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S. HRG. 109–194

INDIAN TRUST REFORM ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

S. 1439

TO PROVIDE FOR INDIAN TRUST ASSET MANAGEMENT REFORM AND RESOLUTION OF HISTORICAL ACCOUNTING CLAIMS

JULY 26, 2005
WASHINGTON, DC

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INDIAN TRUST REFORM ACT

TUESDAY, JULY 26, 2005

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

The committee met, pursuant to notice, at 10:03 a.m. in room 216, Senate Hart Building, Hon. John McCain (chairman of the committee) presiding.

Present: Senators McCain, Akaka, Dorgan, and Johnson.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. I want to ask the indulgence of my colleagues and the witnesses and those who have joined us today to observe this hearing. All of you know that I do not ordinarily take a lot of time for an opening statement at our hearings and that I encourage our witnesses to be brief in their testimony.

I want to take a few extra minutes to share some of my perspectives on the bill before us. For the past several years, I have heard broad-based concerns from tribal leaders and members of Congress that the *Cobell* litigation, which has been pending for nine years, is draining resources from Indian country and creating a poisonous atmosphere for the administration of the Federal Government's trust responsibilities to Native Americans.

In the 107th and 108th Congresses, I introduced legislation that was intended to try to correct some of the problems in the administration of the trust funds and assets. In those bills, the *Cobell* plaintiffs asked that I include a provision that would allow the litigation to continue to its conclusion. With the support of tribal leaders, I agreed to do so.

In the 108th Congress, the House Committee on Resources and this committee worked with the *Cobell* plaintiffs and the Departments of the Interior and Justice to identify and enlist the support of two highly qualified mediators to determine if it would be possible to reach an agreement on a settlement of the litigation. I supported that effort. Unfortunately, it did not succeed and neither did any of the bills I introduced.

Earlier this year, with the support of the plaintiffs and defendants in the *Cobell* litigation, but more importantly with the support of many in Indian country, I said I would make one good attempt at resolving the matter legislatively. If it did not succeed, there are many, many other issues that the committee can attend to.

Last week, Senator Dorgan, my friend and cochairman, joined me in introducing S. 1439, a bill to resolve the historical accounting claims in *Cobell* v. *Norton,* and begin to reform the Department of the Interior's trust responsibility. We made it very clear to all parties that the bill was intended to provide a basis for discussion and review of the issues, and we welcome comment and the opportunity to improve it.

However, before anyone had time to read and fully understand the bill, the lead plaintiff in the *Cobell* case was quoted in the press saying that the bill "reminded me of the Baker massacre at Black Feet when they gave Heavy Runner this piece of paper. They said, 'Hold it up, it will keep you safe.' "

I can certainly understand that no one would be entirely satisfied with the bill. I can even understand that many would be disappointed. That is the nature of a settlement proposal. No one gets everything they want. There are no clear winners.

This bill embodies a series of proposals. It reflects extensive listening and reflecting on the views of the parties to the litigation, tribal leaders and many other stakeholders from around the country. It cannot credibly be compared to a massacre, even in a figure of speech.

I hope that those who are affected most directly by the settlement of this longstanding dispute will engage constructively in the process. I am disturbed, however, by what I see as a serious misapprehension of some that settlement legislation can be enacted by being forced down the throat of either party. This simply cannot and will not happen. The idea that it might betrays a fundamental lack of understanding of the legislative process in general and the battle ahead for any legislation that would settle the *Cobell* litigation in particular.

If all of the people testifying here today were to join hands and reach agreement on every word in the bill, the work before all of us would be just beginning. There are many members of Congress, of the public at large, and in the claimant class who will ask very hard questions about the amount of money we propose to pay in lieu of providing an historical accounting. I think the sizable sum we envision and the manner of its distribution can be defended, but it will have to be defended and unity among those here today is necessary, but by no means sufficient to do that.

While they do not like to talk about it in public, the fact remains that both parties to the case face very serious legal risks if the litigation continues. Some aspects of the strong opinions of the District Court, often cited by plaintiffs, have been rejected by the Court of Appeals, which is much more selectively cited. The burden of proof that the Court of Appeals has established for the claims appears to comport with the precedent, but imposes a very real and substantial challenge to each and every claimant in the class.

While the parties may not agree on how much risk each faces, they should agree that they risk facing years and years and years of litigation during which time the individual plaintiffs stand to receive nothing, save the further draining of resources away from programs such as education and public safety and towards the Office of Special Trustee.

The defendants face year after year of painstaking efforts to reconstruct the past, while simultaneously trying to cope with seemingly inexhaustible demands to do more and better with limited resources appropriated by Congress. I am well aware of the hardships experienced every day by the individuals who have not been and are not being treated fairly in the administration of their trust funds and assets. I have visited them in their homes and on the lands in the Southwest, the Northwest and the Great Plains. I, too, would like to see them achieve some justice in their lifetimes, and I would like to believe that at the end of the day, the individuals who struggle through the drama of the litigation on both sides, I would like to see them made as whole as is possible in the circumstances we all confront.

I understand that the plaintiffs have reacted negatively to the proposal that the settlement funds to be made available by Congress would be distributed by a special master, as opposed to having the court distribute the funds and determine attorneys fees. While the legislation does not specify a dollar amount, it does make clear that the resolution will be for billions of dollars at a minimum for the class of hundreds of thousands described in the bill. The bill proposed that each receive thousands of dollars in per capita payments alone. This is at a minimum.

In addition to per capita payments, the legislation envisions that many claimants will receive much more than this in formula payments, depending on what they were likely to have lost as a result of the Department of the Interior's mishandling of their individual Indian money accounts.

If the Federal Government is going to make this money available to attempt to right a wrong perpetrated over many years of mismanaging accounts, it does not strike me as unreasonable that the legislation resolve the class action for historical accountings and remove it from the court for a prompt and fair distribution to claimants. Congress did this for the families of the victims of the 9–11 attacks. It is not a flawless way to proceed, but it has been demonstrated to be fair and prompt.

I look forward to hearing the witnesses' statements today. We are considering very complex issues, and S. 1439 can be significantly improved, but it must be with the agreement of both parties to the *Cobell* litigation and with the support of tribes from around the Nation. Although no tribe is a direct party to the litigation, it is evident to even the most casual observer that all tribes have been and are being affected by it.

Let's start to put our efforts into finding a way to move forward together. We have an opportunity to try to make some genuine progress on the issues that are addressed in S. 1439. Let's all approach it with the seriousness it deserves and leave the rhetoric to others. We will not have this opportunity again anytime soon.

[Text of S. 1439 follows:]

II

109TH CONGRESS
1ST SESSION

S. 1439

To provide for Indian trust asset management reform and resolution of historical accounting claims, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 20, 2005

Mr. MCCAIN (for himself and Mr. DORGAN) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To provide for Indian trust asset management reform and resolution of historical accounting claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Indian Trust Reform Act of 2005''.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—SETTLEMENT OF LITIGATION CLAIMS

Sec. 101. Findings.
Sec. 102. Definitions.

Sec. 103. Individual Indian Accounting Claim Settlement Fund.
Sec. 104. General distribution.
Sec. 105. Claims relating to share determination.
Sec. 106. Claims relating to method of valuation.
Sec. 107. Claims relating to constitutionality.
Sec. 108. Attorneys' fees.
Sec. 109. Waiver and release of claims.
Sec. 110. Effect of title.

TITLE II—INDIAN TRUST ASSET MANAGEMENT POLICY REVIEW COMMISSION

Sec. 201. Establishment.
Sec. 202. Membership.
Sec. 203. Meetings and procedures.
Sec. 204. Duties.
Sec. 205. Powers.
Sec. 206. Commission personnel matters.
Sec. 207. Exemption from FACA.
Sec. 208. Authorization of appropriations.
Sec. 209. Termination of Commission.

TITLE III—INDIAN TRUST ASSET MANAGEMENT DEMONSTRATION PROJECT ACT

Sec. 301. Short title.
Sec. 302. Definitions.
Sec. 303. Establishment of demonstration project; selection of participating Indian tribes.
Sec. 304. Indian trust asset management plan.
Sec. 305. Effect of title.

TITLE IV—FRACTIONAL INTEREST PURCHASE AND CONSOLIDATION PROGRAM

Sec. 401. Fractional interest program.

TITLE V—RESTRUCTURING BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE

Sec. 501. Purpose.
Sec. 502. Definitions.
Sec. 503. Under Secretary for Indian Affairs.
Sec. 504. Transfer of functions of Assistant Secretary for Indian Affairs.
Sec. 505. Office of Special Trustee for American Indians.
Sec. 506. Hiring preference.
Sec. 507. Authorization of appropriations.

TITLE VI—AUDIT OF INDIAN TRUST FUNDS

Sec. 601. Audits and reports.
Sec. 602. Authorization of appropriations.

TITLE I—SETTLEMENT OF LITIGATION CLAIMS

SEC. 101. FINDINGS.

Congress finds that—

(1) Congress has appropriated tens of millions of dollars for purposes of providing an historical accounting of funds held in Individual Indian Money accounts;

(2) as of the date of enactment of this Act, the efforts of the Federal Government in conducting historical accounting activities have provided information regarding the feasibility and cost of providing a complete historical accounting of IIM account funds;

(3) in the case of many IIM accounts, a complete historical accounting—

(A) may be impossible because necessary records and accounting data are missing or destroyed;

(B) may take several years to perform even if necessary records are available;

(C) may cost the United States hundreds of millions and possibly several billion dollars; and

(D) may be impossible to complete before the deaths of many elderly IIM account beneficiaries;

(4) without a complete historical accounting, it may be difficult or impossible to ascertain the extent of losses in an IIM account as a result of accounting errors or mismanagement of funds, or the correct amount of interest accrued or owned on the IIM account;

(5) the total cost to the United States of providing a complete historical accounting of an IIM account may exceed—

(A) the current balance of the IIM account;

(B) the total sums of money that have passed through the IIM account; and

(C) the enforceable liability of the United States for losses from, and interest in, the IIM account;

(6)(A) the delays in obtaining an accounting and in pursuing accounting claims in the case styled Cobell v. Norton, Civil Action No. 96–1285 (RCL) in the United States District Court for the District of Columbia, have created a great hardship on IIM account beneficiaries; and

(B) many beneficiaries and their representatives have indicated that they would rather receive monetary compensation than experience the continued frustration and delay associated with an accounting of transactions and funds in their IIM accounts;

(7) it is appropriate for Congress, taking into consideration the findings under paragraphs (1) through (6), to provide benefits that are reasonably calculated to be fair and appropriate in lieu of performing an accounting of an IIM account, or assuming liability for errors in such an accounting, mismanagement of IIM account funds (including undetermined amounts of interest in IIM accounts, losses in which may never be discovered or quantified if a complete historical accounting cannot be performed), or breach of fiduciary duties with respect to the administration of IIM accounts, in order to transmute claims by the beneficiaries of IIM accounts for undetermined or unquantified accounting losses and interest to a fixed amount to be distributed to the beneficiaries of IIM accounts;

(8) in determining the amount of the payments to be distributed as described in paragraph (7), Congress should take into consideration, in addition to

the factors described in paragraphs (1) through (6)—

(A) the risks and costs to IIM account beneficiaries, as well as any delay, associated with the litigation of claims that will be resolved by this title; and

(B) the benefits to IIM account beneficiaries available under this title;

(9) the situation of the Osage Nation is unique because, among other things, income from the mineral estate of the Osage Nation is distributed to individuals through headright interests that belong not only to members of the Osage Nation, but also to members of other Indian tribes, and to non-Indians; and

(10) due to the unique situation of the Osage Nation, the Osage Nation, on its own behalf, has filed various actions in Federal district court and the United States Court of Federal Claims seeking accountings, money damages, and other legal and equitable relief

SEC. 102. DEFINITIONS.

In this title:

(1) ACCOUNTING CLAIM.—The term ''accounting claim'' means any claim for an historical ac-

counting of a claimant against the United States under the Litigation.

(2) CLAIMANT.—The term ''claimant'' means any beneficiary of an IIM account (including an heir of such a beneficiary) that was living on the date of enactment of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.).

(3) IIM ACCOUNT.—The term ''IIM account'' means an Individual Indian Money account administered by the Bureau of Indian Affairs.

(4) LITIGATION.—The term ''Litigation'' means the case styled Cobell v. Norton, Civil Action No. 96–1285 (RCL) in the United States District Court for the District of Columbia.

(5) SECRETARY.—The term ''Secretary'' means the Secretary of the Treasury.

(6) SETTLEMENT FUND.—The term ''Settlement Fund'' means the fund established by section 103(a).

(7) SPECIAL MASTER.—The term ''Special Master'' means the special master appointed by the Secretary under section 103(b) to administer the Settlement Fund.

SEC. 103. INDIVIDUAL INDIAN ACCOUNTING CLAIM SETTLEMENT FUND.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—There is established in the general fund of the Treasury a fund, to be known as the ''Individual Indian Accounting Claim Settlement Fund''.

(2) INITIAL DEPOSIT.—The Secretary shall deposit into the Settlement Fund to carry out this title not less than $[____],000,000,000 from funds appropriated under section 1304 of title 31, United States Code.

(b) SPECIAL MASTER.—As soon as practicable after the date of enactment of this Act, the Secretary shall appoint a Special Master to administer the Settlement Fund in accordance with this title.

(c) DISTRIBUTION.—

(1) IN GENERAL.—The Special Master shall use not less than 80 percent of amounts in the Settlement Fund to make payments to claimants in accordance with section 104.

(2) METHOD OF VALUATION AND CONSTITUTIONAL CLAIMS.—The Special Master may use not to exceed 12 percent of amounts in the Settlement Fund to make payments to claimants described in—

(A) section 106; or

(B) section 107.

(3) ATTORNEYS' FEES.—The Special Master may use not to exceed [____] percent of amounts in the Settlement Fund to make payments to claimants for attorneys' fees in accordance with section 108.

(d) COSTS OF ADMINISTRATION.—The Secretary may use not more than [____] percent of amounts in the Settlement Fund to pay the costs of—

(1) administering the Settlement Fund; and

(2) otherwise carrying out this title.

SEC. 104. GENERAL DISTRIBUTION.

(a) PAYMENTS TO CLAIMANTS.—

(1) IN GENERAL.—Not later than 1 year after the date on which the Secretary publishes in the Federal Register the regulations described in subsection (d), the Special Master shall distribute to each claimant from the Settlement Fund an amount equal to the sum of—

(A) the per capita share of the claimant of $[____],000,000,000 of the amounts described in section 103(c)(1); and

(B) of $[____],000,000,000 of the amounts described in section 103(c)(1), the additional share of the claimant, to be determined

in accordance with a formula established by the Secretary under subsection (d)(1).

(2) HEIRS OF CLAIMANTS.—

(A) IN GENERAL.—An heir of a claimant shall receive the entire amount distributed to the claimant under paragraphs (1) and (3).

(B) MULTIPLE HEIRS.—If a claimant has more than 1 heir, the amount distributed to the claimant under paragraphs (1) and (3) shall be divided equally among the heirs of the claimant.

(3) RESIDUAL AMOUNTS.—After making each distribution required under sections 106, 107, and 108, the Special Master shall distribute to claimants the remainder of the amounts described in paragraphs (2) and (3) of section 103(c), in accordance with paragraph (1)(B).

(b) REQUIREMENT FOR DISTRIBUTION.—The Special Master shall not make a distribution to a claimant under subsection (a) until the claimant executes a waiver and release of accounting claims against the United States in accordance with section 109.

(c) LOCATION OF CLAIMANTS.—

(1) RESPONSIBILITY OF SECRETARY OF THE INTERIOR.—The Secretary of the Interior shall provide to the Special Master any information, includ-

ing IIM account information, that the Special Master determines to be necessary to—

(A) identify any claimant under this title; or

(B) apply a formula established by the Secretary under subsection (d).

(2) CLAIMANTS OF UNKNOWN LOCATION.—

(A) IN GENERAL.—The Special Master shall deposit in an account, for future distribution, amounts under this title for each claimant who—

(i) is entitled to receive a distribution under this title, as determined by the Special Master; and

(ii) has not been located by the Special Master as of the date on which a distribution is required under subsection (a)(1).

(B) LOCATION OF CLAIMANTS.—

(i) RESPONSIBILITY OF SECRETARY OF THE INTERIOR.—The Secretary of the Interior shall provide to the Special Master any information and assistance necessary to locate a claimant described in subparagraph (A)(ii).

(ii) CONTRACTS.—The Special Master may enter into contracts with an Indian tribe or an organization representing individual Indians in order to locate a claimant described in subparagraph (A)(ii).

(d) REGULATIONS.—

(1) IN GENERAL.—The Secretary shall promulgate any regulations that the Secretary determines to be necessary to carry out this title, including regulations establishing a formula to determine the share of each claimant of payments under subsection (a)(1).

(2) FACTORS FOR CONSIDERATION.—In developing the formula described in paragraph (1), the Secretary shall take into consideration the amount of funds that have passed through the IIM account of each claimant during the period beginning on January 1, 1980, and ending on December 31, 2005, or another period, as the Secretary determines to be appropriate.

SEC. 105. CLAIMS RELATING TO SHARE DETERMINATION.

(a) IN GENERAL.—Subject to subsection (b), any claimant may seek judicial review of the determination of the Special Master with respect to the amount of a share payment of a claimant under section 104(a)(1).

(b) REQUIREMENTS.—A claimant shall file a claim under subsection (a)—

(1) not later than 180 days after the date of receipt of a notice by the claimant under subsection (c); and

(2) in the United States district court for the district in which the claimant resides.

(c) NOTICE.—The Secretary shall provide to each claimant a notice of the right of any claimant to seek judicial review of a determination of the Special Master with respect to the amount of the share payment of the claimant under section 105.

(d) SUBSEQUENT APPEALS.—A claim relating to a determination of a United States district court relating to an appeal under subsection (a) shall be filed only in the United States Court of Appeals for the District of Columbia.

SEC. 106. CLAIMS RELATING TO METHOD OF VALUATION.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, a claimant may seek judicial review of the method of distribution of a payment to the claimant under section 104(a).

(b) REQUIREMENTS.—A claim under subsection (a)—

(1) shall not be filed as part of a class action claim against any party; and

(2) shall be filed only in the United States Court of Federal Claims.

(c) AVAILABLE AMOUNTS.—

(1) IN GENERAL.—The Special Master shall use only amounts described in section 103(c)(2)(A) to satisfy an award under a claim under this section.

(2) PAYMENTS TO CLAIMANTS.—A claimant that files a claim under this subsection shall not be eligible to receive a distribution under section 104(a).

(d) EFFECT OF CLAIM.—The filing of a claim under this section shall be considered to be a waiver by the claimant of any right to an award under section 104.

SEC. 107. CLAIMS RELATING TO CONSTITUTIONALITY.

(a) IN GENERAL.—Any claimant may seek judicial review in the United States District Court for the District of Columbia of the constitutionality of the application of this title to an individual claimant.

(b) PROCEDURE.—

(1) JUDICIAL PANEL.—A claim under this section shall be determined by a panel of 3 judges, to be appointed by the chief judge of the United States District Court for the District of Columbia.

(2) CONSOLIDATION OF CLAIMS.—

(A) IN GENERAL.—The judicial panel may consolidate claims under this section, as the judicial panel determines to be appropriate.

(B) PROHIBITION OF CLASS ACTION CASES.—A claim under this section shall not be filed as part of a class action claim against any party.

(3) DETERMINATION.—The judicial panel may award a claimant such relief as the judicial panel determines to be appropriate, including monetary compensation.

(c) AVAILABLE AMOUNTS.—

(1) IN GENERAL.—The Special Master shall use only amounts described in section 103(c)(2)(B) to satisfy an award under a claim under this section.

(2) PAYMENTS TO CLAIMANTS.—A claimant that files a claim under this subsection shall not be eligible to receive a distribution under section 104(a).

(d) EFFECT OF CLAIM.—The filing of a claim under this section shall be considered to be a waiver by the claimant of any right to an award under section 104.

SEC. 108. ATTORNEYS' FEES.

(a) IN GENERAL.—The Special Master may use amounts described in section 103(c)(3) to make payments to claimants for costs and attorneys' fees incurred under the Litigation before the date of enactment of this Act, or in connection with a claim under section 104, at a rate not to exceed $[_____] per hour.

(b) REQUIREMENTS.—

(1) IN GENERAL.—The Special Master may make a payment under subsection (a) only if, as of the date on which the Special Master makes the payment, the applicable costs and attorneys' fees have not been paid by the United States pursuant to a court order.

(2) ACTION BY ATTORNEYS.—To receive a payment under subsection (a), an attorney of the claimant shall submit to the Special Master a written claim for costs or fees under the Litigation.

SEC. 109. WAIVER AND RELEASE OF CLAIMS.

(a) IN GENERAL.—In order to receive an award under this title, a claimant shall execute and submit to the Special Master a waiver and release of claims under this section.

(b) CONTENTS.—A waiver and release under subsection (a) shall contain a statement that the claimant waives and releases the United States (including any offi-

cer, official, employee, or contractor of the United States) from any legal or equitable claim under Federal, State, or other law (including common law) relating to any accounting of funds in the IIM account of the claimant on or before the date of enactment of this Act.

SEC. 110. EFFECT OF TITLE.

(a) SUBSTITUTION OF BENEFITS.—

(1) IN GENERAL.—The benefits provided under this title shall be considered to be provided in lieu of any claims under Federal, State, or other law originating before the date of enactment of this Act for—

(A) losses as a result of accounting errors relating to funds in an IIM account;

(B) mismanagement of funds in an IIM account; or

(C) interest accrued or owed in connection with funds in an IIM account.

(2) LIMITATION OF CLAIMS.—Except as provided in this title, and notwithstanding any other provision of law, a claimant shall not maintain an action in any Federal, State, or other court for an accounting claim originating before the date of enactment of this Act.

(3) JURISDICTION OF COURTS.—

(A) IN GENERAL.—Except as otherwise provided in this title, no court shall have jurisdiction over a claim filed by an individual or group for the historical accounting of funds in an IIM account on or before the date of enactment of this Act, including any such claim that is pending on the date of enactment of this Act.

(B) LIMITATION.—This paragraph does not prevent a court from ordering an accounting in connection with an action relating to the mismanagement of trust resources that are not funds in an IIM account on or before the date of enactment of this Act.

(b) ACCEPTANCE AS WAIVER.—The acceptance by a claimant of a benefit under this title shall be considered to be a waiver by the claimant of any accounting claim that the claimant has or may have relating to the IIM account of the claimant.

(c) RECEIPT OF PAYMENTS HAVE NO IMPACT ON BENEFITS UNDER OTHER FEDERAL PROGRAMS.—The receipt of a payment by a claimant under this title shall not be—

(1) subject to Federal or State income tax; or

(2) treated as benefits or otherwise taken into account in determining the eligibility of the claimant

for, or the amount of benefits under, any other Federal program, including the social security program, the medicare program, the medicaid program, the State children's health insurance program, the food stamp program, or the Temporary Assistance for Needy Families program.

(d) CERTAIN CLAIMS.—Nothing in this title precludes any court from granting any legal or equitable relief in an action by an Indian tribe or Indian nation against the United States, or an officer of the United States, filed or pending on or before the date of enactment of this Act, seeking an accounting, money damages, or any other relief relating to a tribal trust account or trust asset or resource.

TITLE II—INDIAN TRUST ASSET MANAGEMENT POLICY REVIEW COMMISSION

SEC. 201. ESTABLISHMENT.

There is established a commission, to be known as the ''Indian Trust Asset Management Policy Review Commission,'' (referred to in this title as the ''Commission''), for the purposes of—

(1) reviewing trust asset management laws (including regulations) in existence on the date of enactment of this Act governing the management and

administration of individual Indian and Indian tribal trust assets;

(2) reviewing the management and administration practices of the Department of the Interior with respect to individual Indian and Indian tribal trust assets; and

(3) making recommendations to the Secretary of the Interior and Congress for improving those laws and practices.

SEC. 202. MEMBERSHIP.

(a) IN GENERAL.—The Commission shall be composed of 12 members, of whom—

(1) 4 shall be appointed by the President;

(2) 2 shall be appointed by the Majority Leader of the Senate;

(3) 2 shall be appointed by the Minority Leader of the Senate;

(4) 2 shall be appointed by the Speaker of the House of Representatives; and

(5) 2 shall be appointed by the Minority Leader of the House of Representatives.

(b) QUALIFICATIONS.—The membership of the Commission shall include—

(1) at least 6 members who are representatives of federally recognized Indian tribes with reservation land or other trust land that is managed for—

(A) grazing;

(B) fishing; or

(C) crop, timber, mineral, or other resource production purposes;

(2) at least 1 member (including any member described in paragraph (1)) who is or has been the beneficial owner of an individual Indian monies account; and

(3) at least 4 members who have experience in—

(A) Indian trust resource (excluding a financial resource) management;

(B) fiduciary investment management;

(C) financial asset management; and

(D) Federal law and policy relating to Indians.

(c) DATE OF APPOINTMENTS.—

(1) IN GENERAL.—The appointment of a member of the Commission shall be made not later than 90 days after the date of enactment of this Act.

(2) FAILURES TO APPOINT.—A failure to make an appointment in accordance with paragraph (1)

shall not affect the powers or duties of the Commission if sufficient members are appointed to establish a quorum.

(d) TERM; VACANCIES.—

(1) TERM.—A member shall be appointed for the life of the Commission.

(2) VACANCIES.—A vacancy on the Commission—

(A) shall not affect the powers or duties of the Commission; and

(B) shall be filled in the same manner as the original appointment was made.

SEC. 203. MEETINGS AND PROCEDURES.

(a) INITIAL MEETING.—Not later than 150 days after the date of enactment of this Act, the Commission shall hold the initial meeting of the Commission to—

(1) elect a Chairperson; and

(2) establish procedures for the conduct of business of the Commission, including public hearings.

(b) SUBSEQUENT MEETINGS.—The Commission shall meet at the call of the Chairperson.

(c) QUORUM.—7 members of the Commission shall constitute a quorum, but a lesser number of members may hold hearings.

(d) CHAIRPERSON.—The Commission shall elect a Chairperson from among the members of the Commission.

SEC. 204. DUTIES.

(a) REVIEWS AND ASSESSMENTS.—The Commission shall review and assess—

(1) Federal laws (including regulations) applicable or relating to the management and administration of Indian trust assets; and

(2) the practices of the Department of the Interior relating to the management and administration of Indian trust assets.

(b) CONSULTATION.—In conducting the reviews and assessments under subsection (a), the Commission shall consult with—

(1) the Secretary of the Interior;

(2) federally recognized Indian tribes; and

(3) organizations that represent the interests of individual owners of Indian trust assets.

(c) RECOMMENDATIONS.—After conducting the reviews and assessments under subsection (a), the Commission shall develop recommendations with respect to—

(1) changes to Federal law that would improve the management and administration of Indian trust assets by the Secretary of the Interior;

(2) changes to Indian trust asset management and administration practices that would—

(A) better protect and conserve Indian trust assets;

(B) improve the return on those assets to individual Indian and Indian tribal beneficiaries; or

(C) improve the level of security of individual Indian and Indian tribal money account data and assets; and

(3) proposed Indian trust asset management standards that are consistent with any Federal law that is otherwise applicable to the management and administration of the assets.

(d) REPORT.—Not later than 2 years after the date on which the Commission holds the initial meeting, the Commission shall submit to the Committee on Indian Affairs of the Senate, the Committee on Resources of the House of Representatives, and the Secretary of the Interior a report that includes—

(1) an overview and the results of the reviews and assessments under subsection (a); and

(2) any recommendations of the Commission under subsection (c).

SEC. 205. POWERS.

(a) HEARINGS.—The Commission may hold such hearings, meet and act at such times and places, take such testimony, and receive such evidence as the Chairperson determines to be appropriate to carry out this title.

(b) INFORMATION FROM FEDERAL AGENCIES.—

(1) IN GENERAL.—The Commission may secure directly from a Federal agency such information as the Chairperson determines to be necessary to carry out this title.

(2) PROVISION OF INFORMATION.—On request of the Chairperson, the head of a Federal agency shall provide information to the Commission.

(c) ACCESS TO PERSONNEL.—For purposes of carrying out this title, the Commission shall have reasonable access to staff responsible for Indian trust asset management and administration of—

(1) the Department of the Interior;

(2) the Department of the Treasury; and

(3) the Department of Justice.

(d) POSTAL SERVICES.—The Commission may use the United States mail in the same manner and under the same conditions as other Federal agencies.

(e) GIFTS.—The Commission may accept, use, and dispose of gifts or donations of services or property to the

same extent and under the same conditions as other Federal agencies.

SEC. 206. COMMISSION PERSONNEL MATTERS.

(a) COMPENSATION OF MEMBERS.—

(1) NON-FEDERAL EMPLOYEES.—A member of the Commission who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the performance of the duties of the Commission.

(2) FEDERAL EMPLOYEES.—A member of the Commission who is an officer or employee of the Federal Government shall serve without compensation in addition to the compensation received for the services of the member as an officer or employee of the Federal Government.

(b) TRAVEL EXPENSES.—A member of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for an employee of an agency under subchapter I of chapter 57 of title 5, United States Code, while away from home or regular

place of business of the member in the performance of the duties of the Commission.

(c) STAFF.—

(1) IN GENERAL.—The Chairperson may, without regard to the civil services laws (including regulations), appoint and terminate an executive director and such other additional personnel as are necessary to enable the Commission to perform the duties of the Commission.

(2) CONFIRMATION OF EXECUTIVE DIRECTOR.—The employment of an executive director shall be subject to confirmation by the Commission.

(3) COMPENSATION.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the Chairperson may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of title 5, United States Code, relating to classification of positions and General Schedule pay rates.

(B) MAXIMUM RATE OF PAY.—The rate of pay for the executive director and other personnel shall not exceed the rate payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.

SEC. 207. EXEMPTION FROM FACA.

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission if all hearings of the Commission are held open to the public.

SEC. 208. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this title.

SEC. 209. TERMINATION OF COMMISSION.

The Commission and the authority of the Commission under this title shall terminate on the date that is 3 years after the date on which the Commission holds the initial meeting of the Commission.

TITLE III—INDIAN TRUST ASSET MANAGEMENT DEMONSTRATION PROJECT ACT

SEC. 301. SHORT TITLE.

This title may be cited as the ''Indian Trust Asset Management Demonstration Project Act of 2005''.

SEC. 302. DEFINITIONS.

In this title:

(1) PROJECT.—The term ''Project'' means the Indian trust asset management demonstration project established under section 303(a).

(2) OTHER INDIAN TRIBE.—The term ''other Indian tribe'' means an Indian tribe that—

(A) is federally recognized;

(B) is not a section 131 Indian tribe; and

(C) submits an application under section 303(c).

(3) SECRETARY.—The term ''Secretary'' means the Secretary of the Interior.

(4) SECTION 131 INDIAN TRIBE.—The term ''section 131 Indian tribe'' means any Indian tribe that is participating in the demonstration project under section 131 of title III, division E of the Consolidated Appropriations Act, 2005 (Public Law 108–447; 118 Stat. 2809).

SEC. 303. ESTABLISHMENT OF DEMONSTRATION PROJECT; SELECTION OF PARTICIPATING INDIAN TRIBES.

(a) IN GENERAL.—The Secretary shall establish and carry out an Indian trust asset management demonstration project, in accordance with this title.

(b) SELECTION OF PARTICIPATING INDIAN TRIBES.—

(1) SECTION 131 INDIAN TRIBES.—A section 131 Indian tribe shall be eligible to participate in the Project if the section 131 Indian tribe submits to the Secretary an application under subsection (c).

(2) OTHER TRIBES.—

(A) IN GENERAL.—Any other Indian tribe shall be eligible to participate in the Project if—

(i) the other Indian tribe submits to the Secretary an application under subsection (c); and

(ii) the Secretary approves the application of the other Indian tribe.

(B) LIMITATION.—

(i) 30 OR FEWER APPLICANTS.—If 30 or fewer other Indian tribes submit applications under subsection (c), each of the other Indian tribes shall be eligible to participate in the Project.

(ii) MORE THAN 30 APPLICANTS.—

(I) IN GENERAL.—If more than 30 other Indian tribes submit applications under subsection (c), the Secretary shall select 30 other Indian tribes to participate in the Project.

(II) PREFERENCE.—In selecting other Indian tribes under subclause (I), the Secretary shall give preference to other Indian tribes the applications

of which were first received by the Secretary.

(3) NOTICE.—

(A) IN GENERAL.—The Secretary shall provide a written notice to each Indian tribe selected to participate in the Project.

(B) CONTENTS.—A notice under subparagraph (A) shall include—

(i) a statement that the application of the Indian tribe has been approved by the Secretary; and

(ii) a requirement that the Indian tribe shall submit to the Secretary a proposed Indian trust asset management plan in accordance with section 304.

(c) APPLICATION.—

(1) IN GENERAL.—To be eligible to participate in the Project, an Indian tribe shall submit to the Secretary a written application in accordance with paragraph (2).

(2) REQUIREMENTS.—The Secretary shall take into consideration an application under this subsection only if the application—

(A) includes a copy of a resolution or other appropriate action by the governing body of the

Indian tribe, as determined by the Secretary, in support of or authorizing the application;

(B) is received by the Secretary by the date that is 180 days after the date of enactment of this Act; and

(C) states that the Indian tribe is requesting to participate in the Project.

(d) DURATION.—The Project shall remain in effect for a period of 8 years after the date of enactment of this Act.

SEC. 304. INDIAN TRUST ASSET MANAGEMENT PLAN.

(a) PROPOSED PLAN.—

(1) SUBMISSION.—

(A) IN GENERAL.—Not later than 120 days after the date on which an Indian tribe receives a notice from the Secretary under section 303(b)(3), the Indian tribe shall submit to the Secretary a proposed Indian trust asset management plan in accordance with paragraph (2).

(B) TIME LIMITATIONS.—

(i) IN GENERAL.—Except as provided in clause (ii), any Indian tribe that fails to submit the Indian trust asset management plan of the Indian tribe by the date speci-

fied in subparagraph (A) shall no longer be eligible to participate in the Project.

(ii) EXTENSION.—The Secretary shall grant an extension of not more than 60 days to an Indian tribe if the Indian tribe submits a written request for such an extension before the date described in subparagraph (A).

(2) CONTENTS.—A proposed Indian trust asset management plan shall include provisions that—

(A) identify the trust assets that will be subject to the plan, including financial and nonfinancial trust assets;

(B) establish trust asset management objectives and priorities for Indian trust assets that are located within the reservation, or otherwise subject to the jurisdiction, of the Indian tribe;

(C) allocate trust asset management funding that is available for the Indian trust assets subject to the plan in order to meet the trust asset management objectives and priorities;

(D) if the Indian tribe has contracted or compacted functions or activities under the Indian Self-Determination and Education Assist-

ance Act (25 U.S.C. 450 et seq.) relating to the management of trust assets—

(i) identify the functions or activities that are being performed by the Indian tribe under the contracts or compacts; and

(ii) describe the proposed management systems, practices, and procedures that the Indian tribe will follow; and

(E) establish procedures for nonbinding mediation or resolution of any dispute between the Indian tribe and the United States relating to the trust asset management plan.

(3) AUTHORITY OF INDIAN TRIBES TO DEVELOP SYSTEMS, PRACTICES, AND PROCEDURES.—For purposes of preparing and carrying out a management plan under this section, an Indian tribe that has compacted or contracted activities or functions under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), for purposes of carrying out the activities or functions, may develop and carry out trust asset management systems, practices, and procedures that differ from any such systems, practices, and procedures used by the Secretary in managing the trust assets if the systems, practices, and procedures of the Indian

tribe meet the requirements of the laws, standards, and responsibilities described in subsection (c).

(4) TECHNICAL ASSISTANCE AND INFORMATION.—The Secretary shall provide to an Indian tribe any technical assistance and information, including budgetary information, that the Indian tribe determines to be necessary for preparation of a proposed plan on receipt of a written request from the Indian tribe.

(b) APPROVAL AND DISAPPROVAL OF PROPOSED PLANS.—

(1) APPROVAL.—

(A) IN GENERAL.—Not later than 120 days after the date on which an Indian tribe submits a proposed Indian trust asset management plan under subsection (a), Secretary shall approve or disapprove the proposed plan.

(B) REQUIREMENTS FOR DISAPPROVAL.—The Secretary shall approve a proposed plan unless the Secretary determines that—

(i) the proposed plan fails to address a requirement under subsection (a)(2);

(ii) the proposed plan includes 1 or more provisions that are inconsistent with subsection (c); or

(iii) the cost of implementing the proposed plan exceeds the amount of funding available for the management of trust assets that would be subject to the proposed plan.

(2) ACTION ON DISAPPROVAL.—

(A) NOTICE.—If the Secretary disapproves a proposed plan under paragraph (1)(B), the Secretary shall provide to the Indian tribe a written notice of the disapproval, including any reason why the proposed plan was disapproved.

(B) ACTION BY TRIBES.—An Indian tribe the proposed plan of which is disapproved under paragraph (1)(B) may resubmit an amended proposed plan not later than 90 days after the date on which the Indian tribe receives the notice under subparagraph (A).

(3) FAILURE TO APPROVE OR DISAPPROVE.—If the Secretary fails to approve or disapprove a proposed plan in accordance with paragraph (1), the plan shall be considered to be disapproved under clauses (i) and (ii) of paragraph (1)(B).

(4) JUDICIAL REVIEW.—An Indian tribe may seek judicial review of the determination of the Secretary in accordance with subchapter II of chapter

5, and chapter 7, of title 5, United States Code (commonly known as the ''Administrative Procedure Act'') if—

(A) the Secretary disapproves the proposed plan of the Indian tribe under paragraph (1) or (3); and

(B) the Indian tribe has exhausted any other administrative remedy available to the Indian tribe.

(c) APPLICABLE LAWS; STANDARDS; TRUST RESPONSIBILITY.—

(1) APPLICABLE LAWS.—An Indian trust asset management plan, and any activity carried out under the plan, shall not be approved unless the proposed plan is consistent with—

(A) all Federal treaties, statutes, regulations, Executive orders, and court decisions that are applicable to the trust assets, or the management of the trust assets, identified in the plan; and

(B) all tribal laws that are applicable to the trust assets, or the management of trust assets, identified in the plan, except to the extent that the laws are inconsistent with the treaties,

statutes, regulations, Executive orders, and court decisions referred to in subparagraph (A).

(2) STANDARDS.—Subject to the laws referred to in paragraph (1)(A), an Indian trust asset management plan shall not be approved unless the Secretary determines that the plan will—

(A) protect trust assets from loss, waste, and unlawful alienation;

(B) promote the interests of the beneficial owner of the trust asset;

(C) conform, to the maximum extent practicable, to the preferred use of the trust asset by the beneficial owner, unless the use is inconsistent with a treaty, statute, regulation, Executive order, or court decision referred to in paragraph (1)(A);

(D) protect any applicable treaty-based fishing, hunting and gathering, and similar rights relating to the use, access, or enjoyment of a trust asset; and

(E) require that any activity carried out under the plan be carried out in good faith and with loyalty to the beneficial owner of the trust asset.

(3) TRUST RESPONSIBILITY.—An Indian trust asset management plan shall not be approved unless the Secretary determines that the plan is consistent with the trust responsibility of the United States to the Indian tribe and individual Indians.

(d) TERMINATION OF PLAN.—

(1) IN GENERAL.—An Indian tribe may terminate an Indian trust asset management plan on any date after the date on which a proposed Indian trust asset management plan is approved by providing to the Secretary—

(A) a notice of the intent of the Indian tribe to terminate the plan; and

(B) a resolution of the governing body of the Indian tribe authorizing the termination of the plan.

(2) EFFECTIVE DATE.—A termination of an Indian trust asset management plan under paragraph (1) takes effect on October 1 of the first fiscal year following the date on which a notice is provided to the Secretary under paragraph (1)(A).

SEC. 305. EFFECT OF TITLE.

(a) LIABILITY.—Nothing in this title, or a trust asset management plan approved under section 304, shall independently diminish, increase, create, or otherwise affect

the liability of the United States or an Indian tribe participating in the Project for any loss resulting from the management of an Indian trust asset under an Indian trust asset management plan.

(b) EFFECT ON OTHER LAWS.—Nothing in this title amends or otherwise affects the application of any treaty, statute, regulation, Executive order, or court decision that is applicable to Indian trust assets or the management or administration of Indian trust assets, including the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).

(c) TRUST RESPONSIBILITY.—Nothing in this title diminishes or otherwise affects the trust responsibility of the United States to Indian tribes and individual Indians.

TITLE IV—FRACTIONAL INTEREST PURCHASE AND CONSOLIDATION PROGRAM

SEC. 401. FRACTIONAL INTEREST PROGRAM.

Section 213 of the Indian Land Consolidation Act (25 U.S.C. 2212) is amended—

(1) by redesignating subsection (d) as subsection (h); and

(2) by inserting after subsection (c) the following:

"(d) PURCHASE OF INTERESTS IN FRACTIONATED INDIAN LAND.—

"(1) INCENTIVES.—In acquiring an interest under this section in any parcel of land that includes undivided trust or restricted interests owned by not less than 20 separate individuals, as determined by the Secretary, the Secretary may include in the offered purchase price for the interest, in addition to fair market value, an amount not less than $100 and not to exceed $350, as an incentive for the owner to sell the interest to the Secretary.

"(2) SALE OF ALL TRUST OR RESTRICTED INTERESTS.—If an individual agrees to sell to the Secretary all trust or restricted interests owned by the individual, the Secretary may include in the offered purchase price, in addition to fair market value and the incentive described in paragraph (1), an amount not to exceed $2,000, as the Secretary determines to be appropriate, taking into consideration the avoided costs to the United States of probating the estate of the individual or an heir of the individual.

"(e) CERTAIN PARCELS OF HIGHLY FRACTIONATED INDIAN LAND.—

"(1) DEFINITION OF OFFEREE.—In this subsection, the term 'offeree' does not include the In-

dian tribe that has jurisdiction over a parcel of land for which an offer is made.

"(2) OFFER TO PURCHASE.—

"(A) IN GENERAL.—If the Secretary determines that a tract of land consists of not less than 200 separate undivided trust or restricted interests, the Secretary may offer to purchase the interests in the tract, in accordance with this subsection, for an amount equal to the sum of—

"(i) the fair market value of the interests; and

"(ii) an additional amount, to be determined by the Secretary, not less than triple the fair market value of the interest.

"(B) REQUIREMENT.—The Secretary shall make an offer under subparagraph (A) not later than 3 days before the date on which the Secretary mails a notice of the offer to the offeree under paragraph (3).

"(3) NOTICE OF OFFER.—

"(A) IN GENERAL.—The Secretary shall provide to an offeree, by certified mail to the last known address of the offeree, a notice of

any offer to purchase land under this subsection.

"(B) INCLUSIONS.—A notice under subparagraph (A) shall include in plain language, as determined by the Secretary—

"(i) the date on which the offer was made;

"(ii) the name of the offeree;

"(iii) the location of the tract of land containing the interest that is the subject of the offer;

"(iv) the size of the interest of the offeree, expressed in terms of a fraction or a percentage of the tract of land described in clause (iii);

"(v) the fair market value of the tract of land described in clause (iii);

"(vi) the fair market value of the interest of the offeree;

"(vii) the amount offered for the interest in addition to fair market value under paragraph (2)(A)(ii);

"(viii) a statement that the offeree shall be considered to have accepted the offer for the amount stated in the notice

unless a notice of rejection form is deposited in the United States mail not later than 90 days after the date on which the offer is received; and

"(ix) a self-addressed, postage prepaid notice of rejection form.

"(4) TREATMENT OF OFFER.—

"(A) IN GENERAL.—An offer made under this subsection shall be considered to be accepted by the offeree if—

"(i) the certified mail receipt for the offer is signed by the offeree; and

"(ii) the notice of rejection form described in paragraph (3)(B)(ix) is not deposited in the United States mail by the date that is 90 days after the date on which the offer is received.

"(B) REJECTION.—An offer made under this subsection shall be considered to be rejected by the offeree if—

"(i) the notice of rejection form described in paragraph (3)(B)(ix) is deposited in the United States mail by the date that is 90 days after the date on which the offer is received; or

"(ii) the certified mail receipt for the offer is returned to the Secretary unsigned by the offeree.

"(5) WITHDRAWAL OF ACCEPTANCE; NOTICE.—

"(A) WITHDRAWAL OF ACCEPTANCE.—A person that is considered to have accepted an offer under paragraph (4)(A) may withdraw the acceptance by depositing in the United States mail a notice of withdrawal of acceptance form by the date that is 30 days after the date of receipt of the notice under subparagraph (B).

"(B) NOTICE.—The Secretary shall provide to any person that is considered to have accepted an offer under paragraph (4)(A), by certified mail, restricted delivery, to the last known address of the person, a preaddressed, postage prepaid withdrawal of acceptance form and a notice stating that—

"(i) the offer made to the person is considered to be accepted; and

"(ii) the person has the right to withdraw the acceptance by depositing in the United States mail the notice of withdrawal of acceptance form by the date that

is 30 days after the date on which the notice was delivered to the person.

"(6) NOTICE OF ACCEPTANCE AND RIGHT TO APPEAL.—The Secretary shall provide to any person that has been served with a notice under paragraph (5)(B) and fails to withdraw the acceptance of the offer in accordance with paragraph (5)(A), by first class mail to the last known address of the person, a notice stating that—

"(A) the offer made to the person is considered to be accepted and not timely withdrawn; and

"(B) after exhausting all administrative remedies, the person may appeal any determination of the Secretary in accordance with paragraph (7).

"(7) JUDICIAL REVIEW.—A person described in paragraph (6) may appeal any determination of the Secretary with respect to—

"(A) the number of owners of undivided interests in a tract of land required under paragraph (2);

"(B) the fair market value of a tract of land or interest in land;

"(C) the date on which a notice of rejection form was deposited in the United States mail under paragraph (4)(B)(i); or

"(D) the date on which a notice of withdrawal of acceptance form was deposited in the United States mail under paragraph (5)(A).

"(f) OFFER TO SETTLE CLAIMS AGAINST THE UNITED STATES.—

"(1) IN GENERAL.—The Secretary may make an offer to any individual owner (not including an Indian tribe) of a trust or restricted interest in a tract of land to settle any claim that the owner may have against the United States relating to the specific tract of land of which the interest is a part (not including a claim for an accounting described in title I of the Indian Trust Reform Act of 2005).

"(2) REQUIREMENTS.—An offer to settle claims under this subsection shall—

"(A) be in writing;

"(B) be delivered to an individual owner by the Secretary in person or through first class mail; and

"(C) include—

"(i) the name of the individual owner;

1 ''(ii) a description of the tract of land
2 to which the offer relates;
3 ''(iii) the amount offered to settle a
4 claim of the individual owner;
5 ''(iv) the manner and date by which
6 the individual owner shall accept the offer;
7 ''(v) a statement that the individual
8 owner is under no obligation to accept the
9 offer;
10 ''(vi) a statement that the individual
11 owner has the right to consult an attorney
12 or other advisor before accepting the offer;
13 ''(vii) a statement that acceptance of
14 the offer by the individual owner will result
15 in a full and final settlement of all claims,
16 known and unknown, of the individual
17 owner (including the heirs and assigns of
18 the individual owner) against the United
19 States relating to the tract of land identi-
20 fied in the offer; and
21 ''(viii) a statement that the settlement
22 proposed by the offer does not cover any
23 claim for an accounting described in title I
24 of the Indian Trust Reform Act of 2005.

"(3) ACCEPTANCE.—No acceptance of an offer under this subsection shall be valid or binding on the individual owner unless the acceptance—

"(A) is in writing;

"(B) is signed by the individual owner;

"(C) is notarized; and

"(D) is attached to a copy of, or contains all material terms of, the offer to which the acceptance corresponds.

"(4) LIMITATION.—No offer to purchase an interest under this section or any other provision of law shall be conditioned on the acceptance of an offer to settle a claim under this subsection.

"(5) OTHER LAWS.—The authority of the Secretary to settle claims under this subsection shall be in addition to, and not in lieu of, the authority of the Secretary to settle claims under any other provision of Federal law.

"(g) BORROWING FROM TREASURY.—

"(1) ISSUANCE OF OBLIGATIONS.—

"(A) IN GENERAL.—To the extent approved in annual appropriations Acts, the Secretary may issue to the Secretary of the Treasury obligations in such amounts as the Secretary determines to be necessary to acquire in-

terests under this Act, subject to approval of the Secretary of the Treasury, and bearing interest at a rate to be determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities to the obligations.

"(B) LIMITATION.—The aggregate amount of obligations under subparagraph (A) outstanding at any time shall not exceed $[_____].

"(2) FORMS AND DENOMINATIONS.—The obligations issued under paragraph (1) shall be in such forms and denominations, and subject to such other terms and conditions, as the Secretary of the Treasury may prescribe.

"(3) REPAYMENT.—

"(A) IN GENERAL.—Revenues derived from land restored to the Tribe under this Act shall be used by the Secretary to pay the principal and interest on the obligations issued under paragraph (1).

"(B) ASSURANCE OF REPAYMENT.—The Secretary shall ensure, to the maximum extent possible, that the revenues described in sub-

paragraph (A) provide reasonable assurance of repayment of the obligations issued under paragraph (1).

"(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary for each fiscal year beginning after the date of enactment of this subsection such sums as are necessary to cover any difference between—

"(A) the total amount of repayments of principal and interest on obligations issued to the Secretary of the Treasury under paragraph (1) during the previous fiscal year; and

"(B) the total amount of repayments described in subparagraph (A) that were contractually required to be made to the Secretary of the Treasury during that fiscal year.

"(h) RECEIPT OF PAYMENTS HAVE NO IMPACT ON BENEFITS UNDER OTHER FEDERAL PROGRAMS.—The receipt of a payment by an offeree under this title shall not be—

"(1) subject to Federal or State income tax; or

"(2) treated as benefits or otherwise taken into account in determining the eligibility of the offeree for, or the amount of benefits under, any other Federal program, including the social security program,

the medicare program, the medicaid program, the State children's health insurance program, the food stamp program, or the Temporary Assistance for Needy Families program.''.

TITLE V—RESTRUCTURING BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE

SEC. 501. PURPOSE.

The purpose of this title is to ensure a more effective and accountable administration of duties of the Secretary of the Interior with respect to providing services and programs to Indians and Indian tribes, including the management of Indian trust resources.

SEC. 502. DEFINITIONS.

In this title:

(1) BUREAU.—The term ''Bureau'' means the Bureau of Indian Affairs.

(2) OFFICE.—The term ''Office'' means the Office of Trust Reform Implementation and Oversight referred to in section 503(c).

(3) SECRETARY.—The term ''Secretary'' means the Secretary of the Interior.

(4) UNDER SECRETARY.—The term ''Under Secretary'' means the individual appointed to the po-

sition of Under Secretary for Indian Affairs, established by section 503(a).

SEC. 503. UNDER SECRETARY FOR INDIAN AFFAIRS.

(a) ESTABLISHMENT OF POSITION.—There is established in the Department of the Interior the position of Under Secretary for Indian Affairs, who shall report directly to the Secretary.

(b) APPOINTMENT.—

(1) IN GENERAL.—Except as provided in paragraph (2), the Under Secretary shall be appointed by the President, by and with the advice and consent of the Senate.

(2) EXCEPTION.—The officer serving as the Assistant Secretary for Indian Affairs on the date of enactment of this Act may assume the position of Under Secretary without appointment under paragraph (1) if—

(A) the officer was appointed as Assistant Secretary for Indian Affairs by the President by and with the advice and consent of the Senate; and

(B) not later than 180 days after the date of enactment of this Act, the Secretary approves the assumption.

(c) DUTIES.—In addition to the duties transferred to the Under Secretary under sections 504 and 505, the Under Secretary, acting through an Office of Trust Reform Implementation and Oversight, shall—

(1) carry out any activity relating to trust fund accounts and trust resource management of the Bureau (except any activity carried out under the Office of the Special Trustee for American Indians before the date on which the Office of the Special Trustee is abolished), in accordance with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.);

(2) develop and maintain an inventory of Indian trust assets and resources;

(3) coordinate with the Special Trustee for American Indians to ensure an orderly transition of the functions of the Special Trustee under section 505;

(4) supervise any activity carried out by the Department of the Interior, including—

(A) to the extent that the activities relate to Indian affairs, activities carried out by—

(i) the Commissioner of Reclamation;

(ii) the Director of the Bureau of Land Management; and

(iii) the Director of the Minerals Management Service; and

(B) intergovernmental relations between the Bureau and Indian tribal governments;

(5) to the maximum extent practicable, coordinate activities and policies of the Bureau with activities and policies of—

(A) the Bureau of Reclamation;

(B) the Bureau of Land Management; and

(C) the Minerals Management Service;

(6) provide for regular consultation with Indians and Indian tribes that own interests in trust resources and trust fund accounts;

(7) manage and administer Indian trust resources in accordance with any applicable Federal law;

(8) take steps to protect the security of data relating to individual Indian and Indian tribal trust accounts; and

(9) take any other measure the Under Secretary determines to be necessary with respect to Indian affairs.

SEC. 504. TRANSFER OF FUNCTIONS OF ASSISTANT SECRETARY FOR INDIAN AFFAIRS.

(a) TRANSFER OF FUNCTIONS.—There is transferred to the Under Secretary any function of the Assistant Secretary for Indian Affairs that has not been carried out by the Assistant Secretary as of the date of enactment of this Act.

(b) DETERMINATIONS OF CERTAIN FUNCTIONS BY THE OFFICE OF MANAGEMENT AND BUDGET.—If necessary, the Office of Management and Budget shall make any determination relating to the functions transferred under subsection (a).

(c) PERSONNEL PROVISIONS.—

(1) APPOINTMENTS.—The Under Secretary may appoint and fix the compensation of such officers and employees as the Under Secretary determines to be necessary to carry out any function transferred under this section.

(2) REQUIREMENTS.—Except as otherwise provided by law—

(A) an officer or employee described in paragraph (1) shall be appointed in accordance with the civil service laws; and

(B) the compensation of the officer or employee shall be fixed in accordance with title 5, United States Code.

(d) DELEGATION AND ASSIGNMENT.—

(1) IN GENERAL.—Except as otherwise expressly prohibited by law or otherwise provided by this section, the Under Secretary may—

(A) delegate any of the functions transferred to the Under Secretary by this section and any function transferred or granted to the Under Secretary after the date of enactment of this Act to such officers and employees of the Office as the Under Secretary may designate; and

(B) authorize successive redelegations of such functions as the Under Secretary determines to be necessary or appropriate.

(2) DELEGATION.—No delegation of functions by the Under Secretary under this section shall relieve the Under Secretary of responsibility for the administration of the functions.

(e) REORGANIZATION.—The Under Secretary may allocate or reallocate any function transferred under this section among the officers of the Office, and establish, consolidate, alter, or discontinue such organizational entities in the Office, as the Under Secretary determines to be necessary or appropriate.

(f) RULES.—The Under Secretary may prescribe, in accordance with the provisions of chapters 5 and 6 of title 5, United States Code, such rules and regulations as the Under Secretary determines to be necessary or appropriate to administer and manage the functions of the Office.

(g) TRANSFER AND ALLOCATIONS OF APPROPRIATIONS AND PERSONNEL.—

(1) IN GENERAL.—Except as otherwise provided in this section, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to, or to be made available in connection with, the functions transferred by this section, subject to section 1531 of title 31, United States Code, shall be transferred to the Office.

(2) UNEXPENDED FUNDS.—Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(h) INCIDENTAL TRANSFERS.—

(1) IN GENERAL.—The Director of the Office of Management and Budget, at any time the Director

may provide, may make such determinations as are necessary with regard to the functions transferred by this section, and make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, as are necessary, to carry out this section.

(2) TERMINATION OF AFFAIRS.—The Director of the Office of Management and Budget shall provide for the termination of the affairs of all entities terminated by this section and for any further measures and dispositions as are necessary to effectuate the purposes of this section.

(i) EFFECT ON PERSONNEL.—

(1) IN GENERAL.—Except as otherwise provided by this section, the transfer pursuant to this section of full-time personnel (except special Government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for a period of at least 1 year after the date of transfer of the employee under this section.

(2) EXECUTIVE SCHEDULE POSITIONS.—Except as otherwise provided in this section, any person who, on the day preceding the date of enactment of this Act, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without a break in service, is appointed to a position in the Office having duties comparable to the duties performed immediately preceding such appointment shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of the service of the person in the new position.

(3) TERMINATION OF CERTAIN POSITIONS.—Positions whose incumbents are appointed by the President, by and with the advice and consent of the Senate, the functions of which are transferred by this title, shall terminate on the date of enactment of this Act.

(j) SEPARABILITY.—If a provision of this section or the application of this section to any person or circumstance is held invalid, neither the remainder of this section nor the application of the provision to other persons or circumstances shall be affected.

(k) TRANSITION.—The Under Secretary may use—

(1) the services of the officers, employees, and other personnel of the Assistant Secretary for Indian Affairs relating to functions transferred to the Office by this section; and

(2) funds appropriated to the functions for such period of time as may reasonably be needed to facilitate the orderly implementation of this section.

(l) REFERENCES.—Any reference in a Federal law, Executive order, rule, regulation, delegation of authority, or document relating to the Assistant Secretary for Indian Affairs, with respect to functions transferred under this section, shall be deemed to be a reference to the Under Secretary.

(m) RECOMMENDED LEGISLATION.—Not later than 180 days after the effective date of this title, the Under Secretary, in consultation with the appropriate committees of Congress and the Director of the Office of Management and Budget, shall submit to Congress any recommendations relating to additional technical and conforming amendments to Federal law to reflect the changes made by this section.

(n) EFFECT OF SECTION.—

(1) CONTINUING EFFECT OF LEGAL DOCUMENTS.—Any legal document relating to a function transferred by this section that is in effect on the

date of enactment of this Act shall continue in effect in accordance with the terms of the document until the document is modified or terminated by—

(A) the President;

(B) the Under Secretary;

(C) a court of competent jurisdiction; or

(D) operation of Federal or State law.

