more.

Ms. COBELL. OK.

The CHAIRMAN. If 99 percent of the accounts—maybe I have misunderstood you, but if 99 percent of the accounts, they have no records for, then how do you come up with a number?

Ms. COBELL. Well, we came up with the number of the amount of money that flowed through those accounts. OK? In Trial 1.5, we presented an alternative method of accounting which reflected \$13 billion that flowed through those accounts. The government's estimate was \$13 billion, so we agreed on that.

The CHAIRMAN. So there was agreement on how much money should have gone in. There is no agreement on how much was actually paid.

Ms. COBELL. Yes. They do not know how much is actually paid because their own accountants cannot verify 99 percent of the transactions, and that is the issue here because there are so many documents that are destroyed, it is impossible, and we have known that it has been impossible to do an accounting. So you take an alternative method of an accounting. That is what we did, and what went through those accounts, the compounded interest, and then giving the government the benefit of the doubt that they paid out 80 percent of the money, and we came out with the discounted amount of \$27.5 billion.

The CHAIRMAN. But you do not know whether they paid out 50 percent of the money or 90 percent of the money.

Ms. COBELL. They are the trustee.

The CHAIRMAN. But nobody knows.

Ms. COBELL. Nobody knows. Nobody knows what they paid. They do not know what they paid. They destroyed so many documents, they do not know what they paid. The Ernst & Young report that they talked about in their testimony where only there is a small amount missing; that report basically said that they could not account for 99 percent of the transactions.

The CHAIRMAN. Now, as far as dealing with my colleagues on what the cost of this is, your numbers are an educated guess as to what you think would be owed. Interior's number is an educated guess on what they think should be owed or what is owed on this, and we are somewhere in that ballpark.

Ms. COBELL. Well, I guess I would say that theirs is a total guess; ours is more right on. And you have to understand that the government experts themselves say that 10 to \$40 billion of liability exists here. We bring the amount of \$27.5 billion. Ours is not

an educated guess; it is based on our methodology that we presented in our Trial 1.5.

The CHAIRMAN. Well, I am not disputing that at all. I understand that, but you really do not know how much was paid out because they do not know how much was paid out. You are making the assumption that 80 percent was.

Ms. COBELL. And it could be a lot less that was paid, yeah. We are giving the government the benefit of the doubt. Probably there are many beneficiaries that would like to see the total liability of \$176 billion paid out because according to common trust law standards, it is that you have to account for every single document. I am a banker. I understand this. Every single document has to be accounted for. You do not get away with saying, "Oh, well, maybe we can find 50 percent of the records, or maybe we can find 80 percent." You cannot do that. So what we did is we gave the government the benefit of the doubt, if we want to come to a settlement amount, in saying that they distributed 80 percent of the money, and I think that is more than fair.

The CHAIRMAN. Thank you. Mr. Rahall?

Mr. RAHALL. Thank you, Mr. Chairman. Elouise, in your testimony, you indicate that the Plaintiffs have "achieved a remarkable record of success." You also say the recent ruling in the Appeals Court for the D.C. Circuit has "set the table for an early and fair resolution of the Cobell case by the district court."

So my question would be, do you consider the November 15, 2005, Appeals Court decision to be a victory for the Plaintiffs, and, if so, do you still welcome a legislative settlement?

Ms. COBELL. Yes, I do. I welcome a legislative settlement, but we do feel that Cobell XVII, the November 15th ruling was in our favor. It basically vacated the structural injunction that the judge laid out for a way that the accounting was to be done which would have taken up until 200 years to accomplish, just by our calculations. But the judge did that because the government was not responding to any of the other decisions of the court to do an accounting.

So it basically took it back to the district judge that will now hear a trial on the accounting that has to be done, and we look forward to that. We look forward to the Department of the Interior getting up and telling us how they plan on doing an accounting before a judge because we know it is impossible.