(2) PROCEEDINGS NOT AFFECTED.—This section shall not affect any proceeding (including a notice of proposed rulemaking, an administrative proceeding, and an application for a license, permit, certificate, or financial assistance) relating to a function transferred under this section that is pending before the Assistant Secretary on the date of enactment of this Act.

SEC. 505. OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS.

(a) TERMINATION.—Notwithstanding sections 302 and 303 of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4042; 4043), the Office of Special Trustee for American Indians shall terminate on the effective date of this section.

(b) TRANSFER OF FUNCTIONS.—There is transferred to the Under Secretary any function of the Special Trustee

for American Indians that has not been carried out by the Special Trustee as of the effective date of this section.

(c) DETERMINATIONS OF CERTAIN FUNCTIONS BY THE OFFICE OF MANAGEMENT AND BUDGET.—If necessary, the Office of Management and Budget shall make any determination relating to the functions transferred under subsection (b).

(d) PERSONNEL PROVISIONS.—

(1) APPOINTMENTS.—The Under Secretary may appoint and fix the compensation of such officers and employees as the Under Secretary determines to be necessary to carry out any function transferred under this section.

(2) REQUIREMENTS.—Except as otherwise provided by law—

(A) any officer or employee described in paragraph (1) shall be appointed in accordance with the civil service laws; and

(B) the compensation of such an officer or employee shall be fixed in accordance with title 5, United States Code.

(e) DELEGATION AND ASSIGNMENT.—

(1) IN GENERAL.—Except as otherwise expressly prohibited by law or otherwise provided by this section, the Under Secretary may—

(A) delegate any of the functions transferred to the Under Secretary under this section and any function transferred or granted to the Under Secretary after the effective date of this section to such officers and employees of the Office as the Under Secretary may designate; and

(B) authorize successive redelegations of the functions as are necessary or appropriate.

(2) DELEGATION.—No delegation of functions by the Under Secretary under this section shall relieve the Under Secretary of responsibility for the administration of the functions.

(f) REORGANIZATION.—The Under Secretary may allocate or reallocate any function transferred under subsection (b) among the officers of the Office, and establish, consolidate, alter, or discontinue such organizational entities in the Office as the Under Secretary determines to be necessary or appropriate.

(g) RULES.—The Under Secretary may prescribe, in accordance with the provisions of chapters 5 and 6 of title 5, United States Code, such rules and regulations as the Under Secretary determines to be necessary or appropriate to administer and manage the functions of the Office.

(h) TRANSFER AND ALLOCATIONS OF APPROPRIATIONS AND PERSONNEL.—

(1) IN GENERAL.—Except as otherwise provided in this section, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to, or to be made available in connection with the functions transferred by this section, subject to section 1531 of title 31, United States Code, shall be transferred to the Office.

(2) UNEXPENDED FUNDS.—Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(i) INCIDENTAL TRANSFERS.—

(1) IN GENERAL.—The Director of the Office of Management and Budget, at any time the Director may provide, may make such determinations as are necessary with regard to the functions transferred by this section, and make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations,

and other funds held, used, arising from, available to, or to be made available in connection with such functions, as are necessary, to carry out this section.

(2) TERMINATION OF AFFAIRS.—The Director of the Office of Management and Budget shall provide for the termination of the affairs of all entities terminated by this section and for any further measures and dispositions as are necessary to effectuate the purposes of this section.

(j) EFFECT ON PERSONNEL.—

(1) IN GENERAL.—Except as otherwise provided by this section, the transfer pursuant to this section of full-time personnel (except special Government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for a period of at least 1 year after the date of transfer of the employee under this section.

(2) EXECUTIVE SCHEDULE POSITIONS.—Except as otherwise provided in this section, any person who, on the day preceding the effective date of this section, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without a break in service, is appointed to a position in the

Office having duties comparable to the duties performed immediately preceding such appointment, shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of the service of the person in the new position.

(3) TERMINATION OF CERTAIN POSITIONS.—Positions the incumbents of which are appointed by the President, by and with the advice and consent of the Senate, and the functions of which are transferred by this title, shall terminate on the effective date of this section.

(k) SEPARABILITY.—If a provision of this section or the application of this section to any person or circumstance is held invalid, neither the remainder of this section nor the application of the provision to other persons or circumstances shall be affected.

(l) TRANSITION.—The Under Secretary may use—

(1) the services of the officers, employees, and other personnel of the Special Trustee relating to functions transferred to the Office by this section; and

(2) funds appropriated to those functions for such period of time as may reasonably be needed to facilitate the orderly implementation of this section.

(m) REFERENCES.—Any reference in a Federal law, Executive order, rule, regulation, delegation of authority, or document relating to the Special Trustee, with respect to functions transferred under this section, shall be deemed to be a reference to the Under Secretary.

(n) RECOMMENDED LEGISLATION.—Not later than 180 days after the effective date of this title, the Under Secretary, in consultation with the appropriate committees of Congress and the Director of the Office of Management and Budget, shall submit to Congress any recommendations relating to additional technical and conforming amendments to Federal law to reflect the changes made by this section.

(o) EFFECT OF SECTION.—

(1) CONTINUING EFFECT OF LEGAL DOCUMENTS.—Any legal document relating to a function transferred by this section that is in effect on the effective date of this section shall continue in effect in accordance with the terms of the document until the document is modified or terminated by—

(A) the President;

(B) the Under Secretary;

(C) a court of competent jurisdiction; or

(D) operation of Federal or State law.

(2) PROCEEDINGS NOT AFFECTED.—This section shall not affect any proceeding (including a notice of proposed rulemaking, an administrative proceeding, and an application for a license, permit, certificate, or financial assistance) relating to a function transferred under this section that is pending before the Special Trustee on the effective date of this section.

(p) EFFECTIVE DATE.—This section shall take effect on December 31, 2008.

SEC. 506. HIRING PREFERENCE.

In appointing or otherwise hiring any employee to the Office, the Under Secretary shall give preference to Indians in accordance with section 12 of the Act of June 8, 1934 (25 U.S.C. 472).

SEC. 507. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this title.

TITLE VI—AUDIT OF INDIAN TRUST FUNDS

SEC. 601. AUDITS AND REPORTS.

(a) FINANCIAL STATEMENTS AND INTERNAL CONTROL REPORT.—

(1) FINANCIAL STATEMENTS.—For each fiscal year beginning after the enactment of this Act, the

Secretary of Interior shall prepare financial statements for individual Indian, Indian tribal, and other Indian trust accounts in accordance with generally accepted accounting principles of the Federal Government.

(2) INTERNAL CONTROL REPORT.—Concurrently with the financial statements under by paragraph (1), the Secretary shall prepare an internal control report that—

(A) establishes the responsibility of the Secretary for establishing and maintaining an adequate internal control structure and procedures for financial reporting under this Act; and

(B) assesses the effectiveness of the internal control structure and procedures for financial reporting under subparagraph (A) during the preceding fiscal year.

(b) INDEPENDENT EXTERNAL AUDITOR.—

(1) IN GENERAL.—The Comptroller General of the United States shall enter into a contract with an independent external auditor to conduct an audit and prepare a report in accordance with this subparagraph.

(2) AUDIT REPORT.—An independent external auditor shall submit to the Committee on Indian Affairs of the Senate, and make available to the public, an audit of the financial statements under subsection (a)(1) in accordance with—

(A) generally accepted auditing standards of the Federal Government; and

(B) the financial audit manual jointly issued by the Government Accountability Office and the Council on Integrity and Efficiency of the President.

(3) ATTESTATION AND REPORT.—In conducting the audit under paragraph (2), the independent external auditor shall attest to, and report on, the assessment of internal controls made by the Secretary under subsection (a)(2)(B).

(4) PAYMENT FOR AUDIT AND REPORT.—

(A) TRANSFER OF FUNDS.—On request of the Comptroller General, the Secretary shall transfer to the Government Accountability Office from funds made available for administrative expenses of the Department of Interior the amount requested by the Comptroller General to pay for an annual audit and report.

(B) CREDIT TO ACCOUNT.—

(i) IN GENERAL.—The Controller General shall credit the amount of any funds transferred under subparagraph (A) to the account established for salaries and expenses of the Government Accountability Office.

(ii) AVAILABILITY.—Any amount credited under clause (i) shall be made available on receipt, without fiscal year limitation, to cover the full costs of the audit and report.

SEC. 602. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this title.

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STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator DORGAN. Mr. Chairman, thank you very much.

Let me echo your comments about some of the more intemperate remarks that have been made about our draft proposal. It is important to point out that this litigation, the *Cobell* litigation, affects not just the individuals that are a party to the litigation. It will affect all Indian people all across this country. In the future, we can spend billions of dollars doing historical accounting, sending the money to accountants, legions of accountants and lawyers to do the historical accounting, or we can find some way to resolve this. But the fact is, this issue is going to affect Indian health care, Indian housing, Indian education unless we find some way to address it.

Now, we drafted a piece of legislation. We said it was a start, a draft. We left the money issue blank in the larger numbers. We drafted this influenced by many of the principles developed by the work group that was organized by the National Congress of American Indians and Chairman Tex Hall and the Intertribal Monitoring Association. When we put it out there, we clearly indicated, look, this is just a step we hope in the right direction.

Indian people have been cheated, bilked and defrauded over a long period of time. I understand that. I agree with that. This country needs to deal with that. It has been the case with respect to trust accounts. Senator McCain and I and other members of the committee cannot undo that. We wish we could, but we can't. So the question is, what do we do now?

Well, there are two choices. We can be actively involved trying to reach some kind of legislative solution to this that is acceptable to everyone, or hopefully acceptable to most. Or we can just say, we have a lot of other things we ought to work on. You all just handle it. Let the courts handle it. We cannot pass legislation. We have too many discordant voices out there. It cannot be done, so that will not be our agenda. We will just not move legislation. Whatever the courts decide, they decide. Whatever money we have to pony up for accountants and attorneys, we will do it. But we cannot provide the leadership on something that is insoluble.

That is one approach. We have chosen not to try to move down that road because we think that is counterproductive for the country, but most importantly we believe it is counterproductive for Indian people. We think for the tribes and the individuals involved in the case and for all Indians all across this country, who I think still suffer from a bona fide emergency in health care, housing and education, we need to do better. That is why we have decided to try to advance working with the working group, advance something that we think constructively could intercept and respond to this.

Does anybody in this room think that spending $8 billion, $10 billion, or $12 billion for accountants and lawyers and historical accounting is the right way to address this? That is unbelievable.

So we have two choices. We can either decide to proceed and work with people in a constructive way, or we can decide, don't bother us; we can't do it. And so you all go figure it out with the courts and let the lawyers and the accountants get rich and everybody else is going to suffer the consequences. I hope we choose the

former, but I must say that I was not very impressed the other day reading some of the statements. There is so much shrill noise, crowd noise on some of these issues that it will make it very hard to proceed.

Let me also as I conclude say that there are also some important leadership out there in Indian country as well who really feel that this needs to get resolved in the right way for Indian people. We want to work with them. This will not be easy, but Chairman McCain and I and other members of the committee have decided we have a responsibility to try. We are going to try as hard as we can to see if we cannot find a way to do this, but we can't do it without your help.

Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you very much.

Our first panel is Jim Cason, who is the associate deputy secretary of the Department of the Interior. He is accompanied by Ross Swimmer, who is the special trustee for American Indians in the Department of the Interior. Welcome to both of you, and please proceed. It is good to have you back, Mr. Cason.

Mr. CASON. Thank you, Mr. Chairman.

The CHAIRMAN. Excuse me, before you go. Did Senator Akaka or Senator Johnson have opening comments?

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

Senator AKAKA. Yes, Mr. Chairman; I do have a statement. In the interests of time, I will submit my statement for the record.

But before that, I want to commend you and Senator Dorgan for addressing this huge, historic problem for Indian country and all Indian people. It is something that is going to be tough, but I hope that we will all work together to try to find the best solutions to this problem over many, many centuries, not centuries, but decades that this has been a problem

Mr. Chairman, I want to commend you and Senator Dorgan for introducing S. 1439 and commend you for the effort and to let you know that I will be with you in addressing this huge issue for our country.

Thank you very much, Mr. Chairman.

[Prepared statement of Senator Akaka appears in appendix.]

The CHAIRMAN. Thank you.

Senator Johnson.

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

Senator JOHNSON. Yes, Mr. Chairman; I will be very brief.

Thank you for holding this hearing and for your efforts with the Indian Trust Reform Act of 2005. I am still receiving comments from both tribal leaders and tribal members regarding this bill. Upon receiving more feedback from the interested parties back home, I will share their concerns with the committee.

It is my hope that all concerned parties can work toward a just conclusion with a minimum of harsh rhetoric and a maximum of good faith, cooperation and consultation. I want to thank the committee staff for consulting with our tribal leaders thus far, as the

committee should. My home State of South Dakota is home to a significant percentage of individual Indian money account holders and trust asset, with 26 percent of Indian money accounts from tribes in the Great Plains region, twice the number of individual accounts of any other region.

I look forward to continuing to work with you as we proceed on this important issue. Frankly, I have been discouraged over the years with the Government's actions pertaining to the management and mismanagement of the tribes and individual trust assets. The Government as trustee has failed Indian country. At times, the Government has acted in bad faith.

I understand that this bill was drafted with compromise in mind. It is important that efforts continue to go on to reach a reasonable consensus. While I believe that this legislation is a good start, I urge the committee, as I know you will, to continue to take a hard look at some of the pro-tribal provisions that have been omitted. Most importantly, however, I hope that we can arrive at a point where legislation will include an articulation of trust standards in the legislation itself.

Finally, any settlement legislation should balance the obligations that the United States owes to the tribes and tribal claimants. We have to be mindful that this legislation does not just address the settlement of *Cobell,* but has a significant impact on all tribal concerns.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much

Mr. Cason.

STATEMENT OF JIM CASON, ASSOCIATE DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS

Mr. CASON. Good morning, Mr. Chairman.

Thank you for the opportunity to come before the committee again and discuss the *Cobell* v. *Norton* lawsuit. We have discussed the lawsuit on several prior occasions. The Department of the Interior supports the efforts of Congress as the Indian Trust Settlor to clarify our Indian trust duties, responsibilities and expectations.

We particularly want to thank the chairman and vice chairman for their efforts to try to reach a full, fair, and final settlement of the issues in this case. This Congress has the opportunity to look at this issue anew, examine the facts, and move forward to a clear and consistent sense of purpose regarding the Federal Government's administration of the Indian trust.

Mr. Chairman, as mentioned before, we have had a significant challenge in trying to separate rhetoric from fact involving this issue. The case is laced heavily with rhetoric. What we have done in the last 3 years is attempt to replace rhetoric with fact with our accounting efforts. I would like to synopsize basically what we have found.

On the individual accounting area, the Department of the Interior spent approximately $100 million in individual accounting thus far. We have done an accounting or compiled the ledgers for the name plaintiffs and predecessors in interest. We have looked at tens of thousands of judgment and per capita accounts. We have

distributed thousands of special deposit accounts. We have done a statistical evaluation of thousands of transactions involving land-based accounts.

We have done all of these activities under the auspices of the plan provided by the Department of the Interior to Congress and the court to conduct the historical accounting. Throughout all of these efforts, we have found that there are differences between what is on the accounting ledgers within the Department of the Interior and what is in the supporting documentation. The differences tend to be few. They tend to be small. And they tend to be on both sides of the ledger. There are instances in which we have overpaid Indian account holders and there are instances in which we have underpaid Indian account holders. If you take all of the transactions and all of the interest that is associated with the transactions in total for all of the things that we have examined, we have so far overpaid Indian beneficiaries.

That does not mean that the job is done. It is not. We have been concentrating on our first priority, which is to do the accounting for the accounts that had current balances as of December 31, 2000. We selected that as the priority because we have an ongoing relationship with those account holders. These accounts go beyond the period in which we were planning to do historical accounting, where they had an ongoing responsibility, and under the 1994 act we had ongoing requirements for providing periodic statements and balancing those accounts.

So we set that as the priority accounts that we would do first. We have found some errors, but they do not amount to anywhere near the magnitude of error that has been asserted thus far in this case. For example, Mr. Chairman, as we have looked at the accounts for land-based accounts, which are the most problematic, the most expensive to do, the most complicated to do, and the most time-consuming to do, thus far in examining all of the thousands of transactions that we have looked at, we have a net error of about $10,000. We have an overall error of underpayments of about $48,000 and about $35,000 of off-setting overpayments.

So there are some errors, but they tend to be small. They tend to be few. I would leave this synopsis with the thought that depending on the task that we are given as to how far back we account and for whom we account, there could be much, much more to be done and in that area there is risk and uncertainty. We do not know what we will find if we spend hundreds of millions or billions of dollars to go do an accounting. We may find results similar to what we have found so far, or we may find that there are in fact problems. We do not know. The plaintiffs do not know.

But what we know so far is, after doing tens of thousands of accounts, we have not found any sign of systemic fraud or systemic accounting error in our systems. What I have been told by the accounting firms through our Office of Historical Trust Accounting is that the errors that we have found manifest themselves as normal human error, as opposed to the result of any systemic problem with our systems.

If I can move on, Congress created the individual trust. We are hopeful that S. 1439 will resolve many of the issues that we have spent the last 9 years in court debating. From the Government's

standpoint, we believe that S. 1439 should provide a full, fair, and final resolution of the entire case; provide a clear and realistic statement of the Government's historic accounting obligations for the trust funds of individuals; resolve the accounting claims of account holders and any associated funds for funds mismanagement; eliminate inefficient trust management obligations by consolidating individual Indians' lands through a land purchasing program; address any historical land assets mismanagement claims; clarify trust accounting and management responsibilities such that they are limited by available appropriations so that future claims and litigation do not arise as a result of unfunded obligations; and provide a clear statement of the government's historical accounting obligations for Indian tribes.

We recognize that this is a daunting task, but I can assure you it is no more daunting than the prospect of facing many more years in court trying to find the answers to these issues.

Mr. Chairman, I would like to close with a comment in support of our people at the Department of the Interior. We want to be sure that the public record reflects the fact of their extraordinary service to their country. Many of our employees past and present have faced rough sledding in the *Cobell* case and have been unfairly maligned.

Department of the Interior employees working on the issues involved in the *Cobell* case, like other employees of the department, are here to serve the American public. They work hard and in good faith to implement the laws that you enact and protect the legal rights of Native Americans. We ask that our employees be treated with the dignity and respect they have earned and deserve, as we all work our way together through the difficult legal issues involved in the *Cobell* case.

The department is encouraged by the Senate's leadership on this issue. We look forward to resolving this case so that the department and beneficiaries can move forward on a positive agenda for Indian country.

Thank you for the opportunity to appear. We would be happy to answer any questions at this time.

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

The CHAIRMAN. Mr. Swimmer, do you have any additional comments?

Mr. SWIMMER. Mr. Chairman, I do not have specifically on the bill, but I would like to bring to the attention of the committee some of the reform items which have been a sideline to the *Cobell* matter in the court, in requesting that the trust be reformed. After the 2002 consultations that we had with the tribal leaders and the tribal leader task force, several things came out of that that I felt were very important. After becoming the Special Trustee, we moved forward on this agenda of reform. I would like to just let you know a few of the things that have happened.

One of the most distressing things has been, I guess in the rhetoric both in the case and previous to our tenure there and that is that there seems to be a wholesale lack of records in Indian country that can establish for fact what happened in individual Indian accounts. I think at one time this was true, but it was true not because records were not available. It is because they could not be

brought together. They were located in literally hundreds of different locations, Federal record centers from Fort Worth to Washington; tribes; BIA offices; and other places.

One of the things that has happened is the creation of a records repository in Lenexa, KS. It is a state-of-the-art, actually the most modern records center of any in the Federal Government, as well as elsewhere. Currently, that record center is housing over 100,000 boxes of records that have been collected and approximately 250-plus million pages of records. Most of these deal with the financial accounting or management of Indian lands over the years.

These have also been indexed and stored, and they are there in perpetuity. As we are able to collect additional records, they go into this repository. This has been no small effort. Approximately $20 million a year has been dedicated to this effort for the last few years to bring these records together.

Since the 1994 act, beginning in the late 1990's, the trust fund has been audited annually by outside auditors, both the tribal and the individual trust fund. In addition to that, as provided in the act, quarterly statements of account have been sent to beneficiaries who are entitled to receive the statements on any funds that might be there. I might add, the quarterly statements are sent out for those who have more than $1 in their account. The 1994 act provides that those with less than $1 in their account receive annual statements, and those too are sent.

We have just completed the conversion of legacy systems into what we call pilot agencies at Anadarko and Concho. These legacy systems change from 30- to 40-year-old computer systems for the title, work that is done by the Bureau of Indian Affairs to the accounting work that is done by the Special Trustee's office, and tracking the leasing and the use of land. The conversion of these legacy systems and the data in these legacy systems enable us to fulfill the requirements of the 1994 act, identifying source, type and status of funds for each individual Indian account holder.

We have recently implemented at those two locations a lockbox system. This has been particularly troubling in Indian country. It is to collect the money that is owed. It is not unusual, has not been in the past, for a lessee to come in and give money to the Bureau of Indian Affairs and have it sit on someone's desk for a few days, maybe weeks. This lockbox system allows us to collect directly from the lessee, deposit the money immediately, begin generating interest on those funds, and place it in the appropriate account to avoid the special deposit account problem that we have now.

One innovative thing, I think, that has been very helpful in Indian country just in the last 4 months, is a call center operation that was set up to receive calls from beneficiaries to help them identify answers to problems that they might have with their accounts or anything dealing with the trust issue. So far, we have fielded over 33,000 calls from beneficiaries at this call center with an 800 number. Over 90 percent, I think about 94 percent of the calls are able to be resolved at the time of the call, which is also important to avoid having to continually call back and try to find someone to provide an answer.

For the first time in the history of the Indian trust, we now have trained trust administrators and trust officers located in the field.

These are people who have come both from the private sector of trust, fiduciary trust, working in trust companies, building trust companies, to people in the Bureau of Indian Affairs who have been trained in the fiduciary trust, and then cross-trained with the Indian trust and those coming from the private trust and vice versa.

Seven years ago, there was one person in the Department of the Interior that had private sector trust experience, and that is my Deputy Special Trustee Donna Erwin. Since that time, we now have over 60 people trained similarly in the trust world of fiduciary trust administering accounts and business on behalf of our trust beneficiaries. The total focus of the reform effort has been to, for the beneficiary him- or herself to provide the services that have in fact been lacking in the past.

So I bring these items to your attention to let you know that there is another side to *Cobell,* and that has been in the reform, and we have not been waiting on things to happen, but moving forward with the support of the Congress and the appropriations, and the support of the Secretary particularly, and people like Mr. Cason. So we bring that to the attention of the Congress and thank you very much also for the efforts on the introduction of the proposed legislation.

The CHAIRMAN. Thank you very much.

Mr. Cason, what percentage of the total land-based accounts have you examined, roughly?

Mr. CASON. The part that we have been looking at, Mr. Chairman, is the electronic-era accounts, 1985 to 2000. Our estimate is that they represent about 70 percent of the accounts that we intend to look at under our plan.

The CHAIRMAN. What is the percentage of the total accounts?

Mr. CASON. Total accounts since 1887? We do not know. No one knows. As far as I know, there is no list ever compiled of all the accounts over the last 118 years. No one knows.

The CHAIRMAN. How much money have you spent on examining land-based accounts?

Mr. CASON. I do not have a specific figure. Overall, we have spent about $100 million looking at individual accounts, broken into the efforts that I mentioned earlier

The CHAIRMAN. Would you provide that for the record for us?

Mr. CASON. Yes.

The CHAIRMAN. How much money do you think it will cost to complete the land-based accounts?

Mr. CASON. The estimate that we have in our plan that we submitted to Congress for the accounting that we intended to do was $335 million. The cost of the accounting looks like it may be a little bit more than that, but we have not revised it, pending discussions about how we resolve our accounting duties and obligations.

The CHAIRMAN. Mr. Swimmer, I think it was the 108th Congress, we called for two mediators to work to try to solve this. Do you remember that? Two highly qualified individuals? What happened?

Mr. SWIMMER. I think what happened is that any mediation needs to work toward a middle point and you eventually get the two parties together. The information that has been generated thus far is that there could be millions of dollars in discrepancies in the

Indian trust funds over 100 years. It is not evident that there was, as Mr. Cason said, wholesale fraud at the bureau level. Money came in, money went out, and that was the basis of the accounting that was ordered. Money came in and money went out. It was not for estimating what should have come in. If I leased my minerals for *x* dollars and I think I should have gotten X plus one, the point is, *x* went into your account.

The plaintiffs, on the other hand, have set a number based on $13 billion that we generally both agree came into the trust. Their position is none of it went out. It never got paid. If you add interest to that over those periods of time, you come up with $170-plus billion. When you start at $170-plus billion and what could be millions that could be assessed, and you are trying to reach a middle point, I really believe that the mediators were unable to bring that together, to bring the two parties closer together than that.

The CHAIRMAN. Do you have an idea as to what a lump-sum payment would be, Mr. Cason, under our proposal?

Mr. CASON. No, Mr. Chairman; it would depend on the assumptions that you make. If we use the facts that we have found so far in the accounting process, the number would be very, very low. If you looked at the assumptions that Ross just talked about, the number would be very, very high. We do not think that the facts that we have thus far would support a very high number, but there is uncertainty and risk associated with, as you mentioned, Mr. Chairman, in your opening statement, that as we go further back, depending on the size of the job and how we frame the job, what exactly has to get done while we look at it. There is risk and uncertainty in a 100-years worth of activity, if that is what we have to look at.

The CHAIRMAN. Finally, suppose that Senator Dorgan's and my proposal gains no traction and there is just opposition to it from all sides, so we move on to other issues. As mentioned, we have a number of other issues. It seems to me there is a great deal of uncertainty in the courts given the record of the District Court judge making certain decisions and then that being overturned by an appellate court.

Then it seems to me that understandably people who are involved in litigation may want to carry it all the way to the U.S. Supreme Court, since there seems to be divisions of opinion at the lower court levels. Is that a logical sequence of events here?

Mr. CASON. Mr. Chairman, in my opinion, if we are not successful with this effort it will be a great opportunity lost. We have been in court for 9 years. I do not think we are any closer to a resolution now after 9 years than we were when we started. I think you are right that there are several rounds of up and down through the District Court, Court of Appeals, and eventually the U.S. Supreme Court if we have to go down that pathway. At this point, the time and effort spent going down that pathway does not look very productive if there is another alternative, which I am hopeful this bill will provide us

The CHAIRMAN. Ross.

Mr. SWIMMER. I would agree with Mr. Cason. I would say that based on the expenditures to date for the litigation, which exceed $100 million, we are looking at another $400 million to $500 mil-

lion just in litigation expenses. So I think there is obviously some room for some value to be put on this in the legislation.

The CHAIRMAN. Senator Dorgan.

Senator DORGAN. Mr. Cason, to the extent that you know, what is the size of the class in the *Cobell* v. *Norton* case? Some say 200,000; some say 500,000 individuals. What is your sense of that?

Mr. CASON. At this point, it is undefined. What we have from the court is a generic reference to current and former IIM account holders, but we have not had any more specific definition of that. There are some parameters, a time frame. The numbers would change if you say a statute of limitations would apply which the District Court does not say applies, or if you say, well, I want to take accounts from the 1970's or 1950's or 1930's. Some people believe that the operative date would be 1938 when the Court of Appeals referred to that date and it is also in the 1994 act, and the District Court judge says 1887. At this point, we do not have any clear definition as to who would be covered and who would not be covered.

Senator DORGAN. Mr. Cason, you told me once about a particular parcel of land. You were trying to make a point about fractionated ownership, a particular parcel of land, I think maybe it was 2,000 acres at the Wahpeton-Sisseton Tribe. Can you recount that for me?

Mr. CASON. I have had several examples, in particular I have one tract of land that has been pointed out to me by our staff that the smallest individual interest is one-ten-billionth of an interest. If you take a typical allotment, most of them are 40 acres or 80 acres or 160 acres. It amounts to a very, very tiny, small amount of undivided interest in a property.

The point that I was making with you is that as a result of fractionation, we have huge complications in running this trust. Instead of the 100,000 allotments that we have, we have 2.5 million to 4 million ownership interests, depending on what you count, that we have to keep track of.

In doing all the land title work for all of those things and the implications for leasing and the implications for probate, puts us in a position that the way the trust is currently framed for individual allotees, we end up wasting a lot of money because we have to administrative processing on interest of very low value or no value.

Senator DORGAN. Interest payments of 0.1 cent or 0.4 cents.

Mr. CASON. Yes.

Senator DORGAN. I think you described to me a piece of land that produced, was it $2,000 worth of revenue and cost $42,000 for the yearly accounting to keep track of the fractionated ownership.

Mr. CASON. Yes.

Senator DORGAN. The only reason I make that point is to describe I assume how difficult historical accounting is and how time-consuming and how much money it is going to take.

Mr. Swimmer, you said that if this continues through the courts to its conclusion, you think upward of $500 million of additional legal fees?

Mr. SWIMMER. Accounting and legal.

Senator DORGAN. Accounting and legal fees.

Mr. SWIMMER. Accounting and legal, and most of that, well, that is what the money is going for now is to do the historical accounting and to perform the various orders of the court, as well as to pay the attorneys, both sides, for the effort that they are putting into the case.

Senator DORGAN. But that would not reflect the cost of the larger historical accounting, if you were to be required, as the court seems to suggest, and go through the entire historical accounting effort, I assume that the costs are much, much higher.

Mr. SWIMMER. It could be. We have estimated I believe as high as in excess of $10 billion if you were do a transaction by tranaction analysis since 1887 of every single account holder. If you took the 2,000 owners of the 160-acre tract, every time that is leased you have 2,000 transactions because each owner has to have an account set up, whatever the money, if it less than one penny, it is rounded up to one penny and goes into the account, and then when that person passes on, we have to do a probate for that particular person, even though it is one-ten-billionth.

So there are structural reforms that need to be done with the trust, and certainly the effort at fractionation interests that you all have worked on before I think will be helpful in the future. It has been helpful in the past.

Senator DORGAN. One final point. Mr. Cason, you indicated that in some of the accounting efforts that you have made that the results show little if any error. And yet, most of us have read of just devastating anecdotal accounts of not just errors, but fraud, manipulation in various parts of the country over many years. How does that square with your assessment that you take some accounts and take a look at it and you find very little error?

Mr. CASON. It doesn't. In terms of separating the rhetoric from fact, we have not found that in the accounting that we have done. I think it is also fair to say that we have not looked at all accounts everywhere. We started with a priority of doing the accounts that are relatively new that had balances. Maybe there is something different about those than the ones in the past.

Where we are potentially different in how the two sides refer to this is I take the position that until I have actually done the accounting and have some indicator one way or the other as to what the actual facts are, I do not project one way or the other what I would find. Based on the areas that we have actually looked and found the facts, what we have found is a few errors, and they are small and they are both sides of the ledger, where we have overpaid the Indian account holder, underpaid the Indian account holder, and that when you net it out it is very close to zero relatively.

So it suggests that we have not found any systemic fraud. We have not found any systemic accounting errors in our systems. As Ross said, we do balance our accounts daily now. So for that period of 1985 to 2000 that we are looking at principally, we have not found material problems. It is possible before that that there may be problems.

Senator DORGAN. Then I think I understand the basis for your comment. The fact is, this goes back a long, long way with unscrupulous land agents and a whole series of fascinating and in some ways devastating stories. I think I understand why you say little

error if you are just talking about a few accounts in a relatively short recent timeframe.

Mr. Chairman, as I indicated to you, we have a series of five votes, the first of which will start in just 1 moment. When that first vote starts, I will run over and cast my vote and come back so we can continue the hearing. I think the third, fourth, and fifth votes will be 10-minute votes, but we will have to see how that goes. I just wanted to mention that when the buzzer rings for the first vote, I will leave and then come back so we can retain the hearing as scheduled.

The CHAIRMAN. Thank you very much.

Senator Johnson.

Senator JOHNSON. Yes, Mr. Cason; I wonder if you and the Department of the Interior would address this specific bill, S. 1439. Have you taken a position on this legislation? And would you share any further elaboration or critique of the bill?

Mr. CASON. The Administration has not provided a statement of Administration position on the bill yet. As you know, Senator, we just got it last Thursday. We have looked at the bill and given the nature of the *Cobell* litigation, there are lots of people in the Administration who are interested in this legislation and the prospect for resolving the issues.

I would say generally for all the people that I have talked to within the Administration, people have been positive about the effort, hopeful about the leadership being shown by this committee to try and address the issue. There are a few issues which we would like to discuss further with the committee in further deliberations of the bill, but overall we have been positive.

Senator JOHNSON. Thank you

No further questions.

The CHAIRMAN. Thank you very much.

Thank you for appearing today. It is good to see you again.

Mr. CASON. Nice to see you, Mr. Chairman.

The CHAIRMAN. Thank you.

Our next panel is Tex Hall, who is the president of the National Congress of American Indians; Chief James Gray, who is the president of the Inter-Tribal Monitoring Association and cochairman of the Trust Reform and Cobell Settlement Work Group; Ernest L. Stensgar, who is the president of the Affiliated Tribes of Northwest Indians of Portland, OR; James T. Martin, the executive director of the United South and Eastern Tribes of Nashville, TN; and Elouise P. Cobell, the Blackfeet Reservation Development Fund of Browning, MT.

We will begin with you, Chief Gray.

STATEMENT OF JIM GRAY, CHAIRMAN, BOARD OF DIRECTORS, INTER-TRIBAL MONITORING ASSOCIATION

Mr. GRAY. Mr. Chairman, Mr. Vice Chairman, and members of the committee, I am here in my capacity as chairman of the Inter-Tribal Monitoring Association, and as cochairman of the Trust Reform and Cobell Settlement Work Group. I also serve as principal chief of the Osage Nation.

The Nation will provide its own separate written testimony about S. 1439 in light of our unique hybrid situation.

The CHAIRMAN. Without objection, all written statements will be made part of the record.

Mr. GRAY. Thank you.

Those of you have worked to establish the principles for resolving *Cobell,* reforming the broken Federal trust system, have strongly held convictions about solutions to this decades-old problem. We may come from different regions of the country, have varying trust resources and have different stories to tell about the harm we have suffered, but we all share the same critical and overriding objective: a meaningful settlement of the *Cobell* litigation that helps to both undo the damage done and ensure that it does not happen again.

There is no doubt in my mind, Mr. Chairman and Mr. Vice Chairman, that we share the objective of justice for the past and certainty for the future. There can be no question that this bill represents the first and perhaps the only opportunity we will have to settle this case through discussions with the U.S. Congress, the entity that established the trust and which has preliminary, but not unlimited authority to establish the terms of the trust.

As tribal leaders, we have the responsibility to make the most of this extraordinary opportunity. This bill represents the committee's commitment to this objective as well. We must be successful in this effort, for if we are not, the growing rift between Indian tribes and the United States will become an entrenched gulf.

Consequently, I would like to note at the outset that one of the most positive aspects of this significant legislation is the simple fact that it has been introduced and by whom. I, for one, view the chairman's and vice chairman's commitment to this effort as evidenced by the introduction of S. 1439 to be a very positive step and pledge to work with you in a frank, pragmatic and reasonable manner to make this the best legislation it can be.

You have both demonstrated true political courage and leadership in crafting a bill to address this bitterly controversial issue, and you deserve thanks and appreciation from all of us for this bold step.

As to the bill you have introduced, I want to underscore in my testimony today the key element that we believe is right, and then close with a few thoughts of where we can go to improve the bill. Let me begin with the things that we believe are right in S. 1439.

First, in your bill the funds for settlement do not come from programmatic funding of other Federal activities. This is a very important element of the bill that is absolutely correct. Unquestionably, funds to settle the injustice against individual Indian money account holders cannot come from Indian programs. We believe the explicit reference in S. 1439 to the judgement fund sends a clear message that there is no legitimate argument that the cost of this settlement should be charged or borne by any distinct part of the Federal Government or Federal beneficiary.

Second, S. 1439 takes clear and affirmative steps toward reducing and eliminating several of the primary causes of the mismanagement mess. In particular, the bill addresses two causes: The fractionated ownership of allotted lands and the absence of clear executive responsibility for Federal trust activities.

The fractionation component of the bill demonstrates your commitment to a comprehensive effort to put this sad history and allotment policy and its nefarious consequences behind us. The creation of an Under Secretary position should result in the coordination of Federal policies throughout the Department of the Interior through the focus of the Federal Government's trust obligation. The recognition of this trust responsibility underscores the legitimacy of every interaction between the Federal Government and Indian tribes and their members. These and other provisions demonstrate that this bill is concerned with both settling the past and taking steps to fix the future.

Third, the bill recognizes that a fair settlement for hundreds of thousands of individuals who have suffered for years or decades will need to be resolved with a payment involving billions of dollars. With a class of claimants that includes hundreds of thousands of individuals, a settlement of even hundreds of millions of dollars would amount to nothing more than a token payment for each individual. Your bill recognizes that such a token payment will be a constitutionally questionable act of confiscation, not the legitimate act of a trustee.

Even if such a patently inadequate payment might be permissible, it would neither be fair or adequate to bring the crisis to an immediate resolution we must strive to achieve.

There are a number of tribal leaders like myself who look forward to developing a legislative proposal that we can recommend to Indian country. As you have heard from others today, we are not yet at that point. But both the sponsor statements upon introduction clearly demonstrated that neither the chairman or vice chairman assume that this bill was intended to be anything more than a starting point.

I look forward to our dialog. In this dialog, we must face each tough issue together. There will be likely to be many, and resolve them pragmatically, but also in a manner mindful of the terrible injustice we are all committed to rectify. Ultimately, we must succeed. No amount of effort or accomplishment in any other area in this committee's jurisdiction will make up for the cost of not achieving a settlement.

So where do we go from here? First, we must begin with a dialog with the sponsors and their staff to develop an understanding of whether certain provision of S. 1439 constitute mere place holders, necessary components of settlement legislation, or concessions to the legislative environment. For example, there is a great deal of mistrust of both the Departments of the Interior and Treasury within Indian country. Allowing either department to exercise the scope of discretion that would be permitted under the current version of the bill could allow the very individuals who are the most antagonistic to the objectives of this process to control most or nearly all of the elements of the distribution of a settlement fund.

There may come a day when there is enough trust in Indian country to structure the settlement in this fashion, but we are not at that point today. In fact, we are far from it. If there are reasons why a judicially managed distribution is presently perceived as either unworkable or unacceptable, we need an open dialogue to analyze and address those concerns.

Similarly, we must develop together a model to determine how much to compensate the victims of this injustice. We greatly appreciate the sponsors' recognition that a settlement must be measured in the billions. We must now work on how to develop a rationale for a more specific number. In this process, we must bear in mind that an insurmountable burden of accuracy measuring the precise amount of compensation is due completely to the Federal Government's mismanagement of its own records.

In light of this, we believe that it may be worthwhile to work with committee staff to develop some models for calculating a fair and equitable settlement figure. One proposed model would calculate a compensation amount using an inputted error rate times account activity. Adjusted for interest and inflation, this idea has some genuine merit and together we should explore its viability.

There are a number of other issues that concern ITMA members, which includes allotees. We will provide you with more detailed comments as to these in the near future. We have a meeting in Denver that is scheduled this week to address this area specifically. There is a great deal more to say and discuss. Some of these discussions will probably be somewhat heated, but we must remember that we are all working in good faith and to a common end. We represent a lot of people who have a lot of stake in this issue, but when tribal leaders get home, no one wants to know whether we won any arguments. They want to know if they will be compensated in their lifetimes for acknowledged injustices, whether their parents will get justice before they die.

To the chairman and vice chairman, I thank you for giving them some hope that this will be the case.

Thank you and I would be happy to answer any questions.

The CHAIRMAN. Thank you.

Tex Hall, welcome back.

STATEMENT OF TEX HALL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. HALL. Thank you, Chairman McCain, and good morning Senator Johnson and Vice Chairman Dorgan, and members of the committee.

I want to thank you for holding this hearing, Chairman McCain, on this most critical issue in all of Indian country today. I want to thank the vice chairman and members of the committee for their support and leadership on this issue.

I am honored to appear before the committee today to testify on the Indian Trust Reform Act of 2005. I want to start by expressing my appreciation to the committee on behalf of the 250 member tribes of the National Congress of American Indians, for your commitment to Indian country and to the people of American Indians, and to bedrock the principles of trust which underlie the entire relationship between our sovereign Indian nations and the Federal Government.

NCAI strongly shares the view of the committee that it is time for Congress to establish a fair and equitable process for settling the *Cobell* lawsuit. We cannot wait any longer. We also stand with the *Cobell* plaintiffs in seeking a full and fair adjustment of the individual Indian money trust accounts. I want to point out that as

tribal leaders that are seated in the audience today, we also have the responsibility to fight for the welfare of our individual tribal members who are for the most part IIM account holders. We are accountable to them as elected tribal leaders.

For that reason, as NCAI president and as a tribal chairman, I have invested months and directly used my authority to help build a national tribal initiative to resolve the *Cobell* case and reform the trust management system. This process resulted in the development of 50 trust principles that represent the views of Indian country and I would like have them submitted in the record, Mr. Chairman.

The CHAIRMAN. Without objection.

Mr. HALL. Thank you very much.

[Referenced document appears in appendix.]

Mr. HALL. I understand this process and response to the challenge of the committee to unite Indian country behind a bill that is both fair and comprehensive. Let me say without reservation that I remain committed to that process. I whole heartedly agree with you, Mr. Chairman and Mr. Vice Chairman, that the bill as introduced is a starting point and a solid starting point for resolving the trust.

But make no mistake, the bill needs to go further. There are major changes that need to be made in order to convince all of Indian country to rally behind the bill. I know that the committee is committed to working with Indian country and I am positive that together we can agree on the right changes to the bill. As we do so, I can guarantee you that I will be working day and night to help unite Indian country behind this bill.

On trust standards, the lack of trust standards, independence and enforceability are the most conspicuous omissions from the 50 principles we submitted. NCAI believes that standards and accountability are the cornerstone tenets of meaningful trust reform. There simply must be an independent body with true oversight authority, explicit trust standards, and a cause of action in Federal courts for a breach of those standards.

The very absence of those provisions is why we have the *Cobell* lawsuit and all of the tribal trust lawsuits. Decades of trust reform efforts have borne little, if any, fruit. Why? Because the Department of the Interior believes its job is to ensure that the United States is never held liable for its failure to properly administer trust assets. For this reason, DOI has always opposed the standards in trust reform.

On the settlement in title I in our 50 trust principles, we set forth the rationale we use to justify a sum of $27.5 billion. We understand that you, Mr. Chairman, believe that the settlement should be in the billions of dollars, as mentioned in the bill, but the bill before us does not specify a specific dollar amount. In order for us as tribal leaders to convince Indian country and our members that whatever figure is settled on is fair, we need to be armed with a dollar amount and a credible rationale that we can explain to our tribal members.

Without that, we will be hamstrung in our efforts. I believe that the $14 billion needed for historical accounting is a starting point. That fact that the lump sum would come from the judgement fund

so would no come at the expense of any other Indian programs or an account is an example we could use to rally Indian country.

Under title II, the Indian Trust Asset Management and Policy Review Commission, the NCAI believes that this provision has the power to make a significant contribution to the ways our trust accounts are managed. We suggest that Congress should make all of the appointments, rather than leave a significant number up to the executive branch. Indian country is united that a commission must have teeth and a power to independently investigate the Department of the Interior.

In regards to title III, NCAI strongly applauds the creation of the Indian Trust Asset Management Project. As the tribal chairman of my own reservation in the Great Plains, I support the creation of an area-wide demonstration project. I can assure you there will be a flood of tribes that will want to participate in this project and free them from the shackles of the governmental structure of the Office of Special Trustee.

NCAI recognizes that this provision is an affirmation of tribal self-determination and sovereignty. Nevertheless, even for the tribes participating in this project, the bill does not go far enough. Not only should more tribes be allowed to participate, but tribes should be given the opportunity to establish clear trust standards.

Furthermore, tribes should be able to immediately resolve disputes through the courts or a third party mediator such as the Federal Mediation and Conciliation Service, rather than have to exhaust departmental appeals.

In regards to title IV, the fractionation, NCAI strongly supports the new incentives for voluntary sales of fractionated interests by allowing the secretary to offer more than fair market value. On the other hand, the bill has a provision for highly fractionated lands of more than 200 owners where if the secretary follows certain procedures, including notice by certified mail, the offer would be deemed accepted unless it is affirmatively rejected by the owner. NCAI understands the rationale behind this provision, but it seems grossly unfair to the landowners.

Mr. Chairman, as you know, there are 50,000 addresses that are unknown today in the system. One possibility is to work with the tribes' enrollment offices in order to establish a direct communication with the IIM holders because the tribal enrollment office has every account member's enrollment number and address. NCAI strongly agrees that any payments Indians received under a land repurchase program should not be subject to State or Federal income tax, and should not affect their eligibility for Social Security and welfare.

Under title V, the restructuring of the BIA and Office of Special Trustee, the new Office of the Under Secretary meets a number of the goals in our trust principles, including the elimination of the Office of Special Trustee. The creation of this position addresses a major issue that has been raised in every significant study of trust management at Interior: The lack of clear lines of authority within the department.

NCAI believes the bill should go further. Nearly every agency in the Department of the Interior, not just MMS or BLM or USGS, has some significant trust responsibilities. At this time, there is no

single executive within the secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies. This absence has particularly hurt the progress of those issues that cut across agencies such as the development of a system architecture that integrates trust fund accountings with the land and asset management systems of the BIA, BLM and MMS, and as required by the 1994 act.

Furthermore, the BIA has never been provided with an adequate level of resources, staffing and budgeting to fulfill its trust responsibilities to Indian country. This has been a chronic neglect and this understaffing and underfunding has contributed to the dysfunctional management and financial systems at all levels of the BIA.

NCAI also believes that an independent entity, perhaps the GAO, should have the job of reviewing the Federal budget for trust management and provide an assessment to Congress of its adequacy. I believe this role may be more important than ever today as the Administration moves to assess Federal budgets under the PART, the program assessment rating tool.

Under title V, the audit of Indian trust funds, this section would require the Secretary of the Interior to prepare financial statements for individual Indians, tribal and other Indian trust accounts and prepare an internal control report. The section would also direct the Comptroller General of the United States to hire an independent auditor to conduct an audit of the secretary's financial statements and report on the secretary's internal controls. This title appears to meet the goals of our trust principles and I believe that the details of the audit procedures can be redefined and improved after more discussion with tribal leadership.

So in conclusion, Mr. Chairman, on behalf of NCAI I would like to thank the members of the committee for all of their hard work and their staffs and the time they have put into this bill and the entire trust reform effort. For the most part, I also want to recognize Chief Jim Gray here as cochairman of the National Indian Working Group. Together with NCAI and ITMA and all the other tribal leaders that are here, and our membership of the 250 tribes of NCAI, and the 50 tribes of ITMA, comprising 300 Indian tribes, we will continue our Work Group to reach out to all tribes and all national and regional tribal organizations for as long as it takes.

This bill is a good starting point. It is a solid starting point, but it needs to go further. We need resolution. We need to come together. We need to stay united, and I will continue as president of NCAI to call on and to work with Indian country and the committee here to come up with a bill that we can all support to provide a meaningful settlement for our elders, especially for our elders who have died in poverty without receiving justice. It is time justice comes to Indian people. They have waited too long.

So thank you, Mr. Chairman, for your continuing support on this. We appreciate it.

Senator DORGAN [assuming chair]. Chairman Hall, thank you very much, and Chief Gray, thank you as well. I know the two of you have worked and spent a lot of time, travel, effort and this committee appreciates that very much.

Next, we will hear from Elouise Cobell. Ms. Cobell, you may proceed.

Let me also just mention the Chairman has gone to cast a vote on the first vote and will return right after the second vote has started, and he will have cast a vote on that.

You may proceed.

STATEMENT OF ELOUISE P. COBELL, BLACKFEET RESERVATION DEVELOPMENT FUND

Ms. COBELL. Good morning, Vice Chairman Dorgan and members of the committee. Mr. McCain, I will tell him good morning when he returns.

I would like to thank you for inviting me here today to provide testimony to the committee on the possible legislative resolution of our 9 year old lawsuit. Although we have our strong disagreements with your initial proposal as an appropriate way to resolve the case in a fair manner, we are all united in our end goal to achieve an equitable resolution to this century-old stain on this great Nation's honor.

I am here today on behalf of myself and the more than 500,000 individual Indian trust beneficiaries represented in the lawsuit we filed in the Federal court, *Cobell* v. *Norton.* I would also like to explain to you that the Blackfeet pray at the Baker massacre on a yearly basis and we pray that the Federal Government will never treat us like they treated us then.

I also pray on a daily basis going to work on the Blackfeet Reservation at Ghost Ridge where 500 Blackfeet died of starvation because the Indian agent withheld rations.

So I apologize to you if I hurt the committee's feelings when I explained what I felt about S. 1439, but that is the only way that I could express myself because I have to tell you that has been a very difficult task in making the U.S. Government accountable for individual Indian beneficiaries. I did not want to be in a 9-year lawsuit. I think this could have been over very quickly if the U.S. Government would admit that they could not give an accounting to individual Indian beneficiaries.

We are in the 10th year of this litigation and more than 1 century of mismanagement of individual Indian trusts has already passed. Justice has been delayed for individual trust beneficiaries. Every individual trust beneficiary I have spoken with has told me that they want a fair resolution even if it takes longer. They do not want to be sacrificed at the altar of a political expediency as they have so many times before.

Since 1887, members of the class have been subjected to injustice after injustice. Report after report for generations after generations have cited the rampant mismanagement and the malfeasant administration of the Individual Indian Trust. As you know, a congressional report from 1915 spoke about the scandals in terms of fraud, corruption and institutional incompetence almost beyond the possibility of comprehension.

A 1989 investigative report by this committee found similar fraud and corruption. The misplaced trust report from the House Committee on Government Oversight made similar findings of malfeasance. The Court of Appeals described the disastrous historic

and continuing management of individual Indian property as malfeasance, and in 2001 held the continuing delay was unconscionable.

The Federal District Court Judge Royce Lamberth, who has presided over this case for nearly a decade, appropriately described the utter failure to reform the Interior Department and continued abuse of Indian beneficiaries in this way:

> The entire record in this case tells the dreary story of Interior's degenerate tenure as trustee delegate for the Indian trust, a story shot-through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandal, deception, dirty tricks and outright villainy, the end of which is nowhere in sight.

By setting up the trust, the Government promised to abide by common trust laws. It has failed even the most simple of these trustee duties. The Government still cannot say how much money is in each beneficiary's account. Imagine the outrage if suddenly a major United States financial institution were to announce that it had no idea how much money was in each depositor's account. Imagine the congressional hearings, the class action lawsuits that would be filed as a result.

Yet, that is exactly what has happened here. The courts have held that the Government is in breach of its trust duties. They have held that interest and imputed yields are owed beneficiaries as a class. They have held that the duty to account preexisted the 1994 Trust Fund Reform Act and that the Government has a duty to account for all funds. Time after time on major issue after major issue, the courts have made it clear that the law and the facts are on our side.

I should point out that there are some aspects of the proposed legislation that are positive. First, this hearing itself is a constructive step forward to educate Congress and the American people. Additionally, the inclusion of a provision that calls for the settlement amount to come from the claims judgment fund to ensure victims are not punished also is an important positive component, as is recognition that the settlement amount is in billions.

To be honest, I was deeply disappointed when I read S. 1439. It falls so short of being a good starting point to resolving the *Cobell* case in an equitable manner. This bill in present form is drastically in favor of the Government malfeasors position. It is not faithful to the two important sources that offer considerable guidance to any legislative resolution effort, the 50 principles for settlement that Chief Gray and Tex Hall talked about, and the numerous decisions rendered by the court in *Cobell* itself.

We need your support to stand up for the many individual Indian beneficiaries who are relying on all of us to create a fair and equitable resolution. Like Mary Johnson, a Navajo grandmother who relies almost exclusively on a few dollars in her allotment to receive support for her family. She receives pennies of what a non-Indian is paid for gas from her land. Or Mary Fish, a 70-year-old Creek woman who cannot replace windows in her small home because she lacks the funds, yet there are five oil wells pumping constantly for decades on her land. There are so many more across every reservation, grandmothers and grandfathers and parents and children suffering from the same indignities of their forbears.

I am confident that if we work together we can achieve our common objectives. There are many specific parts of S. 1439 that I believe I need to address. One of the most disturbing aspects of S. 1439 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 to be in charge of the settlement funds. The Treasury Department has been Interior's partner in crime for far too long. They have been found in breach of trust. They have failed to reform. The suggestion that any settlement fund be handled by such an entity is wholly unacceptable to the beneficiary class.

A second area of concern to all Individual Indian Trust beneficiaries is that under this legislation, 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 for resolving difficult distribution issues.

The court in *Cobell* has 9 years of experience of living with the facts of this case. The knowledge developed through that process is invaluable and irreplaceable. We recognize that S. 1439 places the settlement amount approximately in the billions of dollars. That, of course, is only sensible since the government's own internal risk assessment by their contractors set the liability as between $10 billion and $40 billion.

In the 50 principles, the Work Group put forward a reasonable and well-founded aggregate settlement amount of $27.487 billion. This is not reparations. This is not damages, nor is it welfare. It is quite simply a return of a portion of the money that was and is being taken from us. The amount was derived by reviewing our model for each year of total proceeds from the Indian allotted lands. The Government's model of these proceeds is not far off from the plaintiffs in aggregate amount generated from these lands. For each year, plaintiffs calculate a percentage of the moneys that were, for settlement purposes, properly collected, invested and disbursed to the appropriate beneficiary. The disbursement percentages we have used are highly favorable to the Government, even though we have evidence that the Government cannot account for even 1 percent of the transactions.

For purposes of the calculation we assumed that the Government could account for 80 percent. Using this percentage, we calculated how much of the yearly aggregate proceeds defendants failed to distribute properly. In this number, we add interest for a yearly calculation. We added this number together and then subtracted, again a litigation delay, a percentage-based calculation for the cost of continuing litigation. The result of this calculation is $27.487 billion. The number is further justified in my written testimony.

Reform requires fundamental changes that must be made immediately in all other trusts. There are, among other things, clarity of the trust duties, clarity regarding the complete enforceability and the availability of meaningful remedies, independent oversight with substantial enforcement of authority to ensure that bene-

ficiaries are protected. These core trust elements are not in the legislation and need to be.

Congress must clarify that Indian beneficiaries will receive the same protection as all other non-Indian trust beneficiaries. The importance of keeping the courts involved cannot be overemphasized. Only when we turned to the courts was any progress made to fix the trust and establish the individual Indian beneficiaries right to an accounting. The decades of experience by the Federal courts in dealing with class action cases must not be cast aside. It is essential to resolving this case and achieving accountability.

Not only has the executive branch abused us and defied the courts, it has defied you. It has repeatedly refused to comply with legislation passed by this body. It must finally be called to account.

I look forward to continuing our work together and to finally and conclusively put an end to the criminal administration of our trust property. I thank you very much for this opportunity to testify.

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

Senator DORGAN. Ms. Cobell, thank you very much.

Next, we will hear from President Stensgar.

STATEMENT OF ERNEST L. STENSGAR, PRESIDENT, AFFILIATED TRIBES OF NORTHWEST INDIANS

Mr. STENSGAR. Thank you.

Good morning, Vice Chairman Dorgan, members of the committee. I appreciate the opportunity to present testimony. I have submitted written testimony and I would like it included in the record.

My name is Ernie Stensgar. I am president of the Affiliated Tribes of the Northwest. I represent 54 tribes from Montana, Idaho, Oregon, Western Montana, California, and some of Alaska. Over the past several years, and after numerous court-issued declarations in the *Cobell* litigation, Affiliated realized that resolution of the litigation in the court system would take many years and that a settlement of the litigation would probably not result in action that would compensate the plaintiffs, along with individual Indian trust account holders to a level that would be fair and equitable.

Therefore, ATNI, Affiliated Tribes of Northwest Indians, decided to focus on working cooperatively with Congress and other stakeholders in creating a legislative resolution of the *Cobell* litigation, while at the same time accomplishing reorganization of the Department of the Interior to fit the needs of Indian country.

On April 5, 2005, Affiliated submitted Indian trust reform legislation to the Hon. Maria Cantwell to be considered on an expedited basis by the Senate Committee on Indian Affairs. The legislation essentially asked Congress to provide several provisions for the settlement of the *Cobell* litigation and to accomplish trust reform. The first provision sought to elevate the assistant secretary for Indian Affairs to a deputy secretary. The intent of this provision was to ensure that the principal officer assigned to fulfill the trust responsibility would have the authority over the constituent agencies that have an effect or impact on the trust responsibility.

Under S. 1439, Section 503 entitled Under Secretary for Indian Affairs, there is an under secretary for Indian affairs position created that is directly subordinate to the Secretary of the Interior.

Affiliated supports the creation of the under secretary for Indian affairs position within the department, along with the duties requiring management and accountability of the trust responsibility in consultation with Indian tribes.

ATNI also supports section 505 of the legislation which would terminate the Office of the Special Trustee for American Indians by December 31, 2008. ATNI also sought the codification of the standards of the administration of trust duties that were adopted by Secretary Babbitt in 2000. ATNI understands that these standards have not been codified as a provision of the act, but it does not believe that this will ultimately be fatal to the legislation. Under section 503 of the act, there is the under secretary for Indian affairs that will be required to implement and account for the fulfillment of the trust responsibility to Indian tribes.

The legislation also describes the duties that the under secretary for Indian affairs will be required to fulfill under section 503. ATNI asserts that if this section is holistically integrated with other provisions of the legislation, the under secretary has some guidance from Congress defining some actions and responsibilities that will be required to fulfill the trust responsibility. Specific trust standards can be finalized at a later date and in subsequent legislation.

The third provision that Affiliated sought was a settlement of the *Cobell* litigation by the authorization of a mediator that would submit recommendations to the court on settlement issues and allow the court the ability to implement the recommendations without having to submit to a drawn-out trial process. Affiliated has reviewed the act and is in agreement with the congressional findings contained within section 101.

ATNI realizes that in many cases it is impossible for the Federal Government to provide a total historical accounting of funds held in IIM accounts due to any number of factors. Affiliated supports the proposition that the settlement of the *Cobell* litigation must provide a fair and appropriate calculation of the IIM accounts in lieu of actually performing an accounting of the IIM accounts.

ATNI lends its support for the creation of an individual accounting claims settlement fund contemplated in section 103 so that there can be closure to the plaintiffs in the *Cobell* litigation and other aggrieved parties. The settlement amount will obviously need to be debated and agreed upon after intense consultation with all the affected parties. The animosity that has guided previous attempts at settlement should not deter actual and honest agreement over a final settlement amount.

Affiliated supports the proposition that a special master should be appointed to administer the settlement fund. However, section 103 allows the secretary the unilateral ability to appoint a special master to administer the fund without allowing any tribal input in the determination of appointing the special master. Since the settlement fund is the result of litigation between two adversarial parties, there should be the ability of the representatives of both parties to come to agreement on the appointment of a special master to administer the settlement fund.

ATNI is supportive of the provisions in the legislation which recognizes the right of claimants to seek judicial review. However, provisions in sections 105, 106, and 107 are confusing and should

be clarified to protect these important rights. ATNI supports the right of judicial review for claims relating to share determinations in the U.S. District Court for the District in which a claimant resides. In this instance, the claim would not be considered a waiver by the claimant of the right to receive a share under section 104. However, a claim relating to the method of valuation and a claim relating to the constitutionality of the application of this title to the claimant filed in the U.S. Court of Federal Claims would be considered a waiver by the claimant of any right to receive either the per capita share or the formula-based share under section 104. Affiliated does not support the provisions that require a waiver by the claimant of any right to an award under section 104 if the claimant files a claim seeking review.

ATNI asserts its strong support for section 110. In that section, tribal government claims against the United States would not be discharged as a part of the settlement of litigation claims identified in section 102.

The fourth provision sought by the ATNI was the creation of an independent legal authority that would have some oversight power over administration of the Federal trust responsibility. Title II of the act creates a commission known as the Indian Trust Asset Management Policy Review Commission that would be charged with the review of trust asset management laws and the review of the department's practices with regard to individual Indian trust assets. The commission would then have the ability to make recommendations to the secretary and to the committee for improvement of the department's laws, practices and management of the trust assets.

Affiliated supports the commission as created by title II of the act since it would allow for an independent review of the department's practices and would possibly lead to recommendations that would assist the department in adopting a best practices approach to fulfillment of the trust responsibility. Indian country has shown in the past that it is willing and able to participate in crafting recommendations that will lead to an improved department as it continues to administer its trust duties.

The fifth provision sought the establishment of a demonstration project that would build on the work of those tribes that have been administering their own trust programs pursuant to authority granted by the Congress in the appropriations bills.

Senator DORGAN. Mr. Stensgar, I am going to have to ask you to complete your testimony, if you would. There are 2 minutes remaining on the vote on the floor of the Senate and I have to be there to vote. So if you will just finish in a sentence or two, we will then recess for 10 minutes.

Mr. STENSGAR. Okay. I just want to say that the Northwest tribes stand ready to proceed in the process of adopting legislation and working with this committee to further that. It is time that the tribes continue on with their other important work and we are at a standstill now.

Thank you.

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

Senator DORGAN. Mr. Stensgar, thank you very much for your testimony.

Mr. Martin, you will begin testifying when we reconvene. We expect the committee will be in recess for 10 minutes while we vote on the floor of the Senate.

[Recess.]

The CHAIRMAN. [Presiding] Again, I would like to extend my apologies to the witnesses because of we have five consecutive votes in a row. I apologize for any inconvenience this has caused them.

I believe we are now at Mr. Martin, is that correct?

Mr. MARTIN. Yes, sir.

The CHAIRMAN. Please proceed.

STATEMENT OF JAMES T. MARTIN, EXECUTIVE DIRECTOR, UNITED SOUTH AND EASTERN TRIBES, INC.

Mr. MARTIN. Chairman McCain, Vice Chairman Dorgan and distinguished members of the Senate, my name is James T. Martin. I am an enrolled member of the Poarch Band of Creek Indians and executive director of United South and Eastern Tribes.

On behalf of the 24 tribes of USET, we have closely followed the *Cobell* case over the last 10 years and the Department of the Interior's subsequent reorganizations. Along with President George, I represented the tribes of the Eastern Region Office in the DOI Tribal Task Force and have testified before this committee several times on trust reorganization. I thank this committee for the opportunity to testify on this issue again.

For USET tribes, the *Cobell* litigation and the Department of the Interior's redirecting of funds to trust activities carried out by the Office of the Special Trustee has had an immediate and harmful impact for fiscal year 2005 and 2006. Funding for the BIA has reduced full-time staff for law enforcement, education and other vital programs. The *Cobell* litigation and DOI's interpretation of the requirements to meet court orders have absorbed resources and limited the ability to implement already under funded programs.

I thank the Senators McCain and Dorgan for introducing S. 1439, which represents a critical step for trust reform and provides a solid footing for resolving the interrelated and complex problems of trust reform. Given the complexity of the trust-related issues, one piece of legislation is unlikely to solve all of the problems. This bill, however, takes on the challenge of addressing the fundamental issues of the settlement of the *Cobell* lawsuit, land consolidation, and prospective trust reform reorganization.

USET, in response to Senator McCain's call for legislative solutions to this crisis, developed proposed trust reform legislation in April and provided that proposal to the chairman and to committee staff. The USET proposal legislation is intended to introduce measures that would increase the accountability and efficiency of DOI's administering of the United States trust responsibility, while enhancing self-determination.

Upon review of S. 1439, it appears that the committee shares USET's concerns and provides similar approaches to resolving them. Additionally, USET requests that the committee further deliberate several critical issues. I am attaching USET's proposed legislation to my written testimony and request that this proposal be included in the hearing record, as it may be useful to the committee as it seeks to finalize trust reform legislation.

But first, I would like to commend the committee for the recognition and incorporation of key components for trust reform and DOI reorganization. Specifically, let me mention a few of these here. Elevation of the Assistant Secretary of Indian Affairs to the position of under secretary and eliminating the OST, which the tribes have advocated for for a long time, would improve coordination of trust activities within the DOI and establish decisionmaking authority and accountability under one executive authority.

USET views the commission established by title II of S. 1439 as a logical extension of the DOI Tribal Task Force. This commission is needed to conduct a thorough analytical review of laws and practices in order to make valuable recommendations for future legislative actions for trust reform.

With regard to land consolidation, S. 1439 responds to Tribal Trust Reform Work Group recommendations to expand the voluntary buy-back of highly fractionated shares by providing for sums greater than fair market value shares. USET suggests, however, that the problem of locating whereabouts unknown individuals for purposes of land consolidation is a matter that should be addressed by this legislation or by the commission created by title II of S. 1439.

S. 1439, with its Tribal Trust Assets Management Demonstration Project, title III, embraces a view strongly held by the USET tribes that self-determination works. USET is confident that management of trust functions will benefit from this demonstration project. Moreover, we expect it will foster an array of best practices to be utilized for the wide range of trust resources managed in Indian country. While the legislation does not itself codify tribal standards, USET recognizes that S. 1439 provides for a commission to issue recommendations on proposed Indian trust management standards, section 204(3)(c), and that the demonstration project provides for the development of trust asset management plans that meet trust standards as established by tribal law and consistent with trust responsibilities of the United States.

USET recognizes the necessity of standards, yet acknowledges those standards must be developed in a manner that allows for flexibility, reflecting the diversity that exists among tribes, as well as the diversity that exists among the resources that both exist in tribes and resources, but to which the secretary has a trust responsibility.

Title I of S. 1439 would resolve the complex and prolonged and costly *Cobell* litigation. The terms of the bill demonstrates the committee's understanding of many of the issues and considerations involved in this large class action lawsuit. Title I addresses such matters as the distribution of the settlement funds and offers a mechanism for judicial review for that distribution, including the filing of claims to challenge the share distribution, to challenge the validation of the claim, and to challenge the constitutionality of the application of the title to an individual claimant.

USET encourages a fair and complete resolution to that litigation and I understand the committee will hold additional hearings to consider the views of the *Cobell* plaintiffs. USET urges the parties to this dispute to engage the proposed legislation in the spirit of

compromise and the recognition of the unique opportunity this legislation offers.

USET appreciates that tribal claims are preserved in section 110(d). USET also endorses Indian preference in hiring by the under secretary in the offices under the under secretary by section 506.

USET highlights these provisions as those which are directly responding to the concerns and approaches the USET tribes and other tribal organizations have identified as critical to trust reform legislation. USET urges the committee to give additional consideration to several other considerations.

First among them is for independent accountability. While the independent external audit provisions contained in title VI of S. 1439 establishes a sound approach for accounting or auditing, USET believes that DOI's management of non-monetary trust assets needs similar independent review. Additionally, the beneficiaries need a point of regress to report fraud and abuse and the day-to-day implementation of the Government's fiduciary trust responsibility.

USET's proposal would create an assistant inspector general for Indian Trust to carry out investigations and audit responsibilities. We urge the committee to give greater attention to the need for this mechanism that can police the DOI's compliance reform contained in S. 1439.

Second is the ineffective duplication that has been created by the DOI's stovepiping its lines of accountability and decisionmaking authority between trust and non-trust functions. We believe this is a critical issue that the trust reform legislation and the commission created by title II of S. 1439 must address.

Finally, all of the reform in the world cannot get the job done without adequate funding. The number of vacancies and understaffing in the DOI has contributed to the problem. As the committee has recognized with S. 1439, trust reform requires tribally driven flexible mechanisms that reflect the diversity of tribes and the distinct types and quantities of resources that exist.

Moreover, in order for trust reform to advance, the *Cobell* litigation must be resolved. We stand ready to work with this committee to further this legislation and other legislation that is needed to bring this issue resolution.

I thank the committee and look forward to answering any of your questions, sir.

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

The CHAIRMAN. Thank you very much.

All the witnesses have testified in favor of the court being the one who would be responsible for the distribution of money. In the 50 principles, you say the court would conduct a court fairness hearing. What will the court be testing the fairness of? I guess I will begin with you, Chief Gray.

Mr. GRAY. Part of what I think may be helpful in describing what the rationale behind the 50 principles and that particular area are certain aspects of what we consider to be the use of the resources, the land, the amount of money and activity and flew to these accounts. Obviously, you are looking at situations like, for example on my reservation, the Osage Nation, we have had over 100

years of oil and gas exploration. Through that hybrid system I referred to earlier, you also have a similar situation that occurs in the use of those lands and the resources, the surface lands that have been leased out to the allotment.

To try to understand the through-put, for example, of that kind of funding that went through there certainly does create different scenarios throughout Indian country.

The CHAIRMAN. So the court would decide each different tribal entity throughout Indian country?

Mr. GRAY. I think it is not so much a tribal entity as much as it is the use of the land, and how the resources derive from that land or how are they going to be fairly and adequately valued.

The CHAIRMAN. So the court would decide in each entity that is owned by tribes as to what is fair and what is not fair?

Mr. GRAY. I admit, it is a head-scratcher, Senator. I really do think that what we are trying to achieve here is just trying to find the entity, or to find out a formula. Should it be congressionally driven, for example, that you have in the bill; that a formula be adequately put together that can address the specific uses of the lands and the uses of the resources and the funds as a way to determine the value of each one of the settlement accounts that are being put forward.

We just came up with one proposal, and in light of the specific information that exists in the bill, there may be ways in which we might be able to approach the committee on how this could be resolved through a formula of some type.

The CHAIRMAN. Tex.

Mr. HALL. Mr. Chairman, I just think that in our testimony and most everybody's testimony, they feel that the court is more fair and impartial. I believe that the treasury is a named defendant, Mr. Chairman, so the impartiality is not, you know, that is the thought and it's not there.

The CHAIRMAN. I understand there is profound mistrust of the Department of the Interior and the BIA, and I understand that there is great trust, at least at the District Court level and the judge, but I think you are asking a District judge to take on a task which is incredibly complex and one that I do not know if a District judge has the kind of assets to make those kinds of judgments. That is my question. I think we are all interested in fairness.

Mr. HALL. We would be happy to work with you, Mr. Chairman, on something I think that we could come to agreement on.

The CHAIRMAN. Mr. Stensgar, do you have any thoughts on this issue?

Mr. STENSGAR. The Northwest supported the special master, Mr. Chairman. We would have to look at that section about the courts and do an evaluation before we respond to that. We thought that the Special Master would address that issue.

The CHAIRMAN. As you know, we have had special masters in the past.

Mr. STENSGAR. The special master, Mr. Chairman, we want some Indian input in respecting that. We want to make sure that the sheep dog is guarding the sheep.

The CHAIRMAN. Well said.

Mr. Martin.

Mr. MARTIN. USET's position is that we support also the special master. I am a father of four boys, and when one boy does something to the other, I make the one who is the perpetrator apologize and correct the wrong. I think it is just to make sure the perpetrators correct what was wrong and make them do it fairly.

I think still, though, there could be a role of the court as far as supervision and some sort of injunction-type of mechanism that if the special master or the people that are made to correct these wrongs go outside of the parameters, then there should be some sort of relief to that.

The CHAIRMAN. Ms. Cobell, attorneys fees were not mentioned in the principles set forth by the working group. What dollar amount or percentage of the proposed $27.5 billion was to go to attorneys fees?

Ms. COBELL. Could I answer that first question that you asked all the other witnesses, too?

The CHAIRMAN. If you would like to, it would be a pleasure.

Ms. COBELL. I would love to.

The courts do this all the time, distributing.

The CHAIRMAN. Not with this amount of money, they don't.

Ms. COBELL. Yes; on a class action lawsuit, yes they do.

The CHAIRMAN. No; they don't. They don't decide what is fair and unfair. Go ahead.

Ms. COBELL. At least everything I read, Senator. They weigh the evidence.

The CHAIRMAN. Courts also decide what attorneys fees are.

Ms. COBELL. Yes; and that was my answer that I was going to tell you.

The CHAIRMAN. Okay.

Ms. COBELL. It is my understanding that the courts will decide the attorneys fees, and that was done as a result of a congressional act that took out the States and wanted to make sure that the Federal judge decides on what the attorney fees should be.

The CHAIRMAN. Excuse me. Whenever there is a settlement proposal, they require an accounting of attorneys fees. I think the taxpayers of America would be more than entitled to know what your view is of the amount of attorneys fees that would be part of this $27.5 billion settlement.

Ms. COBELL. Well, our attorney fees are submitted to the courts for reimbursement. But you know, Senator, I really have to tell you is I have been interested in what the attorney fees have been by the Federal Government in fighting this case. We cannot find out. There are hundreds who just come to the courtroom. There are hundreds of attorneys that are sitting in that courtroom day after day, and there was a rider approved by the Congress in the appropriation bill that allowed for the Government officials that were accused of this wrongdoing to hire their own attorney private firms. I see those people every single day.

So vice versa. I really would like to see what the Government is spending on attorney fees.

The CHAIRMAN. I would like to also, but that does not change the fact I would like to know how much of the $27.5 billion would be spent on attorneys fees.

Ms. COBELL. I am sure that we could get you the figure and we could share that with you.

The CHAIRMAN. I would very much appreciate that.

Ms. COBELL. My attorneys have not been paid in years, let me tell you.

The CHAIRMAN. Well, if there is $27.5 billion at play, I am sure they will be, Ms. Cobell.

Ms. COBELL. There is no huge contingency amount that has been negotiated with attorneys, let me assure you of that.

The CHAIRMAN. Let me assure you, then, there should be no problem then of telling us how much of the $27.5 billion.

Ms. COBELL. Yes; I would be very happy to do that, sir.

The CHAIRMAN. Thank you very much, because I am familiar with a case many years ago where Agent Orange was settled and veterans died before they got any money and lawyers got paid first. And I am not going to see that happen in whatever settlement we have of this case. Native Americans will be reimbursed first, and then attorneys, if I have anything to say about it.

Again, I want to go back to this business, because there is strong disagreement, and we are trying to come to agreement with the Administration. I will again begin with you, Chief Gray.

If Congress were to place billions of dollars in the court registry, how would the judge distribute the money? Would it be through, as you stated earlier, a special master would be appointed and he would be making those decisions? Is that a methodology that would be pursued?

Mr. GRAY. I think you said it there, methodology. Obviously, just to help clarify the previous response to your first question earlier was that obviously we need more information, I think, on basically what a formula would look like. It is not so much to say that, and certainly in our testimony, that we felt like there wasn't a suitable method in the court that is far superior to any other method out there. But the way you described this particular issue to be resolved in the bill leaves open a need for more clarification and more information, and maybe that might be where I think a starting point might be in our discussions, for finding out exactly what the formula might be in terms of how Congress might be able to distribute these funds fairly and adequately, because obviously the bill in and of itself at this point does not answer all those questions right now. Even though the question you just raised to me, I do not have a complete answer myself. So obviously, we still have a lot of work to do in this area.

The CHAIRMAN. Thank you.

We will have additional questions which we will submit to you as we continue through this process, as well as questions for the Administration.

I want to emphasize again that we appreciate many of your long years of involvement in this issue. We are trying to come up with some way of preventing another 10, 15, or 20 years of litigation in the courts which is very uncertain. I have a personal opinion that I am a bit disturbed at some of the recent Supreme Court decisions as they affect Native Americans. I think there has been some encroachment on the principle of tribal sovereignty and government-to-government relationship.

So I am not totally confident that even though you have a District Court judge that has ruled your way that if it wended its way all the way through the courts that you would get a satisfactory resolution, number one.

Number two is, it still eludes me why we cannot sit down together, all of us that are involved, and come up with some reasonable resolution to an issue that, as Mr. Swimmer testified, has already been in the courts for nine years. If we are going to reach an agreement, there is going to have to be some compromise on both sides. When I talk to the previous special masters, they say that the reason why it failed, I met with them, and they say the reason why it has failed is because neither side has been willing to move in a more compromising direction.

So I think that I speak for both of us when I say, and certainly Senator Dorgan is more eloquent than I am, we want to give this as hard an effort as we possibly can, but we cannot just have hearing after hearing year after year on this issue because there are needs in Indian country for education, health care, housing, et cetera. As Senator Dorgan pointed out, all of those efforts are impacted by this issue. That is why we are giving it the priority that we are.

I know that all of the witnesses at this table and behind you are men and women of good faith and maybe we are going to have to ask you to exercise that to a significant degree even where it may alienate some of your constituency. I can assure you that Senator Dorgan and I have on several occasions on this one alienated part of our constituency. [Laughter.]

So I want to thank you again and appreciate your involvement in your cases of many, many years. I thank the witnesses.

Senator DORGAN. [Presiding] Mr. Chairman, thank you very much.

First of all, let me thank all five of you. I regret that we are moving back and forth, but it is the only way we can conduct 10-minute votes and still maintain this hearing and complete it.

Ms. Cobell, let me start with you. You said you are sorry if you hurt the committee's feelings. You do not hurt feelings of people involved in politics. If one's feelings are hurt easily, you do not run for the U.S. Senate. So it is not about hurting our feelings.

I think, however that using a term like "massacre" in your description and also in just disillusionment with legislation, I worry it hurts our opportunity to find solutions. That was the only point that I was making in my statement. It is not about hurting feelings.

You are a very passionate and a very articulate advocate. That is obvious from your testimony today. I understand that. I would be as well if I were sitting on that side of the table, concerned, upset, anxious, worried that this has taken far too long. I would have all those feelings because I think from your testimony, you describe descriptions of 1915 and periods back when I think literally people were stealing from Indian people.

Unscrupulous people were supposed to be in charge of these assets on behalf of Indian people and there was very substantial waste and abuse and fraud, especially fraud, I think. And we need to do a better job of describing that, I think, because others say,

well, we have looked at accounts in the last 10 years or something. It is a different story. This is historical and it is substantial and it is a big issue.

So I just want to say that I understand your passion, but I do hope even if we disagree in the end of this process, if we cannot find agreement and this committee finally says, look, we cannot do this. You go back to the courts and whatever happens, happens in the courts and figure it all out, but it is something we cannot do. I mean, if that is the case, it won't have been because we didn't make an honest, as aggressive as possible effort, because we felt it was necessary to try to solve it.

But it is not solvable without all the stakeholders. It will not, cannot ever be solved in the context of the kind of discussion we are having, without having all the stakeholders being interested in solving it. If all the stakeholders are not interested, it is very easy, in my judgement, to up-end any agreement or any negotiation.

And then it just goes back to the courts and perhaps another $500 million in legal expenses and maybe $6 billion, $8 billion, $10 billion in accounting fees to try to figure out who the thousands of people are that own a fractionated interest in 200 acres of land someplace so that we can send them a penny or two pennies. None of this comes together unless we find a thoughtful way for reasonable people to come together and say, let's figure this out and solve it and address the abuses.

Let me just finally ask a couple of questions. Tex Hall, your organization, I believe, because you and Chief Gray have traveled a lot, used a lot of personal time to try to work through this, I assume you are committed to seeing if you can find a legislative solution.

There are other solutions, but Senator McCain and I are both talking now about some kind of a negotiated legislative solution. Is that what you would prefer and is that what you are committed to trying to find?

Mr. HALL. Mr. Chairman, there is no question about it that NCAI and I know ITMA, as well as working with the *Cobell* plaintiffs, are totally committed. When you were raising the question about in the past, 1915, and the fraud, it made me think of an elder that passed on, Carol Young Bear. Carol had diabetes. This was 2 years ago.

She asked me for help to get her IIM account checked. There was a delay in getting the checks paid out. All she wanted was, she only gets $200, not too much, in her IIM account. She just wanted a used van with a hydraulic lift because she had her legs amputated. All she wanted was to expedite her check so she could get a used van and go play bingo. It was sad to not be able to help because we could not get the check and she passed on.

So it is elders like her that make me get criticized at home for traveling too much. My constituents want me to work at my tribe, but as NCAI President I have to travel to try to bring unity to get this done. So I am further committed because of the elders like Carol, to get this legislation, find common ground, find a way to do that.

I know with the gentlemen sitting next to me and all the people at this panel, these five people I know we are committed to doing that. We started this in February and I know that he has probably

caught heck at home, too, for being gone from his tribe in Osage, because he is a chief at his tribe. But it is an issue that affects all of us, Mr. Chairman, so that is why we are further committed and we are optimistic because, and I want to publicly thank you for your leadership, for cosponsoring S. 1439, Senator Dorgan. That, to me, is the key, is that bipartisan leadership and you stepped forward and you signed onto this bill. So that tells me that you are committed, and if you are committed we have to be committed as well.

So to me, it is a team effort and we are totally committed, and further committed after hearing the words that I heard from you and Chairman McCain and members of the committee today.

Senator DORGAN. Chief Gray.

Mr. GRAY. Yes; like Chairman Hall said, when we set out the effort to respond to this call for input from Indian country, we knew what we were getting into in terms of the commitment that it was going to take. I want to specifically say that we would not have done it if we did not think that you all were genuinely sincere in trying to do this.

I think that what we have tried to do is try to bring all the parties together and have these meetings both region-wide and tribal-wide and significantly address some of the specific resources out there. When we formulated our principles last June and presented them to the committee, we felt like that, too, was a good start.

Although there is going to have to be that kind of necessary give and take with the Administration and the committee regarding these areas where we have broad enough agreement to go forward, I just want to let you know that ITMA and the tribes that make up this organization, as well as the Osages, are going to be committed to the process.

Senator DORGAN. Mr. Martin, I was not here when you testified, but I have been able to look at your testimony. You testified that there are a number of vacant positions and understaffing at the Department of Interior and the BIA. How does that impact your member tribes?

Mr. MARTIN. This year in the 2006 budget and coming in the 2007 budget, they allude to a crisis in law enforcement where money is needed for law enforcement elsewhere, so therefore the staffing, and only six staff people exist in our District Six office. It is proposed to be cut down to one. Due to the absorption of trust-related functions, there has been less money to be able to go to non-trust related functions like law enforcement, education and other programs like that.

Also, you will find, then, the (2)(B) and the re-engineering, if you look at the reorganization and the work of the OST, a lot of areas when they go in there with their trust officers, and they have made improvement. I have to give credit where credit is due. They have made improvements in the trust office, but you will find in some regions they do not have the staff to do the work for the trust officers to review and sign-off on. You find that there are places in the BIA across Indian country that are understaffed, that you have good working people, but not enough warm bodies to get the work done.

Senator DORGAN. Ms. Cobell, words have meaning and I understand the story you told about the history of your tribe and the suffering of your people, and understand the way you used words in your description of this. The draft legislation that Senator McCain and I have issued, we did when we issued it say this is a draft, a starting point.

For some people in negotiations, "no" means it is an opening position; for other people, "no" means never under any condition. You never know exactly what it means from certain people until you begin negotiating. I am wondering what negotiations would mean to you here in terms of your very strong feelings about this. You have given us, I think, helpful testimony today. We appreciate that. Beyond that which you recited orally today, you have described in some detail certain provisions that you think need to be changed and how they should be changed.

But it is much easier to oppose than propose. It just is. Mark Twain was once asked if he would get involved in a debate and he said, sure, as long as I can take the opposing view. And they said, we have not told you what the subject is. It doesn't matter, he said, the opposing view will not take any time to prepare. It is so much easier to oppose than propose.

So the question I ask you, you have heard Chairman Hall and Chief Gray and others talk about the need to be involved in trying to construct some sort of legislative approach that might address these issues or solve these issues. Do you feel this is achievable in a legislative arena? Is this the manner in which it should be addressed? And do you feel you would want to be a continuing part of negotiations in an attempt to address it?

Ms. COBELL. Of course. I definitely would like to be involved in the continuing negotiations. I would like to clarify just a couple of areas after listening to the testimony today, is that when the mediation took place, we put proposals on the table. The department did not. So we are not the bad guys in this entire game. We are the ones that are fighting, that have fought and won major victories in court.

That is what I saw about the legislation is these major victories were not implemented into the legislation, and I was really concerned about that, especially we won. And I think it is important to clarify that the Court of Appeals has largely affirmed the District Court.

When I heard Senator McCain talking about just the District Court, he was not referring to the Court of Appeals. The Court of Appeals has affirmed the District Court on jurisdiction, on standards, on the application of the trust law, on the scope of the accounting, that the accounting scope is from 1887 forward. The appellate court has upheld the District Court in all of these arenas, and those are very important areas to cover in this legislation.

So I just want to make sure that, you know, I worked on the 1994 Trust Fund Reform Act. Let me tell you, we gave. We compromised. And look what happened? It didn't work. And that is what I feel about. The Office of the Special Trustee is not working. You heard from the testimony today that that is an area that does not seem to be working.

So, you know, I compromise. I am not the bad person in this. I am just wanting accountability for individual Indian beneficiaries. If we can do it in the ways that satisfy individual Indian beneficiaries, then I am willing to sit at the table, but I think there are certain victories that have happened in the court that need to be part of this legislation.

Senator DORGAN. Well, we will stipulate that our feelings are not hurt and you are not the bad person. [Laughter.]

You and others have every right to seek redress in the courts. You have done that. You have been successful at many different levels. So I understand that you are not coming to this in bad faith at all. You have used the system of justice in this country to address wrongs.

So the question at the moment is, we find ourselves at kind of an intersection here. One road, I think, leads us to spend a lot of money on things that detract from the needs of Indian people in a way that will probably never get us a good solution. Another road might be for all of us to understand that we really are forced to negotiate something that is fair and just and equitable in order to put the past behind us, address the needs of people who have been victimized, and then from here forward, trying to straighten all this out and make certain this does not happen again.

Let me again say on behalf of Chairman McCain and myself, we and our staffs have worked very hard on this and we will continue to do that. What we would like to do is use this hearing as an opportunity, and many of you have brought ideas to this hearing as well. Chairman McCain said, and he is absolutely correct, we cannot just go on and have hearing after hearing after hearing. We are not going to take this next year and a half in this Congress and decide that we are going to have 10 more hearings on trust reform because we cannot do that. But we can, it seems to me, make this a major priority from now forward as we negotiate to see if we can find a solution. If by the end of this year, in the next 3 or 4 or 5 months, if we could find our way through this, that would seek a solution that all of us think is just and fair, I think it would be the best news in the world for Native Americans, for the First Americans who have seen their rights violated and who ask not just the courts, but ask the Congress now to intervene in a way that redresses those wrongs.

So that would be my hope. The reason I asked Ms. Cobell, your name is on the litigation, obviously, and others of you. All of us have interests here. I just wanted to make sure everybody is really interested in pursuing this approach that Senator McCain and I have tried to initiate.

I am hopeful, as a result of your response and the response of all of you, and I think Senator McCain will not be able to return because we will have another vote I believe that has perhaps just started on the defense authorization bill, so I will have to go cast that vote as well.

On behalf of the Chairman and myself and other members of the committee, I thank all of you for taking the time to come to Washington, DC today and to participate in this hearing and give us I hope a renewed starting point with the legislation that we have in-

troduced and the opportunity to continue working with you and talking with you about this important issue.

This hearing is adjourned.

[Whereupon, at 4:15 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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

I thank Chairman John McCain and Vice Chairman Byron Dorgan for holding this hearing today and for introducing S. 1439, the Indian Trust Reform Act of 2005. In addition, I thank the witnesses who will testify before the committee for their participation today.

For decades, the United States has been trying to resolve the accounting problems for both the individual Indian money and Indian tribal accounts. As a result, for 10 years now, litigants for individual Indian money account holders who filed a lawsuit in 1996 against then Secretary of Interior Bruce Babbit and now against Secretary of the Interior Ann Norton, have been waiting for an accurate and complete accounting of their individual trust accounts. However, to this day, after contempt of court findings against cabinet officials and expenditures by both the Government and litigants, a historical accounting of the individual Indian money accounts still has not been rendered. On February 23, 2005, Judge Royce Lamberth issued another structural injunction requiring the Department of the Interior to admit to Individual Indian Money trust account holders that its accounting may be unreliable. It also provides specific requirements for the Department as it completes its accounting. Still, I am not certain the Department will be able to fully comply with Judge Lamberth's latest Memorandum and Order.

Mr. Chairman, for this reason, I am pleased that you and Senator Dorgan have introduced S. 1439. While I commend the chairman and vice chairman for their efforts to bring forth this legislation to address the Government's responsibility to provide an accurate and complete accounting of the individual Indian money accounts, I wish to ensure that this legislation is a balanced and fair approach that will be acceptable to the plaintiffs and the Department of the Interior. It is imperative that Congress ensures that this legislation does not diminish the government's trust responsibility with Indian country. I agree with the intent of S. 1439, but I have some concerns and I look forward to working with Senators McCain and Dorgan on addressing them. Mr. Chairman, again, I thank you for holding this important hearing.

PREPARED STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, AND ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS ON THE COBELL LAWSUIT.

Thank you for the opportunity to come before this committee again and discuss the *Cobell* v. *Norton* lawsuit. As we have discussed on several prior occasions, the Department of the Interior supports the efforts of Congress, as the Indian trust settlor, to clarify Indian trust duties, responsibilities, and expectations.

Allow me to emphasize that the Administration strongly supports protecting the rights of Native Americans under the law and that is an important objective of the Department of the Interior. Everyone involved the *Cobell* lawsuit—the Government, the Indian plaintiffs, and the judges in the district court and the appeals court—

shares, we believe, that objective. But the protracted and painful litigation that has occurred does not serve that objective as well as would a settlement reached by agreement of the parties. It may not be easy for the Government and the Indians to reach a settlement, but it is well worth the effort for all concerned to engage in a good faith effort to resolve the matter. It is, of course, important that any settlement have the support of the Congress, as a settlement could not be implemented without appropriation of the necessary funds.

We particularly want to thank the chairman and the ranking minority member for their efforts in trying to reach a full, fair, and final settlement of the issues in this case. This Congress has an opportunity to look at this issue anew, examine the facts, and move forward with a clear and consistent sense of purpose regarding the Federal Government's administration of the Indian trust.

The *Cobell* litigation has been pending for too long. It is clear that after 9 years of litigation, the courts have not reached a resolution that is broadly supported by Congress. Interior's annual appropriations make it clear that Congress has not and does not support the kind of accounting effort required by the District Court.

While Congress recently took actions to forestall the implementation of the District Court's structural injunction regarding historical accounting, the introduction of 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 toward bringing the parties together for a meaningful effort to seek closure on this matter.

Congress is the Indian trust settler, that is, the creator of the trust and hence the party that defines its terms. Congress provides statutory direction to guide the management of assets held in trust for Indians and Congressional appropriations are provided to fund trust operations.

Congress began its involvement with the passage of the General Allotment Act. That act authorized the allotment of tribal lands to individual Indians with the hope individual Indians would take up farming and assimilate themselves into the non-Indian society and culture. The act provided that the Secretary would hold the lands as an allotment in trust for 25 years. After 25 years, Indians would be free to sell or encumber their lands as they saw fit.

In 1934, Congress passed the Indian Reorganization Act and extended the trust for individual Indian allotments in perpetuity. By then, many of these lands had already started to fractionate into many undivided interests and have continued to do so exponentially over the next 71 years. The interests have become so small in many cases that heirs do not bother to claim their inheritances and interest holders in many cases fail to inform the BIA of their whereabouts. Keeping track of family deaths, missing relatives, and moving interest-holders is a full time job for many employees at BIA.

The 1994 Reform Act was intended to further define the Department of the Interior's obligations regarding the management of IIM funds. In particular, the 1994 Reform Act defined several prospective accounting duties and a requirement to provide Indian beneficiaries with periodic account statements. In reading the legislative history of the 1994 Reform Act, one will recognize that Congress had known for years about the condition of the trust accounts. However, it also seems apparent that Congress did not expect the Act to set the stage for what is now claimed to be a multi-billion dollar historical accounting liability on the part of the United States. The District Court has directed Interior to account for every land and cash transaction since 1887, even with regards to beneficiaries who had died and whose trust account was closed before 1994. The Court of Appeals seems to have identified a historical accounting requirement beginning in 1938.

In 1996, the *Cobell* plaintiffs filed a lawsuit seeking an accounting of IIM account funds. Although Congress had not directed Interior to prepare periodic accounting statements or consistently funded such a requirement in the past, the Court of Appeals has ruled that a historical accounting for IIM accounts is required, ostensibly to ensure that the current balances of IIM accounts are accurate.

The plaintiffs' lawyers have said they do not want handouts; they do not want reparations; they do not want welfare. They just want what is rightfully owed to them—in other words, they want money that was collected for them, but which they believe has not been distributed. In Court, the plaintiffs seek a historical accounting but are now working hard to prevent that accounting from occurring. In Congress, they argue against providing funding for that accounting; in Court, they argue that the accounting is impossible. Instead of an accounting, they want a lot of money. The plaintiffs have been quoted by the press as asserting that the Government has failed to pay individual Indians $176 billion. Recently, the plaintiffs and tribal leaders have offered to settle the historical accounting claims of individual Indians for $27.487 billion. In the recently proposed S. 1439, the Senate left blank the amount

of the proposed settlement, but with an indicator that the figure should be in the billions.

Before we speak to the provisions of S. 1439, we would briefly like to address the list of 50 principles the committee has before it from the Trust Reform and Cobell Settlement Workgroup, which included the *Cobell* plaintiffs. The principles recommend a lump sum payment to the plaintiffs of $27.487 billion.

This $27.487 billion payment will not necessarily resolve the *Cobell* litigation. In addition, it does not settle any other claims individuals might have against the United States related to funds management or to their lands. The $27.487 billion is intended to cover only the historical accounting claim. Principles 48–50 State clearly that the individuals should be allowed to continue to seek redress for Federal mismanagement claims. Federal mismanagement, the principles say, should be treated as a matter of national interest and, under principle #48, Congress is urged to provide a fair offer to individuals to compensate them for mismanagement in addition to the $27.487 billion.

To achieve a full, fair and final settlement to the potential claims being raised by individual Indians (and separately, by tribes) it is important to consider carefully four key components:

- Any requirement to conduct historical accounting activities should be eliminated. In exchange for a settlement payment, the account holder must relinquish any claim to an accounting and accept as accurate the balance of the account when closed or at the date of settlement. In addition, permitting a significant number of account holders the option of pursuing an accounting will undermine the cost effectiveness of a settlement program.
- Claims regarding funds mismanagement, including but not limited to accounts receivable issues, funds handling and deposit, investment decisions, etc. must be addressed.
- Appropriate mechanisms for the mitigation of fractionated interests must be provided. For example, the authority to conduct "consolidation" sales of highly fractionated lands would be helpful.
- Congress must decide whether separate resource mismanagement claims will be permitted, and if so, what remedies will be made available by Congress. If the legislation does not resolve those claims, Congress should ensure that these claims do not provide an opportunity to seek a sweeping historical accounting similar to that sought in the *Cobell* litigation.

In determining how much money the Federal Government should provide to settle individual Indian claims, Congress should consider what work Interior has done so far and what we have found.

As part of the *Cobell* litigation, Interior collected over 165,000 documents for the historical accounting 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 13,000 transactions.

Pursuant to the requirement in section 131 of the fiscal year 2003 Appropriations Act, on March 25, 2003, the Department of the Interior provided Congress with a summary of the expert opinion of 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 over payments to class members (37 instances totaling $3,462) and under payments (14 instances totaling $244).

As of June 30, 2005, Interior's Office of Historical Trust Accounting [OHTA] had reconciled more than 21,847 Individual Indian Money [IIM] judgment accounts with balances totaling more than $56.3 million and an approximately 15,000 additional accounts with no balance as of December 31, 2000. This accounting effort found non-interest overpayments (2 instances totaling $2,205) and under payments (21 instances totaling $52).

As of June 30, 2005, OHTA had also reconciled 3,995 IIM per capita accounts with balances of over $28.1 million and an additional approximately 4,000 accounts with no balance as of December 31, 2000. In this accounting effort, no overpayment or underpayment discrepancies were identified.

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) and, more broadly, interest amounts for judgment and per capita accounts that appeared to have been overpaid (a net amount approximating $377,000 on about 25,842 accounts).

The National Opinion Research Center [the Center] at the University of Chicago, a national organization for research, has contracted to assist Interior with interpreting historical accounting data and results. It has recently completed a draft progress report entitled "Reconciliation of the High Dollar and National Sample Transactions from LandBased 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. The historical accounting initiative is scheduled to end in August 2005. To date, the Center has found:

- Over 98 percent of the sampled transactions needed for preliminary estimates have been reconciled for all 12 BIA regions.
- A completion rate of 98 percent is extremely high in a sample such as this. The draft report states: "This very high completion rate for searching and attendant reconciliations should put to rest most concerns about the impact that the few remaining reconciled transactions might have on results."
- Of land-based IIM account transactions exceeding $100,000, 1,730, of 1,737 were reconciled [99 percent]. The reconciliation identified both over payments [34 instances totaling $34,053] and under payments [24 instances totaling $47,168]. For the sampled land-based transactions of less than $100,000, fewer differences were found among the 4,134 out of 4,162 transactions reconciled, with over payments to beneficiaries [15 instances totaling $506] and under payments [6 instances totaling $516].
- Reconciliation shows the debit difference rate to be 0.3 percent.
- Reconciliation results show the credit difference rate to be a little over 1 percent.

Based upon the historical accounting results so far, Interior suggests that Congress consider exempting Judgment and Per Capita funds from any proposed legislation. Regarding the findings from the IIM land-based accounting thus far, the net difference [under payments—over payments] would be about $10,000. Just under payments, without regard to offsetting over payments, equal less than $48,000. Notwithstanding the facts, all parties need to be mindful of the cost, risks and uncertainties associated with continued accounting efforts involving the remaining as yet unreconciled accounts.

Through December 31, 2004, OHTA also resolved residual balances in nearly 8,200 special deposit accounts, identifying the proper ownership of more than $38 million belonging to individual Indians, tribes, and private entities. By the end of 2005, OHTA expects to resolve the proper ownership of approximately $51 million [cumulative] in residual IIM Special Deposit account balances.

Consistent with Interior's historical accounting plan, the Administration proposed funding the historic accounting at $130 million in fiscal year 2004, Congress appropriated $45 million. We requested $109 million for fiscal year 2005; only $58 million was appropriated and this includes funding for tribal trust fund accounting as well. The fiscal year 2006 budget request for historical accounting is $135 million. This amount would provide $95 million for IIM accounting and $40 million for tribal accounting, however initial indications from House and Senate passed appropriations

bills suggest approximately $58 million will be provided. As a result of the lower appropriations amounts provided, the pace of completing Interior's planned historical accounting effort is slower, and the anticipated completion date will move further into the future. To date, Interior has spent in excess of $100 million to obtain the historical accounting results indicated above.

We are pleased to have an opportunity to review S. 1439, the "Indian Trust Reform Act of 2005." This bill was just introduced late last week so our comments today are preliminary ones. We will provide more detailed comments after an in-depth review of the bill.

First, we appreciate the fact that legislation has now 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. S. 1439 would provide a yet undetermined number of billions 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 does not include money to resolve potential mismanagement of trust fund and asset claims. In deciding upon the amount to provide for a resolution, the Congress should carefully consider all potential liabilities with respect to the individual Indian trust. The legislation should resolve or restrict any claims that might permit the reinstatement of historical accounting litigation comparable to the *Cobell* case. Congress should also realize that 25 tribal trust cases have been filed involving sums of money far greater than those involved in the individual Indian trust.

Indian Trust Asset Management Demonstration Project Act. S. 1439 includes provisions allowing for a pilot project for 30 tribes to take over management of Indian trust assets. However, it is critical to transfer the responsibility for results along with authority and funding. Thus, we do not believe the United States should remain liable for any losses resulting from a tribe's potential mismanagement of an Indian trust asset. This is particularly true because the bill would allow tribes to develop and carryout 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. Of course this would have no impact on the government-to-government relationship.

We look forward to further discussing the following key aspects of this provision. For example, would Interior need to develop expertise in 30 different trust asset management systems sufficient enough to ensure that everything a tribe is doing under that system is in keeping with Interior's trust responsibility? 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 constant 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 associate with Public Law 93–638 or the "highest and most exacting fiduciary" standard being required of Interior?

Fractional Interest Purchase and Consolidation Program. As we stated above, we are pleased to see that the bill places a priority on developing an aggressive program for the purchase of interests in individual Indian land with the intent of restoring those interests to the tribes, we are not prepared to take a detailed position on the specific provisions in the bill until we have done further analyses.

The President's fiscal year 2005 budget request included an unprecedented $75 million request for Indian land consolidation. Congress chose to appropriate $34.5 million for the program in fiscal year 2005. In light of this, we requested $34.5 million for fiscal year 2006.

As structured, the program in S. 1439 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 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 fractionate land so that individuals can become eligible for the bill's incentives. So far, there has been no lack of willing sellers at appraised values. In addition, we would like to work with you further on the 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. Further, we need Congressional clarification regarding the seemingly apparent public policy of retaining individual Indian land within Indian Country ownership versus the trust responsibility to obtain fair market value for each land interest. 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. S. 1439 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. We will review this new title with respect to the reorganization just completed and provide you with our comments in our comprehensive report on the bill.

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 decisionmaking priorities, the challenges of incorporating Public Law 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 in 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 1 percent of the American public. If we unduly restrict hiring to this small fraction of potential employees, instead of reaching out to whoever may be most qualified, we deprive ourselves of 99 percent of the available talent pool. While the Indian preference hiring policy does permit the hiring of non-Indians, it also may serve as a significant disincentive for non-Indian applicants. We would like the opportunity to serve Indian Country to appeal to a broader range of applicants so as to create an applicant pool large enough to ensure we are hiring well qualified employees.

Let me be clear. Indian people who are the best or equally well-qualified should be given preference. This allows us to ensure our organization understands the unique issues of Indian country. However, when better qualified individuals are not even considered or given reasonable promotion potential, a reality exists that organizational performance suffers.

Audit of Indian Funds. The last title of S. 1439 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.

Congress created the individual Indian trust. We are hopeful that S. 1439 will resolve many of the issues that we have spent over 9 years in court debating.

From the Government's standpoint, we believe S. 1439 should——

- provide for a full, fair, and final resolution of the entire case;
- provide a clear and realistic statement of the government's historic accounting obligations for the trust funds of individuals;

- resolve the accounting claims of the account holders and any associated funds mismanagement claims;
- eliminate inefficient trust management obligations by consolidating individual Indians' lands through a land purchasing program and address any historic land assets mismanagement claims;
- clarify trust accounting and management responsibilities such that they are limited by available appropriations, so that future claims and litigation do not arise as a result of unfunded obligations; and,
- provide a clear statement of the Government's historic accounting obligations for Indian tribes.

We recognize this is a daunting task. But I can assure you, it is no more daunting than the prospect of facing many more years in the court system trying to find the answers to these issues.

Mr Chairman, I would like to close with a comment in support of our people at the Department of the Interior. We want to be sure that the public record reflects the fact of their extraordinary service to the country. Many of our employees past and present have faced rough-sledding in the *Cobell* case and have been unfairly maligned. Department of the Interior employees working on the issues involved in the *Cobell* case, like the other employees of the department, are here to serve the American public. They work hard, in good faith, to implement the laws you enact and protect the legal rights of Native Americans. We ask that our employees be treated with the dignity and respect they have earned and deserve as we all work our way together through the difficult legal issues involved in the *Cobell* case.

The department is encouraged by the Senate's leadership on this issue. We look forward to resolving this case so that the department and beneficiaries can move forward on a positive agenda for Indian country. Thank you for the opportunity to appear. We would be happy to answer any questions you might have at this time.

PREPARED STATEMENT OF CLIFFORD LYLE MARSHALL, SR., CHAIRMAN, HOOPA VALLEY TRIBE

We thank you for the opportunity to submit testimony on S. 1439, the Indian Trust Reform Act of 2005. The Hoopa Valley Tribe, one of the original self-governance tribes, a section 131 tribe and member of California Trust Reform Consortium and ATNI, commends Chairman McCain and Vice Chairman Dorgan for their dedication to resolving the issues arising from the *Cobell* v. *Norton* case, the Department of the Interior's reaction to that case, and the future of tribal and individual Indian trust assets management. The Hoopa Valley Tribe appreciates the time and energy spent on the development of S. 1439 and is pleased with the outcome. We support the effort and look forward to working with the committee on improving the bill as it moves through the legislative process.

S. 1439 presents a plan for remedying the wrongs of the past while proposing a structured approach for future trust management. It seeks to ensure that problems surrounding the Federal management of trust assets and resources, which have, afflicted Indian country, for so long, will not plague us in the future. The bill supports the government-to-government relationship between tribes and the United States, adheres to the Federal Government trust Responsibility to tribes, and furthers the principles of self-governance and self-determination. Unlike past short-sighted trust management approaches of the United States, that gave rise to the breach of trust claims, S. 1439 is a balanced approach to addressing the immediate issues of *Cobell* and the Federal Government's management of trust assets. Importantly, S. 1439 also preserves the rights of tribes, as inherent sovereign governments, to participate in the management and protection of their territories and resources. It recognizes that the United States must be held accountable for past wrongs and also that true reform is needed for proper trust management in the future. We believe S. 1439 is the vehicle for that for that reform.

Below, we discuss three overarching points of the bill and then provide brief comments on certain provisions. Specifically, we believe S. 1439 rightfully refocuses trust reform to the original objectives and intent of the 1994 Trust Fund Management Reform Act, blunting the United States' recent policy of micromanaging trust issues in light of *Cobell* which has caused duplication and bloated bureaucracy. Further, we believe S. 1439 protects self-governance and the rights and abilities of tribes to participate in trust management. Finally, it appears S. 1439 frees up substantial funds that could be used on the ground to address the many issues in Indian country.

Refocusing Trust Reform

We believe S. 1439 correctly refocuses trust reform back to the original mission of the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§4001–4061. The Hoopa Tribe agrees with the goals and principles of the 1994 act. We also believe in the need for the Office of Trust Fund Management [OTFM] to operate within the BIA. The 1994 act established the Office of Special Trustee [OST] to oversee and coordinate reforms in the Department of the Interior's [DOI] practices relating to the management and discharge of the secretary's trust responsibility to tribes and individual Indians. Under the act, the OST is to ensure that policies, procedures, practices and systems of the DOI's bureaus related to the discharge of the trust responsibility are coordinated, consistent and integrated. It is clear under the Act that OST is meant to be an oversight and coordinating entity.

In light of *Cobell,* however, the OST in recent years has used the 1994 act to leverage unnecessary control and micromanage trust issues. It has moved away from its intended role as a coordinating oversight entity to become an entity engaged in the delivery of trust services, a role originally reserved for the BIA. This has resulted in a fragmentation of appropriations for Indian programs, a dismantling of the Indian service delivery system and unnecessary duplication and bloating of bureaucracy. This is in direct contradiction to tribes' longstanding desire to keep the BIA system intact while repairing resource management problems that need fixing. The purpose of the 1994 act was to provide oversight, not create a new agency focused on protecting itself from liability.

We do not need additional bureaucracy, nor can we afford it, particularly in today's budget environment. OST has been operating under a "bright line" philosophy under which it attempts to develop an arbitrary separation between Indian assets and the people themselves. Indian people and their assets, however, cannot be conveniently separated simply by dividing programs and functions and moving trust program management from a single line of authority to multiple lines of decision-makers at different agencies. Any bright line plan that has a basic framework to separate trust assets from Indian communities will necessarily be in conflict with the goals of economic development, providing adequate services, and reducing poverty in Indian country.

Under the existing BIA structure, each Regional and Agency Office has established internal trust personnel to oversee the management of trust assets at every point in the delivery of trust services. The OST has also established trust officers to serve in the Regional and Agency Offices. Under the combined BIA and OST restructured trust programs, there are nearly 1 dozen Federal employees carrying out what was done by less than One-half in previous years. We do not believe this is what was intended by the 1994 act.

The Hoopa Tribe supports S. 1439, in part, because title V takes bold steps to restructure the BIA and the OST. Title V seeks to ensure a more accountable administration of the secretary's duties with respect to providing services and programs to Indians and tribes, including the management of trust resources. Title V creates the position of under secretary for Indian Affairs, who reports directly to the Secretary of the Interior, and provides for the phasing out of the OST by December 31, 2008. The termination of the OST is specifically intended by the 1994 act. S. 1439's clear sunset of the OST protects against the possibility that the OST will become permanent, regardless of its efforts in bureaucracy building and assuming the responsibility for delivering certain trust services.

The Hoopa Tribe supports S. 1439's creation of the position of Under Secretary and the transfer of the duties and functions of the OST and the Assistant Secretary for Indian Affairs to this new position. We think the plan will streamline the process for carrying out trust functions. Moreover, with the emerging trust issues regularly surfacing in other bureaus and agencies of the DOI, we believe the creation of the under secretary position will help resolve trust problems tribes face due to the lack of coordination or understanding of the issues by those other agencies/bureaus. Having one direct line of authority will assist in the coordination of the various aspects of trust management. Further, we support the effective merger of OST functions back into Indian programs of the BIA, under the under secretary. This would prevent the duplication of services and the overgrowth of bureaucracy, and foster progress in the delivery of services to Indian people.

S. 1439 Protects self-governance and the ability of tribes to manage their own resources

As a self-governance tribe and participant of section 131, we are grateful that Congress recognizes the benefits of the section 131 Demonstration Project and has included the Indian Trust Asset Management Demonstration Project Act in Title III of S. 1439. The Hoopa Tribe is honored to participate in the section 131 project with the six other tribes in the California Trust Reform Consortium (Karuk, Yurok,

Cabazon, Big Lagoon, Redding, and Guidiville) as well as the Salt River Pima Maricopa Indian Community, the Confederated Salish—Kootenai Tribes and the Chippewa Cree of the Rocky Boys Reservation. Section 131, to date, has been successful. Accordingly, we strongly support the Demonstration Project in S. 1439 and will assist in any manner to address areas of concern that Congress or the Administration may have.

The motivation behind section 131 [section 139 in its initial year] was multi-fold. For the California Trust Reform Consortium, we sought protection of our then-existing Operating Agreement for trust resources management that we entered into with the BIA Pacific Regional Office [PRO] and protection of our relationship with the PRO in the face of uncertainty in the direction of trust reform efforts. We did not want the imposition of the restructured OST and DOI to alter our tried and true successful means of managing our trust resources. It is our position that trust reform should focus on what is broken and preserve what is working. Section 131 tribes have systems and practices for trust management that work. In fact, pursuant to section 131 each participating tribe underwent an evaluation by the OST and received a determination that it is capable of performing compacted trust functions under the same fiduciary standards to which the secretary is held. Hoopa was even cited as "an excellent example of trust administration, in furtherance of tribal self-determination."

Section 131, we also believe, is an appropriate way to showcase successful models of trust management that not only demonstrate to the United States how trust management can be implemented, but also encourage tribes to participate in the management of their resources. It stands as an example that local decisionmaking and combined efforts with the BIA can result in significant trust management improvements. Tribes can properly implement trust management even though they may use different practices and methods than the DOI. Title III of S. 1439 maintains and encourages this concept by preserving the ability of tribes to continue their own successful trust resource management.

The S. 1439 Demonstration Project builds upon and encourages self-governance and self-determination, which are proven successful policies for building growth in capability and infrastructure in tribal governments. We believe that the Demonstration Project under title III will provide a useful model for how tribal governments can assist the United States with properly managing trust assets and create an understanding on the part of the Federal Government of the differences between our respective values and expectations when managing trust assets within our tribal territories. We also believe that all tribal governments, regardless of whether they are direct service tribes or operating pursuant to self-governance or self-determination agreements, should be a part of the management of trust assets within their jurisdictions. Active participation by tribal governments in the management of trust assets not only creates positive results, but reduces the chance of conflicts or breach of trust claims. Again, we support the concept of the Demonstration Project and are committed to working with the committee to find ways for tribal governments of any fashion of service delivery to engage in the management of their trust assets.

One concern we do have with the Title III Demonstration Project is that the default action under section 304(b)(3) is to deny approval of a tribal applicant's demonstration project plan if the secretary does not act within a certain timeframe. We believe this standard should be reversed so that a plan is approved unless specifically denied by the Secretary. This approach would be mindful of the fact that tribes are always at a disadvantage when the secretary has the ability to obstruct the negotiation process.

Under S. 1439, substantial amounts of money will be available for use on the ground to address the many issues in Indian country.

It appears that under S. 1439 a substantial amount of funds currently being used for litigation costs by the DOI in the *Cobell* case as well as reorganization efforts of the OST would be available to be used for on-the-ground initiatives in Indian country to address the many needs of tribes and their members.

We have previously estimated that the costs of implementing the To-Be Model, Records Policy and Trust Examination Handbook nationwide would be approximately $1 billion. While we support the continuing requests of tribal leaders to provide adequate funding for trust resource programs, we do not support the concept that creating new multi-million dollar centralized bureaucracies located thousands of miles away from where the resources need to be managed is the best way to accomplish trust improvements. To the contrary, we strongly believe that meaningful and cost effective trust improvements occur when there is support and funding provided at the local level. S. 1439 appears to recognize this principle by encouraging self-governance and the integration of tribal government action with a local deci-

sionmaking focus in trust management. S. 1439 appears to streamline trust management rather than expand Federal bureaucracy. With this, moneys that would have been put toward centralized bureaucracies, it appears, would be available for spending at the local level on trust improvements. This, in turn, will further tribal economic development and the effort to reduce poverty among tribal members.

Titles I, II, IV, and VI of S. 1439

The Hoopa Tribe is in support of a timely and fair resolution of the *Cobell* case. The importance of the United States' obligations to Indian people can never be diminished. Further, Indian people should not suffer from inaction on their claims. The Hoopa tribe has had experience with claims that take far too long to resolve. Such delay does not do justice to Indian people. A fair and timely resolution is needed so Indian people can move forward. We look forward to hearing the comments that will be forthcoming with regard to the proposal outlined in title I.

The Hoopa Tribe previously has not supported the concept of a commission because we do not want it to become another level of overreaching bureaucracy. However, as title II is written, it seems the Trust Asset Management Policy Review Commission [Commission] might provide some benefit in reviewing the laws and practices of the DOI with respect to trust asset management, and recommending improvements to those laws and practices to the Secretary and Congress. The manner in which Indian trust services has been staffed, funded and carried out has left many of us with a strong sense of frustration and disappointment. The commission concept may help ensure that the problems which plagued us in the past will not plague us in the future. It is absolutely necessary, however, to ensure that there is no risk that the Commission will take on a life of its own, by extending its reach beyond reviewing and making recommendations. It cannot duplicate efforts of the agencies nor can it drain critically needed funds from Indian programs or wield any authority over how tribal governments address individual issues relating to trust management, The manner in which Title II is drafted appears to protect against such short-sighted policies and additional bureaucracy that would only complicate the problems. We recommend, however, that the commissioners selected from Indian country consist of a balance between direct service and self-governance tribes.

The Hoopa Tribe strongly supports resolving the problem of fractionated interests. We, however, reserve comments on title IV regarding the Fractional Interest Purchase and Consolidation Program until we have had the opportunity to hear from the Indian Land Working Group and other appropriate entities that have an interest in this matter.

We believe the concept in Title VI, Audit of Indian Trust Funds, is necessary to ensure adequate checks and balances of financial trust functions within the Federal Government. The requirement for an independent audit will lend necessary credibility to the overall management of trust funds by the Federal Governments.

We want to express our appreciation for Chairman McCain's and Vice Chairman Dorgan's leadership demonstrated through the introduction of S. 1439. Trust mismanagement problems have afflicted tribes and Indian people for too long. Allowing these problems to remain unresolved for much longer will only create more injustices, conflict and delays in the services the United States is obligated to provide Indian people. It is time to act. We believe that S. 1439 is a solid foundation for such action, and we look forward to working with the committee, the House Resources Committee and the Administration to move meaningful legislation through the process as expeditiously as possible.

STATEMENT OF THE HARVEY MOSES, JR., CHAIRMAN CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

The Confederated Tribes of the Colville Reservation [Colville Tribe] would like to express its thanks to Chairman McCain and Vice Chairman Dorgan for introducing S. 1439, the "Indian Trust Reform Act of 2005," and would like to take this opportunity to provide initial thoughts and comments on the bill. Although such an important legislative initiative will undoubtedly generate a wide range of reactions, the Colville Tribe generally supports the legislation and believes that it is a crucial first step in resolving the *Cobell* v. *Norton* litigation and implementing meaningful trust reform in the Department of the Interior.