Mr. RAHALL. How do you respond to, and do you accept, last year's Appeals Court for the D.C. Circuit when they said that the Department's trust duties are grounded in statute, not in the common law?

Ms. COBELL. I think I am going to refer to Keith. He is more an expert on—

Mr. HARPER. Congressman Rahall, the question goes back to a number of the different appellate court decisions. One thing that is absolutely clear, and this comes from Cobell VI—there are now 17 of these decisions, so they get a bit confusing, but Cobell VI, February 23, 2001, very clearly articulated the general principle, which is that although the duty must be in statute, it does not have to be express in statute. It can be implicit in the trust relationship itself that is created by that statute. So once the statute

creates the trust relationship, then it is inferred from that that all of the normal trust duties, common law trust duties, are applicable to this trust, and that has been the consistent rule in all of the appeals.

One of the things that Elouise touched upon a little earlier is what is called the “first-in-time rule.” Cobell VI being the first appellate decision, is the one that has precedential value. Any later decisions, including to the extent Cobell XVII, the most recent decision, is inconsistent with that prior one, that has no legal effect. That is the rule of the D.C. Circuit as well as all of the other circuits.

Mr. RAHALL. Thank you. I appreciate that.

With respect to our legislation and who distributes a settlement, this bill, of course, is a work in progress, as I am sure you recognize. Elouise, you have stated your position as far as having Treasury in charge, and I am sure that will be something we will consider, but I, quite frankly, do not see giving this job to the district court. So if I am correct, what ideas would you have for managing a settlement and distribution? You do not want Treasury in charge. Right?

Ms. COBELL. Yes. Thank you, Congressman Rahall. It is important to understand—

Mr. RAHALL. You mean, no, you do not want Treasury in charge.

Ms. COBELL. It is important to understand that we do not want Treasury. They are one of the defendants. They have been held in contempt of court, and so we do not want them in charge of the distribution. I think that the settlement funds have to be given to the court, and I do have to tell you that Judge Lamberth has probably been one of the most fairest [sic] people in the history of the United States in regard to making sure that we get true justice on this horrible mismanagement mess. So if it is distributed in his court, you know, that is fine. I do not know any other specifics on how other than that it should be addressed. Maybe Keith can add to that. I am only familiar with the district court.

Mr. HARPER. Congressman Rahall, we believe that the district court or a court in general is the appropriate place to do a distribution, and that is because they have the institutional competence to hear evidence, to waive various issues, and to make determinations that are appropriate in light of the evidence that they receive, and how that distribution gets done is very important to our class members.

We, as representatives of that class, have a fiduciary obligation to make sure absentee class members are fairly represented, and we think that the most appropriate entity, the one with the highest competence to do that, are the courts. Also, they are not a political branch. They apply legal rules, which, for us, and given the history of this litigation, they have been the solace in a history of mismanagement, and so, for us, it really is the courts which are in the best posture to do this.

Could I just mention one other thing because I think that there has been an implicit—well, there has been a campaign—let us just put it out there—there has been a campaign in some quarters against this judge, and Elouise, I think, said it quite fairly. I do not know what the complaints are. If you are a Federal judge, and

you get lied to, and you call people out for it, is that a bad judge? If you have a malfeasance that the Court of Appeals says is unconscionable—"malfeasance," that means evil doing—and you are a Federal judge, a district court judge, and you call them out on that, is that a bad judge? What makes this judge problematic other than to make something that has been nonaccountable for a century have some accountability?

So I caution a little bit the notion that this judge is somehow misguided in his approach. Yes, this is a very complicated case, and there have been individual legal issues that have gone to the Court of Appeals, and they have disagreed with him, but there have been many that they have agreed with him, and they have affirmed him in toto in the most important of the decisions, Cobell VI.

So I just put that out there because I want to counter the perception or the attempt out there to paint this judge as some kind of rogue. We do not believe that is the case. We think that the record is plain that what he has done is to treat the parties fairly.