While the statements contained herein are based only on a preliminary review of the bill, the Colville Tribe is pleased to see that title V of S. 1439 would help rectify one of the more unfortunate recent developments in Federal Indian policy—the rise and gradual domination of trust issues by the Office of Special Trustee [OST]. The Colville Tribe has long made known its opposition to OST, as have many of our sister tribes in the Pacific Northwest and around the country. Our opposition to OST

and our desire to see the transfer of OST functions back to the Bureau of Indian Affairs [BIA] are based on our own experiences with OST and on the detrimental impact continued funding of the OST bureaucracy has had on the funding levels of critical Indian programs.

The Colville Reservation comprises over 1.4 million acres of trust and allotted lands in north central Washington State. With lands that include timber, agricultural and water resources, our tribe and our tribal members necessarily depend on a smooth working relationship with our local BIA agency office to ensure that land transactions and other BIA supervised activities are completed in a timely manner. For decades, the Colville Tribe has generally enjoyed such a relationship. Certain activities undertaken by the OST, however, have resulted in periods of extended delays in completing land sales by and between our people. OST has gone so far as to impound our tribe's probate records from our agency office in Nespelem, WA [where they had been secure for decades], and moved them to Albuquerque, NM. We understand that since the move, OST cannot account for all of the records. To say the least, these actions have dealt a serious setback to our tribe's ability to conduct business and are not in keeping with a healthy and constructive Federal-tribal relationship.

Also, as we noted in statements previously submitted to the committee in connection with its March 9, 2005, oversight hearing on trust reform, continued funding of OST at the expense of the BIA means that OST diverts critical funding and personnel away from agency offices. Our tribal members are the beneficiaries of these agency-level services and are the very people who need the assistance most and who can least afford to suffer bureaucratic folly. Indeed, every new fiscal year brings with it another increase in OST funding and a corresponding reduction in BIA funding for critical health and safety programs. Returning these functions to a single administrative entity, as proposed by S. 1439, would reverse this trend.

While we believe a need exists for independent oversight of the BIA's delivery of trust services, OST has morphed far beyond this oversight function. As proposed, title 11 of S. 1439 would establish a trust management policy review commission that would provide policy oversight, while title VI would give the Government Accountability Office a key role in overseeing how the Department safeguards its trust responsibility. While these titles could use some fine tuning, the Colville Tribe believes that these are steps in the right direction.

The Colville Tribe also agrees with the intent of title III—which would establish the Indian Trust Asset Management Demonstration Project—that tribes that so choose should have an opportunity to prioritize funding and management of their trust resources based on their own needs. Although we have questions on how the proposed project will be implemented and are interested in seeing the details of how tribes and the Department would negotiate a "trust resource management plan," these issues can surely be resolved later.

Title I of the bill proposes a voluntary claims resolution regime to settle the accounting claims of the hundreds of thousands of Individual Indian Money [IIM] account holders currently embroiled in the *Cobell* v. *Norton* litigation. While the specific dollar amount is left undetermined in S. 1439, the tribe is very encouraged that funds to resolve the IIM accounting claims will come from the Judgment Fund and not from the annual Indian program appropriation. The tribe is also supportive of the availability of judicial review for claimants to challenge their settlement amount or, indeed, challenge the methodologies used to arrive at a settlement amount. We are mindful of the complexities involved in trying to settle the *Cobell* case, and are fully aware that many questions need to be answered, but applaud the committee for taking the initiative to bring this 9-year old litigation to a fair and final conclusion.

The Colville Tribe supports a comprehensive legislative approach such as the one set forth in S. 1439. The legislation would clarify the Department's trust obligations and ensure that services provided by the BIA are not jeopardized because of a competing office within the department.

Again, the Colville Tribe thanks the committee for the opportunity to present its preliminary views on this critical legislative proposal. The Tribe looks forward to working with the committee on this important subject.

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Statement of Harold Frazier
Chairman, Cheyenne River Sioux Tribe
Before the Senate Committee on Indian Affairs
Oversight Hearing on the Indian Trust Reform Act of 2005 (S. 1439)

July 26, 2005

As Chairman of the Cheyenne River Sioux Trib
S. 1439, the Indian Trust Reform Act of 2005. I commend Senators McCain and Dorgan for introducing such ground-breaking legislation that would provide fundamental change in the federal government's management of Indian trust resources and would provide a method for settlement of *Cobell v. Norton*, a case that has embroiled most of Indian Country for close to ten years. I would like to say at the outset that, because of the short time between the introduction of the bill and this hearing, we have not yet had the opportunity to complete our study of its provisions and it may very well be that we will have additional points to be made after further study of the bill.

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I am pleased to pre ent this testimony on

In March of this year, I testified as to the effects of the *Cobell* lawsuit, specifically on the Department of Interior's reorganization of the Bureau of Indian Affairs (BIA) and the Office of the Special Trustee (OST), for the Cheyenne River Sioux Tribe at the Great Plains Region. My testimony reflected the nearly universal view that settlement of *Cobell* is necessary and prudent, as the case has been a fiscal drain on vital resources that would otherwise be dedicated to tribal governments for law enforcement, healthcare and other social programs. However, I noted that, like many tribes, the Cheyenne River Sioux Tribe is a tribal account holder and has many members who are Individual Indian Money account holders as well. Consequently, my testimony stressed that any settlement of the watershed case should balance the interests of both tribal and individual account holder interests and recognize that such a balance is an essential element to a successful out-of-court resolution. I also stressed that, in addition to settlement of the *Cobell* case, there also needed to be fundamental reform of the BIA's management of Indian trust resources. Finally, I stressed that any reform of trust management needs to reflect the fact that "one size does not fit all," and that the needs of the Great Plains Region were far different from the needs of other Regions. To that end, we proposed a Great Plains Demonstration project that would allow the Tribes of that region a special role in the management of the trust resources of their reservations.

The blue represents the thunder clouds above the world where live the thunder birds who control the four winds. The rainbow is for the Cheyenne River Sioux people who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Maiden. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian Nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka - The Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth

Today, it is clear that Senators McCain and Dorgan took many tribal views into consideration in drafting S. 1439, particularly in the provisions dealing with the Indian trust resource management demonstration project, creating a new office of the Under Secretary for Indian Affairs, and restructuring the BIA and the OST. On behalf of the Cheyenne River Sioux Tribe, I would like to give my strong general endorsement of these provisions and respectfully request that such provisions be retained in the final version of the bill. Once we have studied the bill more closely, I feel certain that there will be changes that we will request that you consider. For example, while the bill addresses settlement of claims for an accounting of IIM accounts held by individuals, it is unclear whether tribes, as IIM account holders, are considered claimants for purposes of settlement. We address these issues in more detail below.

In February 2004, the Great Plains Region-Tribes joined efforts in presenting an alternative plan to Reorganization in the Great Plains Region to Congress. The alternative plan focused on the unique land-based needs of the Great Plains Region-Tribes for reform at the local level, such as a need for range management functions such as soil and range conservation. Since that time, significant progress has been made toward effectuating a different course of reform for land management functions in the Great Plains Region. Accordingly, we applaud Title II of the bill, which would effectively codify direct service, self-determination and self-governance tribes' ability to undertake reforms that are specifically targeted to their regions and trust assets.

We also endorse the Title II language that addresses liability issues implicated in the Project plans, requiring that such plans will not diminish, increase, create or otherwise affect the liability of the United States or a participating Indian tribe for any loss resulting from the management of assets under the plan, and that the operation of such plans under the Project in no way diminishes or impacts the trust responsibility of the United States to Indian tribes and individual Indians. As a direct service tribe, we strongly believe that our treaties guarantee that the United States will provide services at the local level to our people and reimburse the tribes for any services lost, and that any failure to do so is a breach of trust. The trust obligation is the cornerstone of our relationship with the federal Government, and any provision rolling back this duty would be unacceptable.

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s important that the new Under Secretary is

Moreover, we fully support the abolishment of the OST by December 31, 2008 and transitioning that agency's responsibilities back to the BIA during the interim. In previous testimony, we questioned the expanded role of the OST from that of an agency which performs simple oversight functions, as originally envisioned in the American Indian Trust Fund Management Reform Act of 1994, to performing operational duties of trust management. This expansion raised questions about the effectiveness of the OST's oversight role and the need for concrete independent review of its performance. It is commendable that Senators McCain and Dorgan recognized that the agency has gone well beyond its intended purpose and that the proper bureau within Interior for managing trust resources and providing trust services at the local level is the BIA. Our only concern with this provision is that the date of abolishment of this office is postponed until 2008. We respectfully request that the Committee consider an earlier date. In our view, this Office should be phased out no later than December 31, 2006.

Finally, we are in full support the provision creating an Under Secretary for Indian Affairs, who reports direct to the Secretary of the Interior. It
authorized to have overall management and oversight authority on matters of the Department relating to trust ass fund management and reform, including those duties transferred from the Special Trustee. However, we hope that the Under Secretary's enumerated management and

oversight duties will include oversight responsibilities for Indian trust functions and treaty-based rights throughout the Department of the Interior, including all Bureaus (not just BIA, BLM and MMS). It is imperative that the Under Secretary be apprised of all trust-related issues across all Bureaus, since he/she will ultimately be answerable to failure to manage and administer Indian trust resources in accordance with federal law.

The Cheyenne River Sioux Tribe acknowledges that settlement of *Cobell v. Norton* is in the best interest of tribal and individual IIM accountholders. However, any settlement must recognize the rights of both types of beneficiaries and balance their interests so that a fair and equitable resolution can be accomplished. S. 1439 provides for settlement of claims for an accounting of IIM accounts held by individuals, however, it is unclear from the bill language whether tribes, as IIM account holders, are considered claimants for purposes of settlement. Section 110(d) appears to preclude settlement of tribal IIM claims "seeking an accounting, money damages or any other relief relating to a tribal trust account or trust asset or resource," but it is unclear whether a tribal trust account includes tribal IIM accounts. We suggest that this be clarified to avoid any misinterpretation that tribes should not be considered claimants for purposes of settlement in this bill.

To conclude, I would like to thank the Chairman, Vice Chairman and members of Senate Committee on Indian Affairs for holding this hearing today. The many voices of Indian Country should be heard regarding the impact of this landmark legislation on the future of not only the *Cobell* lawsuit, but also the structure of the federal agencies that implement and manage the federal trust responsibility.

The blue represents the thunder clouds above the world where live the thunder birds who control the four winds. The rainbow is for the Cheyenne River Sioux people who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Maiden. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian Nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka - The Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth

INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

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TESTIMONY

OF THE

INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

BY

THE HONORABLE CHIEF JIM GRAY, CHAIRMAN, ITMA

on S. 1439 'Indian Trust Reform Act of 2005'

before the
Senate Committee on Indian Affairs
Oversight Hearing

July 26, 2005

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following 63 federally recognized tribes: **Absentee Shawnee Tribe, Alabama Quassarte Tribe, Blackfeet Tribe, Central Council of Tlingit & Haida Indian Tribes of Alaska, Chehalis Tribe, Cherokee Nation of Oklahoma, Cheyenne River Sioux Tribe, Chippewa Cree Tribe of Rocky Boy Reservation, Coeur D'Alene Tribe, Confederated Salish & Kootenai Tribes, Confederated Tribes of Colville, Confederated Tribes of Warm Springs, Confederated Tribes of Umatilla, Crow Tribe, Eastern Shoshone Tribe, Ewiiaapaayp Band of Kumeyaay Indians, Fallon Paiute-Shoshone Tribe, Forest County Potawatomi Tribe, Fort Belknap Tribes, Fort Bidwell Indian Community, Fort Peck Tribes, Grand Portage Tribe, Hoopa Valley Tribe, Hopi Nation, Iowa Tribe, Jicarilla Apache Nation, Kaw Nation, Kiowa Tribe, Kenaitze Indian Tribe, Lac Vieux Desert Tribe, Leech Lake Band, Mescalero Apache Tribe, Metlakatla Tribe, Muscogee Creek Nation, Nez Perce Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Ojibwe Indian Tribe, Oneida Tribe of Wisconsin, Osage Tribe, Walker River Paiute Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Picuris, Pueblo of Sandia, Quapaw Tribe, Quinault Indian Tribe, Red Lake Band of Chippewa Indians, Salt River Pima-Maricopa Indian Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Shoshone-Bannock Tribes, Sisseton-Wahpeton Oyate Tribes, Soboba Band of Luiseno Indians, Southern Ute Tribe, Thlopthlocco Tribal Town, Three Affiliated Tribes of Fort Berthold, Tohono O'odham Nation, Turtle Mountain Band of Chippewa, Walker River Paiute Tribe, Winnebago Tribe of Wisconsin, and the Yurok Tribe.**

S. 1439 represents the first and perhaps the only opportunity to settle *Cobell v. Norton* ("*Cobell*") through discussions between trust beneficiaries and the United States Congress, the entity that established the trust and which has plenary, but not unlimited authority to establish the terms of the trust. One of the most positive aspects of this significant legislation is the simple fact that it has been introduced and by whom. As a bi-partisan effort to construct a settlement, the Chairman and Vice-chairman of the Senate Committee Indian Affairs Committee ("SCIA" or "Committee") have demonstrated true political courage and leadership in crafting a bill to address this bitterly controversial issue and the sponsors of S. 1439 deserve thanks and appreciation for this bold step.

ITMA recognizes that a number of the provisions of S. 1439 come directly from the Principles for Legislation ("50 Principles") established by the Trust Reform and *Cobell* Settlement Workgroup ("Workgroup"). These include:

* Obtaining the funding for the settlement from non-programmatic sources, specifically the Judgment Fund;

* Recognition that an adequate accounting in conformity with trust law cannot be performed by the government;

* Recognition that compensation to individual Indian trust beneficiaries should not be applied to determine eligibility for federal programs such as Social Security, Medicaid and Medicare;

* Establishment of a sunset for the Office of Special Trustee ("OST").

Before addressing the specific provisions of the bill, ITMA wishes to commend the Chairman and Vice-Chairman of the Committee for making the Majority and Minority General Counsel available to ITMA throughout the drafting of the Principles developed by the National Trust Reform Workgroup, as well as during our ITMA Member Meeting held in Denver the same week as this hearing. The information provided by these senior members of the Committee's staff addressed a number of questions about how certain provisions of the bill were drafted. This provided those attending the meeting with the opportunity to begin a dialogue with the Committee's staff on these complicated issues.

I. *Cobell* Settlement

Establishing an adequate range for the cost of a settlement

While S. 1439 recognizes that a *Cobell* settlement will involve billions of dollars, the bill stops short of embracing the Workgroup-derived settlement figure of $27.455 billion. ITMA believes that the government has a strong incentive to "lowball" the cost of a settlement before this Committee while using higher estimates of the ongoing costs and contingent liability of this case before other Congressional institutions. By adopting the Workgroup-sponsored settlement figure, the sponsors can send a loud and clear message that the current Administration needs to begin considering and discussing a settlement amount that will be acceptable to Indian Country.

At the same time, ITMA recognizes that we must develop together a model to determine how much to compensate the victims of this injustice. We greatly appreciate the sponsors' recognition that a settlement must be measured in the billions. We must now work on how to develop a rationale for a more specific number. In this process, we must bear in mind that the insurmountable burden of accurately measuring the precise amount of compensation is due completely to the federal government's mismanagement of its own records. In light of this, we believe that it may be worthwhile to work with Committee staff to develop some **models** for calculating a fair and equitable settlement figure. ITMA would be happy to work with the Committee in exploring various models that might be useful in this regard.

Previous Congressional effort to settle *Cobell*

One earlier Congressional effort to settle the *Cobell* case[1] failed spectacularly, in large part because that effort merely adopted the position of one of the parties and attempted to enact it without benefit of hearings or opportunity to be heard by the other party, or by anyone whose rights would have been affected. That effort deserves some attention, both because it reflects the Administration's proposed settlement methodology and because it represents the ease with which the Congress could be misled if the

[1] H.R. 2691, Section 137 (108th Cong., 1st Sess.) (House appropriations bill for Interior and Related Agencies for FY 2004).

committees of jurisdiction are not permitted to exercise the oversight role that the rules of Congress contemplate for them.[2]

H.R. 2691 would have required the Secretary to conduct a "statistical sampling evaluation" of IIM accounts, making such judgments as to feasibility and appropriateness as she deemed appropriate, to determine "the rate of past accounting error," with a 98% confidence level.[3] The Secretary would then make "adjustment" to IIM accounts by applying the calculated "error rate" to "to the average transaction amount for transactions in an account."[4] This approach would have the effect of enacting into law the plan submitted to Congress by the Interior Department on July 2, 2002.[5] This approach has a certain off-handed ring of reasonableness (statistical sampling), validation (98% confidence level), and fairness (apply the error rate to whatever the average transaction amount, whatever it is).

These facile assumptions, however, mask significant flaws in the approach that are neither examined nor disclosed. First, the approach specified in the bill and in the Department's proposal would exclude from the sampling all special deposit, judgment, and per capita accounts.[6] Money in these accounts represented more than one-half the entire IIM portfolio.[7] And money in those accounts, likely most of it in fact, does belong to account holders. Statistical sampling of a judgment sample of less than one-half the portfolio is simply not an appropriate method of estimating losses from the portfolio as a whole.

Secondly, this approach would have the effect of applying a factor determined by the mere incidence of clerical or computational error to make restitution, without regard to the magnitude of those errors. There is no rational relation between these two elements, even for the sampled accounts. Suppose, for example, that a sample account contains

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[2] Indian country has been cautioned, if the current legislative effort represented by S.1439 is not successful, that the appropriations committees will likely work changes in the law governing the *Cobell* case. That is precisely what H.R. 2691, *id.*, proposed to do, notwithstanding House Rule XXI(2)(b) that provides, "A provision changing existing law may not be reported in a general appropriation bill, ... except germane provisions that retrench expenditures ... and except rescissions"

[3] H.R. 2691, *n.*19, *supra,* Section 137 (b), p. 85.

[4] *Id.*, section 137(d)(1), p. 86.

[5] DEPARTMENT OF THE INTERIOR, REPORT TO CONGRESS ON THE HISTORICAL ACCOUNTING OF INDIVIDUAL INDIAN MONEY ACCOUNTS, prepared Pursuant to Conference Report 107-234 (July 2002).

[6] H.R. 2691, *n.* 19, *supra,* Section 137(k), p. 89.

[7] As of December 31, 2000, $69.5 million were contained in 9,013 per capita accounts; 33,205 judgment accounts contained $80.8 million; and special deposit accounts contained $67.9 million. The total amount of all IIM accounts was reported as $416.2 million. DEPARTMENT OF INTERIOR REPORT, *n.5, supra,* at A-10.

100 transactions with an average transaction amount of $40 for the period reviewed, and two "accounting errors" representing a combined dollar loss of $1,000 to the account. The "rate of past accounting error" would be two one-hundredths, or 2%. Applying the "error rate" of 2% to the average transaction amount of $40 would result in an adjustment of eighty cents ($.80) to the account against a *known* loss of $1,000.00. This account would be settled for .00008 cents on the dollar, or less than one one-hundredth of a penny on the dollar.

For these reasons, ITMA has insisted that every proposal for settlement of the accounts at issue in the *Cobell* case should be transparent, with an opportunity for full examination of underlying assumptions. The Department has attempted to foist onto tribal and individual account holders the use of "statistical sampling" and resulting "error rates" for more than ten years.[8] In its deliberations, the Congress must not allow sheer repetition to become accepted wisdom. In particular, Congress must not be misled into accepting "statistical significance" as a reflection of "economic significance."

Establishing a settlement distribution framework

In this area S. 1439 includes provisions that are not consistent with the Principles. The discussion in Denver on July 28, 2005 included a very candid discussion about the factors that were taken into account as this section was drafted. For example, any settlement legislation that will be enacted into law must take a wide range of congressional views into consideration and appeal to a broad cross-section of Congress. It is at least arguable that a majority of Congress might not support a bill that simply appropriated funds into a court registry with no guidance as to their disposition. At the Denver meeting the respective SCIA general counsel's seemed receptive to the idea that the Chairman and Vice-Chairman were not completely opposed to considering a more "judicial-centric" distribution mechanism. In the final analysis, it will be important that the distribution scheme enjoy the confidence of affected parties. That confidence will be in direct proportion to the clarity and specificity for payment contained in the statute.

[8] *See,* SWIMMER, ROSS, "... if the projected error rate holds, the accounting errors are likely to be bar less than the billions suggested by the plaintiffs." TULSA WORLD (July 17, 2005, p. G-2).

Establishing an allocation methodology

The more clarity Congress can provide about how settlement funds will be distributed, the more amenable Indian Country may be to alternatives to the simple process of depositing the settlement funds in the court registry. As introduced, S. 1439 provides too great a degree of discretion to the proposed Special Master. Even if there were widespread agreement about the proposed formulation of the office of the Special Master, which there is not, there would still be widespread unease about the factors the Special Master can or will take into consideration in allocating settlement funds. ITMA believes this question is best addressed in legislation. Unquestionably, a great deal of work must be done to craft clear standards for the distributing entity to follow. History shows that such an effort will yield substantial rewards by minimizing unproductive disputes between the intended beneficiaries of the settlement fund and the entity charged with its distribution.

Attorney's Fees

The framework for compensating attorneys does not reflect the common practice for compensated counsel in similar class action cases. This case has certainly seen more than its share of controversy. In the end, even representatives of the Department of Interior have acknowledged that the suit has focused attention on an often-ignored part of America's responsibility as a trustee. However Congress should eventually decide to treat the matter of attorneys' fees, the method should be fully transparent so that all members of the class, the government, and the Congress are fully aware of the methodology put forth. ITMA understands that plaintiffs agreed during the hearing to provide the Committee with further information on the contractual arrangements between the attorneys and the class representatives of the beneficiary class.

Share determination and disqualification

Additional clarity is necessary to remove any question that a mere dispute over "share determination" under section 105 of S. 1439 will not disqualify an individual from participating in the distribution under section 104. This is the apparent inference to be drawn from this section because it does not specifically state that a dispute will lead to disqualification, as is provided in sections 106 and 107. If this is the intent of S. 1439, additional clarity should not present a difficulty.

II. Trust Reform

Trust principles

The Indian Trust Management Policy Review Commission proposed by S. 1439 could provide a means for bringing trust management closer to compliance with the trust principles described in our recommended Principles. ITMA notes with dismay, however, that any such benefits to trust reform will not occur until several years into the future. This fact is in stark contrast with the admonition received from the Committee earlier in the year that neither *Cobell* settlement nor trust reform could proceed unless both proceeded in tandem. The approach in S.1439 as written puts real trust reform off until after this Congress adjourns. In addition, ITMA strongly recommends that the bill direct the Commission to analyze the Department's current policies and practices in light of the trust standards included in the 50 Principles we have proposed. At a minimum, these principles provide a starting point for developing an appropriate basis for meeting the government's high trust management responsibility.

Trust Management Demonstration Project ("Demonstration Project")

This section of S. 1439 represents a recognition of some of the 50 Principles. Several changes to this provision can and should be included immediately. Other changes can be addressed after further discussions with stakeholders, including the Department of Interior. Immediate changes include amendments to clarify the right and the means for "direct service" tribes to participate in the Demonstration Project. Additional discussions may be necessary to address several additional items including the need to ensure that the interests of beneficial owners of trust resources will be taken into account under both the development of and implementation of an Indian Trust Asset Management Plan. ITMA also encourages Committee staff to work with the Department to find ways to create additional incentives for Indian tribes to participate in this project.

III. Land Consolidation

ITMA recognizes the need for affirmative steps to be taken to reduce fractionated ownership of allotted lands. In the past the Committee has worked hard to focus

legislation on the highly fractionated parcels of land. Individuals should also be provided the opportunity to participate in the consolidation program.

IV. Restructuring the Bureau of Indian Affairs ("BIA") and Office of Special Trustee ("OST")

Simply moving the current functions of OST into another newly created office, however, raises the question of elevating form over substance. The creation of an Under Secretary position should improve the coordination of federal policies throughout the Department of Interior. ITMA would like to work with the Committee to ensure that the Under Secretary has the authority to fulfill the federal government's trust obligation without being saddled with actual operation of the functions that officer is charged with overseeing, as is the situation with the current OST. The recognition of this trust responsibility underscores the legitimacy of every interaction between the federal government and Indian tribes and their members. These and other provisions demonstrate that this bill is concerned with both settling the past and taking steps to fix the future.

V. Annual Audit

ITMA strongly agrees with the need to upgrade and formalize the internal controls and audits of trust resources. The audit requirement provides an important starting point for providing Indian trust beneficiaries with additional confidence that federal management of trust resources will improve. Placing audit responsibility with an arm of Congress, the settlor of the trust and overseer of trustee performance, is a highly appropriate first step in developing that confidence.

Funding for this function should not be derived from either trust resources or programmatic funds. In addition, ITMA does not believe that any funding for trust functions can or should be derived from trust assets or proceeds until such time as Congress is satisfied that any such charges are reasonable, equitable, accountable, and fully understood by the beneficiaries, such as Congress has taken pains to ensure with the administrative fees charged to timber sale operations. This concern has implications for administrative fees, irrigation charges, and rents derived from land consolidation purchases. ITMA looks forward to an opportunity to make sure the Committee is adequately briefed on our concerns in this matter.

Conclusion

ITMA looks forward to developing a legislative proposal that can be supported by Indian Country. S. 1439 is not yet at that point. As both of the bill's sponsors made clear when introducing S. 1439, neither the Chairman nor Vice-Chairman assumed that this bill was intended to be anything more than a starting point. We accept that starting point gratefully. Thank you again, for your joint leadership and your initiative.

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

Testimony before the United States Senate
Committee on Indian Affairs

Oversight Hearing on S. 1439, the Indian Trust Reform Act of 2005

July 26, 2005

Chairman McCain, Vice-Chairman Dorgan, and members of the Committee, thank you for your invitation to testify today. I would like to express my appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The National Congress of American Indians strongly shares the views of the leadership of this Committee that it is time for Congress to establish a fair and equitable process for settling the *Cobell v. Norton* litigation. Tribal leaders have supported the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting at the Department of Interior. At the same time, tribes are concerned about the impacts of the litigation upon the capacity of the United States to deliver services to tribal communities and to support the federal policy of tribal self-determination. Significant financial and human resources have been diverted by DOI in response to the litigation. The BIA has become extraordinarily risk averse and slow to implement the policies, procedures and systems to improve its performance of its trust responsibility. Perhaps most significantly, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship and address other pressing needs confronting Indian country.

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

I want to express my deep appreciation for your leadership in developing S. 1439, the Indian Trust Reform Act of 2005. This bill was introduced last week and we have had a short time to review it. The National Congress of American Indians has not developed an official position on the legislation, and I know that tribal leaders will want to have some time to study the bill and consider it carefully. I can tell you that tribal leaders are extremely interested in continuing to work on this legislation. We may have a ways to go in getting to a bill signed into law, but there is a lot that we like in this bill.

Title I – Settlement of Litigation Claims

The bill makes a good start with its findings that an accounting for individual trust accounts is impossible because of missing data and may cost billions of dollars to perform, and as a result it is appropriate for Congress to provide a monetary settlement in lieu of an accounting to the individual Indian account holders who make up the class action in *Cobell v. Norton.*

The bill would provide a lump sum settlement of "$[___],000,000,000." The bill does not say exactly what the settlement amount would be, but hints that it would be in the billions. Plaintiffs have indicated their view that $27 billion is the appropriate figure for settlement and I support that figure without reservation. The lump sum would come from the Judgment Fund, so it would not come at the expense of any other Indian program or account. We greatly appreciate that feature of the bill.

Personally I have strong concerns that the distribution of the settlement fund would be administered by the Secretary of the Treasury. The Treasury is one of the defendants in this case and there is simply a severe lack of faith among Indian people that the executive branch can be trusted to handle our money. The bill also would also allow the Treasury to take a percentage of the funds in administrative costs. This just seems wrong – they mishandled our money for decades and now we would have to pay them to return our money.

The bill indicates that the lump sum would be divided into two portions. One portion would be distributed per capita to all claimants regardless of the value of their account. The other portion would be distributed by a formula intended to measure the value of the accounts. The legislation directs the Secretary of Treasury to develop this formula taking into consideration the amount of funds that have passed through the IIM accounts in the period from 1980 to 2005. This provision of the legislation is causing considerable concern. We need some clarification that this time period is not intended to limit the time frame for the overall accounting, but to determine a relative distribution formula among claimants.

There is also a limitation in the bill that only account holder who held an account in 1994 or their heirs may make a claim. I understand that current account holders are generally the heirs of the original account holders, but there is some concern about person who may have sold their land prior to 1994. Have these people lost their right to an accounting? This also needs to be clarified.

If any claimant is dissatisfied with the settlement amount, they have the right to appeal but must give up any right to the settlement amount. That seems unfairly punitive. On the other hand we greatly appreciate the provision that any receipt of payments would not be subject to federal or state taxes and would not affect eligibility for any federal program such as Social Security or welfare.

The bill appears to meet some of the Trust Principles that we submitted to the Committee last month, particularly in that there is a lump sum settlement and that it is not taken from other Indian programs. However the legislation does not determine the final amount of the settlement, and we have a lot to do to create confidence that the distribution will be handled fairly.

Title II – Indian Trust Asset Management Policy Review Commission

This section would establish a commission to review all federal laws and regulations and the practices of the Department of Interior relating to the administration of Indian trust assets. After conducting the review, the Commission is to develop recommendations and submit a report to Congress on changes to federal law that would improve the management and administration of Indian trust assets. The Commission is to consult with Indian tribes, the Secretary of Interior, and organizations representing individual Indian owners of trust assets.

This part of the bill does not meet the goals of our Trust Principles to establish an independent body with true oversight authority, explicit trust standards and a cause of action in federal court for breach of those standards. I would definitely like you to take a harder look at this issue. Decades of trust reform efforts have produced little change in DOI's willingness to take corrective actions because the DOI believes its job is to ensure that the U.S. is never held liable for its failure to properly administer trust assets. For this reason, DOI is unwilling to put standards into regulations that would govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new understanding of DOI's role in Indian trust management.

The Commission appears to be modeled on the 1970's Indian Policy Review Commission, and for that reason we cannot dismiss it as an empty gesture. The Indian Policy Review Commission did phenomenal work because of its outreach to Indian Country and the credibility of its analysis. Its report led to some of the most important legislation in Indian affairs in U.S. history, including the Indian Finance Act, the Indian Health Care Improvement Act, the Indian Elementary and Secondary Education Act, the Indian Self-Determination and Education Assistance Act and the Indian Child Welfare Act. If this Commission is even half as successful it will be great for Indian Country.

If this Commission is created, Congress should consider making all of the appointments. The Executive Branch has had plenty of opportunities to develop policy on trust reform, and now it is time for Congress to exercise its oversight role.

Title III – Indian Trust Asset Management Project

This section would create a demonstration project where an Indian tribe may develop its own "trust asset management plan" that is unique to the trust assets and situation on a particular reservation. The plan would identify the trust assets, establish objectives and priorities, and allocate the available funding. Contracting and compacting tribes may identify the functions performed by the tribe and establish management systems, practices and procedures that the tribe will follow.

This is an area where I am sure we will need a lot more discussion with tribal leadership on the details, but I am very encouraged by the direction you are going. All over the country tribal governments are increasing their capacity to manage their reservations. Tribes are very interested in increasing their ability to make decisions about how the reservation lands will be managed and used for the long term benefit of their people because every reservation is unique and we know that we can do a better job at the local level.

Title IV – Fractional Interest Purchase and Consolidation Program

This section would amend the Indian Land Consolidation Act to expand the program for acquisition of fractionated interests. Fractionation of ownership exponentially increases the complexity and cost of federal administration, deprives Indian beneficiaries of the full benefit of their resources, and jeopardizes tribal jurisdiction over our reservations. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest. Management of this huge number of small ownership interests has created an enormous workload problem at the BIA. We believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system.

I strongly support the new incentives for voluntary sales of fractionated interests by allowing the Secretary to offer more than fair market value. Many interests are so small even if the owner wants to sell it is not worth the time to do the paperwork for a transfer. The bonuses make a lot of sense and they should greatly increase voluntary participation by landowners.

The bill has a provision for highly fractionated lands of more than 200 owners, where if the Secretary follows certain procedures, including notice by certified mail, the offer would be deemed accepted unless it is affirmatively rejected by the owner. I understand the rationale behind this provision, but it seems grossly unfair to landowners. Every one of us knows how easy it is to lose a notice at the bottom of a stack of mail, and for that the bill would take away a person's property. I think we can find a better system to achieve the same goal.

I very much appreciate the provisions that allow for settlement of any natural resource mismanagement claim although we can improve the details. And once again we strongly support that the bill provides that any payments that landowners receive under the land repurchase program would not be subject to state or federal income tax and would not affect eligibility for any programs including social security and welfare.

Title V – Restructuring Bureau of Indian Affairs and Office of Special Trustee

This title would create a new position of "Under Secretary for Indian Affairs" who would replace the Assistant Secretary for Indian Affairs. The Office of Special Trustee for American Indians would sunset on December 31st, 2008 and the functions of the Special Trustee would be transferred to the Under Secretary on the same date. The Office of Under Secretary would create a single line of authority for all functions that are now split between the BIA and the OST, and the Under Secretary would also have the responsibility to supervise any activities related to Indian affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service.

This title of the bill appears to meet many of the goals of our Trust Principles for reorganization, including the tribal priority of eliminating the Office of Special Trustee and creating a single line of authority. The creation of this position would address a major issue that has been raised in every significant study of trust management at Interior: the lack of clear lines of authority and responsibility within the Department to ensure accountability for trust reform efforts by the various

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

Once again, I think there is more we can do to improve this provision but it is a great step forward and Indian country greatly appreciates this provision. In particular we would like to visit the issue of making sure that the resources of the Department are not wasted on bureaucracy but are used to deliver services at the reservation level. The BIA has never been provided with an adequate level of financial and human resources to fulfill its trust responsibilities to Indian country. This chronic neglect of staffing and funding has contributed to dysfunctional management and financial systems at all levels of the BIA.

The 1994 Trust Reform Act provides that the Special Trustee is to review the federal budget for trust reform and certify that it is adequate to meet the needs of trust management. In practice, the Special Trustee has no independence, and simply certifies whatever budget is submitted by the Administration. Tribal leaders strongly supported the concept that an independent entity should have the job of reviewing the federal budget for trust management and provide an assessment to Congress of its adequacy. I believe this role may be more important than ever today, as the Administration moves to assess federal budgets under the Program Assessment Rating Tool (PART). We are going to have to show measurable result for trust programs, and we could greatly use an independent assessment of the appropriate ways to measure the effectiveness of trust asset management programs.

Title VI – Audit of Indian Trust Funds

This section would require the Secretary of Interior to prepare financial statements for individual Indian, tribal and other Indian trust accounts and prepare an internal control report. The section would also direct the Comptroller General of the United States to hire an independent auditor to conduct an audit of the Secretary's financial statements and report on the Secretary's internal controls. This title appears to meet the goals of our Trust Principles, and I believe that the details of the audit procedures can be refined and improved after more discussion with tribal leadership.

Conclusion

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into this bill and the trust reform effort. This is a tough issue and it will take strong leadership on all sides to get it resolved. If we maintain a serious level of effort and commitment, work to understand the viewpoints of all parties, and exercise leadership, we can

make informed, strategic decisions on key policies and priorities necessary to bring about settlement and true reform in trust administration.

As you know, I have served as Co-Chair of an Indian Country working group on this issue along with Chief Jim Gray, of the Osage Tribe and the Chairman of the Intertribal Monitoring Association (ITMA). As an attachment to my testimony I am including the Trust Reform and Cobell Settlement Workgroup Principles for Legislation that we developed and sent to you last month. We plan to continue to reach out to all tribes and all national and regional tribal organizations. ITMA is having a meeting later this week in Denver where we will work on the bill some more. We welcome and encourage participation at these meetings by all tribes and individuals who have an interest in the legislation.

TRUST REFORM AND *COBELL* SETTLEMENT WORKGROUP

PRINCIPLES FOR LEGISLATION

June 20, 2005

The Trust Reform and *Cobell* Settlement Workgroup presents these Principles for Legislation as the basis for resolving the nine-year court battle in *Cobell v. Norton* concerning the federal government's failure to account for trust funds held for Americans Indians and for reforming the federal government's systems for tribal and individual trust management. The Workgroup was organized by National Congress of American Indians (NCAI) President Tex Hall and Inter-Tribal Monitoring Association (ITMA) Chairman Jim Gray and includes the *Cobell* Plaintiffs, tribes, individual Indian allottees, and Indian organizations.

The Principles were drafted in response to a request by Senator John McCain (R-AZ), Chairman of the Senate Indian Affairs Committee, Senator Byron Dorgan (D-ND), Vice Chairman of the Senate Indian Affairs Committee, Congressman Richard Pombo (R-CA), Chairman of the House Resources Committee, and Congressman Nick Rahall (D-WV), Ranking Member of the House Resources Committee. The lawmakers asked Indian Country to provide a set of principles that would guide the lawmakers' drafting of legislation to provide for a prompt and fair resolution of the trust issue.

The Principles include four major areas: (1) historical accounting of individual Indian trust accounts, (2) reforming the individual and tribal trust systems, (3) Indian land consolidation, and (4) individual Indian resource mismanagement claims.

Historical Accounting of Individual Indian Trust Accounts

1. Any funds used for the settlement of the historical accounting claim should not be scored against any agency nor should any agency appropriations be diminished to satisfy any judgment. The Claims Judgment Fund is a perfect source since it is a permanent and indefinite appropriation.

Rationale

Using agency funds towards any settlement would simply be unjust. Congress needs to appropriate more funds, not less, toward the management of trust resources. There are many desperate needs in Indian Country, including substandard housing, dilapidated schools, and serious health problems. A fair and acceptable settlement amount will require significant funds. If those funds come from monies otherwise used for Indian programs, it would make the already horrific, inadequate funding crisis that much more intolerable. The better approach and the one we recommend is to use a source of funds that is not scored.

2. Settlement legislation should expressly recognize that adequate accountings in conformity with law cannot be performed. Because of the loss and destruction of so many of the trust documents needed to perform an adequate accounting required of a trustee, it is impossible to do an accounting except to the extent an alternative methodology is used as set forth in Principle 3 and 4.

Rationale

The federal government recently estimated that a transaction-by-transaction accounting required by law would cost $12-13 billion and "perhaps significantly more" and the result in the end would render an inadequate accounting.

3. A "lump sum" amount reflecting the aggregate correction of accounts should be adopted as the settlement figure.

Rationale

There are two potential approaches to settling the historical accounting claim – a determination of a fair settlement amount based on the known facts and the law of the case or, alternatively, there can be an agreed upon process to determine a fair settlement amount. Because of the loss and destruction of documents, any "accounting" process that is not consistent with trust law is suspect and a derogation of Indian beneficiaries' rights. For this and the other reasons outlined above, the better approach and the one that should be implemented by the settlement legislation is the lump sum approach.

4. For the reasons outlined in Principle 2, an adequate accounting is impossible; but that does not mean there is not a way to calculate the necessary aggregate correction of accounts and determine a reasonable settlement amount consistent with trust law. Importantly, there is general agreement between the parties about the aggregate amount which has been generated by the trust (*i.e.* between $13 and $14 billion for a designated period). Those deposits earn compound interest. The requirement that interest and imputed yields are due has been confirmed by the District Court and Court of Appeals in *Cobell v. Norton*. Any amounts which can be proved to have been properly distributed to the correct beneficiary could be deducted. But, the records are not there to make such a determination. Even when significantly discounted and substantially reduced in consideration of litigation risks, this analysis justifies a sum specific settlement amount of $27.487 Billion.

Rationale

There is ample justification for the proposed settlement amount. The potential liability of the federal government well exceeds $100 billion, given the aggregate amount of trust proceeds collected from Indian lands and the interest due on such funds. Much of these funds never were collected and distributed to the proper Indian landowner. Moreover, the government, because of destruction of trust records in violation of their fiduciary duties can establish with competent evidence only a small fraction of the transactions involving these trust funds. A fundamental principle of

trust law is where "the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor." IIA SCOTT ON TRUSTS § 173. Thus, all funds the government, like any trustee, cannot prove were collected and distributed to the correct Indian landowner, are owed.

In fact, understanding the astounding level of mismanagement of these large sums of money, the government's own contractor in an internal memorandum, placed the government's liability as between $10-40 billion. SRA International Inc. "Risk Assessment" at 5-1 (2002).

Another critical factor supporting the reasonableness of this figure is the costs of the historical accounting required by law. The government estimates that the accounting may cost $12-13 billion or "perhaps significantly more." That is how much they must spend just to figure out how many billions they in fact owe. And that estimate may very well be considerably low. It is important for Congress to recognize that the cost associated with an accounting is exorbitant and money that is not well spent given that an accurate accounting cannot be accomplished.

An example of the potential costs associated with an accounting is the Administration's effort two years ago to produce what it initially called an "accounting" for four accounts of the lead plaintiffs in the *Cobell* case. Although the government spent approximately $23 million, the so called "accountings" were facially deficient and plainly did not discharge their legal obligation to account. As a result, he government since has retreated from this position, admitting in recent court papers that the so-called "accountings" were nothing more than a very expensive "expert report." All this is to say that resolving the historical accounting claim will save literally billions of dollars the government will otherwise have to spend to produce an accounting that will be inadequate in any case.

In light of these and other factors and with calculation of significant discount for litigation risk (even though given the settled issues of the case, the risk is modest), the Workgroup believes that the sum of $27.487 Billion is reasonable as the aggregate settlement amount.

5. No settlement legislation should seek to individualize the claims of beneficiaries – this is an inherently unfair approach. The settlement must be on a class-wide basis.

Rationale

Courts have had experience with break-up-the-class type approaches, which place individual plaintiffs in perilous positions. The Black Farmers case, *Pigford*, is a perfect example. There, the vast majority of claimants received no funds because most were forced to proceed *pro se* up against Department of Justice lawyers. Because they were not represented by counsel and lost the advantage of the class action, they failed to establish their claims – many because of missed filing deadlines. Individual beneficiaries should not be placed in such a dangerous position by any settlement scheme.

6. The agreed settlement amount must be fair. To ensure a fair amount, class representatives must consent to the aggregate settlement amount.

Rationale

Without such consent, the legislation will likely be constitutionally infirm.

7. The settlement sum shall be paid into the court registry. Court approved payment to beneficiaries, along with the other settlement provisions, shall constitute a full, fair, and final settlement of *Cobell v. Norton.*

Rationale

The court can have "fairness" hearings and provide the due process necessary to distribute any funds appropriated towards the settlement. Courts distribute large class action awards all the time and know how to distribute the funds in a fair and equitable manner. Neither Congress nor the Executive Branch have the necessary experience, expertise or institutional competence to hold fairness hearings, provide notice, flexibly modify the distribution based on new information and provide necessary finality.

8. Because this is income derived from trust property, legislation should include an express clause that any monies received by an individual beneficiary will not be considered in determining eligibility for state or federal benefits including but not limited to TANF, Social Security, Medicaid and Medicare and that such monies shall not be taxable income. Furthermore, an additional provision shall be included expressly stating that no sums paid hereunder shall be utilized as offsets by the federal government for claims it may have against the recipient.

Rationale

Beneficiaries should not be penalized by the receipt of settlement proceeds intended to restore to them a portion of their own money wrongly withheld due to the historical mismanagement of the Individual Indian Trust.

9. Rulings of the Trial Court and Appellate Court in *Cobell v. Norton* shall be followed and applied in providing, implementing, and interpreting the legislative settlement.

Rationale

To date, there have been more than 80 published decisions in this nine-year-old case. At this point, the legal principles announced in the decided opinions constitute the "law of the case." Therefore, the legislative settlement should be developed and implemented in full accord with the courts' decisions unless -- with the consent of the parties -- Congress expressly legislates to the contrary, and then only as to issues that are not Constitutionally protected.

10. The distribution or allocation of the settlement amount to the IIM beneficiaries should be determined by the district court in conformance with the customary method of resolving class action litigations in federal courts. Federal Rule of Civil Procedure 23 shall be used, including a fairness hearing and in the resolution of other administrative matters.

Rationale

Courts are ordinarily the entities that make determinations regarding distributions particularly in complex matters. To ensure constitutionally protected due process is afforded, including notice and opportunity to be heard, it is important that the allocation of the settlement amounts to beneficiaries be done in the manner it is normally done in complex class action settlements. Federal Rule of Civil Procedure 23, along with the many cases interpreting Rule 23 offers a known and knowable mechanism to determine distribution, after beneficiaries have been provided adequate notice and an opportunity to be heard. Courts are better institutions to weigh competing interests in light of facts as known to make the most equitable determinations. Courts – particularly sitting in equity as here – also are far more adept at apprising new information and altering and adjusting a distribution scheme. For the same reason, it would be unwise for Congress to place strictures on how the money can be distributed. Such strictures will merely bind the Court's ability to flexibly react to evidence that is presented by affected stakeholders through the fairness hearings and by other mechanisms.

11. There should be a severability clause providing for severing the *Cobell* settlement provisions from the rest of the legislation. There also should be a non-severability clause relating to the provisions within the IIM accounting provisions of the legislation.

Rationale

Severing the *Cobell* provisions from the rest of the legislation is needed to protect the legislative settlement of this case from being vitiated due to constitutional infirmities in other unrelated provisions. On the other hand, the provisions of the historical accounting settlement represent a finely balanced and integrated framework. The removal of one piece would change that balance and destroy the integrated compromises that the legislation was intended to reflect.

12. The following is an example of language that could be implemented to settle the historical accounting claim of the *Cobell* case:

> *"The Congress authorizes and directs the Department of Treasury to correct the account balances of the Individual Indian Trust held in Account 14X6039, in the aggregate amount of $27.487 billion. This represents a fair and final settlement of the historical accounting claim in the case entitled Cobell v. Norton Civ. No. 96-1285(RCL) before the United States District Court of the District of Columbia. To the extent funds are needed for this purpose, the Congress authorizes and directs the use of the Claims Judgment Fund, 31*

U.S.C. § 1301 et seq. to pay for the settlement of the lawsuit. The Federal District Court shall determine a fair and equitable distribution of the settlement proceeds to the trust beneficiaries in accordance with Rule 23 of the Federal Rules of Civil Procedure."

13. Legislation should address the unique situation of the Osage Tribe, whose income from tribal trust assets are distributed to individuals through "headright" interests that belong not only to Osages, but Indians of other tribes, and non-Indians.

Rationale

The federal system for distributing income from Osage tribal trust assets requires the United States to deposit such funds first into tribal trust accounts, then distribute funds into IIM accounts for individuals Indians, both Osage and non-Osage each quarter. Non-Indians, including individuals, churches, corporations, and others, receive checks from the United States. The Osage Tribe receives a small portion of these funds for administration of Osage Reservation sub-surface mineral estate, an amount which must be negotiated and approved by the United States.

Reforming the Individual and Tribal Trust Systems

14. Legislation should affirm and clarify the specific standards for the administration of trust funds and transactions that involve those funds which prescribe what needs to be done, but not how to do it.

Rationale

Standards should be specific and clearly stated in legislation. By setting specific standards, the Department will know exactly what the expectations are in managing the trust. The legislation should make clear that the trust responsibility would not be diminished.

15. To the extent practicable, the legislation should establish resource-specific, generic standards where possible (e.g. sustained yield requirements for Indian timber).

Rationale

An example of this principle can be found in the National Indian Forest Resources Management Act and the American Indian Agricultural Resources Management Act. Both of these acts have "standards provisions" that are specific to these resources.

16. Legislation should clarify that fulfillment of fiduciary duties must be administered in accordance with applicable law, including tribal law.

Rationale

The National Indian Forest Resources Management Act and the American Indian Agricultural Resources Management Act both have provisions that expressly require the Secretary to abide by tribal laws in exercising his/her duties. A similar provision should be included in any trust reform/settlement bill.

17. The legislation shall codify the applicability of the following duties to the Indian Trust:

a. Duty of Loyalty and Candor
b. Duty to Keep and Render Accounts
c. Duty to Exercise Reasonable Care and Skill
d. Duty to Administer the Trust
e. Duty not to Delegate (this does not negatively impact compacting or contracting.)
f. Duty to Furnish Information
g. Duty to Take & Keep Control
h. Duty to Preserve the Trust Property
i. Duty to Enforce Claims and Defend Actions
j. Duty to Keep Trust Property Separate
k. Duty with Respect to Bank Deposits
l. Duty to Make Trust Property Productive
m. Duty to Pay Income to Beneficiaries
n. Duty to Deal Impartially with Beneficiaries
o. Duty with Respect to Co-Trustees
p. Duty with Respect to Persons Holding Power of Control

18. The legislation should state that in the absence of more specific statutory law or specific agreements between the trustee and the beneficiary, common law duties shall govern the administration of the trust.

Rationale

The law on trusts applies to the management of trust assets for Indian beneficiaries. The legislation should clearly state this so that the Department of Interior knows the scope of its duties in administering the trust for Indian beneficiaries.

19. The legislation should reaffirm that Indian beneficiaries have a cause of action in federal courts for breach of fiduciary duties and granting of equitable and legal relief.

Rationale

The Department of Interior is the trustee of lands, natural resources, and trust funds for tribes and individual Indians. These beneficiaries must have the right to redress if the trustee fails to meet its trust duties.

20. An independent Executive Branch entity is needed to provide oversight and enforcement authority for federal trust administration.

Rationale

The Department is engaged in trust management of assets and resources. Consequently, the Department is subject to strict fiduciary standards just as any private trustee is subject to such standards. Private trustees are subject to State and/or Federal regulation. The reasoning giving rise to government oversight of private trustees also applies to the Department in exercising its trust asset/resource management duties. There is an inherent conflict in self-regulation. Thus, an independent entity with oversight and enforcement authority over the Department of Interior is needed.

21. The independent Executive Branch entity should not diminish the inherent sovereign authority of tribal governments to make their own laws, nor should it interfere with tribal management of tribal land and other tribal resources where tribes assume these responsibilities through self-determination contracting or compacting.

Rationale

There is some concern that an independent entity could impact a tribe's ability to make their own laws and be governed by them. Specifically, tribes are concerned that an independent entity could impact a tribe's ability to enact land use laws. Management of trust assets/resources should be executed in conformance with tribal laws.

22. The legislation should prohibit the independent Executive Branch entity from engaging in any trust management functions.

Rationale

An historical function of the BIA is trust asset management. Any entity that oversees trust management cannot actively manage the trust as this would create a conflict of interest. An independent entity's functions must be limited to oversight and enforcement functions.

23. The legislation should require that the independent entity be separate from the Department of the Interior and not under its control.

Rationale

Again, a trustee cannot regulate itself. This also means that a sub-entity of the Department cannot regulate the Department. An independent regulatory entity necessarily means complete autonomy from the Department.

24. The legislation should charge the independent entity with ensuring that proper audits are conducted in accordance with generally accepted auditing standards. The independent entity should then be required to review the audits and ensure that corrective measures are taken.

Rationale

Audits ensure that trusts are properly managed and that accounts are accurate. When the audit reveals that the accounts are not accurate or that they have not been properly managed, then corrective measures can and should be taken. The trust managed by the Department of Interior should be subject to the same scrutiny as private trust which are subject to regulatory audits.

25. The legislation should require the independent entity to be governed by presidential appointees for five year terms from a list of nominated candidates.

Rationale

Five year terms signal that the appointee is not necessarily beholden to the President that appointed him/her.

26. Legislation should create the permanent position of the Deputy Secretary to be responsible for Indian Affairs including the management and administration of the Indian trust. The trust functions of BLM, OTFM, MMS, and other federal agencies with fiduciary responsibilities within Interior should also come under the jurisdiction of the Deputy Secretary.

Rationale

There has been widespread support among tribes and the Department on the creation of a Deputy Secretary of Interior for Indian Affairs. A similar proposal for a Deputy Secretary is included in S. 1459. The creation of this position would address a major issue that has been raised in every significant study of trust management at Interior, including the EDS Report and by the *Cobell* court: the lack of clear lines of authority and responsibility within the Department to ensure accountability for trust reform efforts by the various divisions of the Department of Interior. The two major entities responsible for trust assets and accounting are the Bureau of Indian Affairs and the Office of Special Trustee. The lines of authority, responsibility and communication between these two entities have been uncertain and at times have come into direct conflict. In addition, the Minerals Management Service, the Bureau of Land Management, and the U.S. Geological Service all play important roles in trust management, and various responsibilities are spread throughout the Office of Hearings and Appeals, the Office of American Indian Trust, and the Office of Historical Accounting. Nearly every agency in the Department of Interior has some significant trust responsibilities. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies. This absence has particularly hurt the progress of those issues that cut across agencies, such as the development of a system architecture that integrates trust funds accounting with the land

and asset management systems of the BIA, BLM and MMS (as required by the 1994 Act).

27. Legislation should require that tribal leaders be consulted with respect to the appointment of the Deputy Secretary and Indian preference shall apply to the Office of the Deputy Secretary.

Rationale

The appointment of a Deputy Secretary that knows Indian Country and its issues is critical to gaining the respect and confidence of tribal leaders. Tribal leaders know who is knowledgeable in regard to issues faced by Indian country and could provide necessary expertise and insight concerning potential candidates for the position.

Indian preference requirements have been intentionally avoided by the Office of the Special Trustee. Tribal leaders believe that OST has violated Indian preference by failing to abide by it in employment and contracting. Thus, the legislation should remove all doubt about the applicability of Indian preference to this office by expressly stating that it applies.

28. The legislation should expressly state that the Deputy Secretary shall have the primary duty to fulfill the fiduciary duties of the Secretary of the Interior and protect the interests of Indian beneficiaries including the authority to employ independent trust counsel to advise on ensuring compliance with trust duties.

Rationale

The legislation should expressly state this to make it clear that the Deputy Secretary's primary duty is to protect the trust of the Indian beneficiaries. Independent trust counsel is necessary so that the Deputy Secretary can consult counsel for the trust in regard to the Deputy Secretary's duty to the trust. Independent trust counsel would be especially helpful to advise the Deputy Secretary when he or she has competing duties that conflict with his or her trust duties.

29. The independent entity should assume the oversight responsibilities of the OST, and the Deputy Secretary should assume OST management and administrative responsibilities. Legislation should sunset the Office of the Special Trustee.

Rationale

The eventual elimination of OST is necessary for the efficient and productive management of trust assets. OST was never created to manage trust assets but to simply "oversee" the management of trust assets. Thus, the duty to manage trust assets should be transferred back under the Deputy Secretary and the independent entity would be charged with the responsibility of overseeing the management of the trust by the Deputy Secretary.

30. The legislation should not diminish the rights and responsibilities set forth in the Indian Self-Determination Act.

Rationale

Pursuant to the Indian Self-Determination Act, the United States cannot diminish its trust responsibilities to tribes and individual Indians. This includes tribal management of trust assets.

31. With respect to federal laws relating to use or management of tribal trust assets, legislation should permit and support the development of tribal, reservation-specific plans that provide specific standards for management of tribal trust resources.

Rationale

As mentioned above, the National Indian Forest Resources Management Act and the American Indian Agricultural Resources Management Act address tribal management of these resources. The modern federal policy of tribal self-determination supports tribes having greater authority to manage their tribal trust assets.

32. Legislation should protect the sovereign authorities and reserved rights of tribes to regulate the lands within their jurisdictions.

Rationale

In addition to federal laws that specifically provide for tribal management of trust assets, Congress should respect the sovereignty and reserved rights when considering the scope of legislation.

33. Legislation should support government-to-government agreements between a tribe and the United States for management of all trust resources within the tribe's jurisdiction, provided that the agreements ensure processes and remedies to protect the interests of allottees, including allottees of other tribes.

Rationale

Tribes should have expanded opportunities to manage assets in Self-Determination contracts and compacts.

34. Irrespective of what entity is administering individual Indian trust assets, the same duties and standards of conduct apply. Notwithstanding, tribes involved in self-determination or self-governance management and administration can utilize alternative means to carry out fiduciary duties so long as they meet the generally applicable standards.

Rationale

The rights of individual Indians to the highest standards of trust administration should not change, regardless of what entity is administering them.

35. Legislation should ensure that individual allottees can bring claims for failure to discharge fiduciary duties in managing individual trust assets.

Rationale

The management of individual trust assets must be enforceable in court where mismanagement of those assets occurs.

Indian Land Consolidation

36. Congress should enact new laws or amend existing ones that promote consolidation of fractionated interests in land as an element of a Cobell Settlement/Trust Reform legislative package.

Rationale

Highly fractionated lands are inherently difficult to manage. Thus, it is important for Congress to amend the Indian Land Consolidation Act or enact new legislation encouraging land consolidation.

37. For highly fractionated lands (greater than 50 owners), legislation should focus on expanding the voluntary buy back program and allow the Secretary to take into account other factors in determining land values such as avoided costs.

Rationale

In many instances, the Department of Interior spends more money administering accounts involving highly fractionated land than the appraised value of the land. Most owners would rather keep their lands rather than sell them for a small appraised value because there is a sentimental value in having ownership in the land. Thus, it would make sense for Congress to give the Secretary the discretion to offer more than fair market value for highly fractionated lands based on avoided costs or other factors as the owner may be more willing to sell these lands for a higher price. Data from the BIA land consolidation Office and from the Trust Asset Account Management System seems to indicate that a majority of ownership interests are concentrated in a relatively small portion of the allotments, particularly in the Great Plains, Rocky Mountain, and Northwest BIA Regions.

38. For less fractionated land, legislation should focus on providing mechanisms that encourage land consolidation, such as low interest loans for individuals to purchase fractionated land, and good ownership practices (i.e. family trusts).

Rationale

In order to discourage further fractionation of Indian trust lands, legislation should provide for incentives that allow individuals to purchase land from those individuals that have ownership interest in the same tracts of land.

39. Legislation should set forth enforceable rights and clear standards as to what constitutes adequate information so that landowners can give knowing and informed consent when making decisions whether to sell their lands.

Rationale

Informed consent is a key element to any voluntary program.

40. Legislation should have a process for repurchasing undivided fee interests to consolidate ownership of allotments into trust or restricted status.

Rationale

Undivided fee interests are currently excluded from being repurchased in the current land consolidation process. If a process and authority to repurchase is not established, the tribes may not own a 100% of a tract of land. Tribes and the federal, state and local governments will continue to have jurisdictional problems with the land if fee interests are not consolidated when undivided trust interests are consolidated.

41. The legislation should state that land consolidation payments will not diminish eligibility for federal benefits such as TANF, Social Security, Medicare/Medicaid and VA Benefits, and such payment should not be taxable.

Rationale

Native Americans are America's poorest people. This is especially true where the majority of highly fractionated lands are situated. Congress should not give money to these people with one hand and take it away with the other. A potential reduction in federal benefits will obviously be a disincentive for owners to sell their highly fractionated land. It would be in the federal government's best interest to exclude payments made to individuals in purchasing highly fractionated land from "eligibility formulas" used for federal benefits.

42. Legislation should provide a fair process for notifying persons whose whereabouts are unknown and protection of their interests including in the consolidation of lands.

Rationale

Congress should enact legislation that ensures that people that have IIM accounts or land are given adequate notice, consistent with due process, with regard to any action taken with respect to their account or land.

43. Congress should reconsider the use of liens on lands repurchased under ILCA programs in light of its administrative costs. Liens should be waived when the income from the land will not cover the purchase price.

Rationale

Liens on lands purchased under the "lien program" unduly cloud title to land that cannot produce enough revenue to service the underlying debt. In these instances, the federal government should forgive these debts and remove any liens on the land.

44. Legislation should promote tribal government efforts to repurchase fractionated lands that allow flexibility for cultural needs and priorities.

Rationale

Where some tribes seek to buy restricted fee allotments from individuals, the Department of Interior is requiring the tribes to allow the lands to go out of restriction then reapply to put them into trust for the tribe. This is nonsensical and discourages tribal purchases of allotted land which alleviates fractionation. Thus, purchases of trust or restricted status land should not change the status of the land and Congress should enact legislation to clarify this principle.

45. Legislation should promote tribal land ownership systems while preserving the rights of allottees that are willing to trade their land to a tribe or United States for an assignment or some form of an indefinite individual interest.

Rationale

There are tribal lands systems in place now, like at Eastern Cherokee, where all of the land held in trust by the United States on the reservation is held in trust by the tribe. Individual Indians can possess tribal land through assignments made by the tribe. Any leasehold interest created on these assignments can be mortgaged. These assignments are not subject to term limitations and are alienable to other tribal members. The purpose of keeping the land in trust through the tribe is to retain the benefits associated with trust land. It would be in the federal government's interest to promote tribal land ownership systems because it would alleviate, if not eradicate, the land fractionation problems facing the federal government today.

46. Congress should ensure adequate funding and staffing for efficient land consolidation.

Rationale

Legislation authorizing and promoting land consolidation is meaningless without the funding needed to purchase the land or the resources necessary to do the needed appraisals, title and probate work. Furthermore, more resources are needed to ensure enforcement of land use laws and to develop land consolidation plans.

47. The appraisal system should be fixed in any legislation. Problems like the lack of timeliness of appraisals, the significant backlog, the improper valuation, and the overall transfer of fractional interest lands including voluntary buyback should be addressed. The system should also be consolidated under the Bureau of Indian Affairs.

Rationale

Appraisals are not conducted at the agency level and they take too long to obtain thereby delaying consolidation of fractionated land. Additionally, income based appraisals are consistently inaccurate.

Individual Indian Resource Mismanagement Claims

48. Congress should provide a fair offer to individual Indians for decades of federal mismanagement of their trust resources.

Rationale

Congress has failed to provide adequate oversight of its trustee-delegates and retained only congressional oversight. Congress should provide an avenue for compensation for individuals as it has for tribes.

49. Congress should treat the federal mismanagement of individual Indian resources as a matter of national interest as it has the savings and loan scandal. Congress cannot leave the individual allottee to the mercy of the federal bureaucrats as there is a documented history of widespread, systematic, and continuing mismanagement of Indian resources.

Rationale

Lands were taken from individual Indians by "Order Transferring Inherited Interest" and other underhanded ways. It has kept the poorest Americans from economic advancement by allowing or causing the loss or theft of individual trust resources and bureaucratic expropriation of individual lands.

50. Congress should not involuntarily terminate the rights of individuals to seek redress for federal mismanagement of individual trust resources.

Rationale

Individual allottees should not have settlement of their claims imposed upon them.

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Mr. Ernest L. Stensgar
President
Affiliated Tribes of Northwest Indians

On S. 1439 – The Indian Trust Reform Act of 2005

July 26, 2005

Good morning Chairman McCain, Vice Chairman Dorgan, and members of the Committee. I am Ernest L. Stensgar, the President of the Affiliated Tribes of Northwest Indians (ATNI) and a councilman at the Coeur d'Alene Tribe. In 1953 progressive tribal leaders in the Northwest formed the Affiliated Tribes of Northwest Indians, and set its priorities as the protection of tribal sovereignty and promotion of self-determination. Contemporarily, ATNI is a nonprofit organization composed of 54 Northwest tribal governments from the states of Oregon, Idaho, Washington, southeast Alaska, Northern California and Western Montana. ATNI is an organization whose foundation is composed of the people it is meant to serve -- Northwest Indian people. Representatives from the member tribes set the policy and direction through committees by adopting resolutions at their three yearly meetings. A seven member Executive Board carries out the duties and directives of ATNI. As the President of the ATNI and a member of the Executive Board, I am here today to convey ATNI's comments on the legislation introduced by Chairman McCain and Vice Chairman Dorgan, known as the *Indian Trust Reform Act of 2005*.

The ATNI has been intimately involved in the debate regarding settlement of the *Cobell* litigation and reformation of the Department of Interior (DOI) in order to be more accountable when administering the federal Indian trust responsibility. Over the past several years and after numerous court issued declarations in the *Cobell* litigation, the

ATNI realized that resolution of the litigation in the court system would take many years and that a settlement of the litigation would probably not result in action that would compensate the plaintiffs along with individual Indian trust account holders to a level that would be fair and equitable. Therefore, the ATNI decided to focus on working cooperatively with Congress and other stakeholders in creating a legislative resolution of the *Cobell* litigation while at the same time accomplishing reorganization of the DOI to fit the needs of Indian country. On April 16, 2005, the ATNI submitted Indian trust reform legislation to Senator Cantwell and asked that it

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basis by the Senate Indian Affairs Committee. That legislation was essentially identical to the legislation that Chairman Hillaire from the Lummi Tribe presented to the Committee during the oversight hearing the Committee held on March 9, 2005.

The ATNI proposed trust reform legislation was based substantially upon the previously sponsored legislation of Senator McCain and former Senator Daschle in the 108th Congress known as *S. 1459*. The ATNI proposal had five main provisions as its foundation. The first provision sought to elevate the Assistant Secretary for Indian Affairs to a Deputy Secretary of the Interior. The intent of this provision was to ensure that the principal officer assigned to fulfill the trust responsibility would have the authority over the constituent agencies in the Department of Interior that have an effect or impact on the trust responsibility. The second provision sought codification of the standards for the administration of trust duties that were adopted by Secretary Babbitt in the year 2000. The third provision sought settlement of the *Cobell* litigation by authorization of a mediator that would submit recommendations to the Court on settlement issues and allow the Court the ability to implement the recommendations

without having to submit to a drawn out trial process. The fourth provision sought the creation of an independent legal entity that would have some oversight authority over administration of the federal trust responsibility. The fifth provision sought the establishment of a demonstration project that would build on the work of those tribes that have been administering their own trust programs pursuant to authority granted by the Congress in appropriations bills. The stated goal of the ATNI proposed legislation was to spur discussion and deliberation so that tribally driven provisions could be included in legislation that would inevitably come out of the Committee. It appears now that Indian country has *S. 1439, Indian Trust Reform Act of 2005*, which will undoubtedly spark discussion and ultimately lead to a final version of the legislation that will take into account tribally driven provisions. The ATNI is prepared to proceed forward in that discussion and resolution because it supports the substantive provisions of *S. 1439*.

The ATNI sought to elevate the Assistant Secretary for Indian Affairs to a Deputy Secretary of the Interior. Under Title V of *S. 1439* there is an Under Secretary for Indian Affairs (Under Secretary) position created that is directly subordinate to the Secretary of the Interior (Secretary). The Under Secretary for Indian Affairs would replace the Assistant Secretary for Indian Affairs and the Special Trustee and would assume overall management of the federal trust responsibility with regard to Indian tribes. The ATNI supports the creation of the Under Secretary for Indian Affairs position within the Department along with the duties requiring mana
responsibility in consultation with Indian tribes. The ATNI also supports Section 505 of the legislation, which would terminate the Office of Special Trustee for American Indians by December 31, 2008.

Title VI of *S. 1439* would require the Government Accountability Office to contract with an independent entity to prepare and report to the Committee the status of individual Indian, Indian tribal, and other Indian trust accounts based upon generally accepted accounting principles of the Federal government. The ATNI supports this provision since it would require the Department to account for the management of the trust assets through an independent review and it would allow the Committee to provide oversight with regard to how the Department is performing its trust responsibility. At the heart of the *Cobell* litigation is accountability for management of trust assets by the Department and Title VI of *S. 1439* would set the audit and report requirements that could be a measure for how the Department is progressing in its fiduciary duty as trustee.

The ATNI also sought the codification of the standards of the administration of trust duties that were adopted by Secretary Babbitt in the year 2000. The ATNI understands that these standards have not been included as a provision of *S. 1439*, but it does not believe that this will be ultimately fatal to the legislation. Under Section 503(a) of the *S. 1439*, there is an Under Secretary for Indian Affairs that will be required to implement and account for the fulfillment of the trust responsibility to Indian tribes. The legislation also describes the duties that the Under Secretary for Indian Affairs will be required to fulfill under Section 503(c). Section 503(c)(1) would require the Under Secretary to carry out any activity related to both trust fund accounts and trust resource management of the Bureau of Indian Affairs in accordance with the *American Indian Trust Fund Management Reform Act of 1994*. There are also other duties identified that would require the Under Secretary to account for trust assets and resources; supervise activities carried out by agencies that relate to Indian affairs; consult regularly with

Indian tribes to fulfill the trust responsibility; and manage the Indian trust resources in accordance with applicable Federal law. The ATNI believes that if this section is holistically integrated with other provisions of the legislation, the Under Secretary has some guidance from Congress defining actions and responsibilities that will be required to fulfill the trust responsibility. The specific trust standards can be finalized at a later date and in subsequent legislation based on the recommendations from the Commission that is authorized in Title II of *S. 1439*.

The third provision that the ATNI sought was the settlement of the *Cobell* litigation by the authorization of a mediator that would submit recommendations to the Court on settlement issues and allow the Court the ability to implement the recommendations without having to submit to a drawn out trial process. The ATNI has reviewed *S. 1439* and is in agreement with the congressional findings contained within Section 101. The ATNI realizes that in many cases, it is impossible for the Federal government to provi

Money (IIM) accounts due to any number of factors including destruction of records; length of time to compete a historical accounting; the cost of completing a historical accounting; and the need of those who hold IIM accounts to access the funds now after many years of being put on hold because of delays to sort out the aftermath of a court declaration in the *Cobell* litigation.

The ATNI supports the proposition that the settlement of the *Cobell* litigation must provide a fair and appropriate calculation of the IIM accounts in lieu of actually performing an accounting of the IIM accounts. The ATNI lends its support for the creation of an "Individual Indian Accounting Claim Settlement Fund" contemplated in

Section 103(a) so that there can be closure for the plaintiffs in the *Cobell* litigation and other aggrieved parties. The settlement amount will obviously need to be debated and agreed upon after intense consultation with all the affected parties. The animosity that has guided previous attempts at settlement should not deter actual and honest agreement over a final settlement amount.

The ATNI supports the proposition that a Special Master should be appointed to administer the settlement fund. However, Section 103(b) allows the Secretary the unilateral ability to appoint a Special Master to administer the fund without allowing any tribal input in the determination of appointing the Special Master. Since the settlement fund is a result of litigation between two adversarial parties, there should be the opportunity for the representatives of both parties to come to agreement on the appointment of a Special Master to administer the settlement fund. Otherwise, the legislation will create a situation where only one of the litigants will have the ability to appoint the person charged with administering a settlement fund that was the result of two litigants engaged in adversarial proceedings. In order to preserve the interest of the two litigants in protecting their respective clients' interests, the Committee should allow for both parties to be able to agree to the appointment of the Special Master.

The ATNI supports the ability of the claimants to have judicial review of the constitutionality of their claims under the settlement fund by a neutral and detached judge sitting in the United States District Court for the District of Columbia. The claimants will have to waive their rights to litigate further if they accept distribution of a claim under the settlement fund. The ATNI supports this waiver of liability for the Federal government with regard to individual claimants if administration of the settlement fund is carried out

by the Special Master in a responsible and accountable manner consistent with fiduciary standards. It is important to emphasize that mere appointment of a Special Master to administer the settlement fund does not relieve the Secretarial trust responsibility to ensure that the Special Master acts in a manner designed to fulfill the Secretary's trust responsibility to Indians. The ATNI supports Section 106 of the bill, which allows any IIM account holder to reject the payments from the Special Master and to file a separate claim in the Court of Claims.

The ATNI strongly supports Section 110(d). In that section, tribal government claims against the United States would not be discharged as a part of the settlement of litigation claims identified in Section 102(2). The government-to-government process of settlement of disputes between the tribal and Federal governments should continue until there is full settlement. The tribal governments have the unique responsibility to ensure that they provide for the welfare of all tribal members even if those tribal members hold IIM accounts that are covered under the settlement provisions of *S. 1439*. The tribal trust resource is separate from the individual interest contained with the IIM account system and should therefore be separated from the settlement provisions of the bill regarding the IIM accounts.

The fourth provision sought by the ATNI was the creation of an independent legal authority that would have some oversight power over administration of the federal trust responsibility. Title II of *S. 1439* creates a commission known as the "Indian Trust Asset Management Policy Review Commission" (Commission) that would be charged with the review of trust asset management laws and the review of the Department's practices with regard to individual Indian and Indian tribal trust assets. The Commission would then

have the ability to make recommendations to the Secretary and to the Committee for improvement over the Department's laws, practices, and management of the trust assets. The ATNI supports the Commission, as it would be created by Title II of the bill since it would allow for an independent review of the Department's practices and would possibly lead to recommendations that would assist the Department in adopting a "best practices" approach to fulfillment of the trust responsibility. Indian country has shown in the past that it is willing and able to participate in crafting recommendations that would lead to an improved Department as it continues to administer its trust duties.

The Affiliated Tribes of Northwest Indians stands ready to proceed in the process of enacting legislation that will improve the administration of the trust responsibility and settle the *Cobell* litigation so that each subsequent generation does not inherit the problems of the past. I thank the Committee for the time and opportunity to submit comments on the ATNI position with regard to *S. 1439*, the *Indian Trust Reform Act of 2005*.

I will be pleased to answer any questions the Committee may have.

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TESTIMONY OF JAMES T. MARTIN, EXECUTIVE DIRECTOR OF UNITED SOUTHERN AND EASTERN TRIBES (USET)

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS

Regarding S. 1439, the Indian Trust Reform Act of 2005

Chairman McCain, Vice-Chairman Dorgan and distinguished members of the Senate Committee on Indian Affairs:

My name is James T. (Tim) Martin. I am an enrolled member of the Poarch Band of Creek Indians, and serve as the Executive Director of United South and Eastern Tribes, Inc. (USET). On behalf of its 24 member tribes, USET has closely followed the *Cobell* case over the past ten years and the Department of Interior's (DOI) subsequent reorganization. Along with USET President Keller George, I represented the tribes of the Bureau of Indian Affairs (BIA) Eastern Region on the DOI/Tribal Trust Reform Task Force (Task Force), and have testified before this Committee on trust reform reorganization several times.

I thank this Committee for the opportunity to testify on this topic again. For USET tribes, the *Cobell* litigation and the DOI's redirecting of funding to trust activities carried out by the Office of the Special Trustee (OST) has had immediate and harmful impact. For fiscal years 2005 and 2006, funding cuts to BIA has reduced full time staff

for law enforcement, education and other vital programs. The Cobell litigation and the DOI's interpretations of requirements to meet Court Orders has absorbed resources and limited the ability to implement already under-funded programs.

I thank Senators McCain and Dorgan for introducing S.1439, which represents a critical step for trust reform and provides a solid footing for resolving the inter-related and complex problems of trust reform, the *Cobell* case and Indian affairs more generally. Given the complexity of trust-related issues, one piece of legislation is unlikely to solve all problems. This bill, however, takes on the challenge of addressing the fundamental issues (the settlement of the *Cobell* lawsuit, land consolidation, and prospective trust reform reorganization) all while maintaining a key focus USET continues to stress – that tribes are the entities best suited to drive the reform effort.

USET, in response to Chairman McCain's call for a legislative solution to the crisis in the management of the federal trust responsibility to Indian tribes, developed proposed trust reform legislation and in April provided that proposal to the Chairman and to Committee staff. The USET proposed legislation was intended to introduce measures that would increase the accountability and efficiency of the DOI's administering of the United States' trust responsibility while enhancing tribal self-determination. Those measures included:

- Elevating the Assistant Secretary-Indian Affairs
- Providing standards for the administration of trust funds and trust assets
- Promoting self-determination through tribal management of trust funds and assets
- Consolidating trust functions within the BIA (and eliminating the Office of the Special Trustee)
- Improving trust services to tribal and individual beneficiaries (by

consolidating trust functions at the BIA field office level that serves them, by establishing quality assurance and audit functions and by expediting the implementation of the DOI's core trust business systems)

- Providing procedures to resolve the *Cobell* trust fund class action litigation.

Let me note here that the USET legislative proposal builds upon that provided to this Committee by the Affiliated Tribes of Northwest Indians (ATNI). I am pleased that ATNI President Stensgar is here to discuss that proposal and the concerns of the tribes in the Northwest, which USET member tribes share.

Upon our review of S. 1439, it appears that the Committee shares USET's concerns and provides similar approaches to resolving them. Additionally, USET requests that the Committee further deliberate several critical issues. I am attaching USET's proposed legislation to my written testimony and request that this proposal be included in the hearing record as it may be useful to this Committee as it seeks to finalize trust reform legislation.

But first, I would like to commend the Committee for its recognition and incorporation of the key concepts for trust reform and DOI reorganization that tribes have advocated before this Committee in the past, as well as through the 2002-2003 Trust Reform Task Force and more recently in the Tribal Working Group on Trust Reform Legislation. Specifically, let me mention a few of these here.

Elevation of the Assistant Secretary-Indian Affairs to the position of Under-Secretary and eliminating the OST, which, as tribes have advocated, would improve coordination of trust activities within the DOI and establish decision-making authority and accountability under one executive authority. Tribes in the DOI/Tribal Task Force process endorsed elevation of the Assistant Secretary in order to positively address a

major issue that has been raised in every significant study of trust management at DOI, including the EDS Report, and by the *Cobell* Court: the lack of clear lines of authority and responsibility within the DOI to ensure accountability for trust reform efforts by the various divisions of the DOI. Nearly every agency in the DOI has some significant trust responsibilities. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant bureaus. (We note a drafting error in Section 504(a), line 5: the word "not" should be eliminated).

USET views the Commission, established by Title II of S. 1459, as the logical extension of the DOI/Tribal Task Force. This Commission is needed to conduct a thorough analytical review of laws and practices in order to make viable recommendations for future legislative action on trust reform.

With regards to land consolidation, highly fractionated lands are difficult to manage, limit their productive use and result in the DOI spending more to administer the accounts than the appraised value of these fractionated lands themselves are worth. S. 1439 responds to the Tribal Trust Reform Workgroup recommendation to expand the voluntary buy back program for highly fractionated shares by providing for sums greater than fair market value for shares, and to take into account cost savings to the DOI by consolidating highly fractionated lands. USET suggests, however, that the problem of locating "whereabouts unknown" individual Indian accountholders for the purpose of land consolidation is a matter that should be addressed by this legislation, or by the Commission created in Title II of S. 1439. If these provisions are realized they will reverse the devastating policy introduced through the Allotment Act by restoring tribal trust lands.

S. 1439, with its tribal trust asset management demonstration project (Title III), embraces a view strongly held by USET member tribes – that Indian self-determination works – for trust asset management as well as other activities benefiting Indian tribes. In the BIA Eastern Region, tribes administer 95% of the government's federal Indian program responsibilities pursuant to agreements under the Indian Self-Determination and Education Assistance Act (ISDEAA). By giving tribes greater authority in determining how best to deliver program services to their members, these services have markedly improved. USET is confident that management of trust functions will benefit from this demonstration project. Moreover, we expect it will foster an array of best management practices to be utilized for the wide range of trust resources managed in Indian Country.

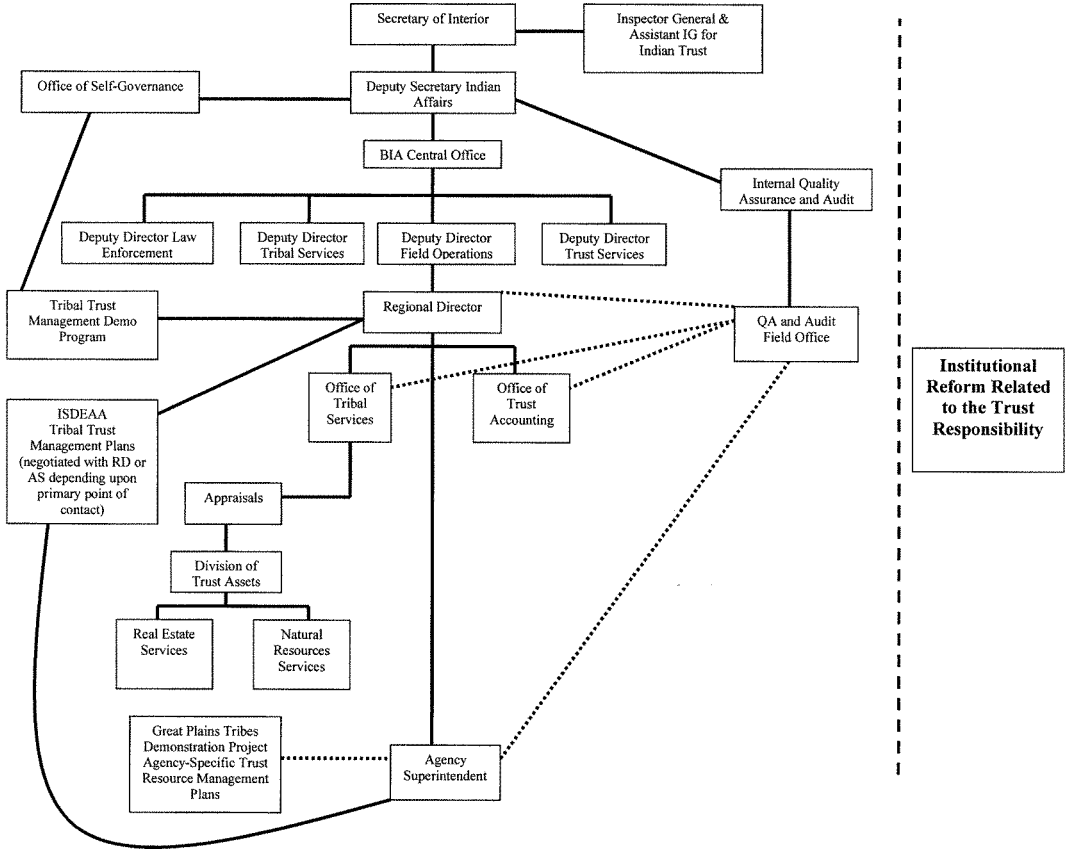
While the legislation does not in itself codify trust standards, USET recognizes that S. 1439 provides for a Commission to issue recommendations on "proposed Indian trust asset management standards" (Section 204(c)(3)) and that the demonstration project provides for the development of trust asset management plans that meet trust standards as established by tribal law and consistent with the trust responsibility of the United States (Section 304(c)). Standards are essential components for assuring accountability and fulfilling the achievement of true trust responsibility. USET recognizes the necessity of standards yet acknowledges those standards must be developed in a manner that allows for flexibility reflecting the diversity that exists among tribes as well as the diversity among the resources to both of which the Secretary has a trust responsibility. The demonstration project will allow for tribes to establish best management practices that can be reinforced and replicated.

Title I of S. 1439 would resolve the complex, protracted and costly *Cobell* lawsuit. The terms of the bill demonstrates the Committee's understanding of the many

USET's proposed legislation Section 304 requires consolidation of functions at the BIA field offices including the restoration of functions and funding previously transferred to OST and clarifying the field office directors' line authority over personnel assigned to that field office. Any separation of trust and "non-trust" functions duplicates bureaucracy, introduces potentially conflicting authorities with jurisdiction over an issue, and produces an organization incapable of efficiently administering the trust responsibility. Similarly, resources and authority must not be stacked at the Central Office. Rather, field offices must have staff, resources and decision-making authority to resolve in a timely manner the vast majority of issues at the point of first contact with the tribe.

Finally, all the reform in the world will not get the job done without adequate funding. The number of vacant positions and/or under-staffing in the DOI, particularly those in BIA responsible for the implementation of trust activities, in itself should demonstrate why the DOI has failed to meet its trust obligations. This Committee must be vigilant in assuring that budget requests do not cut funding for programs essential to carry out the trust responsibility. Transferring resources for the OST to hire supervisory staff cannot improve the system if personnel are not available to carry out the operational responsibilities.

As the Committee has recognized with S. 1439, trust reform requires tribally-driven, flexible mechanisms that reflect the diversity of tribes and the distinct types and quantities of trust resources that exist. Moreover, in order for trust reform to advance, the Cobell litigation must be resolved. USET commends Chairman McCain and Vice Chairman Dorgan for their leadership with this bill. In closing, I thank you for the opportunity to present testimony and I assure you that USET will remain engaged with this Committee as this important bill evolves.


Secretary of Interior
Inspector General & Assistant IG for Indian Trust
Office of Self-Governance
Deputy Secretary Indian Affairs
BIA Central Office
Internal Quality Assurance and Audit
Deputy Director Law Enforcement
Deputy Director Tribal Services
Deputy Director Field Operations
Deputy Director Trust Services
Tribal Trust Management Demo Program
Regional Director
QA and Audit Field Office
Office of Tribal Services
Office of Trust Accounting
ISDEAA Tribal Trust Management Plans (negotiated with RD or AS depending upon primary point of contact)
Appraisals
Division of Trust Assets
Real Estate Services
Natural Resources Services
Great Plains Tribes Demonstration Project Agency-Specific Trust Resource Management Plans
Agency Superintendent
Institutional Reform Related to the Trust Responsibility

American Indian Trust Fund Management Reform Act Amendments of 2005

DRAFT as of June 6, 2005

NOTE: The text in black is the text of the Northwest Tribes' proposal (as it amends the American Indian Trust Fund Management Reform Act of 1994). The underlined (red) text and margin deletions represent the revisions made to the Northwest Tribes' proposal made by this proposal.

Section 1. Short Title; Table of Contents.

(a) SHORT TITLE- This Act may be cited as the 'American Indian Trust Fund Management Reform Act of 1994'.
(b) TABLE OF CONTENTS- The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Purpose.
Sec. 3 Definitions.

TITLE I--RECOGNITION OF TRUST RESPONSIBILITY

Sec. 101. Congressional Findings and Declaration~~Affirmative action requi~~ of Policy~~red~~.
Sec. 102. Responsibility of Secretary~~ to account for the daily and annual balances of Indian trust funds~~.
Sec. 103. Payment of interest on individual Indian money accounts.
Sec. 104. Authority for payment of claims for interest owed.
Sec. 105. Affirmation of Standards.

TITLE II--INDIAN TRUST ~~FUND~~ RESOURCE MANAGEMENT PROGRAM

Sec. 201. Purpose.
Sec. 202. Voluntary withdrawal from trust funds program.
Sec. 203. Judgment funds.
Sec. 204. Technical assistance.
Sec. 205. Grant program.
Sec. 206. Return of withdrawn funds.
Sec. 207. Savings provision.
Sec. 208. Tribal Management of Non-Monetary Trust Assets.
Sec. 209. Establishment of the Tribal Management of Trust Resources Demonstration Project.
Sec. 210. Great Plains Demonstration Project.
Sec. 211. Provisions Related to the Secretary
Sec. 212. Civil Actions.

Sec. 2~~08~~13. Report to Congress.
~~Sec. 209. Regulations.~~

TITLE III--~~SPECIAL TRUSTEE FOR AMERICAN INDIANS~~REFORMS RELATING TO TRUST RESPONSIBILITY

Sec. 301. Purposes.
Sec. 302. ~~Office of Special Trustee for American Indians~~Deputy Secretary for Indian Affairs.
Sec. 303. Additional Authorities and functions of the Deputy Secretary~~Special Trustee~~.
Sec. 304. Trust Administration and Service Requirements for Bureau Field Offices.
Sec. 305. Quality Assurance and Audit.
Sec. 306. Independent Accountability for the Indian Trust
Sec. 307 4. Reconciliation report.
Sec. 308 5. Staff and consultants.
~~Sec. 306. Advisory board.~~

TITLE IV--~~AUTHORIZATION OF APPROPRIATIONS~~INDIVIDUAL INDIAN MONEY ACCOUNT HOLDER CLAIMS SETTLEMENT

Sec. 401. Mediator.
Sec. 402. Negotiating Teams.
Sec. 403. Implementation of Agreements.
Sec. 404. Default or Failure to Reach Agreement

TITLE V—LAND CONSOLIDATION

RESERVED

TITLE VI—ADMINISTRATIVE PROVISIONS AND DISCLAIMERS

Sec. 601. Regulations.
Sec. 602. Savings Provisions
Sec. 603. Severability

TITLE VII. CONFORMING AMENDMENTS

Sec. 701. Government Organization and Employees
Sec. 702. Inspector General Act

TITLE VIII. AUTHORIZATION OF APPROPRIATIONS

Sec. 801. Authorization of appropriations.

Section 2. Purpose.

The purposes of this title are—

(a) to create the Office of the Deputy Secretary for Indian Affairs with a direct line of authority to oversee and supervise the management and reform of Indian trust resources under the jurisdiction of the Department of the Interior;

(b) to provide fiduciary standards and clarify the legal obligations of the Department for the administration of Indian trust resources;

(c) to promote and advance tribal self-determination through tribal management of trust resources;

(d) to eliminate the Office of the Special Trustee;

(e) to reorganize and consolidate trust functions within the BIA at the Central and Field office levels;

(f) to establish a mechanism to evaluate and report as to the adequacy of funding levels and staffing for trust management;

(g) to provide for independent review of the DOI's administration of trust functions;

(h) to accelerate implementation of core trust business systems; and

(i) to provide procedures to resolve the Cobell trust fund class action litigation.

Section 32. Definitions. For the purposes of this Act:

(a) AGENCY OFFICE.—The term "Agency Office" means the local Bureau of Indian Affairs field office that provides services to Indian tribes.

(b) AUDIT.—The term 'audit' means an audit using accounting procedures that conform to generally accepted accounting principles and auditing procedures that conform to chapter 75 of title 31, United States Code (commonly known as the 'Single Audit Act of 1984').”; and

(c) BUREAU.---The term `Bureau' means the Bureau of Indian Affairs within the Department of the Interior.

(d) BUREAU FIELD OFFICE. – The term "Bureau field office" – shall mean the programs, staff, and functions of the BIA Regional Office or the

Agency Office according to which of these offices serves as the primary point of contact with a tribe and as consistent with this Act.

(e) BUREAU FIELD OFFICE DIRECTORS.—The term "Bureau field office directors" shall mean the Regional Director (for the Regional Office level) and the "Agency Superintendent" (for the Agency level).

(f) CENTRAL OFFICE.—The term "Central Office" shall mean the national Bureau headquarters office.

(g)DEPARTMENT.---The term `Department' means the Department of the Interior.

(h) INDIAN TRIBE.--- The term `Indian tribe' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(i) INDIVIDUAL INDIAN--- The term "Individual Indian" means an individual who is a member of an Indian tribe.

(j) INHERENT FEDERAL FUNCTIONS.— The term "inherent Federal functions" means those Federal functions which cannot legally be delegated to Indian tribes.

(k) NON-MONETARY TRUST ASSET.—The term 'non-monetary trust asset' means any tangible property (such as land, a mineral, coal, oil or gas, a, forest resource, an agricultural resource, water, a water source, fish, or wildlife) that is:

(1) held by the Secretary for the benefit of an Indian tribe or an individual Indian or Indians in accordance with Federal law; or

(2) owned in fee by an individual Indian or Indians and subject to statutory restrictions on conveyance in accordance with Federal law.

(l) OFFICE.---The term `Office' means the Office of Special Trustee for American Indians established by section 302 of the 1994 Act.

(m)SECRETARY.---The term `Secretary' means the Secretary of the Interior.

(n) SPECIAL TRUSTEE.---The term `Special Trustee' means the Special Trustee for American Indians appointed under section 302 of the 1994 Act.

(o) TRIBAL GOVERNMENT—The term 'tribal government' means the governing body of an Indian tribe.

~~(9) TRUST ASSET.—The term 'trust asset' means any tangible property (such as land, a mineral, coal, oil or gas, a, forest resource, an agricultural resource, water, a water source, fish, or wildlife) held by the Secretary for the benefit of an Indian tribe or an individual member of an Indian tribe in accordance with Federal law.~~

(p) TRUST FUNDS.—The term 'trust funds' means—

(A) all monies or proceeds derived from non-monetary trust assets; and

(B) all funds held by the Secretary for the benefit of an Indian tribe or an individual ~~member of an~~ Indian ~~tribe~~ in accordance with Federal law.

(q) TRUST RESOURCES. The term 'trust resources" means non-monetary trust assets and/or trust funds.

(1r~~1~~) TRUSTEE.—The term 'trustee' means the United States, or the Secretary, or any other person who has been delegated authority or ~~that is~~ is authorized to act as a trustee for ~~trust~~ funds and other trust assets ~~and trust funds.~~".

TITLE I--RECOGNITION OF TRUST RESPONSIBILITY

Section 101. Congressional Findings and Declaration of Policy

(a) FINDINGS. Congress finds and recognizes the following principles to be the foundations of the United States trust responsibility—

(1) the inherent sovereign authority of Indian tribes predates the United States Constitution and forms a backdrop for the government-to-government and trust relationship between the United States and Indian tribes existing from the early days of this Nation's history;

(2) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;

(3) the United States Constitution grants powers to the federal government in relations with Indian tribes, particularly the congressional power to regulate commerce with the Indian tribes (Art. I, Sec. 8, cl. 3), and the presidential power to make treaties (Art. II, Sec. 2, cl. 2);

(4) federal law uniformly recognizes that tribes have rights to occupy and govern their lands which has led to a land tenure system where the United States holds certain tribal and individual Indian property in beneficial trust or has imposed statutory restrictions on lands owned in fee by individual Indians. Indian tribes exercise authority as sovereigns over trust resources;

(5) During the nineteenth century Congress began implementation of an allotment policy through enactment of the 1887 General Allotment Act (as amended at 25 U.S.C. § 331 et seq.), and other allotment legislation. The allotment legislation allowed the United States to allot communally held tribal lands to individual Indians. The purpose of the allotment policy was to force Indians to assimilate into mainstream society, enable non-Indian acquisition of tribal lands originally set aside for the exclusive benefit of Indian tribes in violation of treaties, diminish tribal land bases and erode tribal sovereignty. After allotment, the United States managed allotted and unallotted lands and established individual trust accounts for individual Indians who received allotments. The General Allotment Act and subsequent Allotment Acts did not diminish tribal jurisdiction over tribal or individually owned lands;

(6) the United States repudiated the assimilation policy in the early twentieth century, has repeatedly reaffirmed the policy of promoting tribal self-governance and self-sufficiency and has an overall trust responsibility to enhance tribal self-government;

(7) the trust relationship imposes fiduciary duties upon the United States when the United States controls or manages the tribal and individual Indian trust resources;

(8) the trust responsibility is not diminished by promoting tribal self-governance and self-sufficiency through self-determination agreements with tribes for tribal administration of trust resources;

(9) the federal bureaucracy has failed to fully meet the United States' trust fund management obligations to tribes;

(10) the failure to meet federal trust obligations stems from the overly-centralized bureaucracy and the under-funding of functions necessary to carry out the United States' trust obligations;

(11) the creation of Office of the Special Trustee has not relieved system delays and inefficiencies, but rather created a duplicative bureaucracy that has eroded tribal self-determination;

(12) decentralizing authority to the local level and increasing tribal control have proven critical to enhance program effectiveness and accountability;

(13) tribally-driven solutions continue to be hindered by the federal bureaucracy; and

(14) remedial measures must be imposed on the federal bureaucracy to correct federal mismanagement of Indian trust resources.

(b) DECLARATION OF POLICY. It is the policy of Congress—

(1) to manage Indian trust resources by clear and enforceable standards, with an express right of compensation for trust mismanagement, and independent review of trust management activity;

(2) to protect the governing authority of Indian tribes, including the right and ability of tribes to regulate management of trust resources;

(3) to reform the United States' Indian trust resources management in a manner that does not require reprogramming funds from vitally needed BIA services nor create new levels of bureaucracy that would impede the delivery of trust services to meet local needs;

(4) to allow for an orderly transition from Federal domination to increased tribal control over trust resources;

(5) to provide oversight and technical assistance in flexible arrangements that meet the unique circumstances and needs of each tribe; and,

(6) to ensure greater tribal government involvement when new systems and policies for trust management are developed.

Sec. 102. Responsibility of Secretary.

(a) —ADMINISTRATION AND MANAGEMENT. -- The responsibilities of the Secretary in carrying out the trust responsibilities of the United States include, but are not limited to --

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

(2) Providing for adequate controls over receipts and disbursements;

(3) Providing for periodic, timely reconciliations of financial records to assure the accuracy of accounts;

(4) Determining accurate cash balances;

(5) Preparing and supplying to account holders periodic account statements;

(6) Establishing and publishing in the Federal Register consistent policies and procedures for trust fund management and accounting;

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

(8) Managing the natural resources protected under federal law for Indian tribes and individual Indians. ~~located within the boundaries of Indian reservations and trust lands.~~

(b) ACCOUNTING FOR DAILY AND ANNUAL BALANCES OF INDIAN TRUST FUNDS.—

(1) IN GENERAL -- The Secretary shall account for the daily and annual balance of all trust funds.

(2) PERIODIC STATEMENT OF PERFORMANCE-

(A) IN GENERAL -- Not later than 20 business days after the close of the second calendar quarter after the date of enactment of

this paragraph, and not later than 20 business days after the close of each calendar quarter thereafter, the Secretary shall provide to each Indian tribe and individual with respect to whom the Secretary manages trust a statement of performance for the trust funds.

(B) REQUIREMENTS.—Each statement under subparagraph (A) shall identify, with respect to the period covered by the statement--

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

(ii) the beginning balance of the funds;

(iii) the gains and losses of the funds;

(iv) receipts and disbursements of the funds; and

(v) the ending balance of the funds.

(3) AUDITS.—With respect to each account containing trust funds, the Secretary shall—

(A) for accounts with less than $1,000, group accounts separately to allow for statistical sampling audit procedures;

(B) for accounts containing more than $1,000 at any time during a given fiscal year—

(i) conduct, for each fiscal year, an audit of all trust funds; and

(ii) include, in the first statement of performance after completion of the audit, a letter describing the results of the audit.

(C) implementation of these audit requirements shall begin with the first fiscal year after the date of the enactment of this subparagraph.

Section 103. Payment of Interest on Individual Indian Money Accounts.

(a) PAYMENT OF INTEREST- The first section of the Act of February 12, 1929 (25 U.S.C. 161a), is amended--

(1) by striking out `That all' and inserting in lieu thereof `That (a) all'; and

(2) by adding after subsection (a) (as designated by paragraph (1) of this subsection) the following:

"(b) All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of individual Indians shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable securities."

(b) WITHDRAWAL AUTHORITY- The second sentence of subsection (a) of the first section of the Act of June 24, 1938 (25 U.S.C. 162a), is amended by inserting `to withdraw from the United States Treasury and' after `prescribe,'.

(c) TECHNICAL CORRECTION- The second subsection (b) of the first section of the Act of June 24, 1938 (25 U.S.C. 162a), as added by section 302 of Public Law 101-644 (104 Stat. 4667), is hereby redesignated as subsection (c).

(d) EFFECTIVE DATE- The amendment made by subsection (a) shall apply to interest earned on amounts deposited or invested on or after the date of the enactment of this Act.

Section. 104. Authority for Payment of Claims for Interest Owed.

The Secretary shall make payments to an individual Indian in full satisfaction of any claim of such individual for interest on amounts deposited or invested on behalf of such individual before the date of enactment of this Act retroactive to the date that the Secretary began investing individual Indian monies on a regular basis, to the extent that the claim is identified--

(1) by a reconciliation process of individual Indian money accounts, or

(2) by the individual and presented to the Secretary with supporting documentation, and is verified by the Secretary pursuant to the Department's policy for addressing accountholder losses.

Section 105. Affirmation of Existing Standards.

(a) The fiduciary duties of the trustee arise from the unique responsibility of the United States to the Indian tribes, which is embodied in the United States Constitution, treaties, statutes, executive orders, court opinions, federal agency regulations and policies, federal course of dealings, common law and contractual documents.

(b) In carrying out the trust responsibility of the United States to Indian tribes, Congress recognizes and affirms that the trustee in order to ~~the~~ properly discharge the~~of~~ trust responsibility of the United States, the trustee ~~requires~~, without limitation, ~~that the trustee,~~ using the highest degree of care, skill, and loyalty, shall—

(1) protect and preserve Indian trust resources~~assets~~ from loss, damage, unlawful alienation, waste, and depletion;

(2) ensure that any management of Indian trust resources~~assets~~ required to be carried out by the Secretary—

(A) promotes the interest of the beneficiary~~l owner~~; and

(B) supports, to the maximum extent practicable in accordance with the trust responsibility of the Secretary, the beneficial owner's intended use of the resources~~assets~~;

(3) enforce claims and defend actions on behalf of the trust against other agents of the United States, the States and other third parties, including, but not limited to

(A) enforcing ~~e~~ the terms of all leases or other agreements that provide for the use of trust resources~~assets~~; and

(B) taking~~e~~ appropriate steps to remedy trespass~~-~~ or interference with ~~on~~ trust or restricted land;

(4) promote ~~tribal control and~~ self-determination and tribal cover over tribal trust land and resources without diminishing the trust responsibility of the Secretary;

(5) allocate and prioritize sufficient budgetary resources and assets for the prudent administration of the trust, including

(A) funds sufficient to select, ~~and~~ oversee and fund sufficient qualified ~~persons~~ persons to~~that~~ manage Indian trust resources~~assets~~;

(B) funds sufficient for the prudent management and protection of trust resources:

(6) confirm that Indian tribes that manage Indian trust resourcesassets in accordance with contracts and compacts authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are protecting and prudently managinge those Indian trust resourcesassets;

(7) provide oversight and review of the performance of the trust responsibility of the Secretary, including Indian trust resourceasset and investment management programs, operational systems, and information systems;

(8) account for and identify, collect, deposit, invest, and distribute, in a timely manner, income due or held on behalf of tribal and individual Indian account holders;

(9) maintain a verifiable system of records that, at a minimum, is capable of identifying, with respect to a trust resourceasset—

(A) the location of the trust resourceasset;

(B) the beneficial owners of the trust resourceasset;

(C) any legal encumbrances (such as leases or permits) applicable to the trust resourceasset;

(D) the user of the trust resourceasset;

(E) any rent or other payments made;

(F) the value of the trust resource or other restricted land and resources associated with the trust resourceasset;

(G) dates of—

(i) collections;

(ii) deposits;

(iii) transfers;

(iv) disbursements;

(v) imposition of third-party obligations (such as court-ordered child support or judgments);

(vi) statements of earnings;

(vii) investment instruments; and

(viii) closure of all trust fund accounts relating to the trust fund resource~~asset~~;

(H) documents pertaining to actions taken to prevent or compensate for any, diminishment of the Indian trust resource~~asset~~; and

(I) documents that evidence the actions of the Secretary regarding the management and disposition of the Indian trust resource~~asset~~;

(10) establish and maintain a system of records that—

(A) permits beneficial owners to obtain information regarding Indian trust resources~~assets~~ in a, timely manner; and

(B) protects the privacy of that information;

(11) invest tribal and individual Indian trust funds to ensure that the trust account remains reasonably productive for the beneficial owner consistent with market conditions existing at the time at which investment is made;

(12) communicate with beneficial owners regarding the management and administration of Indian trust resources~~assets~~; and

(13) protect treaty-based fishing, hunting, gathering, and similar rights-of-access and resource use on traditional tribal land."

(c) Tribal Authority.

(1) No provision contained in subsection (b) shall limit the authority of tribes to develop their own specific standards for the management of trust resources, nor limit the trustee's authority to approve such standards; provided that

(A) The standards are formally approved by the tribe in a manner consistent with the tribe's constitution or other governing law of the tribe.

(B) The standards are established in a manner that allows the tribe and the Secretary to readily compute the amount of revenues that are expected to be received from each revenue-producing trust transaction.

(C) The standards describe in measurable and/or quantifiable terms the expected goals and/or intended results from application of the standards.

(D) The standards provide methods for resolving disputes between tribes, individual Indians and the Federal Government.

(E) The standards include a process whereby the Tribe and the Secretary can conduct mutually acceptable annual evaluations of the management of trust resources.

(2) The trustee shall waive administrative requirements and/or policies which conflict with tribal resource management plans approved by the Secretary unless doing so would violate applicable federal law or judicial decrees.

(3) Trustee compliance with tribal law. No provision contained in this Act shall absolve the trustee of its obligation to comply with applicable tribal laws and ordinances in carrying out the trust responsibility unless prohibited by an applicable federal law or judicial decree.

(d) No diminishment of the trust responsibility.-- The enumeration of trust standards in this section is illustrative and not inclusive and shall not in any way limit, diminish, reverse, nor repeal any existing trust duties applicable to the trustee's administration of Indian trust resources, including any trust duty embodied in the United States Constitution, treaties, statutes, executive orders, court opinions, federal agency regulations and policies, federal course of dealings, common law and contractual documents or any existing trust duty of the United States with respect to the Indian people.

(e) Nothing in this section shall be construed to affect, modify, diminish, or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes.

TITLE II--INDIAN TRUST ~~FUND~~ RESOURCE MANAGEMENT PROGRAM

Section 201. Purpose. The purpose of this title is to allow tribes an opportunity to manage tribal funds currently held in trust by the United States and to manage non-monetary trust assets ~~managed by the Secretary through the Bureau, that~~ consistent with the trust responsibility of the United States and the principles of self-determination, that will--

(a) give Indian tribal governments greater control over the management of such trust funds and non-monetary trust resourcesfunds; and or

(b) otherwise demonstrate how the principles of self-determination can work with respect to the management of such trust fundsresources, in a manner consistent with the trust responsibility of the United States.

Section 202. Voluntary Withdrawal From Trust Funds Program.

(a) IN GENERAL- An Indian tribe may, in accordance with this section, submit a plan to withdraw some or all funds held in trust for such tribe by the United States and managed by the Secretary through the Bureau.

(b) APPROVAL OF PLAN- The Secretary shall approve such plan within 90 days of receipt and when approving the plan, the Secretary shall obtain the advice of the Deputy Secretary for Indian Affairs Special Trustee or prior to the appointment of such Deputy SecretarySpecial Trustee, the Director of the Office of Trust Fund Management within the Bureau. Such plan shall meet the following conditions:

(1) Such plan has been approved by the appropriate Indian tribe and is accompanied by a resolution from the tribal governing body approving the plan.

(2) The Secretary determines such plan to be reasonable after considering all appropriate factors, including (but not limited to) the following:

(A) The capability and experience of the individuals or institutions that will be managing the trust funds.

(B) The protection against substantial loss of principal.

(c) MANAGEMENT THROUGH SELF-DETERMINATION AUTHORITY.—

(1) IN GENERAL.—An Indian tribe may use authority granted to the Indian tribe under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) to manage Indian trust funds and non-monetary trust assets without terminating—

(A) the trust responsibility of the Secretary; or

(B) the trust status of the funds and assets.

(2) NO EFFECT ON TRUST RESPONSIBILITY.—Nothing in this subsection diminishes or otherwise impairs the trust responsibility of the United States with respect to the Indian people.

(d) DISPUTES.—Sections 211 and 212 of this Title shall apply to the plan approval process established by this section and shall be available to any tribe submitting a plan for the management of trust funds and/or non-monetary trust assets under this Act.

Section 203. Judgment Funds.

(a) IN GENERAL- The Secretary is authorized to approve plans under section 202 of this title for the withdrawal of judgment funds held by the Secretary.

(b) LIMITATION- Only such funds held by the Secretary under the terms of the Indian Judgment Funds Use or Distribution Act (25 U.S.C. 1401) or an Act of Congress which provides for the secretarial management of such judgment funds shall be included in such plans.

(c) SECRETARIAL DUTIES- In approving such plans, the Secretary shall ensure--

(1) that the purpose and use of the judgment funds identified in the previously approved judgment fund plan will continue to be followed by the Indian tribe in the management of the judgment funds; and

(2) that only funds held for Indian tribes may be withdrawn and that any funds held for individual tribal members are not to be included in the plan.

Section 204. Technical Assistance.

The Secretary shall--

(1) directly or by contract, provide Indian tribes with technical assistance in developing, implementing, and managing Indian trust fund investment plans; and

(2) among other things, ensure that legal, financial, and other expertise of the Department of the Interior has been made fully available in an advisory capacity to the Indian tribes to assist in the development, implementation, and management of investment plans.

Section 205. Grant Program.

(a) GENERAL AUTHORITY- The Secretary is authorized to award grants to Indian tribes for the purpose of developing and implementing plans for the investment of Indian tribal trust funds.

(b) USE OF FUNDS- The purposes for which funds provided under this section may be used include (but are not limited to)--

(1) the training and education of employees responsible for monitoring the investment of trust funds;

(2) the building of tribal capacity for the investment and management of trust funds;

(3) the development of a comprehensive tribal investment plan;

(4) the implementation and management of tribal trust fund investment plans; and

(5) such other purposes related to this title that the Secretary deems appropriate.

Section 206. Return of Withdrawn Funds.

Subject to such conditions as the Secretary may prescribe, any Indian tribe which has withdrawn trust funds may choose to return any or all of the trust funds such tribe has withdrawn by notifying the Secretary in writing of its intention to return the funds to the control and management of the Secretary.

Section 207. Savings Provision.

By submitting or approving a plan under this title, neither the tribe nor the Secretary shall be deemed to have accepted the account balance as accurate or to have waived any rights regarding such balance and to seek compensation.

Section 208. Tribal Management of Non-Monetary Trust Assets.

(a) TRUST RESOURCES MANAGEMENT PLANNING PROCESS.— At the option of an Indian tribe:

(1) A 10-year trust resources management plan shall be developed and approved by the Secretary in accordance with the following process:

(A) The Secretary shall develop, as appropriate, the plan in close consultation with the affected tribe, unless the tribe requests to develop the plan pursuant to a self-determination agreement or self-governance compact;

(B) An Indian tribe may develop a trust resources management plan proposal pursuant to a self-determination contract or self-governance compact. Subject to the provisions of subparagraph (C), the tribe shall have broad discretion in designing and carrying out the planning process. At the request of the tribe, the Secretary shall convene a meeting of tribal representatives and Agency/Regional Office level staff within 60 days of said request for the purpose of identifying technical assistance that the tribe and Secretary may deem necessary for the development of such a management plan.

(C) Whether developed directly by the tribe or by the Secretary, the plan shall—

(i) determine available trust resources;

(ii) identify specific tribal trust resource goals and objectives;

(iii) establish management objectives for the trust resources;

(iv) define critical values of the Indian tribe and its citizens and provide identified management objectives;

(v) identify actions to be taken to reach established objectives;

(vi) be developed through public meetings;

(vii) use the public meeting records, existing survey documents, reports, and other research from Federal agencies, institutions of higher education, and other available resources;

(viii) include Tribal -specific standards for the management of resources; and

(ix) be completed within two years of the technical assistance meeting provided for in subsection (a)(1)(B).

(2) Indian trust resource management plans developed and approved under this section shall govern the management and administration

of Indian trust resources and Indian trust lands by the Bureau and the Indian tribal government.

(b) APPROVAL OF PLAN.—

(1) The Secretary shall approve such a plan, provided that—

(A) the plan has been approved by the appropriate Indian tribe and is accompanied by a resolution from the tribal governing body approving the plan.

(B) the Secretary determines the plan to be reasonable and is not inconsistent with federal statutory law or judicial decree regarding the management standards for the resources covered by the plan.

(2) If the Secretary rejects a plan, the Secretary shall:

(A) provide a detailed explanation as to the grounds for denial; and

(B) identify technical assistance available that would enable the tribe's plan to be resubmitted for approval.

(c) APPLICABILITY OF OTHER LAW.—

(1) MANDATORY.—The provisions of the Indian Self-Determination and Education Assistance Act (Public Law 93–638) apply to agreements under which tribes assume responsibilities for the development, administration and implementation of management plans under this title.

(2) NO EFFECT.—

(A) Notwithstanding any other provision of law, the contracts and cooperative agreements entered into with a tribe pursuant to this title shall not be subject to Sections 305 or 306 of the Act (including any regulations developed pursuant thereto). Tribal exemption from Sections 305 and 306 shall not be a basis for the Secretary to decline tribal assumption of the functions.

(B) Nothing in this Section shall limit the rights of individual owners of trust or restricted lands to lease such lands without Secretarial approval pursuant to Section 5 of the Indian Land Consolidation Act.

(d) DISPUTES.—Sections 211 and 212 of this Title shall apply to the trust resources management plan approval process established by this section and

shall be available to any tribe submitting a plan for the management of trust resources under this Act.

(e) AUTHORIZATION OF APPROPRIATIONS.-- There are authorized to be appropriated such sums as are necessary to carry out this section

Section 209. Establishment of the Tribal Management of Trust Resources Demonstration Project.

~~**SEC. 307 - ESTABLISHMENT OF THE TRIBAL MANAGEMENT OF TRUST ASSETS DEMONSTRATION PROJECT.**~~

(a) PURPOSE. The Tribal Management of Trust Resources~~Assets~~ Demonstration Project ("Project") is intended to - :

(1) Enhance the working relationship between the participating tribes and Department of the Interior for trust management activities by establishing mutually acceptable methods for addressing trust issues in a manner that is consistent with tribal priorities and applicable federal laws;

(2) Maintain a standard of good faith in the administration of federal trust responsibilities to Indian tribes, the right of tribal self-determination and self-governance, the government-to-government relationship between the Indian tribes and the United States, and provide a meaningful working relationship with participating tribes.

(3) Establish a process for the full implementation of the Project and further the continuation of meaningful partnerships between the participating tribes and the Secretary;

(4) Recognize and utilize tribal expertise and systems to accomplish appropriate management of trust resources, use those opportunities to explore the development of effective working models relating to the management of trust resources, and develop meaningful and measurable means of quantifying the respective values, standards and priorities of the participating tribes and the Department.

(5) Identify ways of resolving conflicting management prescriptions between tribal and federal standards, priorities and values in non-litigation and cooperative government-to-government forums, and memorialize those conflict resolution methodologies in a participating tribe's funding agreement.

(b). AUTHORITY. The Secretary of the Interior shall, for a period not to exceed five years following enactment of this section, administer a

demonstration project to be known as the Tribal Management of Trust ResourcesAssets Demonstration Project according to the provisions of this title. The Project shall provide for the direct Tribal administration and management of trust funds and non-monetaryresources and trust assets, including the administration of any funds appropriated by Congress for the management of Indian trust assets and funds and non-monetary trust assets, which also includes such funds intended for trust improvement activities.

(c) TRIBAL PARTICIPATION

(1) Tribes, which have participated in the demonstration project under Sections 139 and 131 of the Interior and Related Agencies appropriation acts or A any tribe that has entered into an agreement with the Secretary for the management and/or improvement of trust resources shall be eligible for inclusion as a participating tribe in the Project. Each tribe must first submit a formal request to theSecretary to be included in the demonstration project.

(2) The Secretary shall negotiate and enter into agreements with tribes to implement the purposes of this section.

(3) A participating tribe may withdraw from the project at any time.

(d) STANDARD TRUST MANAGEMENT PRINCIPLES AND PROCEDURES. - Management standards for trust resources that have been developed and adopted by tribes, and approved by the Secretary, shall be the applicable standards under the Project. The Secretary shall interpret Federal laws and regulations in a manner that facilitates approval of a Tribe's management standards. The Secretary may only refuse to accept Tribal standards that are inconsistent with applicable Federal treaties, statutes, case law or regulations not waived, governing the performance of trust functions. In the event that the Secretary declines to accept a tribe's management standards, the Secretarial shall inform the tribe in writing of the specific ways in which the Tribe's management standards fail to meet the standards and principles of the applicable Federal law governing the performance of trust functions. The Secretary may propose additional standards to a tribe for its consideration if the Secretary believes such standards will assist in promoting the Tribe's participation in the Project and managing the trust resources in a prudent manner. Tribal management standards may be in any format, including law, plans, procedures, and policies; provided that:

(1) The standards are formally approved by the tribe in a manner consistent with the tribe's constitution or other governing law of the tribe.

(2) The standards are established in a manner that allows the tribe and the Secretary to readily compute the amount of revenues

that are expected to be received from each revenue-generating trust transaction(s).

(3) The standards must describe in measurable and/or quantifiable terms the expected goals and/or intended results from application of the standards.

(4) The standards provide methods for resolving disputes between tribes, individual Indians and the Federal Government.

(5) The standards include a process whereby the Tribe and the Secretary can conduct mutually acceptable annual evaluations of the management of trust resources.