Mr. RAHALL. I appreciate you laying that on the record. I did not mean to join that campaign or cast any aspersions when I said what I did about the D.C. court. That was not my intention whatsoever.

Thank you both your testimony, and, Elouise, again, as I said in my opening comments, I certainly applaud your tenacity and your determination and your persistence, and you are certainly a driving force for a fair and equitable settlement here. Thank you.

The CHAIRMAN. Mr. Pearce?

Mr. PEARCE. Thank you, Mr. Chairman. Ms. Cobell, has the trust relationship outlived its usefulness overall?

Ms. COBELL. I think that if the trust relationship was implemented properly, according to standards that were spelled out in the 50 Principles, that it could work well for Indian people.

Mr. PEARCE. I am asking, do the Indian people need that trust relationship to represent them?

Ms. COBELL. Well, there are certainly certain issues that we have to take into consideration that have to be solved before any change is made, and that is that people have to have an accounting of their trust assets.

Mr. PEARCE. I am saying, once we clear the accounting up, has the trust relationship outlived its usefulness? Do the Native Americans need someone to oversee their affairs?

Ms. COBELL. I think, Congressman, that once we have this resolved, that Indian people can be provided options, and we could take a good look at those options.

Mr. PEARCE. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman, and thank you, Ms. Cobell.

Abraham Lincoln referred to Harriet Beecher Stowe as the lady who started the Civil War that freed the slaves, and I think you have jump started this pursuit of justice for Indians, and while you are not seeking it, your name will go down in history. It is a very quantum leap that you started for justice for Indians, and if I can play some small role in helping you achieve that justice and a

remedy for the injustice, I feel I will have accomplished an important mission here in Congress.

I thank you for your courage. It is not that easy to put your name out there and get both praise but a lot of stones, and I personally appreciate it. I have known your name for a number of years now, and some people might not agree with you, but I think that you have had the courage to really take on a gross injustice that occurred toward the Indians in this country, and I deeply appreciate what you are doing. The trust responsibility does lie with the entire U.S. Government, including this Congress here, and we want to make sure that we are sensitive to really having as much justice as we can achieve, and I, frankly, think your proposal, how you have figured the 80 percent, is modest and reasonable and certainly not outlandish at all. I just want to commend you.

I do not think I can ask any question that you have not answered already. I have read much of what you have said before. I have followed you and just commend you, keep up the work, keep us informed, and keep us aware of our responsibility to that trust that we have.

Now, the trust responsibility really came in not as a patronizing trust. The trust responsibility came in very often, and this is not the case here because this is the Federal government abusing the Indians—the trust responsibility came into being, to a great extent, to protect you from the state government, and the Federal government is supposed to be the great protector, to protect you against intrusion by state government. I know my own State of Michigan intruded upon Indian rights. But when the protector who was in that trust responsibility not only abdicated the role of protection but abused the Indians, then we really have to find a solution for that, and I think you have started this on a path that hopefully will arrive at full justice for the Indians, as much justice as we, in our frailty, can put together. But I think you have acted in a very determined, tough, and reasonable way. Thank you very much. God bless you.

Ms. COBELL. Thank you very much, Congressman Kildee. Your words mean a lot to me.

The CHAIRMAN. Well, thank you to our witness. Ms. Cobell, there may be additional questions that Members have. Those will be submitted to you in writing, if you can answer those in writing so that they can be included in the hearing record.

I know this is something this Committee has been dealing with for a long time. It has gone on way too long, and I think we are at the point where, both in the House and the Senate, we want to deal with this, and hopefully we will not be doing a lot more of these hearings. So thank you very much for being here.

Ms. COBELL. You are very welcome.

The CHAIRMAN. If there is no further business before the Committee, I again thank our witnesses and the members of the Committee. The Committee stands adjourned.

[Whereupon, at 11:57 a.m., the Committee was adjourned.]