(e) JOINT EVALUATION CRITERIA AND PROCEDURES/REPORTING - Each participating tribe and the Secretary will develop joint reporting requirements, which are consistent with the annual trust evaluation requirements. Based on a mutually acceptable reporting format, the report will include methods for determining that trust transactions are carried out consistent with the requirements contained in trust resource management prescriptions and can be easily reconciled with trust fund accounts. The Secretary may conduct additional trust evaluations if sufficient information exists from credible sources that the Tribe is not operating consistently with the approved Tribal/Federal management standards.

(f) GRIEVANCE AND DISPUTE RESOLUTION PROCEDURES --

(1) Each tribe participating in the Trust Reform Pilot Project will develop and maintain with the Secretary non-litigation grievance and dispute resolution procedures that shall be incorporated into the tribes' funding agreement.

(2) Nothing within this Section shall be interpreted as waiving a participating tribe's authority to utilize the dispute resolution and civil claims provisions under the Indian Self Determination Act.

(3) Sections 211 and 212 of this Title shall apply to disputes under this Section and shall be available to any tribe participating in the demonstration project.

(g) INAPPLICABILITY OF REPORTING, AUDITING, QUALITY ASSURANCE AND INDEPENDENT EVALUATION MEASURES APPLICABLE TO THE TRUSTEE.--No provision of Sections 305 or 306 of this Act or any other reporting, auditing, quality assurance or independent evaluation measures, which apply to the Trustee's management of trust resources shall apply to any tribe participating in the demonstration project under this Section, nor shall the tribal exemption from such measures constitute grounds for the Secretary to refuse to negotiate and enter into agreements with tribes to implement the purposes of this section.

Section 210. Great Plains Demonstration Project.

(a) IN GENERAL--The Secretary shall establish a Demonstration Project under which each Agency in the Great Plains Region shall consult with each of the Tribes it services in order to devise Agency-specific plans that implement trust reform management at the Agency level and reflect the Tribes' unique land-based resources. The Indian Tribes in the Great Plains Region are: Cheyenne River Sioux, Standing Rock Sioux, Crow Creek Sioux, Turtle Mountain Band of Chippewa, Lower Brule Sioux, Three Affiliated Tribes, Yankton Sioux, Spirit Lake Sioux, Oglala Sioux, Rosebud Sioux, Santee Sioux, Sisseton-Wahpeton Oyate, Winnebago, Flandreau Santee Sioux, and Omaha and Ponca Tribes.

(b) TRIBAL CONSULTATION--The Secretary shall not impose trust management infrastructure reforms on, or alter, the existing trust resource management system of the Region before consultation with the Indian tribes that are served by the Agency and in consideration of Agency Plans.

(c) PLANNING AND AGENCY COORDINATION--Each Tribe shall devise an Agency Plan in cooperation with their respective Agency Superintendent, utilizing tribal expertise and systems to accomplish appropriate management of trust resources at the Agency level. The Great Plains Demonstration Project shall operate consistent with the provisions of this Act and pursuant to an Agency Plan.

(d) AGENCY PLANS--

(1) IN GENERAL--Any funds made available to accomplish trust reform at the Agency level shall be expended in accordance with the Agency Plan developed by the Indian Tribe served by the Agency.

(2) TIMING--Each Agency shall submit the Agency Plan developed by the Tribe or Tribes of each Agency to the Secretary not later than 180 days after the date of which funds are made available through authorization of appropriations.

(3) APPROVAL--Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with section 211 of this title, the offer shall be deemed agreed to by the Secretary.

(4) REPORT-- The Secretary's response to an Agency Plan shall--

(A) Include a report that provides findings and recommendations of the Secretary concerning the Agency Plan; and
(B) Provide the Indian tribe covered by the Agency 60 days in which to submit comments regarding the findings and recommendations of the Secretary.

(5) SUBMISSION TO CONGRESS--After receiving comments of the Indian Tribe under paragraph 4(B), the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Appropriations and the Committee on Resources of the House of Representatives for approval--

(A) the Agency Plan;

(B) the report of the Secretary; and

(C) the comments of the Indian Tribe.

(e) PROJECT PERIOD--The Demonstration Project will operate pursuant to an approved Agency Plan for a period of no less than five years after which time a report to Congress shall be jointly submitted by the Agency and participating Tribes, detailing the outcome of the Project for purposes of feasibility for continuing the Project and expanding its scope for other Bureau of Indian Affairs Regions and its Tribes.

(f) AUTHORIZATION OF APPROPRIATIONS--Agencies participating in the Demonstration Project under this subparagraph shall receive funding in an amount not less than $200,000 per Agency per year for a five year period to be made available for use in developing Agency Plans and for purposes of implementation and operation. The minimum funding level shall be increased each year according to need as determined by the Appropriations Committee.

(g) AVAILABILITY--Funds made available under subsection (f) shall remain available until expended.

(h) ELIGIBILITY--All Tribes of the Great Plains Region are eligible to participate in the Project. Any of the Great Plains Tribes that wish to be subject to the provisions in this Act in its entirety shall be able to opt-out of the Demonstration Project at any time, regardless of Agency participation in the Project.

Section 211. Provisions Related to the Secretary.

(a) FINAL OFFER

In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a plan, contract, compact or funding agreement (including funding levels) pursuant to Sections 202 (trust fund management), 208 (trust resource management), 209 (trust resource management demonstration project) and/or 210 (Agency-specific plans for the Great Plains Demonstration Project), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c) of this section, the offer shall be deemed agreed to by the Secretary.

(b) REJECTION OF FINAL OFFERS

(1) In General. — If the Secretary rejects an offer made under subsection (a) of this section (or one or more provisions or funding levels in such offer), the Secretary shall provide—

(A) a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that—

(i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled;

(ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

(iv) the Indian tribe is not eligible to participate under any of the programs in this title;

(B) technical assistance to overcome the objections stated in the notification required by subparagraph (A);

(C) the Indian tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, except that the Indian tribe may, in lieu of filing such appeal,

directly proceed to initiate an action in a Federal district court pursuant to section 212 of this title; and

(D) the Indian tribe with the option of entering into the severable portions of a final proposed plan, contract, compact and/or funding agreement, or provision thereof, (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the agreement to the severed provisions.

(2) Effect of exercising certain option

If an Indian tribe exercises the option specified in paragraph (1)(D), that Indian tribe shall retain the right to appeal the Secretary's rejection under this section, and subparagraphs (A), (B), and (C) of that paragraph shall only apply to that portion of the proposed final agreement that was rejected by the Secretary.

(c) BURDEN OF PROOF.-- With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b) of this section.

(d) RECORDS.—

(1) Unless a tribe specifies otherwise in an agreement, records of the tribe shall not be considered federal records for the purpose of chapter 5 of title 5, United States Code.

(2) A trust records management system shall be negotiated between tribes and the Secretary in order to preserve and protect records in accordance with the following terms:

(A) The Secretary shall include in funding agreements sufficient additional funds to cover the costs of the tribe's records management activities.

(B) The Secretary's access to tribally held trust records shall be limited as follows:

(i) The Secretary must provide reasonable advance notice indicating the purpose for requesting access to records;

(ii) visual inspection of documents shall be deemed sufficient access;

(iii) involuntary removal of trust records shall be expressly prohibited

(C) inactive records may be stored or permanently held by the tribe or, at tribal request, be removed and stored at the American Indian Records Repository at no cost to the tribe.

Section 212. Civil Actions.

(a) CIVIL ACTIONS; CONCURRENT JURISDICTION; RELIEF.-- The United States district courts shall have original jurisdiction over any civil action or claim against the Secretary arising under this title and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under agreements authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this title or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse the Secretary's declination of a plan, contract, compact or funding agreement under this title, or to compel the Secretary to award and fund an approved plan, contract, compact or agreement.

(b) REVISION OF AGREEMENTS. -- The Secretary shall not revise or amend a plan, agreement, contract or compact under this title without the tribe's consent.

(c) APPLICATION OF LAWS TO ADMINISTRATIVE APPEALS. -- Section 504 of title 5, and section 2412 of title 28 shall apply to administrative appeals filed pursuant to this title.

(d) APPLICATION OF CONTRACT DISPUTES ACT. -- The Contract Disputes Act (Public Law 95–563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. 601 et seq.] shall apply to disputes arising under this title, except that all administrative appeals relating to such disputes shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

Section 21~~3~~08. Report to Congress.

(a) The Secretary shall, beginning one year after the date of the enactment of this Act, submit an annual report to the Committee on ~~Natural~~ Resources of the House of Representatives and the Committee on Indian Affairs of the Senate on the implementation of programs under this title.

(b) Such report shall be presented to all tribes for their review and comments prior to the Secretary's presentation of the report to Congress and shall include recommendations (if any) for changes necessary to better implement the purpose of this title.

(c) The report and its finding, recommendations and tribal comments shall be a subject for the annual trust oversight hearing discussed further in Section 306 of this Act.

~~**SEC. 209. REGULATIONS.**~~

~~(a) IN GENERAL- Not later than 12 months after the date of enactment of this title, the Secretary shall promulgate final regulations for the implementation of this title. All regulations promulgated pursuant to this title shall be developed by the Secretary with the full and active participation of the Indian tribes with trust funds held by the Secretary and other affected Indian tribes.~~

~~(b) EFFECT- The lack of promulgated regulations shall not limit the effect of this title.~~

TITLE III--REFORMS RELATING TO TRUST RESPONSIBILITY

Section 301. Purposes.

The purposes of this title are--

(a) to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians by directing the Deputy Secretary to oversee and coordinate reforms within the Department of practices relating to the management and discharge of such responsibilities;

(b) to ensure that reform of such practices in the Department is carried out in a unified manner and that reforms of the policies, practices, procedures and systems of the Bureau, Minerals Management Service, and Bureau of Land Management, which carry out such trust responsibilities, are effective, consistent, and integrated;

(c) to create internal quality assurance mechanisms to enhance tribal and individual beneficiary services and participation;

(d) to provide for technical assistance and dispute resolution at the local level regarding trust fund and trust asset management matters;

(e) to provide for a heightened level of independent review of the discharge of the Secretary's trust duties by the Office of the Inspector General; and

(f) to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians.

Section 302. Deputy Secretary For Indian Affairs.

(a) ESTABLISHMENT-

(1) In General -- There is established within the Department the position of Deputy Secretary for Indian Affairs (referred to in this section as the "Deputy Secretary", who shall report directly to the Secretary.

(2) APPOINTMENT- The Deputy Secretary shall be appointed by the President, by and with the advice and consent of the Senate.

(b) DUTIES.—

(1) IN GENERAL.—The Deputy Secretary shall—

(A) oversee the Bureau of Indian Affairs;

(B) be responsible for carrying out all duties assigned to the Assistant Secretary for Indian Affairs as of the day before the date of enactment of the American Indian Trust Fund Management Reform Act Amendments Act of 2005;

(C) oversee all trust fund and trust asset matters of the Department, including—

(i) administration and management;

(ii) financial and human resource matters; and

(iii) all duties relating to trust fund and trust asset matters;

(D) engage in appropriate government-to-government relations and consultations with Indian tribes and individual trust asset and trust fund account holders on matters involving trust asset and trust fund management and reform within the Department; and

(E) carry out such other duties relating to Indian affairs as the Secretary may assign.

(2) TRANSFER OF DUTIES.

(A) ASSISTANT SECRETARY FOR INDIAN AFFAIRS.—As of the date of enactment of the American Indian Trust Fund Management Reform Act Amendments Act of 2005, all duties, functions and funding assigned to the Assistant Secretary for Indian Affairs shall be transferred to, and become the responsibility of, the Deputy Secretary.

(B) SPECIAL TRUSTEE. The Office of Special Trustee shall be~~is hereby~~ terminated effective one-hundred and eighty days fllowing ~~. As of~~ the date of enactment of the American Indian Trust Management and Reform Act Amendments of 2005; provided that, subject to the requirements of section 305(a), nothing herein shall prohibit the Deputy Secretary from transferring prior to said date~~.~~ all duties, functions, and funding assigned to the Special Trustee to other agencies as deemed appropriate by the Deputy Secretary in his discretion or to tribes that contract or compact with the Department for the exercise of such duties, functions and funding; provided further that funding associated with all transferred functions shall transfer from OST to the Deputy Secretary; and provided further that nothing herein shall be deemed to affect the trust ~~shall be transferred to, and become the~~ responsibility of, the Deputy Secretary to Indian tribes and their citizens.

(3) SUCCESSION.—Any official who is serving as Assistant Secretary for Indian Affairs on the date of enactment of the American Indian Trust Fund Management Reform Act Amendments Act of 2005 and who was appointed by the President, by and with the advice and consent of the Senate, shall not be required to be reappointed under subsection (a) to the successor position authorized under subsection (a) if the Secretary approves the occupation of the position by the official ~~of the position~~ by the date that is 180 days after the date of enactment of the American Indian Trust Fund Management Reform Act Amendments Act of 2005 (or such later date determined by the Secretary if litigation delay's rapid succession).

(c) CORE BUSINESS SYSTEMS

(1) IN GENERAL.—The Deputy Secretary, in consultation with tribes, shall assure that systems to "~~(C) require the development and~~ maintain~~enance of~~ an accurate inventory of all trust funds and non-monetary trust assets is fully developed and implemented.

(2) TITLE, LEASES, SALES AND ACCOUNTING.—

(A) The Deputy Secretary shall within 12 months of the enactment of this Act have fully developed and implemented those procedures necessary to implement core business systems that

establish and maintain complete and accurate records for Titles, Leases and Sales, and accounting.

(B) The Deputy Secretary shall develop and implementation of these core business systems in a manner consistent with Section 211(d) of this Act, including the provision of sufficient funding to tribes carrying out record management systems pursuant to a records management agreement negotiated in accordance with that Section.

(C) The functions carried out by the Office of Trust Fund Management (OTFM), and funding relating thereto, shall be transferred back to the Bureau and reestablished as the BIA Office of Trust Fund Management.

(3) RECONSIDERATION OF INAPPROPRIATE OR UNSUSTAINABLE ;SYSTEMS.—

(A) The Deputy Secretary, in consultation with tribes, shall establish procedures to identify inappropriate or unsustainable business systems and to reconfigure such systems in accordance with this purpose of this Act.

(B) To the extent identified systems cannot be modified to meet the purposes of this Act, the Secretary, in consultation with Tribes, shall abandon the development and implementation of such systems.

~~(2)~~

(d) ASSUMPTION BY TRIBES. All non-inherent federal functions and related funds and functions of the Deputy Secretary, including those transferred from the Office of Special Trustee, are available for assumption by an Indian tribe in the same manner as any other Indian program, services, functions, or activities.

(e) EFFECT ON DUTIES OF OTHER OFFICIALS.—

(1) IN GENERAL.—Except as provided in subsection (c) and paragraph (2), nothing in this section diminishes any responsibility or duty of the Deputy Secretary of the Interior appointed under the Act of May 9, 1935 (43 U.S.C. 1452), or any other Federal official, relating to any duty established under this Act or any other provision of law.

(2) TRUST ASSET AND TRUST FUND MANAGEMENT AND REFORM.—Notwithstanding any other provision of law, the Deputy Secretary shall have overall management and oversight authority on matters of the Department relating to Indian trust asset

and trust fund management and reform and treaty-based rights administered by the Department (including matters that, as of the day before the date of enactment of the Indian Trust Asset and Trust Fund Management and Reform Act of 2003, were carried out by the Commissioner of Indian Affairs). The Office of Special Trustee shall report to the Deputy Secretary until the effective date of termination of the Office of Special Trustee specified in paragraph (2) of subsection (b) of this section for the purpose of achieving transition of duties of that office to such other agencies, contracting tribes or compacting tribes as specified by the Deputy Secretary.

(f) REFERENCES TO ASSISTANT SECRETARY DEEMED TO BE TO DEPUTY SECRETARY.-- Any reference in a law, map, regulation, document, paper, or other record of the United States to the Assistant Secretary of the Interior for Indian Affairs shall be deemed to be a reference to the Deputy Secretary of the Interior for Indian Affairs.

(g) SUBSTITUTION OF DEPUTY SECRETARY AS PARTY.—The Deputy Secretary for Indian Affairs shall be substituted as a party in any pending court proceeding that names the Assistant Secretary-Indian Affairs, or an individual acting in his/her official capacity as Assistant Secretary-Indian Affairs, as a party.

~~"(f) TRUST IMPLEMENTATION AND OVERSIGHT.—~~

~~"(1) ESTABLISHMENT.—There is established within the Office of the Deputy Secretary responsibility for Trust Implementation and Oversight.~~

~~"(2) DUTIES.—The Deputy Secretary shall—~~

~~"(A) provide direct oversight of the day-to-day activities of all Department of Interior agencies to the extent that such agencies administer or manage any Indian trust assets or funds;~~

~~"(B) administer, in accordance with title II, all trust properties, funds, and other assets held by the United States for the benefit of Indian tribes and individual members of Indian tribes;~~

~~"(C) require the development and maintenance of an accurate inventory of all trust funds and trust assets;~~

~~"(D) ensure the prompt posting of revenue derived from a trust fund or trust asset for the benefit of each Indian tribe (or individual member of each Indian tribe) that owns a beneficial interest in the trust fund or trust asset;~~

~~"(E) ensure that all trust fund accounts are audited at least annually, and more frequently as determined to be necessary by the Deputy Secretary;~~

~~"(F) ensure that the Deputy Secretary, the Director of the Bureau of Land Management, the Commissioner of Reclamation, and the Director~~

~~of the Minerals Management Service provide to the Secretary current and accurate information relating to the administration and management of trust funds and trust assets;~~

~~"(G) provide for regular consultation with trust fund account holders on the administration of trust funds and trust assets to ensure, to the maximum extent practicable in accordance with applicable law and a Plan approved under section 202, the greatest return on those funds and assets for the trust fund account holders consistent with the beneficial owners' intended uses for the trust funds; and~~

~~(H) oversee and coordinate the management of trust assets by Department of Interior agencies.~~

~~(g) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as are necessary to carry out this section.".~~

Section 303. Additional Authorities and Functions of the Deputy Secretary.

(a) COMPREHENSIVE STRATEGIC PLAN-

(1) IN GENERAL- The Deputy Secretary shall prepare and, after consultation with Indian tribes and appropriate Indian organizations, submit to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, within one year after the initial appointment is made under section 302(a)(2), a comprehensive strategic plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with this Act.

(2) PLAN REQUIREMENTS- The plan prepared under paragraph (1) shall include the following:

(A) Identification of all reforms to the policies, procedures, practices and systems of the Department, the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, ~~and~~ the Minerals Management Service, the National Park Service, the Office of Surface Mining, the U.S. Fish and Wildlife Service, and the U.S. Geological Survey necessary to ensure the proper and efficient discharge of the Secretary's trust responsibilities in compliance with this Act.

(B) Provisions for opportunities for Indian tribes to assist in the management of their trust ~~accounts~~ resources and to identify for the Secretary options for the investment of their trust resources~~accounts~~, in a manner consistent with the trust

responsibilities of the Secretary, in ways that will help promote economic development in their communities.

(C) A timetable for implementing the reforms identified in the plan, including a date for the proposed termination of the Office.

(b) DUTIES-

(1) GENERAL OVERSIGHT OF REFORM EFFORTS- The Deputy Secretary shall oversee all reform efforts within the Bureau of Indian Affiars, the Bureau of Land Management, the Bureau of Reclamation, ~~and~~ the Minerals Management Service, the National Park Service, the Office of Surface Mining, the U.S. Fish and Wildlife Service, and the U.S. Geological Survey relating to the trust responsibilities of the Secretary to ensure the establishment of policies, procedures, systems and practices to allow the Secretary to discharge his trust responsibilities in compliance with this Act.

(2) BUREAU OF INDIAN AFFAIRS.—

(A) MONITOR RECONCILIATION OF TRUST ACCOUNTS.--The Deputy Secretary shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts.

(B) INVESTMENTS.--The Deputy Secretary shall ensure that the Bureau establishes appropriate policies and procedures, and develops necessary systems, that will allow it—

(i) to properly to account for and invest, as well as maximize, in a manner consistent with the statutory restrictions imposed on the Secretary's investment options, the return on the investment of all trust fund monies, and

(ii) to prepare accurate and timely reports to account holders (and others, as required) on a periodic basis regarding all collections, disbursements, investments, and return on investments related to their accounts.

(C) OWNERSHIP AND LEASE DATA.--The Deputy Secretary shall ensure that the Bureau establishes policies and practices to maintain complete, accurate, and timely data regarding the ownership and lease of Indian lands.

(3) BUREAU OF LAND MANAGEMENT.--The Deputy Secretary shall ensure that the Bureau of Land Management establishes policies and practices adequate to enforce compliance with Federal requirements for drilling, production, accountability, environmental protection, and safety with respect to the lease of Indian lands.

(4) MINERALS MANAGEMENT SERVICE.--The Deputy Secretary shall ensure that the Minerals Management Service establishes policies and practices to enforce compliance by lessees of Indian lands with all requirements for timely and accurate reporting of production and payment of lease royalties and other revenues, including the audit of leases to ensure that lessees are accurately reporting production levels and calculating royalty payments.

(5) PLACEHOLDER FOR BUREAU SPECIFIC TERMS

(c) COORDINATION OF POLICIES.

(1) IN GENERAL.--The Deputy Secretary shall ensure that--

(A) the policies, procedures, practices, and systems of the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, ~~and~~ the Minerals Management Service, the National Park Service, the Office of Surface Mining, the U.S. Fish and Wildlife Service, and the U.S. Geological Survey related to the discharge of the Secretary's trust responsibilities are coordinated, consistent, and integrated, and

(B) the Department prepares comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle.

(2) STANDARDIZED PROCEDURES.--The Deputy Secretary shall ensure that the Bureau imposes standardized trust fund accounting procedures throughout the Bureau.

(3) INTEGRATION OF LEDGER WITH INVESTMENT SYSTEM.--The Deputy Secretary shall ensure that the trust fund investment, general ledger, and subsidiary accounting systems of the Bureau are integrated and that they are adequate to support the trust fund investment needs of the Bureau.

(4) INTEGRATION OF LAND RECORDS, TRUST FUNDS ACCOUNTING, AND ASSET MANAGEMENT SYSTEMS AMONG AGENCIES.--The Deputy Secretary shall ensure that--

(A) the land records system of the Bureau interfaces with the trust fund accounting system, and

(B) the asset management systems of the Minerals Management Service and the Bureau of Land Management interface with the appropriate asset management and accounting systems of the Bureau, including ensuring that

(i) the Minerals Management Service establishes policies and procedures that will allow it to properly collect, account for, and disburse to the Bureau all royalties and other revenues generated by production from leases on Indian lands; and

(ii) the Bureau of Land Management and the Bureau provide Indian landholders with accurate and timely reports on a periodic basis that cover all transactions related to leases of Indian resources.

(C) PLACEHOLDER FOR OTHER BUREAU SPECIFIC TERMS

(5) TRUST MANAGEMENT PROGRAM BUDGET.

(A) DEVELOPMENT AND SUBMISSION.--The Deputy Secretary shall develop for each fiscal year, with the advice of program managers of each office within the Bureau of Indian Affairs, Bureau of Land Management and Minerals Management Service that participates in trust management, including the management of trust funds or non-monetary trust assets~~natural resources~~, or which is charged with any responsibility under the comprehensive strategic plan prepared under subsection (a) of this section, a consolidated Trust Management program budget proposal that would enable the Secretary to efficiently and effectively discharge his trust responsibilities and to implement the comprehensive strategic plan, and shall submit such budget proposal to the Secretary, the Director of the Office of Management and Budget, and to the Congress.

(B) DUTY OF CERTAIN PROGRAM MANAGERS.--Each program manager participating in trust management or charged with responsibilities under the comprehensive strategic plans shall transmit his office's budget request to the Deputy Secretary at the same time as such request is submitted to his superiors (and before submission to the Office of Management and Budget) in the preparation of the budget of the President

submitted to the Congress under section 1105(a) of title 31, United States Code.

(C) CERTIFICATION OF ADEQUACY OF BUDGET REQUEST.--The Deputy Secretary shall--

(i) review each budget request submitted under subparagraph (B);

(ii) certify in writing as to the adequacy of such request to discharge, effectively and efficiently, the Secretary's trust responsibilities and to implement the comprehensive strategic plan; and

(iii) notify the program manager of the Deputy Secretary's certification under clause (ii).

(D) MAINTENANCE OF RECORDS.--The Deputy Secretary shall maintain records of certifications made under paragraph (3)(B).

(E) LIMITATION ON REPROGRAMMING OR TRANSFER.--No program manager shall submit, and no official of the Department of the Interior may approve or otherwise authorize, a reprogramming or transfer request with respect to any funds appropriated for trust management which is included in the Trust Management Program Budget unless such request has been approved by the Deputy Secretary.

(d) PROBLEM RESOLUTION.--The Deputy Secretary shall provide such guidance as necessary to assist Department personnel in identifying problems and options for resolving problems, and in implementing reforms to Department, Bureau, Bureau of Land Management, and Minerals Management Service policies, procedures, systems and practices.

(e) ACCESS OF DEPUTY SECRETARY.--The Deputy Secretary, and his staff, shall have access to all records, reports, audits, reviews, documents, papers, recommendations, files and other material, as well as to any officer and employee, of the Department and any office or bureau thereof, as the Deputy Secretary deems necessary for the accomplishment of the duties of the Deputy Secretary under this Act.

(f) RECORDS. -- Indian trust records held by the Department of Interior as necessary for the Trustee's proper discharge of its fiduciary responsibility to Indian tribes and Indian individuals shall be deemed 'inter-agency' or 'intra-agency' documents for the purposes of the exemption from the Freedom of Information Act, codified in section 552(b) of title 5 of the United States Code.

(g4) ANNUAL REPORT.--The Deputy Secretary shall report to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate each year on the progress of the Department, the Bureau, the Bureau of Land Management, and the Minerals Management Service in implementing the reforms identified in the comprehensive strategic plan under subsection (a)(1) and in meeting the timetable established in the strategic plan under subsection (a)(2)(C).

Section 304. Trust Administration and Service Requirements for Bureau Field Offices.

(a) CONSOLIDATION OF FUNCTIONS. – In order to enhance accountability, improve performance and increase efficiency in the delivery of programs and services at the local level, the Deputy Secretary, in consultation with tribes and Bureau field office directors shall:

(1) ensure the elimination of duplicative bureaucracy at the Regional Office and Agency levels resulting from the Departmental reorganization that separated trust and non-trust functions and that transferred certain functions and funding to the OST;

(2) provide for consolidation that assures returning functions and related funding from OST back to the Bureau and determining a mechanism for allocating funding through the Bureau;

(3) delegate decision-making authority to Bureau field office directors over all program, services, functions and activities administered by that field office;

(4) delegate line authority to Bureau field office directors over all employees performing duties at the field office level, regardless of whether those functions are deemed to be programmatic or administrative;

(5) ensure that staffing, training, technical assistance and funding is sufficient to meet each field office's obligations as established by law and policy;

(6) establish and enforce performance standards for meeting the trustee's responsibilities to tribal and individual beneficiaries; and

(7) preserve tribal authority to consolidate function and function in order to maximize program efficiencies consistent with the intent of the Indian Self Determination Act.

(b) QUALITY ASSURANCE AND AUDIT FIELD OFFICES.--Personnel serving in quality assurance and audit field offices under Section 305 of this Act, shall not be deemed field office employees for the purpose of this Section.

(c) PLACEHOLDER -- Improve dispute resolution efficiency (e.g., regarding land consolidation) by expanding authority of hearing officers [see also Title V].

Section 305. Quality Assurance and Audit.

(a) QUALITY ASSURANCE AND AUDIT. -- In order to enhance accountability, improve performance and increase efficiency, the Deputy Secretary shall establish a quality assurance and audit unit within the Deputy Secretary's Office to provide technical assistance, conduct performance reviews and audits at the field offices and to issue recommendations to field office directors regarding deficiencies in the administration of the trustee's trust management responsibilities at the field offices.

(b) DESIGNATION OF ADDITIONAL PERSONNEL AT TRIBAL REQUEST.—

(1) Upon the request of the tribes with citizens owning or holding beneficial title to more than fifty percent of the individual restricted or trust surface and mineral acres located within the geographic area served by a field office, the quality assurance and audit unit shall retain any trust officer positions established for that field office and existing as of the date of enactment of the American Indian Trust Management and Reform Act Amendments of 2005, whether such positions are filled or unfilled as of said date; provided that such tribal requests shall be documented by resolution of the governing bodies of the tribes and presented to the Deputy Secretary within ninety days from the date of enactment of the American Indian Trust Management and Reform Act Amendments of 2005.

(2) The purpose of the quality assurance and audit unit trust officers shall be the coordination with individual Indians and tribes served by the field office to ensure that their interests and rights are being protected and coordination with the field office to ensure the provision of quality services by the field office in a manner consistent with the federal trust responsibility. The quality assurance and audit unit trust officers shall have such other authority and perform such other functions as described in subsection (c) of this section or as delegated by the Deputy Secretary.

(c) PROCEDURES.-- The Deputy Secretary, in consultation with tribes, shall establish procedures for the operation, management and scope of the quality assurance and audit unit, which shall:

(1) provide for scheduled and unannounced reviews and audits;

(2) include procedures for responding to tribal and individual beneficiary requests; and

(3) provide tribes and individual beneficiaries with a right to appeal quality assurance and audit unit recommendations, and/or agency action or inaction on those recommendations, to the Interior Board of Indian Appeals and/or to the Assistant Inspector General for Trust.

(d) LIMITATION OF AUTHORITY.-- The quality assurance and audit unit shall not have any authority with respect to tribal trust resource management, nor authority to request reports, conduct site visits or otherwise review or audit activities carried out by any tribe under a self-determination agreement;

Section 306. Independent Accountability for the Indian Trust.

(a) The Inspector General Act of 1978 shall be amended to create an Assistant Inspector General for the Indian Trust with the Office of the Inspector General in the Department of Interior. [See terms in Section 702]

(b) ANNUAL CONGRESSIONAL OVERSIGHT HEARING.—

(1) The annual report of the Assistant Inspector General for the Indian Trust shall serve as the basis for an annual oversight hearing in the Senate Committee for Indian Affairs and the House Resources Committee.

(2) The oversight hearing will also consider the findings, recommendations and tribal comments provided for in the Deputy Secretary's annual report as provided by Section 211 of this Act.

(3) The Committees shall consider other topics it considers appropriate pursuant to consultation with tribes, individual beneficiaries and agency officials.

Section 307.4 Reconciliation Report. The Secretary shall transmit to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995. In carrying out this section, the Secretary shall consult with the Deputy Secretary. The report shall include--

(1) a description of the Secretary's methodology in reconciling trust fund accounts;

(2) attestations by each account holder that--

(A) the Secretary has provided the account holder with as full and complete accounting as possible of the account holder's funds to the earliest possible date, and that the account holder accepts the balance as reconciled by the Secretary; or

(B) the account holder disputes the balance of the account holder's account as reconciled by the Secretary and statement explaining why the account holder disputes the Secretary's reconciled balance; and

(3) a statement by the Secretary with regard to each account balance disputed by the account holder outlining efforts the Secretary will undertake to resolve the dispute.

Section 308~~5~~. Staff and Consultants.

(a) STAFF.--The Deputy Secretary may employ such staff as the Deputy Secretary deems necessary. The Deputy Secretary may request staff assistance from within the Department and any office or Bureau thereof as the Deputy Secretary deems necessary.

(b) CONTRACTS.--To the extent and in such amounts as may be provided in advance by appropriations Acts, the Deputy Secretary may enter into contracts and other arrangements with public agencies and with private persons and organizations for consulting services and make such payments as necessary to carry out the provisions of this title.

(c) INDEPENDENT LEGAL COUNSEL ON INDIAN TRUST MATTERS.—Notwithstanding any other provision of law the Deputy Secretary shall be authorized to retain counsel on Indian trust matter who shall be independent of the Department of the Interior's Office of the Solicitor. The Indian Trust Counsel shall advise the Deputy Secretary solely with respect to the fiduciary trust obligations of the Deputy Secretary.

~~SEC. 306. ADVISORY BOARD. *The Consortium proposal does not address Section 306. Rather it proposes a new section 307 which would suggest the intent is to retain Section 306. I have serious concerns that an advisory board to the Deputy Secretary would not be consistent with the logic of the elevation of the AS-IA…*~~

~~(a) ESTABLISHMENT AND MEMBERSHIP.—Notwithstanding any other provision of law, the Special Trustee shall establish an advisory board to~~

~~provide advice on all matters within the jurisdiction of the Special Trustee. The advisory board shall consist of nine members, appointed by the Special Trustee after consultation with Indian tribes and appropriate Indian organizations, of which--~~

~~(1) five members shall represent trust fund account holders, including both tribal and Individual Indian Money accounts;~~

~~(2) two members shall have practical experience in trust fund and financial management;~~

~~(3) one member shall have practical experience in fiduciary investment management; and~~

~~(4) one member, from academia, shall have knowledge of general management of large organizations.~~

~~(b) TERM.--Each member shall serve a term of two years.~~

~~(c) FACA.--The advisory board shall not be subject to the Federal Advisory Committee Act.~~

~~(d) TERMINATION.--The Advisory Board shall terminate upon termination of the Office of Special Trustee.~~

TITLE IV. INDIVIDUAL INDIAN MONEY ACCOUNT HOLDER CLAIMS SETTLEMENT.

Section 401. Mediator.

(a) APPOINTMENT; DUTIES; QUALIFICATIONS; TERMINATION OF DUTIES - Within thirty days after the date of enactment of this Act, the Director of the Federal Mediation and Conciliation Service shall appoint a Mediator hereinafter referred to as the "Mediator") who shall assist in negotiations for the settlement of the rights and interests of the parties in the case of Cobell v. Norton, Civ No. 96-1285 (RCL). The Mediator Shall not have any interest, direct or indirect, in the settlement of the interests and rights of the parties to the litigation. The duties of the Mediator shall cease upon the entering of a full agreement into the records of the District Court or the submission of a report to the District Court after a default in negotiations or a partial agreement among the parties.

(b) NATURE OF PROCEEDINGS - The proceedings in which the Mediator shall be acting shall be those in the Cobell case now pending in the United States District Court for the District of Washington, D.C. (hereinafter referred to as "the District Court").

(c) ASSISTANCE FOR MEDIATOR - The Mediator is authorized to request from any department, agency, or independent instrumentality of the Federal Government any information, personnel, service, or materials he deems necessary to carry out his responsibilities under the provisions of this Title Each such department, agency, or instrumentality is authorized to cooperate

with the Mediator and to comply with such requests to the extent permitted by law, on a reimbursable or nonreimbursable basis.

(d) STAFF ASSISTANTS AND CONSULTANTS - The mediator may retain the services of such staff assistants and consultants as he shall deem necessary, subject to the approval of the Director of the Federal Mediation and Conciliation Service.

Section 402. Negotiating Teams.

(a) APPOINTMENT; TIME; MEMBERSHIP; NATURE OF AUTHORITY - Within thirty days after the appointment of the mediator by the Director of the Federal Mediation and Conciliation Service, the mediator shall communicate in writing with the parties directing them to appoint a negotiating team to represent each party. Each negotiating team shall be composed of not more than five members. Each party shall promptly fill any vacancies which may occur on its negotiating team. Notwithstanding any other provision of law, each negotiating team, when appointed, shall have full authority to bind its principals with respect to any matter concerning the Cobell litigation.

(b) FAILURE TO SELECT AND CERTIFY - In the event either or both of the parties fail to select and certify a negotiating team within thirty days after the mediator communicates with the them under subsection (a) of this section or to select and a replacement member within thirty days of the occurrence of a vacancy, the provisions of section 404 of this title shall become effective.

(c) FIRST NEGOTIATING SESSION; TIME AND PLACE; CHAIRMAN; SUGGESTIONS FOR PROCEDURE, AGENDA, AND RESOLUTION OF ISSUES IN CONTROVERSY - Within fifteen days after the designation of both negotiating teams, the Mediator shall schedule the first negotiating session at such time and place as he deems appropriate. The negotiating sessions, which shall be chaired by the Mediator, shall be held at such times and places as the Mediator deems appropriate. At such sessions, the Mediator may, if he deems it appropriate, put forward his own suggestions for procedure, the agenda, and the resolution of the issues in controversy.

(d) FAILURE TO ATTEND TWO CONSECUTIVE SESSIONS OR BARGAIN IN GOOD FAITH - In the event either negotiating team fails to attend two consecutive sessions or, in the opinion of the Mediator, either negotiating team fails to bargain in good faith or an impasse is reached, the provisions of section 404 of this title shall become effective.

(e) DISAGREEMENTS WITHIN TEAM - In the event of a disagreement within a negotiating team the majority of the members of the team shall prevail and act on behalf of the team.

Section 403. Implementation of Agreements.

(a) FULL AGREEMENT - If, within one hundred and eighty days after the first session scheduled by the Mediator under section 402 of this title, full agreement is reached, such agreement shall be put in such form as the Mediator determines best expresses the intent of the parties. The agreement shall be reviewed by each negotiating team and the mediator shall consider their comments, if any, thereon. The mediator shall then put the agreement in final form and it shall signed by the members of negotiating teams and the Mediator. The Mediator shall then cause the agreement to be entered into the records of the proceedings in the Cobell case. The provisions of the agreement shall be adopted by the District Court and put into effect immediately thereafter.

(b) PARTIAL AGREEMENT - If, within the one hundred and eighty-day period referred to in subsection (a) of this section, a partial agreement has been reached between the parties and they wish such partial agreement to go into effect, they shall follow the procedure set forth in subsection (a) of this section. The partial agreement shall then be considered by the Mediator in preparing his report, and the District Court in making a final adjudication, pursuant to section 404 of this title.

(c) CONSISTENCY WITH EXISTING LAW - For the purpose of this section, the negotiating teams may make any provision in the agreement or partial agreement not inconsistent with existing law. No such agreement or any provision in it shall result in a taking by the United States of private property compensable under the Fifth Amendment of the Constitution of the United States.

Section 404. Default or Failure to Reach Agreement; Recommendations to District Court; Final Adjudication. -- If the negotiating teams fail to reach full agreement within the time period allowed in section 403 of this title or if one or both of the parties are in default under the provisions of section 402(b) or (d) of this title, the Mediator, within ninety days thereafter, shall prepare and submit to the District Court a report containing his recommendations for the settlement of the interests and rights set out in section 401(a) of this title which shall be most reasonable and suitable in light of the law and circumstances and consistent with the provisions of this subchapter. Following the District Court's review of the report and recommendations and any further proceedings which the District Court may schedule, the District Court is authorized to make a final adjudication and enter judgment in the Cobell case consistent with the report and recommendations of the Mediator, and the District Court shall do so no later than 180 days after receipt of the Mediator's report and recommendations.

TITLE V. LAND CONSOLIDATION.

This is reserved as a placeholder for provisions on land Consolidation.

[The Tribal Trust Legislation Work Group has issued a statement of principles concerning land consolidation]

[PLACEHOLDER: Request for permanent ALJ's or hearing officers with broader authority to provide for more efficient resolution of claims].

TITLE VI. ADMINISTRATIVE PROVISIONS AND DISCLAIMERS

Section 601. Regulations.

(a) IN GENERAL-

(1) PROMULGATION- Not later than 90 days after the date of the enactment of the American Indian Trust Fund Management Reform -Amendments Act of 2005, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title.

(2) PUBLICATION OF PROPOSED REGULATIONS- Proposed regulations to implement this title shall be published in the Federal Register by the Secretary no later than 18 months after the date of the enactment of the American Indian Trust Fund Management Reform Amendments Act of 2005.

(3) EXPIRATION OF AUTHORITY- The authority to promulgate regulations under paragraph (1) shall expire 24 months after the date of the enactment of the American Indian Trust Fund Management Reform Amendments Act of 2005.

(b) COMMITTEE-

(1) IN GENERAL- A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall include federal government representatives and representatives nominated by Indian tribes with trust funds held by the Secretary, tribes managing trust resources under Self-Determination Act agreements, tribes eligible for participation in the trust asset management demonstration project, tribes eligible for the Great Plains Demonstration Program, and other affected Indian tribes. `(2) REQUIREMENTS-

(A) The committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, and tribal organizations

(B) The committee shall provide mechanisms for consultation with individual Indians.

(c) ADAPTATION OF PROCEDURES- The Secretary shall adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes.

(d) EFFECT- The lack of promulgated regulations shall not limit the effect of this Act.

Section 602. ~~MISCELLANEOUS~~ Savings Provisions.

(a) FEDERAL TRUST AND TREATY RESPONSIBILITIES.-- Nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws, regulations, policies, agreements and court decisions.

(b) TRIBAL SELF-DETERMINATION AND SELF-GOVERNANCE.-- Nothing in the Act shall be construed to diminish in any way ~~Nothing in this Act diminishes or otherwise impairs the:~~
~~(A) trust responsibility of the United States with respect to the Indian people, or~~
~~(B)~~ the rights and authority of tribes pursuant to the Indian Self-Determination Education and Assistance Act, 25 U.S.C. Sec. 450 et seq.. All agreements entered into pursuant to such law shall remain in full force and effect.

Section 603. Severability. -- If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision or circumstance and the remainder of this Act shall not be affected thereby.

TITLE VII. CONFORMING AMENDMENTS

Section 701. Government Organization Employees.

(a) Section 5313 of title 5, United States Code, is amended by inserting "Deputy Secretary of the Interior for Indian Affairs" after "Deputy Secretary of the Interior"

(b) Section 5315 of title 5, United States Code, is amended by striking "Assistant Secretaries of the Interior (6)" and inserting "Assistant Secretaries of the Interior (5)".

Section 702. Inspector General Act of 1978.—A new section 8K shall be added at the end of Appendix 3, of title 5, United States Code Annotated, which shall read as follows:

Section 8K. Special Provisions relating to the Inspector General of the Department of the Interior.

(a) In addition to the Assistant Inspector Generals provided for in section 3(d) of the Inspector General Act of 1978, the Inspector General of the Department of Interior shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for the Indian Trust who shall have oversight responsibility for internal investigations, performance reviews, audits, and appeals with respect to the United States' trust responsibilities to American Indian tribes and individuals and as provided for in the American Indian Trust Fund Management Reform Amendments Act of 2005.

(b) The responsibility for supervision of programs and operations of DOI described in paragraph (a) shall not extend to tribes or tribal organizations carrying out trust programs, functions, services and activities pursuant to agreements under the ISDEAA.

(c) The Assistant Inspector General for Indian Trust may initiate, conduct and supervise audits and investigations in the Department of the Interior as the Assistant Inspector General for Indian Trust considers appropriate for good cause shown [PLACEHOLDER – are further limits necessary?], whether the requests for such investigations come from Departmental officials, Indian tribes or individual Indian beneficiaries.

(d) When Indian tribes and individual Indian beneficiaries provide a written request for action from the Assistant Inspector General for Trust, a response as to whether or not the requested action will be carried out must be provided within 30 days of receipt of the request. For decisions not to carry out the requested action, a detailed explanation of the grounds for the Assistant Inspector's decision must be provided.

(e) The Assistant Inspector General shall provide independent review of actions associated with the Deputy Secretary for Indian Affairs' "quality assurance and audit unit" as provided by Section 305 of

American Indian Trust Fund Management Reform Amendments Act of 2005.

(f) Reporting to Congress.—

(1) The Assistant Inspector General for Indian Trust shall provide an annual report to the Senate Committee on Indian Affairs and House Resources Committee which shall include, but need not be limited to, the content listed in Section 5 of the Inspector General Act of 1978.

(2) The Assistant Inspector General shall be available to appear at annual hearings to discuss the report and its implications.

TITLE VIII ~~IV~~--AUTHORIZATION OF APPROPRIATIONS

Section 801. Authorization of Appropriations.-- There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

~~**Sec. 9. RESOLUTION OF TRIBAL CLAIMS**~~

~~**There shall be a process for resolving tribal claims against the United States for the mismanagement of trust assets and funds, including the possibility of a tribal claims commission. [detailed language needed.].**~~

~~**Sec. 10. FRACTIONATED HEIRSHIPS AND HEIRSHIP**~~

~~**Enacted tribal laws governing heirship and probate, shall be the prevailing law governing such issues. [detailed language needed].**~~

~~**Sec. 11. INDEPENDENT LEGAL COUNSEL FOR TRUST ISSUES**~~

~~**The Deputy Secretary shall have independent legal counsel to resolve conflicts involving trust matters.**~~

~~**SEC. 12. REGULATIONS.**~~

~~**The Secretary of the Interior, in consultation with interested Indian tribes, shall promulgate such regulations as are necessary to carry out this Act and amendments made by this Act.**~~

TESTIMONY OF ELOUISE C. COBELL, LEAD PLAINTIFF IN *COBELL V. NORTON*

Good morning, Chairman McCain, Vice-Chairman Dorgan and Members of the Committee. Thank you for inviting me here today to provide testimony to the Committee on the possible legislative resolution of our nine-year old lawsuit. I also want to thank you and your staff for all of your years of hard work on this issue. We know that you all share our desire to do justice. Although we have our strong disagreements with this initial proposal as an appropriate vehicle to resolve the case in a fair manner we are all united in our end goal of achieving an equitable resolution to this century-old stain on this great nation's honor.

We thank you for the opportunity to present our views on this initial proposal and look forward to continuing discussions with you and your staff to deriving a sound legislative approach to achieving our shared goals.

As you know from my earlier appearances, I am here today on behalf of myself and the more than 500,000 other individual Indian trust beneficiaries represented in the lawsuit we filed nearly nine years ago in the Federal District Court of the District of Columbia, *Cobell v. Norton,* Civ. No. 96-1285 (RCL).

Let me reiterate what I have said in prior testimony, there is nothing I would like more than a quick and just resolution to this lawsuit. We are in the tenth year of this litigation. Because of obstruction and delay by government counsel – for which they have been repeatedly sanctioned – justice has been delayed for individual trust beneficiaries. Delay and obstruction is not in our interest. Understand though that trust beneficiaries I have spoken with have – to a person – told me that they want a fair resolution, even if it takes a little longer. They do not want to be sacrificed on the altar of political expediency as they have so many times before.

BACKGROUND

Since 1887, members of the class have been subjected to injustice after injustice. Report after report for generation after generation have cited the rampant mismanagement and malfeasant administration of the Individual Indian Trust. As you know a congressional report from 1915 spoke about this scandal in terms of "fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension."[1] A 1989 Investigative Report of this Committee also found similar fraud and corruption. In 1992, the Misplaced Trust Report from the House Committee on Government Operations made similar findings of malfeasance. The Court of Appeals described the disastrous historic and continuing management of individual Indian property as "malfeasance" – not misfeasance or nonfeasance, but malfeasance – and held further in 2001 that the continuing delay was "unconscionable." *Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001). Most recently, the Federal District Court Judge Royce C. Lamberth -- a former Justice Department senior official, appointed to the bench by President Ronald Reagan – who has presided over this case for nearly a decade -- appropriately described the utter failure to reform by the Interior Department and continuing abuse of the Indian beneficiaries in this way in a recent opinion:

"For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions

[1]"Business & Accounting Methods, Indian Bureau," Report of the Joint Commission of the

engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people." [July 12, 2005 slip op. at 1-2.]

"The entire record in this case tells the dreary story of Interior's degenerate tenure as Trustee-Delegate for the Indian trust – a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy – the end of which is no where in sight." [July 12, 2005 slip op. at 10-11.]

I could not have said it better. This property was taken from Indians to be held in trust in 1887 because the U.S. government thought it could do a better job of managing it than Indians themselves. By setting up the trust, the government promised to abide by common trust laws – like investing the property profitably and providing an accounting to the beneficiaries. As you and many others have recognized, the government has made a criminal mess of the situation, and it has only gotten worse over the years. It has failed even the most simple of trustee duties. It is shocking to say, but the government cannot even say how much money is in each beneficiary's account.

Imagine the outrage if suddenly a major U.S. financial institution were to announce that it had no idea how much money was in each depositor's account. Imagine the headlines. Imagine the congressional hearings, the class action lawsuits that would be filed as a result. Heads would surely roll on Wall Street.

Yet that's exactly what has happened here. In the nine years that our lawsuit has been proceeding, we've won on virtually every single substantive point. Both Judge Lamberth and the

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Congress of the United States, 63rd Cong. 3d Sess., at 2 (1915) (emphasis added).

Court of Appeals have agreed with us that the government has done a despicable job – that it has completely failed us – the individual Indians. Understand the extent that we have prevailed. The government argued that they had no duty to account for our money prior to 1994. The District Court and Court of Appeals agreed with us that they did have such a duty and that they would have to account for "all funds." The Courts held that the duty to account "pre-existed" the 1994 Trust Fund Reform Act. The Courts have also held that the government is in breach of its trust duties. They have held that interest and imputed yields are owed the beneficiary class. The Courts have rejected the government's position that the Courts have limited remedial powers and that this suit is controlled by the limitations – such as deferential review – of the Administrative Procedures Act. The government's position that the statute of limitations limits the accounting back to 1984 has been repudiated as well. The government has challenged the court's jurisdiction; they lost that one too. Time after time on major issue after major issue, the Courts have made clear that the law and the facts are on our side. These have been hard won victories, nine years of brutal litigation that has taken its toll on those of us involved. But we will not sell out individual Indian beneficiaries – we have worked too hard to get where we are.

One would have thought that our government's response to the wholesale repudiation of its case time and again would have resulted in reforms, acquiescence to the rule of law and obedience to Court orders. Sadly, it hasn't. Instead, government officials have continued what the Court of Appeals has termed their "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).

Further, not satisfied with flouting orders, government officials have attempted to vilify the Court itself. They – along with certain allies in Congress – have tried to paint the District

Judge as a rogue. What is the evidence? There is none. No court filing nor even the whispered slander has identified any fact that Judge Lamberth got wrong. The Court has – similar to the Court of Appeals – simply called a spade a spade and cited the government's routine and continuing utter disregard for the law.

To be sure, this case continues to be about mismanagement, breach of trust and the victimized Indian beneficiaries – abused by a century of dishonorable dealings. But this case has become something else as well – it has become about the Judiciary attempting to bring an intransigent executive branch into compliance with its crystal clear fiduciary duties and the things that certain Executive Branch officials will do to keep business as usual.

Because of the government's legendary, obstructionist tactics in this case, it has taken nine years to get to this point, and who knows really how long it will take to get to a judgment. Again, don't take my word for it; listen to the words of the judge:

"Despite the breadth and clarity of the record, Interior continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue. This is yet another factor forestalling the final resolution of the issues in this case and delaying the relief Indians so desperately need." [July 12, 2005 slip op. at 10-11.]

Because of the government's position in this litigation, we can be assured that we will be litigating for years before we see victory. We are quite willing to do so if necessary, but we would like to find a way to bring the case to a just resolution sooner if possible. We are simply losing too many elders who have waited a lifetime for this debacle to be corrected. Every time one of them dies, my heart breaks. They should see this fixed in their lifetime.

That is why we were so pleased to respond to your call to develop Settlement Principles for a resolution of the lawsuit. Heeding your call was an Indian Country united like I have never

seen it. Past differences and petty arguments were put aside, and we came together around a set of Principles that we unveiled five weeks ago. I urge you all to revisit those Principles, and I would ask that a copy be made a part of the record.

PLAINTIFFS' VIEWS ON SENATE BILL 1439

Mr. Chairman, I – like most Indian people – have always viewed you and Vice-Chairman Dorgan as supporters of Indian Country in general and of the goals of the *Cobell* case in particular. Indeed, when you stated during a Committee Hearing in 1995 that if any other group of Americans had been victimized like individual Indians had by this government abuse, there would be people in jail. I knew then that you got it – you had some idea what individual Indians felt like.

At the outset, we should point out that there are some aspects of the proposed legislation that are positive. First, this hearing itself is a constructive step forward that provides us with a forum to address this important matter and thereby help educate Congress and the American People.

In addition, the inclusion of a provision that calls for the settlement amount to come from the Claims Judgment Fund is in everybody's interest. It assures that the Interior Department's budget will not be scored with the cost of the correction of the accounts settlement and hence will not diminish funds for vital Indian programs. The victims should not be punished in order to resolve the problem.

S. 1439 recognizes that the settlement amount ranges in the billions of the dollars. That is a positive aspect.

Another beneficial provision is to assure that settlement distributions received by beneficiaries – being a partial return of their own money – shall not be used to disqualify them from receiving any benefit to which they are otherwise entitled nor shall be turned into taxable income.

However, to be honest, I was deeply disappointed when I read Senate Bill 1439. It falls so short of being a good starting point to resolving the *Cobell* case in an equitable manner. This bill, in present form, is drastically in favor of the government-malfeasors' position. What is more, it is not faithful to two important sources that offer considerable guidance to any legislative resolution effort – the 50 Principles for Settlement and the numerous decisions rendered by the courts in *Cobell* itself.

At the request of this Committee, Indian Country came together in an unprecedented effort to develop appropriate principles to resolving *Cobell* and addressing trust reform. We worked hard and had great success in creating 50 Principles that we strongly believe constitute a roadmap to resolution. Never did we think that every principle would be included in your bill. But S.1439 fails to incorporate the vast majority of the Principles. The bill is not in accord with important judicial rulings made over the nine years of *Cobell* litigation. An equitable settlement must honor and reflect the judicial decisions from the many hard fought victories won in the District Court and United States Court of Appeals.

I do not say these words lightly. Nor am I unmindful that we cannot achieve the goal of resolving this case equitably without you, the Vice-Chairman and this Committee's support.

I say these things because I have an obligation – a fiduciary obligation – to represent the many other individual Indians out there who rely of me. Like Mary Johnson, a Navajo grandmother who relies almost exclusively on the few dollars from her allotment she receives to

support herself and her family. She receives pennies of what a non-Indian is paid for the gas from her land. Or Mary Fish, a seventy-year old Creek woman, who cannot replace the windows in her small home because she lacks the fund yet there are five oil wells that have been pumping constantly for decades on her land. There are so many more – across every reservation, grandmothers and grandfathers, parents and children all suffering the same indignities of their forbears. And why? Because, in the end, people in Washington have always cared more about their own parochial interest than the Indian beneficiaries. The powerful have always assured that the gravy train for corporations – oil companies, gas companies, timber companies – doesn't stop. Too many have been willing the cut the expedient deal, despite the negative affect of beneficiaries.

I won't do that. I've promised too many that I will not rest till justice is achieved. We have been in this for nine years and I want an end, but I am prepared to fight for as long as it takes to achieve fairness – to make this right. A century of "fraud, corruption and institutional incompetence" is enough. In short, Indian trust beneficiaries, which I represent, deserve nothing less than complete assurance that I will come here and represent them in the best way I know how.

Despite my disappointment with the bill as presently drafted, I pledge to continue to work with this Committee in this legislative process to resolve the *Cobell* case and put in place reforms of the individual Indian trust. I am confident that if we work together, we can achieve our these common objectives.

It is with this positive and future looking mindset that I offer what I hope you will see as constructive criticism of S.1439. Because we have only had a few days to review the bill, my comments here are not in any way comprehensive. There are many specific parts of the S.1439

that I believe need to be addressed. I merely highlight some of the areas of deepest concern and some of the places I believe the bill offers a sound approach. It is my hope that the Committee will see fit to have another hearing sometime when we and other stakeholders have had an opportunity to more thoroughly review the bill and offer additional commentary to aid the continuing legislative process.

A. The Fox In Charge of the Henhouse

One of the most disturbing aspects of S.1439 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 to 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. They have been found in breach of trust. They have failed to reform. Is it really reasonable given the history of this case to ask trust beneficiaries to accept their victimizer as the entity to provide for a fair distribution now? 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 (that they had consented to) to produce certain documents. *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 is wholly unacceptable 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 with you, other members of both Houses and, of course, the late great Representative Mike Synar and his distinguished colleague Bill Clinger. Finally, in October of 1994, the Trust Reform Act was enacted. One of the core aspects of the law was to put in place 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 people involved in the management that had the competence to do the task. Also, it was to keep people who did not know what they were doing – like Ross Swimmer who was 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 the Administration 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 we should accept that.

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 after 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 juridical 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.

Moreover, the Court in *Cobell* has nine years of experience of living with the facts of this case. The knowledge developed through that process is invaluable and irreplaceable. No Special Master – even a well meaning one – can possibly do as well as a judge intimately familiar with every facet of the case as the *Cobell* Court is.

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 malfeasor 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. The answer is crystal clear in the asking of the question.

B. The Settlement Amount

We recognize that S.1439 places the settlement amount appropriately in the billions of dollars. That, of course, is only sensible since the government's own internal risk assessment by their contractors set the liability as between $10 to $40 billion.[2] But we are disappointed that S.1439 did not get specific with respect to a number for resolution.

In the 50 Principles, the workgroup put forward what is a completely justifiable and reasonable aggregate settlement amount: $27.487 billion. Given the facts as we know them and the record of this case, this figure is not only supportable but is more than fair to the government that given what has been taken from trust beneficiaries. This amount is not reparationsdamages, nor welfare; it is quite simply a return of a portion of the money that was and is being taken from them.

The amount was derived by reviewing our model for each year of total proceeds from Indian allotted lands. In large measure, the government's model of these proceeds is not far off from plaintiffs' in aggregate amount generated from these lands. For each year, plaintiffs calculate a percentage of the monies that were, for settlement purposes, properly collected,

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[2]SRA International Inc. "Risk Assessment" at 5-1 (2002).

invested and disbursed to the appropriate beneficiary. These disbursement percentage rates are made highly favorable to the government. So, for example, we have presumed -- for purposes of this calculation – that the government can account for upwards of 80% of all transactions, even though we have uncontraverted evidence that they are unlikely to be able to establish over 99% of the disbursements with sufficient evidence because of their mass document destruction. Using this percentage, we have calculated how much of the yearly aggregate proceeds defendants failed to distribute properly. To this number we add interest for each yearly calculation. We add this number together and then subtract again a "litigation delay" – a percentage based calculation for the cost of continuing litigation. The result of this calculation is the: $27.487 billion.

The number is further justified with the following uncontraverted facts that are part of the settled record:

1) The government's potential liability well exceeds $100 billion. (This is the $13.5 billion they have admittedly collected plus interest since the courts have already concluded that interest and "imputed yields" are owed).

2) The government concedes that it will have to spend upwards of $14 billion just do perform the accounting required by law – that is how much it will cost merely to figure out how many tens of billion more they owe Indian landowners.

3) Even if they were to spend that amount of money, because they have destroyed so many documents, the accounting will never be adequate. The government concedes have called doing an accounting "futile" and "impracticable."

4) An internal government report – prepared by the government's experts – concludes that the government's liability is between $10-40 billion.

5) The government says it owes Indian Trust beneficiaries only a paltry sum, but the government has no credibility and no facts to back up its wishful claim. In fact, in 2005, plaintiffs asked the Court to have a trial on the adequacy of their so-called "accounting process." Not surprisingly, the government opposed plaintiffs' call for a trial, not wanting to put their wild assertions to the test in a judicial proceeding. That is because their so-called "accounting" is nothing more than a sham. It is even less of an accounting process than the "tribal trust reconciliation" which the GAO reported was no where close to the type of review required by law.

The Principle's settlement amount is fair and reasonable. The government's statements to the contrary are baseless. Report after report from 1915 to 1926 ton1934 all the way to reports in 60s, 70s, 80s, 90s and throughout this century have pointed out the lack of internal controls, lack of document retention, failure to properly invest, use of trust funds as "slush funds," documented "fraud," no information technology security leaving the trust assets free to manipulation and theft, inadequate systems etc., etc. The GAO, Arthur Andersen, the Inspector General, the Courts, OMB, Price Waterhouse and many other entities – both private and public – have repeatedly made such findings. Yet, despite all this body of information, the Administration would like everyone to take it on faith that it has properly collected, invested and distributed over 99.99% of the trust funds. What is their basis for this claim? A so-called "accounting" that they refuse to allow be subjected to judicial scrutiny. This is hardly a position that deserves any credit, particularly in light of a group of government officials that have been sanctioned time and again for failing to tell the truth to the Court.

It is vital that a fair amount be selected for the amount of the settlement funds at an early stage. The number Indian Country has agreed to through the Principles is fair and we hope that upon consideration of the evidence that number is utilized by the Committee.

C. Failure to Adequately Address Trust Reform

Another fundamental area of concern is the inadequacy in addressing reform of the Individual Indian Trust. During my testimony before this Committee in March of this year, I stated what our experience demonstrates conclusively is the bare minimum necessary for even giving trust reform a fighting chance:

This record makes plain certain inescapable facts. Specifically, accountability and meaningful trust reform will come only when the government is forced to change. It will not do so voluntarily. If a century of failed reform is not long enough to demonstrate this fact, certainly the experience of the last two-decades of more promises and more rhetoric – but no reform – should be. I, along with many others from Indian Country, attempted to work with Interior defendants for over a decade prior to bringing this lawsuit. We heard many promises and many commitments made to Congress in hearing after hearing, but never reform, never a meaningful movement towards bringing the government into compliance with its trust duties.

The sole source of the limited progress has been this lawsuit – the constant prod requiring the Interior Department to at least look like it's interested in managing our property better. But even with the litigation, the government has fought us every step of the way. One of the Court's recent orders referenced defendants' obstructionist tactics throughout this case and the resulting delay and harm to the beneficiary-class:

> As this case approaches its ninth year, it is this Court's hope that the defendants' next appeal will be truly expedited, and will lead to the resolution of these legal issues. Elderly class members' hopes of receiving an accounting in their lifetimes are diminishing year by year by year as **the government fights – and re-fights – every legal battle**. For example, the defendants continue to contend today that this is a simple record-review Administrative Procedures Act case – a proposition that has been squarely rejected by this Court on more than one occasion, as well as by three different Court of Appeals panels in *Cobell VI, Cobell XII,* and *Cobell XIII.*
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> **In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics.**[3]

It is these insidious litigation tactics by the government that have led to numerous contempt proceedings[4] and our calls in 2001 for a receivership. Let me be clear on this point, the record amply supports the conclusion that the Interior Department does not have the political will or the institutional competence to reform itself. A receiver – temporarily appointed during the pendency of reform –

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[3]*Cobell v. Norton*, __ F. Supp. 2d __, 2005 WL 419293 at *7 (D.D.C. February 23, 2005) (emphasis added).

[4]While plaintiffs would prefer not to have to resort to contempt, we have been left with no alternative in light of the government's persistent violation of court orders and other serious misconduct. In addition, we note, that we have offered to drop all contempt charges if the government would agree to stop its obstructionist behavior and consent to a prompt accounting trial date. To date, the government has not accepted this offer.

with the requisite competence and charged with, and singularly focused on, instituting reforms that permit the safe and sound management and administration the Individual Indian Trust is, in my view, the sole way to **ensure** reform will occur.

But I also understand that the government is highly resistant to the receivership approach and has called it a "non-starter." So while plaintiffs will continue to pursue this relief, among others, through judicial proceedings, I understand that this is not likely an acceptable avenue to attain the requisite political support for settlement legislation. It is with this baseline understanding that we propose certain other alternative ways that may lead to successful trust reform. These alternatives will not ensure success like a receiver would. But a proposal that contains at least these measures **may** be sufficient for reliable and meaningful reform.

Often, Interior Department officials come to Congress and discuss the Individual Indian Trust as if it is not fixable. They complain of the enormity of the problem and they speak of the challenges involved. We hear excuse after excuse as to why they have not brought themselves into compliance with the most rudimentary and basic fiduciary duties.

What belies their contention that reform is impossible or near impossible is that there are millions of trusts managed in the private sector all over this Nation that do not have these problems and do not suffer from malfeasant management. To be sure, this system has not evolved into a gold standard for mismanagement overnight, it is the result of a century of fraud, corruption and institutional incompetence that has enriched many, but left the Indian owners poor. Contrary to the pleas of government officials, however, the cure need not be decades away.

To achieve real and meaningful reform requires certain fundamental changes must be made immediately. If one compares the mismanaged Individual Indian Trust with any other trust in the United States, certain observations are easily discernable. There are baseline elements that the Individual Indian Trust lacks which are elements of all other trusts. Moreover, the lack of these elements perfectly explains why the Individual Indian Trust is so profoundly mismanaged and wholly lacks accountability.

In all other trusts, there are, among other things: (1) clarity of **trust duties** and standards; (2) clarity regarding the complete **enforceability** in courts of equity of trust duties and clarity regarding the availability of **meaningful remedies** against a trustee breaching its responsibilities; and (3) **independent** oversight with substantial enforcement authority to ensure that beneficiary rights are protected. The Individual Indian Trust, by contrast, does not have these elements.

> These commonplace elements in other trusts ensure accountability and make it impossible for trust to deteriorate to the extent the Individual Indian Trust has. Their absence ensures no accountability and permits the trustee to abuse the beneficiary with impunity. What possible incentive is there for a trustee to manage trust assets safely and soundly and for the best interests of the beneficiary, if it is nearly impossible to hold them accountable when they mismanage?
>
> Reform must, at a minimum, bring the Individual Indian Trust in line with all other trust by addressing these three missing elements. Duties must be stated expressly in statute. Congress must clarify that Indian beneficiaries, like all non-Indian trust beneficiaries, can bring an action to enforce **all** trust duties in courts of equity. And Congress must provide for effective oversight.

Testimony of Elouise P. Cobell, Lead Plaintiff in Cobell v. Norton, The Senate Committee On Indian Affairs, Oversight Hearing on Trust Reform, March 9, 2005, at 6-9

I am deeply disappointed that in this present draft of the bill, our views on the necessary ingredients for adequate reform were wholly ignored. There is no codification of trust standards. There is no oversight body. And there is no cause of action. The three missing elements that distinguish this broken trust from the thousands of trusts for non-Indians throughout this great Nation are still missing.

D. Other Miscellaneous Provisions

The problems identified above are not the only ones. Among the other problems that need to be addressed are the following:

1. The definition of "claimant" is also problematic since Section 102(2) would limit those eligible to receive any distribution to the beneficiaries and their heirs alive as of the date the 1994 Reform Act was enacted. This excludes a substantial percentage of the *Cobell* class, which the court certified on February 4, 1997 as consisting of all past and present

Individual Indian Trust beneficiaries dating back to the Dawes Act of 1887 imposing the trust. Equally disturbing, this narrow definition of the class seems to buy into the government's view that there is no duty to account except as derivative from the 1994 Act – a position that was completely repudiated by the Court of Appeals in February 2001. *Cobell v. Norton,* 240 F.3d 1081 (D.C. Cir. 2001).

2. The bill also directs that to determine the "formula" for determining a portion of the distribution amount to be received by each claimant, the Secretary takes into account only those funds that have passed through the IIM account since 1980. This would work a gross injustice. In light of the holding in Cobell VI that "all" funds means exactly what it says and that an accounting dating back to 1887 is required, the cutback on our clients' rights is a direct affront to this key victory won in the Court of Appeals four and one-half years ago. To make matters worse, the bill would extinguish the rights of beneficiaries – even if they did not receive anything from the settlement.

3. There is no definition of what information should be relied upon to determine facts upon which distribution decisions are made. It is well established that government records lack integrity. Yet, it seems that they are to be relied upon. This is unreasonable and could work serious injustices to various individuals.

4. The findings clauses of the bill completely fail to set a proper foundation for a resolution of this case. There is no mention of mismanagement, fraud

and the corruption that has pervaded the management of our assets. There is no mention of the found breaches of trust. There is no mention of the government's litigation delay tactics and obstructionist conduct. There is no mention of the Court findings of unconscionable delays. There is no mention of the pain and suffering endured by generation of Indians because of this governmental abuse. Instead, there seems to be more of a blame on the litigation and a focus on ending it – the only thing that has achieved any positive change whatsoever.

CONCLUSION

Mr. Chairman, let me conclude by reiterating the plaintiffs commitment to resolving this case. Our misgivings about this current draft bill are not intended as a rejection of the process of achieving resolution. We have vigorously pursued litigation because we want resolution. We do not care if achieving fairness and stopping abuse of individual Indian beneficiaries comes through litigation, mediation or a settlement act, or arbitration for that matter. The means are unimportant. What is important is that we do so quickly and fairly.

I look forward to continuing our work together to finally and conclusively put an end to the criminal administration of our trust property. We have a chance right now to stop this "fraud, corruption, and institutional incompetence" that has pervaded the system for a century. We will not rest until that is completed and we pledge to work with you to get that done. With help from this Committee, we can make sure that the abuse present since 1887 is not still present in 2007.

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA DRIVE • BELLINGHAM, WASHINGTON 98226 • (360) 384-1489
DEPARTMENT_____ EXT._____

STATEMENT OF DARRELL HILILAIRE,
CHAIRMAN OF THE LUMMI INDIAN NATION
FOR THE RECORD OF THE SENATE COMMITTEE ON INDIAN AFFAIRS-
OVERSIGHT HEARING ON THE INDIAN TRUST REFORM ACT OF 2005 (S.1439)
AND THE PROPOSED SETTLEMENT OF COBELL VS. NORTON

JULY 26, 2005

Opening Statement: The Lummi Indian Nation is very concerned about the eventual settlement of the Cobell case and 'Trust Reform' as a matter of federal law & policy. We have reviewed the 'draft legislation' introduced as Senate Bill 1439. We, as a sovereign nation with separate treaty relationships with the United States, recognize that the larger Indian Nations involved, and the nearly half million class action litigants (IIMA Holders), have more invested in the settlement than our small nation. However, in the tedious court process, we believe congressional settlement would provide greater final control over the outcome for all parties. We agree that many of the elderly IIMA Holders will not live long enough to see justice restored. In addition, we believe 'Trust Reform' is essential to the future of Native American governments and people. But, 'Trust Reform' must incorporate the dialogue and recommendations of the Indian Nations' leadership. National control of 'Indian Affairs' was never constitutionally meant, originally, to be a unilateral relationship in which 'federal plenary power' would be used to smother Inherent Indian Sovereignty and economically marginalize the Indian People. The five hundred thousand litigants represented in the action (as IIMA Holders) are tribal members first and foremost. Tribal governments represent their long-term interests and must be at the settlement table.

We have included, hereunder, different papers on this topic that make up our complete testimony for the congressional hearing records. Immediately following this opening statement we have a *'Testimony Summary'*. This is followed by a section entitled, *"A Question of Political Integrity in Indian Country"*. This section addresses what we believe is the constitutional relationship between the Indian tribes, the United States, and the various individual states. We believe the U.S., under the constitutional theory construct, is a block between states and their interference with tribal self-government. We believe this addresses a proper view of what it means for the U.S. to govern over 'Indian Affairs' as intended and understood by the Founding Fathers in

1787. Following that paper is a second section entitled, *"A Brief History of the Lummi Nation's Treaty Relationship with the United States Government"*. We believe this portion of the testimony surmises the hardships that the 'Federal Indian Laws & Policies' (per Trust Responsibility) have inflicted upon the Lummi Nation, despite the fact that the nation had a treaty relationship with the United States. The Lummi Nation believes, as provided therein, that we have a right to exercise our inherent sovereignty, that we have a right to be self-determining, self-governing, and to enjoy economic self-sufficiency that would help finance our duties & responsibilities in performance of 'essential governmental functions and services'. The final part is entitled, *'Self-Determination and Self-government of Indian Country Requires an Intertribal Sovereignty Platform that is an Advocacy Agenda for Working with the U.S. Congress'*. This part addresses areas of Federal Indian Law or policy that must be legislatively addressed in order to eliminate the 'marginalization status' that Native Nations have had to endure for the past one hundred & fifty years or more.

The cruel reality is that 'Federal Indian Law' still holds the individual Indians and Indian Nations to be incompetent and non-competent. It still attempts to separate our tribal members out and away from tribal government and convince them that the 'trust system' is the only means to protect their immediate and long-term interests as 'citizens'. It makes it nearly impossible for Indian Nations to be 'trusted' by their own people. It interferes with the nations' attempts to become economically self-sufficient, self-determining, and self-governing. Indian Country should enjoy jurisdiction over all affairs, persons, and property inside their exterior boundaries. We should enjoy the revenues, taxes, fees, incomes, or whatever, that can be generated from the benefits of having reserved lands and natural resources for our nations and people. The reservations were intended to be our 'permanent homelands' and for our 'exclusive use'. The presence of non-Indians inside our reservations is the result of two forces- federal law that authorized their presence and the 'scorched earth politics' that drove our tribal societies into marginalization and poverty- forcing the elderly and young into an economic desperation that still exits on the majority of the Indian Reservations today.

Cobell should not be settled simply to give the United States a way to avoid their 'duty as the guardian'. Whether the amount is six or one hundred and fifty billion dollars owed (due to Cobell historical accounting, penalities, and interest) the fact remains that the 'Trust System' has failed, it always has and always will. We are not prisoners of war. Very few tribes actually were

conquered in wars with the United States. The United States secured well over 3.5 million square miles of land and natural resources through 370 ratified Peace Treaties (with about the same number not ratified) entered into with the Indian Nations. This is the foundation to their greatness as a Superpower. And, how you treat your own indigenous people(s) becomes the message and model of how other superpowers shall treat theirs. The United States must hold honor and integrity above the cheapness of materialistic politics. Each member of Congress is empowered by various constitutional delegations from 'We the People of the United States' to address the subject of 'Indian Affairs'. How you vote and decide these matters reflects the duty and responsibility owed to the whole Nation, as a free and responsible People.

We pray that Cobell and Trust Reform will go hand-in-hand; but, this is true if and only if there is 'integrity' in how the Individual tribal Indians and Indian Nations are treated in the proposed legislative resolutions.

We applaud the Senate and House Leadership that have come forward time and again in defense of the rights of Indian People and Indian Nations. Each of you reflect the words of Justice Black, *"Great Nations, Like Great Men, Keep Their Word."* We believe that the Senate, working with the Indian Nations, may iron out differences found between the parties as to what would entail an acceptable Cobell Settlement and viable Trust Reform; if all involved parties practice due diligence, patience, and never surrender to failure.

TESTIMONY SUMMARY:

- The Lummi Nation believes that Cobell vs. Norton should be settled in a fair and equitable manner that takes into consideration the pain and suffering endured by the Indians;
- The Lummi Nation believes the Cobell settlement should entail U.S. concessions as to the rights of Indian Nations to exclusively own and regulate their lands and natural resources for their exclusive use, nor shall the federal or individual state governments be allowed to tax the same or the revenues derived therefrom;
- The Lummi Nation believes the Cobell settlement should give great attention to the proposed level advocated by tribal leadership at $27.5 billion dollars;
- The Lummi Nation believes that the 'settlement funds' should not impact current Indian Affairs appropriations and budget, so as to not penalize the victims;
- The Lummi Nation believes that the Office of Special Trustee should be disbanded and the functions transferred back to a 'reorganized' BIA, as a part of Trust Reform, and all functions absorbed by the new Under Secretary;
- The Lummi Nation believes that the legislation must assure tribes that it does not propose to settle tribal claims that were not raised as a part of the litigation;
- The Lummi Nation believes that no tribe should be forced to accept any outstanding 'Indian Claims Commission' or Indian Court of Claims judgments that have been offered/issued but never accepted by the Indian Nations (e.g., Lummi Nation rejected Docket #110 Settlement);
- The Lummi Nation believes it has been deprived of no less than a billion dollars in economic/market value associated with treaty reserved fishing resources (from 1889 to 1975) and this subject was not litigated in the U.S. v. Washington or Cobell cases;
- The Lummi Nation does not relieve the BIA/DOI of any liability or fault associated with their failure to protect the Treaty Reserved Fishing Rights and Resources of the Lummi Nation from 1889 to 1975;
- The Lummi Nation supports the development of the 'Commission' to research, review, investigate, conclude, and make recommendations on federal Indian law and policy, as so much applies to the evolution of 'trust management;'
- The Lummi Nation supports the development of the self-government project for Section 131 tribes and believe the process should be expanded to every Indian Nation that desires to participate, provided appropriations are secured;
- The Lummi Nation believes that participation as a Section 131 Tribe should not relieve the United States of any duty, responsibility or other rights owed by the United States to the Indian Nations and people, regardless of whether or not the participating tribes are successful as Section 131 Tribes;
- The Lummi Nation recognizes that merger funds were transferred to the Nation per the Self-Governance Compacting/Annual Funding Agreements and have been completely inadequate to meet the demands associated with trust management of fractionated estates located on the Lummi Reservation;
- The Lummi Nation believes that starting dates of violations of the trust, per the Indian Tribes, can be substantiated by the Hearing Records of the 42nd Congress, Committee on Indian Affairs, per "Investigations of Indian Frauds" of 1872-73;

- The Lummi Nation accepts that most individual trust mismanagement problems originate with the General Allotment Act of 1887;
- The Lummi Nation believes that all buy back of shares of fractionated estates must place the land title in the permanent ownership of the Indian nation, as a part of its homeland, and should not be subject to any state jurisdiction or taxation;
- The Lummi Nation believes that any congressional settlement should address the court authorized standards for reimbursement and payment of attorney fees and that any other award made to the said attorneys should be kept to a '*de minimus amount*' recognized as five percent or less per the IRC;
- The Lummi Nation believes that we have the right to practice and preserve our inherent sovereignty, and this was not lost by treaty agreement or conquest;
- The Lummi Nation believes that there is a government-to-government relationship structured between the United States and the Indian Nations as provided for by the U.S. Constitution;
- The Lummi Nation believes that state jurisdiction is extraterritorial to Indian Country;
- The Lummi Nation believes that regulation of 'Indian Affairs' and relationships is a national power and not a power of the individual member states;
- The Lummi Nation believes the states cannot legally exercise jurisdiction inside of Indian Country unless consented too by the tribes via Tribe/State Compact approved with the Consent of Congress;
- The Lummi Indian Nation believes that Indian Nations have an inherent right to be self-determining, self-governing, and to enjoy the benefits of economic self-sufficiency;
- The Lummi Nation believes that the U.S. political/legal theory that Indian People are inferior to non-Indians, or that Indian governments are inferior to local non-Indian governments, is an antiquated racist concept of national and state law that can no longer be supported by constitutional governments;
- The Lummi Nation believes that 'trust responsibility' has been an abuse of constitutional power, and that the Indian Nations are competent to manage their own lands, natural resources, economies, and affairs, provided the state interferences are removed;
- The Lummi Nation believes that the established treaty-relationships had obligated the United States to completely fulfill and honor the 'Sacred Trust of Civilization' duty owed to the Indian Nations in exchange for the 3.5+ million square miles of land ceded to the United States, in perpetuity;
- The Lummi Nation believes that Trust Reform is a national necessity;
- The Lummi Nation believes that Trust Reform should not jeopardize or further injure tribal jurisdiction and rights to self-government;
- The Lummi Nation believes that Tribal Self-Government should be expanded to cover and include all federal departments and agencies;
- The Lummi Nation believes the 'commerce clause' should be used by Congress to further clarify the constitutionally intended tax exemption status of tribal Indians;
- The Lummi Nation believes their People have a right to fair and equitable funding for physical & mental health services and benefits as a matter of treaty commitment and the sacred trust of civilization duty owed by the United States;

- The Lummi Nation believes that their People have a right to fair and equitable education assistance & funding, as a matter of treaty commitment and the sacred trust of civilization duty owed by the United States;
- The Lummi Nation believes that their People have a right to fair and equitable housing assistance and funding, as a matter of treaty commitment and the sacred trust of civilization duty owed by the United States;
- The Lummi Nation believes that tribal governments have a right to exercise criminal and civil jurisdiction over all who enter their territory, and that the United States, in failure to competently exercise the same, has a treaty duty to provide funding to cover & implement tribal law enforcement and Court Systems effectively;
- The Lummi Nation believes that Indian Country was reserved or secured by Indian Nations for the exclusive use of their tribal membership (by treaty, executive order or federal statute) and that the United States must include Indian Nations in the full benefits and funding for Homeland Security;
- The Lummi Nation believes that *states that have constitutional disclaimers that have not been removed by formal amendment* do not have a right to exercise jurisdiction over Indian Affairs, lands, and resources, and that the federal government must require constitutional compliance in light of Article IV of the U.S. Constitution and the 1787 N.W. Ordinance;
- The Lummi Nation believes its People has an inherent right to practice traditional spirituality and that national religious freedom laws should be amended to protect native religions, spiritual practices, sacred regalia, guarantee sacred object and human remains repatriation, and to protect off-reservation sacred sites and ancestral cemeteries;
- The Lummi Nation believes that all incomes derived from any natural resources owned by a tribal Indian or Indian tribe, that was set-aside or reserved by treaty, executive order, or federal statute, is exempt from all federal and state taxes, the same as the 'treaty protected fishing rights' under IRC Section 7873;
- The Lummi Nation believes that any tribal income tax imposed by authority of the Indian governmental tax status act should be written against the federal income tax the same as a foreign income tax would be deducted;
- The Lummi Nation believes Congressional Hearings should be held to address 'legal fictions' that have been superimposed by court-made law to the detriment of the Indian Nations, in light of the congressional goal to secure trust reform;
- The Lummi Nation believes we have the right to exercise complete jurisdiction over domestic relations, child foster care, women rights & protections against violence, child support, and to secure fully funded treatment for traumatized victims;
- The Lummi Nation believes tribes should have a right to utilize economic bonding and tax exemptions & breaks to encourage outside investors to form joint ventures and developments inside Indian Country;
- The Lummi Nation believes Indian Country should be able to fully research, finance, and develop alternative energy systems and companies inside Indian Country, and all said revenues should be exempted under Section 7873 IRC via amendment;
- The Lummi Nation believes that Indian Country should be able to fully research, finance, and develop alternative health care systems and services inside Indian Country;
- The Lummi Nation believes that all land within the exterior boundaries of any and all treaty, statutory, or executive order reservations should always be not taxable by any

outside government other than the respective tribal government, if and only if that land is owned by or has been purchased by a tribal Indian or tribal government or its agencies;

- The Lummi Nation believes that all Indian Nations own the surface and subsurface waters rights essential to the permanent homeland status;
- The Lummi Nation believes that all federal departments and agencies are responsible to honor and respect the government-to-government relationship the United States entered into with the Indian tribes, and should provide full and equitable funding and services to the Indian People and Nations via Self-government compacts and contracts;
- The Lummi Indian Nation believes that the BIA interpretations of what composes an "Indian Tribe' and 'Indian person' has been abused and should be congressionally redefined after consultation with and testimony of the federally recognized Indian nations is completed;
- The Lummi Nation believes that "Indian Affairs" should be elevated to a Department of Indian Affairs and that all federal departments and agencies would be required to house offices and agents within the department to provide their respective funding, programs, services, benefits.

The Lummi Indian Nation appreciates the convening of this oversight hearing on S. 1439 by the Senate Committee on Indian Affairs.

Hy'shqe.

A QUESTION OF POLITICAL INTEGRITY IN INDIAN COUNTRY

Jewell P.W. James, Policy Analyst
Lummi Indian Nation

> "Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestricted power over Indian Nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the Institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted with a fundamental contradiction between our political rhetoric and our political realities."
> (Milner Ball, Constitution, Court, Indian Tribes, American Bar Foundation Research Journal, Volume 1987, Winter, Number 1, p.3)

The political integrity of Indian Country has been compromised by various Presidential policies, congressional enactments, and Supreme Court decisions. Inherent Indian Sovereignty is slowly being cut apart. Indian people and tribal governments have survived the propaganda of non-Indian churches, schools, and governments only to find a breeding prejudice within the Supreme Court. The Court has become dependent upon its own legal fictions to sustain its increasing number of anti-Indian decisions that continuously weakens our legal defenses. Added to this, the "1924 Indian Citizenship Act" has split tribal loyalty. Our members pledge allegiance to the Union and states before they pledge to their tribes. As time passes, tribal nations continue to lose more lands, resources, rights, and jurisdiction. Increasingly, over time, the federal and state governments have come to tax and to regulate absolutely everything inside of Indian Country.

Indian Nations are being "incorporated into the political fabric of state government." Tribes are losing their inherent, separate, sovereignty. Judicial rulings are developing legal fictions and tests that conclude "states' powers" pre-exist and preclude the tribal powers inside of Indian Country. The Court is transferring jurisdiction over

Indian affairs to the states, without support of treaty or national statute, or compacts with the Nations. The Court believes the states are racially superior to the tribes, based on court made law.

Over the past two hundred years, Indian Tribes have gone from separate sovereign tribal nations to quasi-sovereign dependencies- like "wards to their guardians." Instituted on top is the concept of U.S. "plenary power" over Indian Affairs. This plenary power is not in line with constitutional intent but based on laws and court decisions that proclaim Indians racially inferior. Since the U.S. Supreme Court (1830's) conceived the 'dependent status' of Indian Nations and 'wardship' of the Indians, there has been a constant erosion of tribal rights and powers (e.g., Oliphant, 1978). Since the BIA assumed control over Indian Affairs, the federal "trust" became a paternalistic management system. By regulation, a federal department had assumed control over 570 tribal governments.

In 1953, the U.S. Congress had introduced House Joint Resolution 108- The Termination Policy. It dominated Indian Affairs until the Indian Self-Determination and Education Assistance Act was approved in 1975. Since then, tribes had witnessed slow, progressive changes to the Indian laws enacted by the Congress. Over the past three decades, Indian tribes had attempted to have Congress repudiate the termination policy sixteen times. The policy was in the legislative books, side-by-side with self-determination. Finally, in 1988, the U.S. Congress absolutely repudiated the Termination Resolution.

The national government has fluctuated back and forth on Indian Affairs. They have moved from extermination, missionary Christianization, to treaty relationships & peace, to tribal termination, to self-determination, and now to tribal self-government (with half of Indian Country operating under Annual Funding Agreements and Compacts). Every President since Nixon has issued supportive policies on Indian Self-determination. The current Administration has yet to issue its firm Indian Policy. Indian Country hopes this Administration will not, at least, manifestly be anti-Indian via the budget cutting process. In addition, Indian Country will be ever vigilant over the states' rights movement that mix and matches with the invested "oil/energy industries" that dominate the Cabinet. Their interests conflict with those of Indian Country.

The most important point is that the national government has broken away from the old negative Indian policies. However, the current administration is confronted with a failing 'federal trust system' that has robbed Indian Country of their individual trust accounts (six billion to one hundred & fifty billion dollars), and the Court is holding the federal government liable and accountable (Cobell case). The President and the Congress have both called for trust reform and Cobell case settlement, simultaneously. In the mean while, Indian Country finds it difficult to develop economically because the federal trust system has fractionated Indian land ownership.

The U.S. Supreme Court has continued to make decisions compatible to the termination era. The Court is not as vulnerable to the passionate public opinion as the other branches of government- except when the public rallies for congressional reversal of negative court decisions. Felix Cohen wrote his famous Handbook of Federal Indian Law (1942) after much arduous research. The original edition has popularly been called "Cohen I." But, during the Termination era, Cohen I was not in line with federal intent to terminate federal responsibility to the Indian tribes. So, the Department of Interior (BIA) revised it. The second version came to be known as Cohen II (1958). This version reflected the Termination Policy (1948-1975). Recently, we witnessed another rewrite into Cohen III (1982). But, the latter edition was not as favorable to Indian tribes as the first, even though the latter was influenced by Native American Indian lawyers. For this reason, the Five Rings Corporation bought up the copy rights to Cohen I and republished & circulated it to law libraries (paperback, 1986). Since then the copyrights have been transferred to the University of New Mexico School of Law. Regardless of tribal cries of injustice, the Supreme Court continues to use the Cohen II termination version as the official Indian Handbook to guide their Indian case decisions.

Judicial transfer of tribal powers to states is a real threat to tribes. Indian Country must organize to strategize long-term and permanent reversal of these decisions. Although Chief Justice Marshall (1830's) eliminated consideration of Indian Nations being treated as foreign nations, the Court ruled the Cherokee Nation established it was a 'state.' And, the state's powers were

extraterritorial to the Cherokee. This meant the state of Georgia could not exercise jurisdiction inside the Cherokee Nation.

However, the Supreme Court has turned this decision upside down. The Court has empowered state jurisdiction inside Indian Country. The court has done this without depending upon legal language inside treaties-made or acts of congress. The Court has done this by 'court made law.' This is in contravention to the separation of powers instituted by the Constitution. The Supreme Court is seen as an enemy of Indian Country today. The tribes recognize that the legal fictions of court made law have to be reversed by the Congress (e.g., Duro Fix, and Lara decision)- if Indian self-determination and self-government is to produce self-sufficiency.

We must review Milner Ball's comments on Williams v. Lee, 358 U.S. 217 (1959), which was a case decided during the Termination Period. Here the Court defined when it believed actions of the state would or could infringe on tribal self-government. Keep in mind that originally states had no jurisdiction over Indian country (Cherokee Case). But, now the court was going to say when state governments are justifiably inside of Indian boundaries and when they are not impacting essential tribal self-government. Ball, at page 75, stated it thus:

"Self-government is not an end in itself for Indians as it is for non-Indians. According to Black, the purpose of encouraging tribal self-government is not self-government. The goal is not tribes that can sustain themselves, but tribes fit for assimilation into the states. In the Black view, the tribes presently fail to meet the standards for consumption by the states. Self-government is encouraged so that tribes can be found worthy of the states- calves fattened for the feast. In Black's terms, by strengthening tribal government, "Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American Society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the education and economic status of the Indians permits the change without disadvantage to them (Id. at 220-21)."

Indian Country will have to depend upon the constitution to prevent this ultimate consumption. The Presidential Administration, the Congress, and the Tribes must work together to prove that the U.S. Constitution was intended to help maintain the tribes' separate governmental integrity. In encouragement, we must remember the historical contributions the Indians made to the national "Republican Form of government." We must remember that the Constitution is a cornerstone to Indian self-government. We must learn how the Constitution keeps tribal and state governments separate- as found within the constituted theories of the Separation of Powers and Checks & Balances systems. This must be clarified for the modern congressional members, the general public, and even present and future tribal leadership.

The Indian Nations may be the litmus test to the United States' constitutional durability. If the Constitution is to last "a "thousand thousand generations" as believed by President Jefferson, then the existence of such a test may be a crucial ingredient. If there was a miracle at Philadelphia, then it was the incorporation of such a litmus test.

We should keep in mind that the "Union" under the Articles of Confederation was facing the possibilities of an open civil war. Some states were considering withdrawal from the 'confederation.' The reaction was the calling of a Constitutional Convention that produced the 1787 Constitution, to institute a stable Union.

At the 1787 Constitutional Convention, the Founding Fathers created a republican form of government untried in other parts of the world. It produced the first '*written constitutional government.*' The Founding Fathers formed a democratic republic that derived it powers from the people, and was accountable to the people. If the people did not like how government worked then they could amend the constitution to reform the government. Of course, the goal of both constitutions (1781 and 1787) was the elimination of "tyranny" and its manifestation by a concentration of any of the "king's" powers in the hands of the few or by a concentration of the powers of any two of the branches in one. In order to insure against this three things happened. The king's sovereign powers were divided (separated) into that of the Executive, the Legislative, and the Judicial. A Checks & Balance System was incorporated (Auxiliary powers)

to prevent a concentration of power. If it did happen then the people could amend the constitution to dismantle any such concentration. This written constitution system was superior to the unwritten British Constitution. The rights of the people were secured and the powers of government were limited via specific delegations.

David Hutchinon (1975), in 'The Foundations of the Constitution,' had stated " ...that the Constitution was not framed at Philadelphia by the Convention of 1787, but was a cumulative Constitution in the making of which Alfred the Great, Ethelred II, the Barons at Runnymeade, Simon de Montfort, Henry II, Edward I, Edward III, Edward VI, Elizabeth, James I, Sir Edward Coke, Vattel, John Locke, John Wilkes, Montesquieu, Blackstone, the English Parliament, the English judges, and others all had a share. They created the material out of which the American statesmen erected the constitutional structure in 1787." Their historic ideas and debates added to the dialogue as to drafting of the fundamental law that would declare, in written form, the sovereign powers the 'People' were delegating to their national government.

In Marbury v. Madison (1 Cranch, 137, 1803), the Court reasoned that, "*The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. ..... If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. ..... Certainly all those who have framed written constitutions contemplate them as forming fundamental and paramount law of the nation, and consequently the theory of every such government must be that a act of the legislature repugnant to the Constitution is void.*"

In 1987, the U.S. Senate Select Committee on Indian Affairs, Chaired by Senator Inouye, held hearings on Senate Concurrent Resolution #76- known as the Iroquois Resolution. The Committee investigated historical facts showing the Iroquois Confederacy was, also, a model that contributed to the written structure and doctrines incorporated into America's constitutional democracy & republican form of government. The Indians reinforced the

idea there was strength in unity (Union), and that real sovereignty was a power derived from the people. They contributed to the idea that representative government was accountable to the common citizen, that there must be separation of powers and checks & balances to prevent tyranny, that leadership could be impeached, and the people retained the right of caucus, and individual freedoms. In 1988, the Congress passed House Concurrent Resolution #331, as the final version of the Iroquois Resolution. The resolutions passed both houses during the Celebration of 200 Years of the U.S. Constitution. The Resolutions specifically recognized the Iroquois *and Choctaw* Confederacies for being contributive models. Further, it declared that the government-to-government relationship with the Indians was based on the constitution itself.

This history has not been taught in the public schools. It is little understood by the general public. America's records prove that the Indians were important contributors to the republican form of government. The 'colonialists' were 'Americanized' under the influences of the Indian Cultures that flourished around them (See: Jack Weatherford, Indian Givers; Bruce Johannson, Forgotten Founding Fathers and his second publication entitled, Exemplars of Liberty). The Indians' contributions were based on a Sacred Vision (Great Tree of Peace vision of the Iroquois) that was received and shared. The Iroquois tribes used the vision to create and guide their inter-tribal alliances. The teachings and experiences they enjoyed and encountered were shared with the Founding Fathers.

Montesquieu, in the 'Spirit of Laws,' advocated the doctrine that "there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates," or "if the power of judging be not separated from the legislative and executive powers." (Bk XI, ch VI). This separation of the king's powers reinforced the strength of the sovereign power of "We the People." Popular sovereignty was addressed by John Locke in his 'Civil Government.' Locke's writings critically influenced the American colonists. The constitution was a delegation of the power/authority from the 'People' to their government (Bicameral Congress, President, Judiciary). The People could, however, only delegate those powers they had. When in doubt, we look to the constitution to determine whether or not one or more

branches of government are lawfully exercising powers that were delegated to it or them via the written constitution.

The U.S. Supreme Court has taken away more inherent powers of the Indian nations then the congress. Collectively, the Congress, Presidency, and Supreme Court have enacted, enforced, and interpreted more laws dealing with the American Indians than any other politically & racially identifiable group in the United States. These "laws" have routinely taken land, natural resources, and rights away. The 'takings' have been secured through legal fictions that justified the illegal actions. Obviously, the 3.5+ million square miles of land and natural resources secured by treaty or legal fiction has made it extremely profitable for all (citizens, states, and the Nation). In the past it was access to more homestead land and the discovery of gold that motivated the takings; today the Indian rights to coal, oil, uranium, natural gas, and water are at stake. In addition, near proximity to major metropolitan areas, with correlated infrastructural development, has increased the economic demand for control of Indian reservation lands by the states.

In 1986, it was been estimated, by the Center for World Indigenous Studies, that more than $10 billion dollars annually leave Indian Country. A part of this drain leaves in the form of federal taxation. This taxation has been imposed by Tax Court (as supported by the Supreme Court) interpretations of the Internal Revenue Code and the intent behind the 16th Amendment. It found no exemption words in the IRC or the 16th Amendment about Indians or Indian Tribes so concluded it meant to cover them as well. The Court's decisions have even authorized state taxation in Indian Country. There are no clear statutory or constitutional foundations to the decisions. It is court made law. Even the funds appropriated for Indian Affairs is taxed before benefits and services are provided to the Indian people. You will not find, in the Internal Revenue Code, language that exempts foreign nations and their peoples' incomes from application of the U.S. Income Tax either. Since tribal Indians were historically separate, as nations, the IRC does not have specific language designating their exemptions.

The federal government remains so engrossed in the act of taking from Indian Country that it has lost sight of the constitutional foundations for the government-to-government

relationships. Here after, we will review the inter-governmental relationship structured by the Constitution. If we can understand this, we can then develop a strategy to move the U.S. Supreme Court and Congress back toward the constitutionally structured relationship. This would require a series of legislative reversals of Court decisions. Our long-term plan is to have all three branches supporting tribal self-determination, self-governance, and economic self-sufficiency as a permanent policy enshrined in national law. National plenary control of 'Indian Affairs' should be exercised to help the Indian People and Nations and rather than as a means to continuously assure their marginalization.

We believe the following constitutional relationships exist with the tribes. In the Constitutional Convention, tribal Indians were identified as those people that were not included as part of the People that were delegating the constitutional power to the national government. Tribal Indians were not going to be represented or governed by it. The 'tribal Indians' were defined as 'excluding Indians not taxed' (Article I, Section 2, Clause 3)- to clearly proclaim that they could not be represented (by this constituted foreign government) nor could they be taxed to support a government that did not represent them. The 14th Amendment was drafted and ratified in final form to assure that the tribal Indians could not become national citizens (14th Amd, Section 1- Subject to the jurisdiction thereof) and could not become state citizens (14th Amd, Section 2- Excluding Indians not taxed). And, the 1924 Indian Citizen Act did not amend the 14th Amendment or the original 1787 Constitution language. And, the 16th Amendment did not amend the 14th Amendment or amend the original language to assure 'tribal Indians' were included under the 16th amendment.

If the Congress wanted to have relationships with the Indian tribes then it could do so by enacting commerce laws governing their citizens and member states' relationships with the Indian nations (Article I, Section 8, Clause 3). If the national government wanted peace and friendship and to secure legal title to the surplus Indian lands then it could use the treaty-making powers of the President & Senate (Article II, Section 2, Clause 2). If anyone had a legitimate problem with the acts of commerce or treaties-made then the Supreme Court had jurisdiction to hear the cases (Article III, Section 2, Clause 1).

Prior debts and engagements that were entered into with the tribes were still binding (in 1787, per Article VI, Clause 1) under the new (1787) constitution. And, treaties-made or which shall be made became a part of the 'supreme Law of the Land' (Article VI, Clause 2). And, all state and national legislators and public officers were required to take an oath or affirmation to support the 1787 Constitution as ratified and amended (Article VI, Clause 3).

Eventually, New States were created and admitted into the Union (based on the 1787 N.W. Ordinance and Article IV, Section 3), and were required to 'disclaim jurisdiction' over Indian Affairs (via state constitution required per Article IV, Section 4), since Indian Affairs was a matter of national law. The individual states absolutely could not enter any treaties with the Indian Nations (Article I, Section 10, Clause 1)- not even with the consent of congress. The state could, based on the Cherokee case finding that the (Cherokee) tribe established itself as a state, enter 'compacts' with the tribes (Article I, Section 10, Clause 3)- but only with the Consent of Congress.

UNDERSTANDING THE SCHEMATA OF THE U.S. CONSTITUTION:
The government of the United States, under the Constitution, is a federal, democratic republic. It is an indivisible Union of 50 sovereign States. It is democratic because the people govern themselves by local, state, and national governments that are representative of them by their exercise of the vote. It is republican because the power to govern derives from the people.

The basic principles of the Constitution provides 1) that all States would be equal. The National Government cannot give special privileges to one State; 2) that there would be three branches of government- the Presidency, the Congress, and the Supreme Court; 3) that the government is one of laws and not of men; 4) that all men are equal before the law; 5) that the people can amend the Constitution and change the authority of the government; and, 6) that the Constitution, Acts of Congress, and Treaties are the supreme law of the land.

The Constitution is famous for its "Separation of Powers" and "Checks and Balances," as underlining the whole system. They work together to prevent tyrannous concentration of power in any one branch of government, to check and

restrain government, and to protect the rights and privileges of the people. This is what James Madison, in the Federalists, called "auxiliary precautions." For example, and not all inclusive, the President can veto an act of Congress and make nominations to the federal judiciary; the Supreme Court can declare acts of Congress or actions of the Presidency as unconstitutional; and, Congress can impeach the President, Federal Court Justices and judges.

The Constitution is a delegation of powers from the people to the government. It is a limited form of government. If the people and states did not delegate a specific power to the national government then it was reserved to them. The delegated powers were addressed in separate articles for the three branches of government. There is a significant difference in the powers the people have granted to the different branches.

The first article deals with the legislative power vested in the U.S. Congress (Senate and House of Representatives). It was Roger Sherman that proposed the Great 1787 Compromise, which created the agreement for formation of the bicameral congress. The Senate was to represent the States (in line with the original concept of state sovereignty). The House was to represent the people (in line with the concept of popular sovereignty).

The second article deals with the President, who is also the Chief Executive and the Commander-in-Chief of the Armed Forces.

The third article deals with the judicial power of the United States- the Supreme Court and the federal judiciary (as expanded and defined by statute per Article I, Section 8, Clause 9).

The fourth article provided for new states to be admitted into the Union, on an equal footing (required per acts of congress), provided they formed a constitutional, republican form of government (required by Article IV). As this article makes evident, it was no coincidence that all fifty States have written, popular sovereignty constitutions. This article allowed the U.S. to govern the lands it would eventually transfer to new States.

The fifth article allows the "people" to amend the Constitution, to change the powers delegated to the national government. The "Popular" state constitutions have incorporated this vehicle as well. This was a key difference between the Articles of Confederation (state sovereignty and inflexible) and the new Constitution (popular sovereignty and flexible). The amendment power made the Constitution a living document, capable of change in accordance to specified procedures and wants of the people.

The sixth article obliged the Union to honor all debts owed prior to 1787 and to hold the Constitution, Acts of Congress, and Treaties Made as supreme Law of the Land. Also, it requires Oaths or Affirmation to support the Constitution.

The seventh article provided for the ratification of the Constitution by the States.

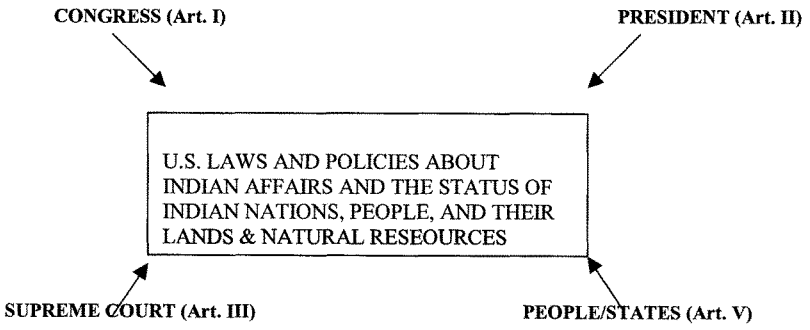
APPLICATION OF THE U.S. CONSTITUTION TO INDIAN AFFAIRS: As noted above, there are several provisions of the U.S. Constitution that have been applied to the Indian Tribes. If we trace the relationship over the past two hundred years, we will begin to understand the intended intergovernmental relationship between the national government and the Indian tribes. We find that each branch of government had a power it could use to help structure the government-to-government relationship with the Indian Nations. And, other provisions were used to interject the national government between the individual states and tribes- for states were most often the enemy of the Indian Tribes.

We believe there is a constitutional block that prevents individual state exercise of jurisdiction inside Indian Country. We find this truth amongst the separation of powers and when considered in light of the "auxiliary precautions" instituted in the system. Of course, the people (as the source of popular sovereignty) recognized the need to protect the rights of states; but, still, the delegation of powers were limited to those powers the people actually had to delegate to either the individual state or the national government.

Government-to-government Relationships with the Indian Tribes: It would be politically convenient to draft a

picture of the questionable 'constitutionally legal' influences on 'Indian Affairs.' If we take all the laws about Indians and put them in a box, then the four corners are represented below. The main idea though is that this is U.S. laws and policies about Indians. It is not laws and policies developed by Indians for Indians. In fact, most all the laws were 'acts of taking from Indians' and the creation of legal fictions to justify the taking. The states exercised their power as a part of the Congress, or via Senate debate in ratification of treaties made with the Indian Nations.

Diagram #1:



Where are the Indian Nations in this diagram? This diagram shows that forces outside of Indian Country has defined what is to be the laws governing Indian Country. Diagram (#1 above) shows the four corners stones to white laws about Indians. Originally, the tribal Nations were separate from the United States and governed themselves. They had powers of self-government. But, once they were classified as 'incompetent' under white law, and since white society believed itself to be racially superior anyway, it began to dictate the laws that would be applied to Indian Country. In fact, the enforcement of these laws became the 'plenary domain' of the Bureau of Indian Affairs in the Department of Interior.

Classic instructions about the U.S. Government begins with the Constitution. Fame attaches to the Separation of Powers and the Checks and Balances instituted in 1787. However, neither of these have been given much consideration in light of their applicability to Indian Affairs and the

intergovernmental relationships with the Indian Nations. Most people only refer to the treaty powers or the Indian Commerce Clause of the constitution. In our review, we find that governance of the relationship with the Indians has been divided amongst all three branches of government. The Congress, the Presidency, and the Judiciary. Each branch has some power over this relationship. And, "We the People" in the process of exercising the Amendment power, can, if it is decided, change it.

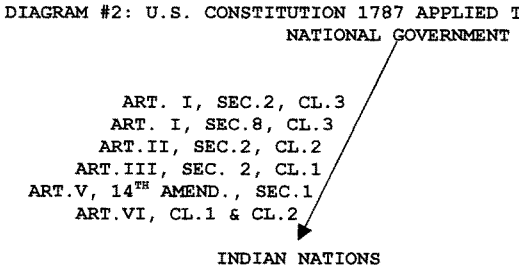
However, Indian people are not considered, by today's governments or courts, as having any more of a right to self-government then federal "plenary power" can accommodate. We have been put into special political and legal categories by the Courts, as accepted by the Congress and Government, to remove us from any inherent protections our tribal governments may extend to us. But, under the constitutional system, neither the "People" nor their government is being held accountable when it comes to protecting the rights and resources of the Indians. In time, our tribal Indians were declared U.S Citizens to force them under the general laws of the United States, the same as other "minorities".

We believe there is an erosion of the "Republican Form of Government," which shall continue until all three branches of government, and "We the People" are forced to honor the original constitutional relationships with the Indian Tribes. Additionally, a new federalism must be installed in which national and state governments will both be required to implementation laws on Indian self-determination and self-governance.

The Iroquois Confederacy was founded on a sacred vision that came to the Indian People and brought unity and peace amongst the warring Nations. The early colonialists (up to the Revolution) found concepts of governance and freedom amongst the Natives that enlightened them to the necessity of rebellion against oppressive government (the British King). The newly forming United States of America would eventually become a world model for the "Republican form of Government." The Founding Fathers used the Indian Confederacies as models for drafting the popular constitution. In fact, the Indian Nations were role-models for formation under the original Articles of Confederation (See: Albany Plan proposal of 1754).

The thoughts of independence behind the 1776 American Revolution would spread across the Atlantic to stimulate the creation of governments instituted by the people throughout Europe. President Woodrow Wilson (1919) used the Iroquois Confederacy as the model for his "League of Nations" proposal right after WWI. That plan failed but became the model for the United Nations after World War II (1945). Today, we find the "Republican form of Government" has become a world vision of oppressed populations that seek freedom (e.g., review member states of the United Nations). The Indian interests in the preservation of the U.S. Constitution should be obvious- it was based on a sacred Indian vision. American Indians have passionately entered every war of the last century in defense of this form of government, and in population ratios above and beyond any other racial or ethnic groups located in the United States. We encourage you to keep this in mind as you explore our diagram of the constitutional relationships(below).

DIAGRAM #2: U.S. CONSTITUTION 1787 APPLIED TO INDIAN TRIBES



The above diagram shows the constitutional provisions that have been applied to govern the relationships the United States has with the Tribal Indians and Indian Tribes. The provisions are explained as follows:

Article I created the Congress, and established the Senate (originally) as representing the States' sovereignty and the House of Representatives representing the People's sovereignty. We find Indians are not included amongst those persons counted for Apportionment of Representation (in the Congress) or direct taxes (Article I, Section 2, Clause 3), by the language "excluding Indians not taxed." Thereunder, it is provided:

"*Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and* ***excluding Indians not taxed****, three fifths of all other Persons.*"

Article I, Section 8, Clause 3 is known as the " Foreign Commerce Clause" and affects relations with foreign Nations. Also, it is known as the 'interstate commerce clause' and affects commerce amongst the several States. Additionally, it is known as the 'Indian Commerce Clause' and affects trade relationships with the Indian Tribes. Thus, although Indians were not represented by the Republic, trade and commerce could be established to the benefit of both parties, under power of the national Legislature. The nation government has the power to govern its memberships (citizens, states) commercial relationships with the Indian nations. The Article provides:

"*To regulate Commerce with foreign Nations, and among the several States, and* ***with the Indian Tribes****;*"

Article II, Section 2, Clause 2 addresses some of the power of the President. The President has power to negotiate treaties. This power has been applied to congressionally authorized negotiations with the Indian tribes more than several hundred times. The President would negotiate the treaties and then submit them to the Senate. Three hundred and seventy Indian treaties were actually ratified by the U.S. Senate and proclaimed by the President. As you can see the Senate has a portion of the treaty powers in order to check & balance the President. In addition, appropriations to meet treaty commitments must originate (Power of the Purse clause) in the House of Representatives. We know that Tribal Indians and Indian Nations could not be represented by the Republic. These relationships were regulated by Acts of Congress through the Indian trade & commerce laws. The other means (as mentioned above) was by establishing a relationship through the treaty powers, in that:

"*He shall* ***have Power, by and with the Advice and Consent of the Senate, to make Treaties****, provided two thirds of the Senators present concur;...*"

Article III, Section 2, Clause 1 empowers the Judiciary to review questions of the Constitution, Laws of the United States, and "treaties made" with the Indian tribes and foreign powers, as follows:

"*The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,* ***and Treaties made, or which shall be made****, under their Authority;-..."*

Article V- Amendments had been applied to Indian Country in the negative, during the constitutional debates of the 39th and 40th Congresses of the Reconstruction Era (1866-1868). The Fourteenth (14th) Amendment, Section 1, provided the words "subject to the jurisdiction thereof" and was intended to not include the tribal Indians in the U.S. Citizenship granted to others; such as the Negro, Gypsy, Hindu, Chinese and other foreign person being naturalized. The Congress debated and concluded that the "tribal Indians" owed their allegiance to their tribal Nations and were not subject to the jurisdiction of the United States, except as exercised by the Treaty-making power or the Indian Commerce clause. As follows:

"*All persons born or naturalized in the United States, and* ***subject to the jurisdiction thereof****, are citizens of the United States and of the State wherein they reside.*"

Article VI, Clause 1 required the United States to honor its debts and engagements owed or entered prior to the ratification of the new 1787 Constitution. Clause 2 made the Constitution, Laws of the United States, and Treaties made, supreme Law of the Land. Therein:

"*All Debts contracted and Engagements entered into, before the Adoption of this Constitution,* ***shall be as valid*** *against the United States under this Constitution, as under the Confederation.*"

"*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and* ***all Treaties made, or which shall be made****, under the Authority of the United States, shall be the* ***supreme Law of the Land;***"

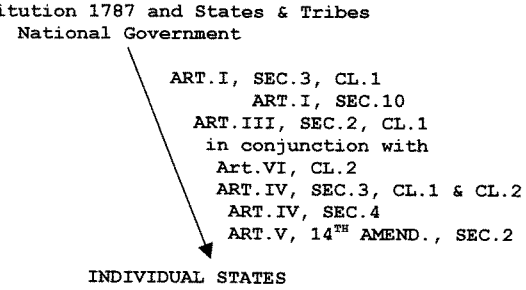
Government-to-Government Relationships with the Individual State:

The Colonies learned from the Indian Confederacies that there is strength in Union- as symbolized by the Eagle clutching the bundle of arrows (See: Dollar Bill). Also, they learned that the individual colonies, and the emerging individual States, were not to be trusted with control and power over Indian Affairs. All to often, the experience of the colonies taught that unchecked actions of one may lead to damages to another or all. . . as in wars with the Indian tribes. This truth was one of the primary reasons the Founding Fathers demanded constitutional assurances that the individual States would not have treaty-making powers.

In consequence, the control of Indian Affairs was retained as a national government power, to protect the republic. Indian Affairs was not subject to the control of the individual states. Their influence had to be exercised through the congressional processes. The states exercised influence when acting as a part of the Union's constitutional government; subject to the Separation of Powers and the Checks and Balances provisions. It was through this process the individual states could influence bicamerally processed legislation that would address trade and commerce relations with the Indian tribes. It through this constitutionally regulated process that the individual States, through their two Senators, could influence "treaty-making." It is via this process the states could influence appropriations for the implementation of Indian Commerce acts or treaty commitments.

Hereunder, we argue there exists a tripartite system between the states, United States, and Indian Tribes, one in which the United States is a constitutional block between the Tribes and the individual States.

DIAGRAM #3: U.S. Constitution 1787 and States & Tribes



As mentioned, the Senate represents the States. This is intended by Article I, Section 3, Clause 1, in accordance to the 1787 Virginia Compromise proposed by Roger Sherman. Working as a part of the Senate, the states, in collective, could influence "treaties-made" under the Senate's treaty-making power of Advice and Consent. The original system, before the election of Senators was amended to become a 'popular' election system, gave the state legislatures elitist control over selection of their two U.S. Senators. The italics show the language that was amended by the 17th Amendment. What is important to us is that each state had two senators that participated in the debates either from the general assembly floor or through committees.

"The Senate of the United States shall be composed of ***two Senators from each State***, *chosen by the legislature thereof*, for six years; and each Senator shall have one vote."

Article I, Section 10, Clause 1, addresses powers the 'People' delegated to the Congress that cannot be impacted by the individual States, except as provided. In the Constitutional Convention of 1787, the pro-state elements sought state treaty-making power, conditioned with the proviso "subject to the Consent of Congress." The Convention proclaimed that 'not even with the consent of congress would this be acceptable.' Section 10 limited State powers on this subject and the power of this provision (regarding Confederacies) is exemplified by the antagonisms of the Civil War Era. In light of the retention of national powers over treaty-making with the Indian Tribes, the scheme begins to make sense when this section is included. When you read the other clauses under this section (i.e., Clause 2 and Clause 3) you find the words 'without the consent of Congress.' Clause 1 was drafted to provide an absolute negative over state attempts to exercise certain types of power reserved to or delegated to the national government. In Article I, Section 10, Clause 1 it is provided:

"No State shall enter into any Treaty, *Alliance, or Confederation;"*

But, as noted earlier, under Article I, Section 10, Clause 3, it is provided that *"No State shall… without the Consent of Congress……Compact with another State…."*. Thus, states can enter interstate compacts, provided the U.S. Congress

gives its consent. In the national Indian Gaming Regulatory act (IGRA) it was provided that states and tribes could enter into compacts. This was approved as a system of regulating tribal/state relations. It was ruled in the Cherokee Case that the Cherokee Nation established that it was a 'state.' Thus, the compact system has become a diplomatic vehicle between the tribes, the individual states, and the United States to streamline and regulate intergovernmental relations as pertains to Indian gaming. In the areas of the exercise of state jurisdiction and state taxation inside the external boundaries of established Indian reservations, we witness the use of 'tribal/state compacting' as the diplomatic vehicle being utilized. By constitutional right, these compacts should only be binding upon securing the 'consent of congress.'

Article III, Section 2, Clause 1, gave the court jurisdiction over treaty questions. This must be read in conjunction with Article VI, Clause 2. This language bound the judges to the duty to honor and heed the 'supreme law of the Land' provision. Neither the state court or constitution could be used to avoid this national duty. Reading the language of both articles further clarifies the limitations on individual States. Article III and Article VI language worked together to further limit the state courts and states, when considered in light of the end of Article VI, Clause 2, wherein it is provided:

"and the **Judges in every State** shall be bound thereby, any Thing in the **Constitution or Laws of any State** to the Contrary notwithstanding."

This is even more powerful, when we read in Clause 3 of Article VI, that the Senators, Representatives, the States, and all federal officials are bound by Oath or Affirmation to support this Constitution. This places a duty upon the President, the Congress, the Supreme Court, and the States and all those appointed or voted to public office to support the constitution.

Article IV is not given the recognition it deserves as pertains to the regulation of the government-to-government relationships with the Indian Tribes. Article IV, Section 3, Clause 1 and 2 provide for the admission of new states, and the transfer of lands to the Territories or new states by the national government. The policy of new states joining the Union on an "equal footing" (Article 5, N.W.

Ordinance of 1787) to the original thirteen states would influence the whole process. The 1787 N.W. Ordinance (Article 3) required respect of the aboriginal land ownership of the Indian Tribes. Title could not be secured except as authorized per lawful treaties. The United States added new lands by securing treaty cessions from the Tribes. In turn, the Congress would transfer title to lands to the proposed Territory or state per under Article IV, Section 4. Collectively, the Article provides:

(Art.IV, Sec. 3, Cl.1) "**New States may be admitted** by the Congress into this Union;...."

(Art.IV, Sec. 3, Cl.2) "The Congress shall have Power to **dispose of and make all needful Rules and Regulations respecting the Territory** or other Property belonging to the United States;..."

(Art. IV, Sec. 4) "The United States shall guarantee to every State in this Union a **Republican Form of Government**, and shall....."

The history of this Article is not clearly taught in the public schools or law schools, and ignored in light of the benefit it created for the new territories or states. The national government expanded with the treaties entered into with the Indian Tribes. At first, the new United States proclaimed it never intended to expand beyond the Appalachian Mountains. Relationships with the Indians were to be governed by treaties or acts of commerce. Boundaries between the tribes and United States were delineated to clearly keep the races separate. Next we witness the establishment of the Northwest Territory (1783) then the Territory South of Ohio River (1783), then the Louisiana Purchase (1803), followed with the Red River Cession (1818), then the Annexation of Texas (1845). Still, up to this time, the tribes and States were kept separate by treaties-made. Neither had jurisdiction inside the boundary of the other, unless exceptions authorized by specific treaty language. As Chief Justice Marshall ruled in the Cherokee cases, tribes were "extraterritorial to the states."

At one critical time, we find the boundary between Indian Country and the United States was the Mississippi and Missouri Rivers. East was the United States and west was Indian Country. At the time, it was inconceivable that the

States and Indian Tribes could live side-by-side. The eastern tribes and confederacies were encouraged to relocate west of this boundary line- leaving their traditional territories. The State of Georgia, in giving up its large land claims secured from the King, prior to the 1776 Revolution and 1787 Constitution, demanded the removal of all Indians from inside its boundaries. The Court would not enforce this demand and ruled in favor of the Cherokee Nation (1830's). The Congress and President worked together to guarantee the removal of the Indians, in compliance with the compromise agreements made with the large states during the constitutional convention (1787). The tribes (east of the Mississippi and Missouri Rivers) were forced onto the Trail of Tears during the Jackson Administration. The majority of the Indians died walking to the new Indian Territory (Oklahoma).

The grab for more Indian territory continued westward, with the establishment of Louisiana Territory, Arkansas Territory, Missouri Territory, Iowa Territory, and Minnesota Territory, all being parts of the original Louisiana Purchase. We find that the Organic Documents of these Territories and new States obligated them to honor the treaty relationships with the Indian Tribes, as negotiated and ratified by the United States. These new western states would go on to develop the constitutionally required "republican forms of government" that attached or included "disclaimers of jurisdiction" over Indians Affairs.

The United States had moved away from maintaining a complete separation between itself and Indian Country. Manifest Destiny became the new national policy on expansion. Massive amounts of Indian territory was opening up as new territories, with or without Indian Treaties. The westward migration exploded with the Mexican Cession (1848) and the Oregon Country Cession (1846), followed by the opening of California (Sutter's Mill & Gold).

The usual process for a new territory to move toward statehood was: The U.S. Congress passed the Territorial Organic Act that established a form of territorial government for the interim of the emerging territory. The Territorial Act continued in force until enough people were present to justify the minimal population (per popular sovereignty) needed to petition for statehood. Then, the Enabling Act would be passed to initiate the steps that

would lead to statehood. This would require a state convention for establishing a republican form of government. When the state constitutional convention ratified the draft of the people, the territorial officials would deliver it to the U.S. President and Congress. The Congress would accept or reject for amendments. If accepted then the statehood admission act was introduced and ratified, allowing the new state to enter on an equal footing. The President, then, proclaimed the admission and new Union member.

We have found that both the Territorial Organic Acts and the Enabling Acts required protection of national powers over Indian Affairs. After the 1850's, most of the states were required to enter a 'Compact with the United States,' disclaiming jurisdiction over the Indians, as well as their land, resources and Affairs. Because the 'compact' was an article in the state constitution it would require a state constitutional amendment to remove it. Requiring the arduous amendment process is a reflection of the national concern to assure that states did not illegally overstep their boundaries. The earlier states that did not include the compact language in the draft state constitution met this burden by attaching a territorial organic ordinance. No Matter what, the compact became law, it was supreme law of the (state) land, as was the Enabling Act. It was the price the 'new state' paid to join the Union on an equal footing.

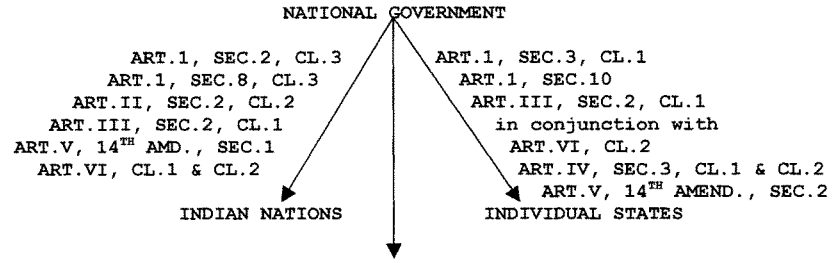
Article V provides the vehicle for Amendments. The Fourteenth Amendment, Section 2 is very interesting. It is recorded in the minutes of the Congressional Reconstruction Debates (39th and 40th Congresses), that the 14th was specifically worded to prevent States from attempting to make Tribal Indians state citizens. It was presented that if the United States could not make Indians national citizens (by the "subject to the jurisdiction thereof" language in Section 1), then the States definitely should not be able to do so. To make sure tribal Indians could not become state citizens, the Congress reiterated the language 'Excluding Indians not taxed' found originally in Article I, Section 2, Clause 3. This kept tribal Indians from being represented by the Congress, as well (Elk v. Wilkins, 1884). The language provided:

"*Representatives shall be apportioned among the several States according to their respective numbers, counting*

the whole number of persons in each State, ***excluding Indians not taxed."***

WHAT DOES THIS MEAN TO INDIAN TRIBES? We have to consolidate Diagrams #2 & #3 to get a full picture of the constitutional relationship. By seeing the full picture then, perhaps, the uninformed reader could more fully appreciate & understand that there is a balancing process written into the whole constitution as regards relationships with the Indian Nations.

DIAGRAM #4: U.S. CONSTITUTION 1787 AND BALANCE OF SOVEREIGNS



THE U.S. CONSTITUTION IS THE FOUNDATION TO THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE INDIAN NATIONS AND THE BALANCE OF INTERESTS BETWEEN THE TRIBAL NATIONS AND THE INDIVIDUAL

Thus, we have Diagram #4, above, b consolidating the two. As you study it, think of the 'Scales of Justice' held by 'Miss Liberty.'

There is more to the U.S. constitutional relationship with the Indian Tribes then the application of the "treaty-making powers" or the "Indian Commerce Clause." We find the Constitution limits the powers of the national government over Indian affairs, and prohibits individual state assumption of jurisdiction over Indians and reservations. If individual states wanted to have relations with the tribal Indians and Indian Nations, then they could do so when operating in Congress Assembled, subject to the limitations of the national constitution they swore allegiance too. If the relationships established, thereby, were unsatisfactory

to the individual states, then they could, in conjunction with "We the People", amend the Constitution.

In summary, we find there is a system of "balances" in which the states are not given the freedom to interfere with the Indian Affairs governed by the National government, nor with the interior matters of the Indian Tribes. We witness the existence of a "balancing theory of constitutional sovereignties."

INDIAN COUNTRY REMAINS CONCERNED!
Every Indian leader is concerned over the United States' constant shifting federal Indian policy. We are concerned about the general public's constant demand for more and more Indian land and natural resources. We are concerned that state government continues to expand their jurisdiction over Indian Country. We are concerned about the Supreme Court ruling that the power of the United States over Indians is plenary. We are concerned that plenary power and trust responsibility have helped destroy tribal self-government. We are concerned because 'popular sovereignty' of a people can only delegate to the government those powers they had. They did not have plenary power over the Indian tribes and could not delegate such a power to the congress. The only plenary power that was delegated was a superior and first right of the national government to regulate commerce with the Indians or enter treaties with the tribes. We are concerned about the Supreme Court ruling that the Indian Tribes were conquered (See: Tee-Hit-Ton Indians, 1955). We know that Indian Country was only conquered by judicial legal fictions.

Indian People suffer the highest infant mortality, shortest life-expectancy, highest poverty, lowest vocational/educational attainment, poorest health, poorest housing, highest underemployment & unemployment, and highest teenage suicide rates in the country. As evident, the impacts caused by the constant non-Indian legal & political attacks upon Indian Country is nearly genocidal. These attacks, over time, have guaranteed Indian economies shall remain fragile and marginal. Indian Nations shall always be within the national boundaries of the Republic. The nation and states shall always continue to struggle with finding a place for Indian sovereignty. Self-determination and self-government is a step in the right direction. Still, today, Indian Policy is mostly characterized (or tarnished) by the 1953 Termination Policy

(H.J.R. #108) and Public Law 280, as amended in 1968. Even though presidential policies and congressional enactments have repudiated the termination policy, the Supreme Court and states operate as if it was still valid.

The U.S. Congress attempted to transfer jurisdiction over Indian Affairs to the individual states. In 1953, there were five, later six, mandatory states required by federal law to assume jurisdiction over the Indian reservations inside their state boundaries. Eventually, there were sixteen states operating in line with this law. The law provided that those states with constitutional disclaimers, called 'Compacts with the United States' (e.g., North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, New Mexico, Alaska, and Hawaii), would have to amend their constitutions to legally assume jurisdiction over Indian Country. Those without such constitutional disclaimers would simply have to amend their original territorial organic legislative enactments to assume jurisdiction over the reservations located inside the state.

Some states, like Minnesota, did not have constitutional disclaimers and did not have to go through a state constitutional amendment process to lawfully assume this jurisdiction over Indian Affairs. The constitutional (disclaimer) compact was not a part of the system imposed per the 'Republican Form of Government' at the time. Later, the state constitutional compacts would be required as a legal means to give the national congress the strict guarantees it sought. Other states, like the State of Washington, had to insert constitutional (compact) disclaimers and should have had to amend their constitution to remove the legal impediment; but it has not complied with this legal duty still to this day. Instead, the U.S. Supreme Court has ruled that this was a matter of state (constitutional) law. However, the Washington State Supreme Court has not required the State to adhere to the amendment process included in their constitution. Thus, the state exercises jurisdiction over Indian reservations that is still constitutionally forbidden. The State has amended its constitution, at least, seventy-five (75) times, with about eight (8) more pending. None of the amendments were applied to Article XXVI- The Compact with the United States.

Other States that initially chose to take the legislative route to assume P.L. 280 jurisdiction over the Indian reservations, rather than lawfully amend their constitutions, were: Arizona, Idaho, Montana, South Dakota, North Dakota, and Utah. North Dakota was forced to amendment its constitution at a later date. South Dakota's Supreme Court invalidated the State's partial assumption of jurisdiction by the legislative means. The Supreme Courts of Arizona, Washington, and Montana upheld their 'legislative' process for assuming jurisdiction; but, this is contrary to the federal law requirements and the state constitution. The states should be legally required to remove the constitutional block that prevents this assumption or surrender their claims to lawfully jurisdiction.

The irony is the power to amend the constitution is central to the people's republican form of government (state and national). If constitutions could be amended without the say of the People, and in violation of the amendment provisions (by ordinary acts of legislature), then the democracy we believe we have under this system is a farce. It means this country is moving toward a system of government that operates under creation of its own extra-constitutional mandates rather then reflecting the will of the people. Why are some states exempt from the requirement to honor the U.S. Constitution and maintain a "republican form of government", as required by Article IV, Section 4? The shape of the state constitutions, with the amendment provisions, were based on the requirements of the national constitution.

We have witnessed the State of Wyoming submitting the question of assumption of lawful, constitutional jurisdiction over the Indians to the state citizens via the amendment process. This was in line with the requirements of P.L. 280. The citizens of Wyoming had rejected the amendment. The State of North Dakota submitted an amendment to their citizens and it was ratified in accordance to state constitutional procedures. A half dozen States have refused to amend their constitutions and the U.S. Supreme Court refuses to review this question as a federal, constitutional question (per Article IV, Section 4). This willful ignorance authorizes a form of multi-billion dollar takings from Indian Country that is going on. Such states have illegally interfered with tribal tax exemptions, zoning, regulation, and management of their

economically valuable lands. They have illegally impacted tribal civil and criminal jurisdiction.

We believe that the conflict is more than a "matter of state law." It is a matter of what type of government shall continue to exist in this country. The U.S. Constitution required the "Republican form of government." This included, in the review of the state constitutional submittals to the U.S. Congresses and Presidents, at the time of application for statehood and admission into the Union, assurances that the citizens of the States had power to amend their constitutions and change the authority delegated.

We cannot have some States adhering to canons of construction of constitutions while others violate at will. We have to review all the states constitutions that have these Compacts (otherwise known as Disclaimers). These came into existence (1848-71) because of the new Colonization of the American Indian- i.e., the establishment of the Indian Reservations. During this time, "Indian Country" was changed and drastically reduced in size. Now the States were forming with Indian Reservations established inside their external boundaries. Indian Country was no longer a cohesive separate part of the continent. Now Indian Country was broken up into small reserves.

The new treaties (after 1848) with the tribes would include, as a boiler plate matter, the transfer of land title to the United States and not individual states. The lands the tribes ceded to the United States would eventually be transferred to the new Territory or State, in accordance to the Article IV of the Constitution and 1787 N.W. Ordinance and other acts of congress.

The U.S. Constitution required the states' enact a "Republican form of Government" to qualify for the lands and admission into the Union. Therefore, individual states should not be allowed to violate canons of construction of written constitutions and while others are forced to comply. The state constitutions were all approved by an orderly national process to assure uniformity. In this way, the U.S. Congress and President guaranteed that the state citizens enjoyed popular sovereignty under both their state and national status.

This prevailing lack of respect for state constitutions by state governments is certainly a concern to all of Indian Country. It is a concern because it impacts the long-term fate of our national, democratic republic. Why are 'legal fictions' applied to Indian Country as if they were 'supreme law' of the land? How come individual states can destroy the basic canons of construction of written constitutions that include amendment provisions? Doesn't the national and state citizenry care about the damages done to their constitutional forms of government? They should reflect upon Felix Cohen when he remarked that:

"Like the miner's canary, the American Indian marks the shift from fresh air to poison gas in our political atmosphere. Our treatment of the Indian, even more than our treatment of other minorities, marks the rise and fall in our democratic faith."

When considering the legal fictions generated to justify the exercise of plenary power over Indian Country, consider the words of Justice Cooley, on the Constitution: "*A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have changed as perhaps to make a different rule in the case seem desirable. A principle share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by -public opinion giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty.* (Cooley's Constitutional Limitations, 68-69 (6th ed. 1890))

A BRIEF HISTORY OF THE LUMMI NATION'S TREATY RELATIONSHIP WITH THE UNITED STATES GOVERNMENT

By Jewell Praying Wolf James, 7/19/05

Originally Close to Paradise:

The modern Lummi Nation is aboriginal to the San Juan Islands (State of Washington) network. It formed intertribal alliances with tribes in close to them. The Semiahmoo people were incorporated into the modern Lummi, and their lands were included in our court-defined territory. Our recognized territory began in the north, including both sides of the U.S./Canada Border. It included Point Roberts, following the shoreline eastward (around Boundary Bay), incorporating the northern boundary of Whatcom County. The boundary then moved south into the United States. The eastern boundary ran along the top of the Cascade (Mt.Baker) range, continuing south to the approximate north boundary of Skagit County. It continued westward and included all the Islands, beyond the western shores of San Juan Island proper. The territorial claim included all the usual & accustomed fishing grounds and stations, and even extended into British Columbia.

We lived primarily off the anadromous salmon and salt-water species of floral, fauna, and fish. However, we hunted the forests for as well. While game animals were plentiful, the vast abundance of seafood made it almost unnecessary to depend primarily upon forest animals and plants. Our diets were naturally rich and our sources were extremely abundant. The Coast Salish were the wealthiest nations ever encountered as regards access to the multiple sources of foods within the environment. We worked a few months of each for food gathering, then we dedicated the remainder of the year to intertribal ceremonials and kinship.

Over a hundred years before Captain Vancover sailed in the Straits of Juan De Fuca, we were a member tribe of the Alliance of the Dwamish & Suquamish. Many marriages were arranged between the Lummi, Skallums, and nations of Vancover's Island. Our traditional forms of inter-tribal spirituality and arranged marriages of leadership families bound the tribes together. Occasionally, there was the threat of war from the more northern tribes of Haida or Tlingit- tribes that would raid the San Juan Islands and mainland villages- arriving in their large cedar war canoes. Most often, though, peace reigned.

Death Preceded Their Arrival:

However, we could not remain sheltered from the intrusions of the competing European Nations. The Russians were occupying Alaska and moving south. The Spanish occupied old Mexico and moved north. The French and English occupied Canada and were moving west across the continent and coming south through British Columbia. The Americans were sailing around South America and coming up along the coast. The Oregon Trail opened the mountain passes that divided us from the rest of the continent. The California 'Gold Rush' moved a new & intrusive population into the Pacific Coast. Before it was the fur trade that encouraged initial interracial contact in the Northwest. Small interracial communities developed around the trade houses or forts. Eventually, the settlers came to stay. They lived off the surplus seafoods harvested and traded to them by the natives. Often they moved onto abandoned Indian village sites or simply squatted upon the occupied sites.

Prior to this their European diseases spread from village to village, tribe to tribe, and killed off the majority of the populations. Before the natives ever saw their first non-Indian dead by plagues spread like a prairie fire in mid-summer. From Oregon to Alaska, the diseases came into the villages like unseen demons. The medicine men were trying to cure physical diseases that were unknown. Small Pox came into 'virgin soil.' Some villages had a one hundred percent mortality impact, others suffered as low as 80%. Stories from the various tribes tell how hunters coming home to find the whole village dead except one lone baby still suckling upon the deceased mother. The early sailors brought venereal diseases that killed or sterilized the women. Malaria would come next and in this 'virgin soil' population kill the majority of the remainder; then return and take another ten to fifteen percent annually. Every disease after small pox would have a high initial killing rate, then settle down and kill an annual percentage. In the beginning, no one was left to bury the dead. In time, the few that were left would pile the bodies in one small area and then flee (See: The Spirit of Pestilence, 2004).

The new settlers would arrive and find whole villages empty of occupants- after the plagues killed everyone or driven them away to other villages. The foreigners had immunities to the diseases that originated with them and could settle in the plague areas in time, for natives it was lethal. The lands tied to the old village sites were

prime for occupation since it was already cleared by the natives. Often the cedar beams and planks, from these 'apparently abandoned' longhouses, were recycled. These became a part of the new settlers initial shelters. Today the surrounding modern communities are shocked to find or encounter these ancient villages sites and their corresponding ancestral cemeteries. For example, the Lummi Nation had been in conflict with the surrounding non-Indian community over development of the Semiahmah site- and its affiliated ancient cemeteries. The Elwha Sklallum had the same problem on the Olympic Pennisula. Both tribes witnessed hundreds of their ancestors being unearthed-reawakening historical traumas in the tribal communities.

The Lummi Tribe was led and represented by a traditional form of leadership- divided up into a class system. Those in leadership were bred from childhood to become leaders-if that was their "gift." The upper classes held the lineage of what become known as the "Chiefs" after contact, and usually being recognized for their 'Christian or Catholic' conversion. Aboriginally, we had leaders that were in-charge in times of peace, different leaders in times of war, and other leaders in times of ceremony. With those tribes that were closely allied with the Lummi inter-tribal marriages were arranged to further cement the tribal alliances. Most often, the languages were clear indicators of those tribes that were more closely allied with each other. The language defined each other's territorial domains as well. The Lummi were more closely affiliated with their relatives from the Sklallum or Vancover Island then tribes more immediately their neighbor. If one sought to understand the forms of traditional governance, then they would be forced to understand the importance of ceremony amongst the native peoples. And, our ceremonies helped govern our relationships with the surrounding environment we were dependent upon, including interpersonal and intertribal relationships.

We had an inherent system of governance that was dependent upon respect of tradition, respect for ceremony, respect for sacred knowledge. Honor and integrity in leadership was expected as the norm. The valued reputation of a "name" was far more valuable than any materialistic accomplishments that the individual could compile. Thus, the accumulation of wealth was conducted so that it could be given away at intra-tribal and intertribal ceremonials. This person "emptied the house" to assure that he was entitled to respect of the people. It brought prestige to his family.

In addition, ultimately, governance of the people depended upon the power of persuasion that each leader inherently had and cultivated. We could talk people into following but we could not force them. They were free to make their own choices- whether in times of peace or war. The power to articulate was a valuable and treasured gift of leadership. The people practiced respect for the speaker on the floor- all were quiet and listened, all would have a turn to respond as needed. Respect was systematically incorporated into the tradition of ceremony. Leadership was held accountable by the custom of calling forward "witnesses" to hear the words and to respond if any questions came forward as to the truth or validity of the statements. In the common practices of today, it would be like having a "notary of the public" present to verify the truth of the statement made, each time a leader spoke out.

The Lummi People had always governed themselves, in accordance to custom, tradition, and ceremony. The world was known in accordance to "oral tradition." However, the validity of this "oral knowledge" was passed from generation to generation, and each time being verified by the people through the use of witnesses and customary ceremonial practices. Our people have continued to preserve and retain their respect for the right to be governed in accordance to their own inherent sovereignty. We will find, over time since contact, that this "self-governing" value would continue to influence Lummi relationships with other governments- especially that of the United States.

Foreign Claims to Ancient Lands:

The United States and Britain had a joint occupancy convention of 1818 that lasted until finalization of the Oregon Treaty of 1846. This treaty was result of the United States taking a more aggressive stance and demanding a border more fixed rather than somewhere between the 42nd and 54th parallels. During that time, many Coast Salish Tribes around the Straits of Georgia and Straits of Juan de Fuca, and South Puget Sound, became accustomed to trading with the non-Indians at the forts in British Columbia. The luxury of the commercial trade activity at Vancover Island would, later, be restricted by treaty agreement between the United States and the Indian Tribes.

The United States claimed the Pacific Northwest under the doctrine of Discovery. In the leading case of M'Intosh, the United States asserted that it had inherited the "discovery claim." The concept of "first Christian nation" to discover an unoccupied land was entitled to it

superior to all claims of other subsequent Christian nations making the same discovery. Discovery, in accordance to the Christian nations, gave them superior title to the lands, even when it was occupied by natives. This, of course, was a legal fiction generated to their own benefit. There were no Indians or Indian tribes involved in M'Intosh. See: Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (U.S. Sup.Ct.1823)).

Another vehicle for asserting territorial claims was by settlement & extinguishment of claims of foreign nations by treaty. In the Oregon Territory more and more "Americans" had moved into the territory. Thus, the U.S. began to assert a superior claim to the territory. Rather then entering a state of war, the United States chose to enter treaty negotiations to diplomatically secure the orderly withdrawal of competing foreign claims. In order of negotiated settlement, the following countries withdrew: Spain under the Treaty of February 22, 1819, 8 Stat. 252; Russia under the Convention of April 17, 1824, 8 Stat. 302; and then Great Britain by Treaty of June 15, 1846, 9 Stat. 869. These countries had established trade relationships with the Indian tribes and required the United States to promise to treat the Indians honorably as a part of the withdrawal treaty. As mentioned above, the Oregon Treaty of June 15, 1846 had settled the disputed boundary line between British Columbia & Vancover Island and the United States. After the foreign treaties were settled, the United States would then initiate treaty-making with the Indian Tribes, as empowered by the constitution, authorized by act of congress, and guided by the N.s. Ordinance of 1787.

The Oregon Territory was established by official Act of Congress on August 14, 1848, 9 Stat. 323. The enactment provided that *"nothing shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians * * *"* Section 14 of the act applied the Northwest Ordinance of 1787, 1 Stat. 51, which provided that: *"good faith shall always be observed toward the Indians; their lands and property shall never taken from them without their consent."*

The United States authorized negotiations of treaties with Indian tribes first in the Oregon Territory (Act of June 5, 1850, 9 Stat. 437). Within three years the congress would divide this territory and create Washington Territory (Act of March 2, 1853, 10 Stat. 172). Section 2

of the act allowed for the appointment of a Territorial Governor to serve concurrently as the Superintendent of Indian Affairs. In the Appropriation Act of 1854 (Act of July 31, 1854, 10 Stat. 315, 330) authorization was granted for the use of appropriations to negotiate treaties in the several territories, including Washington Territory, to be completed prior to July 1, 1885.

In Worcester v. Georgia (31 U.S. (6 Pet.) 515,U.S. Sup. Ct. 1832), the Court held that *"the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense."*

The Lummi Indian Nation entered treaty relationships with the United States at the Point Elliot Treaty negotiations (1855), arranged by Washington Territorial Governor Isaac Stevens. This Treaty With The Duwamish, Suquamish, ETC. (12 Stat. 927) was ratified by the U.S. Senate in 1859. The treaty was based on the Treaty With the Omaha, as negotiated in 1854 by Commissioner of Indian Affairs George Manypenny (1853-1857). It was one of the numerous treaties drafted to initiate the "colonialization of the Indian." It resulted in placing the Indian People on isolated, reservations of lands, as their permanent homes. This "colonialization" of the American Indian was a part of the federal Indian Policy being implemented through the Department of Interior, Bureau of Indian Affairs- which assumed jurisdiction over Indian Affairs, as of 1848, taking jurisdiction from the Department of War.

Commissioner Manypenny appointed Oregon Territorial Governor Joel Palmer and Washington Territorial Governor Isaac Stevens as Indian agents (Superintendents) and directed they immediately initiate negotiations with the Indian tribes in the respective territories. In about eighteen (18) months the two Governors would negotiate sixteen (16) treaties and cover the whole of Washington and Oregon Territories. The Governors would use either in-

land or coastal Chinook Jargon to negotiate with the tribes. The jargons were a mixture of French, Spanish, Russian, English, and Indian words. Both were limited to about 300 words and understood by very few persons of the fur trade era. Governor Stevens used B.F. Shaw as the interpreter for his negotiations. Some Indians spoke Chinook Jargon and were used as interpreters for those tribes whose language they spoke.

We learn some about Stevens in "American Indian Treaties" by Francis P. Prucha (1994, pp.250-55). Isaac Stevens was very paternalistic. He was not going to negotiate with the Indians. He was simply going to impose the treaties upon them. He organized a commission to help design the approach based on the treaty pattern evident in the nation. This commission met December 7, 1854. Using Chinook Jargon the treaties were explained point by point. He was at Point Elliot January 22, 1855, at Point No Point on January 26 and at Neah Bay on January 31. He and Joel Palmer covered the near equivalent of four states (original Oregon Territory) in eighteen months and secured sixteen treaties (eleven by Stevens, five by Palmer). An example of Stevens' paternalism is found in the Point No Point records, as follows: "*This paper [the treaty] is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you Mechanics and a Doctor to teach and cure you. Is not this fatherly? This paper secures your fish. Does not a father give food to his children? Besides fish you can hunt, gather roots and berries. Besides it says you shall not drink whiskey, and does not a father prevent his children from drinking the "fire water?" besides all this, the paper says you shall be paid for your lands as have been explained to you.*" (See: pp. 250-55, American Indian Treaties, F.P. Prucha, 1994)

In U.S.vs. Washington (384 Fed. Supp. At 330), the Court found "*to the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the means to acquire vast Indian lands. It ordered that treaty negotiations with the plaintiff tribes and others in the Northwest be conducted as quickly as possible. Isaac I. Stevens, Governor of Washington Territory, proved ideally suited to that purpose for in less than one year during 1854-1855 he negotiated eleven different treaties, each with several different tribes, at various places distant from each other in this rugged and then primitive area. The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.*"

The Omaha Treaty was the model and under the diverse conditions and amongst the multitude of tribes called to conference at each encampment, the negotiators, using Chinook Jargon, was allegedly able to get all tribes to agree to basically the same words, paragraphs, and cessions in each of the treaties. Each treaty would reference the Omaha Treaty language pertinent to creation of the reservations and restricted assignments of land to individual heads of households. Each treaty would give the U.S. claim to large aboriginal territories, reserving very little for the tribes present and future use. For the established Indian reservations, the treaties gave the U.S. rights of way across the reserves. The treaties assured citizen/foreign violators of the laws would be surrendered up to the proper U.S. authorities. The treaties promised the U.S. would provide education and health services to the people. Most importantly, the treaties reserved certain essential rights to hunt, fish, and gather at usual and accustomed grounds and stations. And, the treaty declared the condition of peace and friendship shall exist between the United States and the Indian tribes.

The U.S. Supreme Court recognizes that the tribes did not understand, most often, what was being conveyed in the treaty negotiations. Therefore, the Court has developed canons of construction of Indian treaties that requires interpretation of the treaties in favor of the tribes. (See: Choctaw Nation v. Oklahoma, 397 W.S. 620, 630, (1970), Jones v. Meinan 175 U.S. 1, 10-11 (1899), Worcester v. Georgia, 31 515 (1832), Tulee v. Washington, 315 U.S. 681, 685-86 (1942)). The interpretation of treaties was addressed in the 1905 Winans Case (198 U.S. p. 380, 25 S.Ct. p.664) in which the Court stated: "*And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality,' by the superior justice which looks only to the substance of the right, without regard to technical rules.*"

By the time the N.W. treaties were negotiated, Indian Affairs was fully transferred from the War Department to the Department of Interior (1846-1848). In 1846 the Department of Interior conducted an extensive study of the Indians to determine exactly what was being transferred to it in 1848. Eventually, the Bureau had "Superintendents" and Indian-agents for addressing the concerns of the tribes and representing the presence of the United States. Over time, the Lummi Indian Reservation was under the control

and management of "Indian agents" or "farmers-in-charge" or "teachers-in-charge" of the affairs of the tribal people resident on the reserve. This was the system implemented by the BIA, rather then recognize any traditional tribal government or leadership. The Bureau had begun to implement a system in which the Indians, regardless of age or status of influence and competency, were treated as "wards" (like incompetent children).

The United States depended upon entering treaty relationships to free up lands owned by the aboriginal tribes. Even though it claimed to have inherited the rights asserted by Britain under the Doctrine of Discovery, after the Revolution of 1776. It still did not have actual dominion or ownership over the Indian territories outside the original thirteen colonies. As it moved westward, toward the South Seas (the Pacific Ocean), it would come to assert rights under the Doctrine of Manifest Destiny (destined to rule all the way to the Pacific Ocean). But, first, Lewis and Clark would have to pave the way with exploration of the unknown territories. They were commissioned by President Jefferson to explore the western lands and report back. They went all the way to the mouth of the Columbia, into the territory of the Chinook- who was a prominent trading tribe amongst the Indians of the northwest (thus, Chinook Jargon). Their journey would open up the trail to Oregon and the eventual flood of "Americans" seeking settlement or new gold fields (stimulated by the California Gold Rush, which in turn resulted in the Manifest Destiny proclamation).

The United States is composed of over 3.5 million square millions of land & natural resources that were secured from the Indian Nations by peace treaties. The United States promised to pay for the lands ceded by the tribes. The tribes reserved lands for their own permanent use. But these "reservations" were conceived as the path of "colonializing" the Indians onto limited areas. Over time, the United States would fail to meet their treaty commitments. Treaty making became controversial. Under the Constitution, the President negotiated the treaties, the Senate ratified. The House of Representatives was given the "power of the purse" and felt unjustly compelled to appropriate monies due to treaty commitments. A treaty backlash erupted. The House refused to appropriate monies to meet the treaty commitments. The tribes nationwide continued to protest the thief by treaty violation.

In the 1871 Appropriation Bill the House inserted a "rider" that claimed to limit the President's and Senate's

treaty making power (16 Stat. 567). The House nullified the President's and Senate's ability to honor the treaty commitments. Theoretically the measure was not to affect treaties already made with the Indians. However, the United States was not making payments on lands they promised to purchase from the treaty tribes. To the outrage of the Indian Nations, this problem would continue throughout the next century.

The 'rider' was codified in Title 25- Indians, United States Code, Section 71: Future Treaties with Indian Tribes. It provided: *"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."*

Post-treaty Anguish of Tribal Communities:

In 1948, the U.S. Congress authorized the creation of the Indian Claims Commission (25 U.S.C. Sections 70 to 70w) to hear the cases by the Indians against the United States. It was a political forum with qausi-judicial power. It was controlled by the United States- for protecting its interests and not that of the Indians. In the end, Indian tribes would not receive justice. They would receive promises to pay for their lands at pennies on the dollar of their value. The Lummi claim was referenced as "The Lummi Tribe of Indians vs. United States of America (1951).

The case was supposedly settled in 1972, on terms that the United States demanded. The BIA, as the guardian, asserted that the Lummi would have to accept the United States offer of $57,000 for all of the San Juan Islands and Whatcom County, Washington. The tribe has continuously rejected the offer for payment as an injustice. The BIA claimed the Lummi Nation could use the money to build medical facilities, to finance education, to purchase homes for them members, and many other essential functions of government. At the time, you could only buy one second rate, run down home with the all the money being offered. To the Lummis, their islands and mainland territory had been stolen. Included in the theft was all the water rights from the marine and riverine areas, as well vast other natural resources on the lands. The federal government paid the lawyer that "represented" the Lummis from the alleged settlement, contrary to the Lummi position. The Lummi were insulted because their lawyer was dictated to by the U.S.

Attorneys, and he failed to represent their best interests. Even today, the Lummi Council passes a resolution each year rejecting the alleged settlement, as a means to continue to educate all new tribal leadership at to the thief of their territory. (See: History of Lummi Legal Action Against the United States by Ann Nugent, 1980).

Prior to the 1951 lawsuit, the Lummis participated in the case of Duwamish et.al. v. United States of America, 1927. The United States passed a Jurisdictional Act (February 12, 1925) that allowed Indian Tribes to bring suit in the Court of Claims. Out of the 155 Indians that testified, ten were Lummis. The lawsuit was all about the violations of the promises made in the treaty (12 Stat. 927).

In the Pacific N.W., an Indian treaty fishing rights case (cited above as U.S. v. Winans, 198 U.S. 371 (1905)) came before the Court at petition of the Yakama Indian Nation. Article III of their treaty (12 Stat. 951) included the protection of their fishing rights. They were being denied access. The Supreme Court interpreted the treaty to guarantee certain rights to the Indian tribes/nations, and a reservation of those rights not surrendered to or given to the United States. The Court ruled, "*The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them- a reservation of those not granted.*" This was an important case for treaty rights and the fishing tribes of Washington State. However, the state would continue to circumvent the treaties and make it illegal (under state law) for Indians to fish outside their reservation boundaries.

Thus, for Indian people in the northwest, there were special concerns about their rights to fish. "*The right of taking fish at usual and accustomed fishing grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing….*" (Article 5 of Pt. Elliot Treaty of 1855) was essential to making the treaty right real. Denial of access and opportunity was a means to destroy the right, just as massive prior interception by the more mobile state fleet would after the turn of the century, with the perfection of the canning industry and their sponsored fleets. All the Stevens' treaties specifically provided protections for the abundant fish

resources so treasured and respected by the tribal peoples. These resources served a functional role in their diets, their spiritual/ceremonial observances, as well as their trade & economy (U.S. v. Washington 384 F. Supp. 350 (1974)).

The Lummi and the other treaty tribes signatory to the Stevens Treaties would continue to assert their rights in court. In July of 1979, in the case Washington v. Washington State Commercial Passenger Fishing Vessel Association (443 U.s. 658-708), the Supreme Court confirmed U.S. v. Washington in favor of the tribes. The tribes did see the inclusion of on-reservation salmon harvests for ceremonial and subsistence purposes, as a part of the fifty/fifty sharing formula, as a lost. And, the Court saw the fifty percent share as the minimum the treaty harvests could be reduced to unless there were unforeseen future circumstances necessitating a reduction for conservation of the species.

We know that the first settlers depended upon a surplus supply of fish resources being secured from the Natives. This is what allowed the settlers to survive their first winters, until they became accustomed to the environments and could earn their own means of subsistence. However, what the settlers failed to learn was the deep respect the natives held for the salmon resources. Dr. Barbara Lane testified that: "*The symbolic acts, attitudes of respect and concern for the well-being of the salmon reflected a wider conception of the interdependence and relatedness of all living things which was a dominant feature of native world view. Such attitudes and rites insured the salmon were never wantonly wasted and that water contamination was not permitted*" (Dr. Lane, "Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid 19th Century." Anthropological Report submitted to U.S. v. Washington, May 10, 1973).

The canning industry caused great exploitation and wastage of the salmon resources. One Lummi elder Sarah James once said, about her years working in Carlyle Cannery that: "*We worked long days. The salmon were brought in by the scow loads and scow loads. At the end of the day there were still fish in the scows. Those were brought to Bellingham Bay and dumped. We only cut off the bellies, because those laid flat and was cut into strips and rolled into the cans. There was a lot of waste*" (Statement made to J.James, 1978).

Eventually, the Lummis had to bring lawsuits to challenge for protection of their treaty rights. Alaska Packers Association had destroyed their rights of access. In United States, Hillaire Crocket, Captain Jack vs. Alaska Packers Association and Kate Waller (1897), the judge ruled the non-Indian interceptions of the salmon before they

reached the Lummi Reefnets was no impact to the Lummis. More than eighty Lummi Indians petitioned the Commissioner of Indian Affairs for protection of their rights but never received assistance. The Lummi lost their rights at Point Roberts and the same was happening to their reefnet sites at Village Point on Lummi Island (See: History of Lummi Indian Fishing Rights, Ann Nugent, 1979).

The Pacific Salmon populations and non-anadromous fish populations served the same functional basics of life to the coastal tribes/nations as did the buffalo herds for the Plateau and Plains cultures. The early explorers and traders noted the value of the abundant salmon resources; but, non-Indian interest was not commercially generated until the perfection of the canning industry. Once this emerged, then the newly emerging Washington State (1889) and its citizens quickly proceeded to over-harvest the stocks to the point of near extinction of all the specis, under state made laws and contrary to the treaties and constitutional mandates that were intended to protect the treaty rights of the Indians.

For the Indian tribes this meant starvation and the resulting rapid decline in their tribal population base. Laws passed by the individual states (e.g., Washington and Oregon) and the corresponding neglect of the United States to fulfill its treaty committed word, resulted in the Indian people being deprived of their fishing resources. They were restricted to the reservations and denied access to their usual and accustomed fishing grounds and stations as well their traditional hunting territories.

Settlers claimed and homesteaded the traditional Lummi lands and quickly imposed "private property Keep Out" as the law. Along the shorelines the Indians were denied access to the traditional fishing sites, as non-Indians claimed the marine uplands. The reservation economy and traditional subsistence society collapsed because of its dependency on access to the off-reservation natural resources. Without access there could be no harvests (See: U.S. v. Winans, 1905). The Indians could no longer even gather basic subsistence levels off the treaty rights. The Pacific N.W. became a haven for the new settlers- who lived and boomed off the fat of the land and waters while the natives were starved into submission. The very Indians that were considered some of the wealthiest in the United States upon "discovery" were left in total impoverishment under U.S. and state laws and economics at

the turn of the century, lasting until the Boldt Decision (1974).

The State of Washington was recognized under the Enabling Act of February 22, 1889, 25 Stat. 676. This enactment, as was the usual case of new statehood proceedings per the N.W. Ordinance of 1787, had a precondition that the people of the State forever disclaim all right and title to all lands owned or held by any Indian or Indian tribes and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and shall remain under the absolute jurisdiction and control of Congress. Washington conceded and was admitted into the Union on November 11, 1889 (26 Stat. Proclamations No. 8). The State abided by this admission precondition by inclusion within it's constitution a Second Section under Article XXVI- COMPACT WITH THE UNITED STATES. This has commonly been called the "constitutional disclaimer clause." (See: pp.315-16, The Evergreen Citizen, C.H. Heffelfinger, 1943 Caxton Printers, ltd.).

The treaties were not a surrender of tribal self-government. If anything, the treaties were confirmation of the "nation" status that Indian tribes inherently held. This was why the United States would negotiate with the tribes, as equals. But, still, the BIA became the paternalistic "government" and would assert it had the legal mandate to manage the affairs of the tribes and Indian people alike. From 1887 to 1934, many tribal societies were devastated by the General Allotment Policy of the United States (U.S. Statutes at Large, 24:388-91; Title 25 U.S.C.A. Sections 331-358) as implemented by the Bureau. This policy eliminated millions of acres of treaty protected lands from Indian ownership. The Bureau became more like a real estate brokerage operation then the office of the guardian. Even lands of Lummi elders and children would end up on the market as a result of powers the general allotment acts placed in the "Indian agents."

It is difficult for the average person to comprehend the difference between the Coast Salish Indian Reservations and those of the Plains of Plateau Tribes. The treaties were different. The reservations west of the Cascades were much smaller in size due to the Natives dependence upon access to the fish resources. Locations of the reservations were strategic to the harvest of the salmon. In the Plains and Plateau it was the hunting of the bison and other mammals

that required vast territories to sustain their populations. So, when the Allotment policy (1887-1934) came into existence, the treaty assignment language would clash with it; however, the BIA handled Indian Affairs as if all treaties and all Indians were exactly the same-incompetent, non-competent, and wards of the government.

The Coast Salish reservations did not have vast surplus land holdings. There was hardly enough land for the existing tribal membership. Thus, there was no land the BIA could report to the Congress as surplus for taking to meet the ever increasing non-Indian homestead needs. All of the lands of the Lummi Reservation were "assigned" out as homelands for the heads of households and their families, under the language of the Point Elliot Treaty. The one exception was the Davie Crow Skootah lands. He was an ex-slave of the Lummi and died without heirs. The congress declared his assigned lands were available for Lummi allotment under the General Allotment laws (Dawes Act). This is the only land on the Lummi Reservation that was not "treaty restricted." In fact, Federal District Judge Barbara Rothstein, in the Lummi Sewer Case, would rule that Lummi was under the Treaty and not the General Allotment Laws.

Dawes Act and Termination Impacted Us All:

Because of the devastating impacts of the General Allotment Laws upon tribal government, society, and land holdings public attention was stirred. Investigations were concluded in 1928 by the Brookings Institution, entitled "The Problem of Indian Administration," otherwise know as the Merriam Report, and the findings sent to Congress (See: p. 219, Documents of United States Indian Policy, F.P. Prucha, University of Nebraska Press, 1975). As a consequence, the United States changed its policy to that created under by the Indian Reorganization Act (48 Stat. 984 (1934), Title 25 U.S.C.A. Sections 461-479). This was the Wheeler-Howard Act, the symbol of the reform movement lead by Commissioner of Indian Affairs John Collier. In the Commissioner's 1933 annual report (See: Prucha, p.225), he stated that: *If we can relieve the Indian of the unrealistic and fatal allotment system, if we can provide him with land and the means to work the land; if, through group organization and tribal incorporation, we can give him a real share in the management of his affairs, he can develop normally in his own natural environment. The Indian problem as it exists today, including the heaviest and most unproductive administration costs of public service, has largely grown out of the allotment system which has destroyed the economic integrity of the Indian estate and deprived the Indians of normal economic and human activity."*

This policy was intended to protect the remaining interests of the tribes, if they would choose to incorporate under the laws of the federal government (25 U.S.C.A. Sec. 476). The Lummi saw this as a means of eliminating their rights to self-determine their own form of government. The Lummi believed that governance of their people was an inherent right, one that could not be delegated to them by the United States. As a consequence, the Lummi leadership objected to the concept of incorporating under the United States as an IRA tribe. When the opportunity arose for the Lummi membership to vote to accept the incorporation process or reject it then the Lummi People rejected it (as was recognized as a legitimate response under 25 U.S.C.A. Sec. 477). Later, the Lummi would draft and ratify their own constitution in 1948, as amended in 1970, and continuously being amended since.

One of the problems suffered by the Lummi people and government has been the fact that the tribal constitutional model used for drafting the Lummi Constitution recognized certain authority of the Bureau of Indian Affairs to review some tribal actions. This was, in 1948, deemed necessary because the tribal leadership were convinced, over time (1855-1948), that the BIA had control of Indian Affairs. This proved to be conflicting with tribal desires and remained to be removed by tribal constitutional amendment. But the BIA even had power over calling the elections for amendment. Although the BIA believed it could control such an election, the Lummi electorate amended the tribal constitution in the 1990s- removing any authority they granted to the BIA (Commissioner of Indian Affairs).

During the Second World War two-thirds of the Lummi men enlisted and fought for America's freedom and form of government. Returning in victory, they still found the BIA in control and the people impoverished. A new breed of Indian leadership had emerged from the war experience. Their eyes were worldly traveled and aware. They wanted more for their people. For the Lummi, a written constitutional form of government (as mentioned above) emerged as a means to remove the BIA paternalistic control over the reservation. Soldiers as veterans became politicians. However, the self-determination initiative that was spreading around the globe, in the aftermath of WWII, was not going to secure U.S. support for its application to Indian Nations- not for decades to come. The best they could, at the time, was draft and ratify a

constitutional form of government that was close to the IRA examples the federal government found acceptable.

America helped free the world from dictatorship but then declared a federal policy of Indian Termination (See: House Concurrent Resolution 108, August 1, 1953; U.S. Statutes at Large, 67:B132). The Congress sought to terminate tribal government, bust up the reservation societies, and transfer lands from trust protected to fee taxable. A big part was to open the Indian natural resources for exploitation by hungry timber, mineral, and agricultural corporations. The federal government sought to transfer jurisdiction over Indians from the federal to the state government. Some of the larger reservations found their tribe being dismantled. With no tribal government left to protect the membership, the BIA forced sells of the land holdings. Indians were required to relocate their families into the cities, and live in impoverished conditions.

Many of the Lummi Indian people had no choice but to relocate in exchange for any vocational training available to adult Indians and heads of families. This program was operated as the Bureau of Indian Affairs' "relocation program" (Annual Report of the Secretary of the Interior, 1954, pp. 242-43). This program was an extension of the U.S. policy to terminate tribal Indian populations. The government sought to force assimilation upon the Indians. Those that stayed on the target reservations would receive no benefits or protection from the federal government. The BIA was implementing a "scorched earth policy" to drive the Indians off the reservations.

While other "citizens" had access to the U.S. Welfare System, the Native Indians would not receive assistance unless they sold their treaty lands to the non-Indians. Because of this, many Lummi families, today, have no land on the reservation for building permanent homes. The BIA and the State Welfare System forced land sales (under the General Allotment Laws) by single mothers, widows, elders, and minor children. Even thought the BIA was legally obliged to deliver public assistance to needy Indian families, they did not. With each passing year more treaty-protected assignment land was alienated in exchange for assistance. And, yet, these were the types of assistance that were guaranteed by the treaties with the United States.

The planning for the termination of tribal peoples was not by accident. During the 82d Congress, 2d Session, on December 15, 1952, a "REPORT WITH RESPECT TO THE HOUSE

RESOLUTIONS AUTHORIZING THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS TO CONDUCT AN INVESTIGATION OF THE BUREAU OF INDIAN AFFAIRS, pursuant to H. Res. 698 (passed July 1, 1952), was submitted by Mr. Murdock, and printed in 1953. The Chairman of the Committee appointed a Subcommittee to conduct the investigation. By letter the Chairman provided directive, based on the House Resolution, into nine specific propositions:

(1) The manner in which the Bureau of Indian Affairs has performed its functions of studying the various tribes, bands, and groups of Indians to determine their qualifications for management of their own affairs without further supervision of the Federal Government;
(2) The manner in which the Bureau of Indian Affairs has fulfilled its obligations of trust as the agency of the Federal Government charged with the guardianship of Indian property;
(3) The adequacy of law and regulations as assure the faithful performance of trust in the exchange, lease, or sale of surface or subsurface interests in or title to real property or disposition of personal property of Indian wards;
(4) Name of tribes, bands, or groups of Indians now qualified for full management of their own affairs;
(5) The legislative proposals designed to promote the earliest practicable termination of all Federal supervision and control over Indians;
(6) The functions now carried on by the Bureau of Indian Affairs which may be discontinued or transferred to other agencies of the Federal Government or the States;
(7) Names of States where further operation of the Bureau of Indian Affairs should be discontinued;
(8) Recommended legislation for removal of legal disability of Indians by reason of guardianship by the Federal Government; and
(9) Findings concerning transactions involving the exchange, lease, or sale of lands or interests in lands belonging to Indian wards, with specific findings as to such transactions in the State of Oregon.

The resulting report of the Bureau of Indian Affairs, as submitted during the 82d Congress, was accepted by the Committee as a "report" and not the position or conclusions of the Committee. The Committee believed the report to be of value to the 83rd Congress, with respect to the "whole Indian problem" (p.124). The Committee did specifically note that "*The objectives, in bringing about the ending of the Indian segregation to which this committee has worked and recommends are: (1) the end of wardship or trust status as not acceptable to our American way of life, and (2) the assumption by individual Indians of all the duties, obligations, and privileges of free citizens.*"

The above stated propositions and report turned into the "Termination Policy," as House Resolution #108, 83rd Congress, 1st Sess., 67 Stat. B132 (1953). The resolution declared that tribes *"should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."*

Irrespective of their treaty relationship with the United States, the Lummi were to be included as one of the tribes, under the Western Washington Agency of the Bureau of Indian Affairs, located in the State of Washington, to be terminated. The Bureau included the Lummi in 21 one different locations of their report to the 82d Congress. According to the late Lummi Tribal Elder Florence Kinley, interviewed in 1991, the Bureau began to meet with the tribes about this matter. Her husband, the late Lummi Tribal Leaders Forest "Dutch" Kinley, and Joseph Hillaire, would travel to the intertribal meetings called by the Bureau, at Puyallup, and other localities. While there they directly challenged the attempts of the Bureau to terminate the relationship of the Lummi's with the United States; supporting and going along with their objections would be the Makah Tribe. The Lummis, today, are proud of their opposition to any attempts to terminate their tribal existence and alienate & dismantle their reservation homeland.

The Bureau indexed (p.108) the Lummi as having a Bureau Court of Indian Offenses, a tribal court and tribal police paid by tribal funds, with the County and State being favorable to assuming jurisdiction over the tribe, while the tribe was not favorable to the assumption of jurisdiction by Washington State or Whatcom County.

However, opposition to the application of certain federal enactments has not always been enough. For example, the United States enacted Public Law 83-280 in 1953 and opened the doors to the "termination policy." Initially, this legislation gave five states (Wisconsin, California, Nebraska, Minnesota, and Oregon) criminal and civil jurisdiction over the Indian reservations within the state's exterior boundaries. This enactment did not include jurisdiction over powers to tax, regulate or decide property ownership or use. But, it did authorize other states to assume similar jurisdiction provided they made the appropriate changes in their constitutions by amendment or respective legislation. In 1968, the Congress then required consent of the tribe before any assumption of jurisdiction by the States.

The Lummi have always fought the application of P.L.

280 to their reservation and people. Such an enactment, in the judgment of the Lummi Council, was a violation of inherent tribal sovereignty. First the United States assumed jurisdiction and transferred from the tribes certain crimes defined at the passage of the Major Crimes Act- which gave federal jurisdiction over originally seven major crimes (Act of March 3, 1885, 18 U.S.C. Sections 1153, 3242). Later the list was expanded to cover fourteen (14) major crimes (18 U.S.C. Section 1153). Each of these enactments infringed upon traditional tribal governance.

In Ex parte Crow Dog, the Supreme Court overturned a murder conviction of Crow Dog for killing Spotted Tail, for lack of jurisdiction. The U.S. Congress was outraged so it enacted the Major Crimes Act of 1885 (23 Stat.385). This assumption of jurisdiction by the United States was upheld in United States v. Kagama (118 U.S. 383-84), the Court said: "*These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights…..From their very weakness and helplessness, so largely due to the course of dealing(s) of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.*" Of course, this was limited to federal expansion of its jurisdiction into Indian Country, and did not extend to the states. But P.L. 280 was turning Indian Country over to the states- which was tragic since states were the historic enemy to Indian interests and land ownership.

Since 1889, when Washington State joined the Union, the Lummi and other tribes continued to press for protection of their treaty secured fishing and hunting rights. They did this throughout the constant shifting of federal Indian policies. They refused to surrender their treaty fishing rights (to anadromous, non-anadromous, and shell fish stocks, as well as to various species of marine floral). The same historical, legal conflicts have remained present over the hunting rights of the tribal people. Open and unclaimed lands were to remain the traditional hunting grounds for the tribes. Indian access to all usual and accustomed fishing grounds and hunting territory was guaranteed by the treaties. But the state always sought to make it illegal for natives to do either outside their reservation lands and waters. Lummi leaders and members, in the recent past, continued to have their fishing gear or hunting equipment confiscated, their persons arrested and imprisoned. This continued with each passing decade. But the lawsuits of the 1970's came about and began to force changes. Leaders of the Nisqually and Puyallup Nations

became to openly protest the treaty violations and face constant imprisonment. Lummi and other nations joined the protests.

In the mid-1970's, the federal government would actually become active in taking responsible legal positions for their treaty committed word, as pertained to Indian Fishing Rights. In Phase I of the United States v. Washington (384 F. Supp. 312 (1974)) case, the federal judiciary interpreted and decided upon the intent of the N.W. treaties with the Indian Tribes party to the Treaty With The Quinault (12 Stat. 971), Treaty With The Dwamish, Suquamish, and Allied Tribes (12 Stat. 927), Treaty With The Makah (12 Stat. 938), Treaty of Point No Point, (12 Stat. 933), Treaty With The Yakima (12 Stat. 951), and others.

However, Indian tribes lost great amounts of economically valuable fishery resources over the one and one-half centuries the United States neglected to enforce its committed words and force the state and its citizens to refrain from the stealing valuable treaty-protected fishery resources. Hundred and hundreds of million dollars in salmon resources were illegally taken from the Indians and they were never compensated for the lost treaty property. Because the fish populations were nearly destroyed by non-Indian over-harvesting, the federal court had to rule on the Indians' treaty right to have the salmon habitat protected (Phase II of U.S. v. Washington) as well. This aspect of the federal rulings have forced the local, state, and federal governments to recognize their obligations to not only protect the present populations of salmon but to aide in rebuilding the resource pool through hatchery operations and protection of the natural habitat for wild stock spawning habitat.

But, this has not been an easy legal/political road for the tribes. The tribes continue to confront non-Indian groups and politicians that see the Indian rights and resources as something up for grabs. Many argue that old treaties are not worth the paper they were written on. Indian tribes face a constant battle to remind the United States that *"Great Nations, Like Great Men, Keep Their Word,"* as noted by U.S. Supreme Court Justice Black. Still, the anti-Indian networks and organizations are quickly spreading across the United States, many are centered in the Pacific N.W. and around the Great Lake States. Racial slogans such as "Indians are supercitizens" or "Kill An Indian, Save a Fish" or "Kill An Indian, Save A Deer" or "Spear An Indian, Save A Fish" were commonly

heard and printed in the U.S. media networks. Behind the scenes, these anti-Indians are simply after Indian resources. While the fish wars may be over, the battle has transferred to non-Indians that own lands on Indian reservations but do not want to be a part of the reserve.

Indian tribes in the Pacific N.W. have never been paid for all the fish that have been illegally taken from them by the state and its citizens, pre-dating the 1974 federal court decision. As mentioned above, the Lummi rejected the 1972 Land Settlement "offer" as unconscionable. So the BIA placed the funds in the U.S. Treasury; until such time that the tribe shall come to its senses and accept the offer. At one time Lummi territory was a paradise. Today, as disputed land owners, we are kept out of our own lands by non-Indian police forces and court systems. Some of the off-reservation treaty land was kept as federal lands or transferred to the State. Even with recognition of this bad experience, the Lummi have right to have compensation for lost value of their salmon resources taken under color of state law, and not just the land and other natural resources.

The BIA was Always an Incompetent System:

The Bureau of Indian Affairs had failed to meet its obligations to protect the interests of it's wards. Even today, in the era of self-determination and self-government, Indian tribes are left with all the problems of the failed federal program to manage the Indian resources. Today, Indian land titles are in such fractionated holdings that the Indian people are unable to utilize their lands. They are threatened with being charged with trespass (e.g., in 2005 trespass charges were filed against a Lummi family member for harvesting seven trees off family land) for being on or using land they inherited with up to several thousand other heirs.

The Indian, more then any other politically identifiable group in America, has had more laws and statutes passed about them and the regulation of their affairs then any other group in the United States. It could be surmised as, "power corrupts and absolute power absolutely corrupts." The federal guardian had failed to protect the ward and rise him to a level defined by the "sacred trust of civilization." This holds true of the Bureau. Recently, the U.S. Senate had to appoint a Special Committee on Investigations to research the allegations of fraud and corruption within the Bureau, in the late 1980's. A similar problem surfaced in the last century. Quoting from page 8 of the 1872-73 Committee on Indian Affairs Report

on the "Investigations of Indian Frauds" submitted to the 42d U.S. Congress, we find: *"A Guardian who wasted his ward's estate as we have wasted and permitted to be wasted that of the Indians, who are by treaty stipulations with them put under our care and protection, would be mulched in damages by any court examing his accounts and held to responsibility on his bond."*

The Lummi Nation was very concerned about the Special Committee on Investigations of the 101st U.S. Congress of 1989. The hearings were called because of the Arizona Republic's disclosure of extensive fraud and corruption existing amongst federal (BIA) officials in the Southwest. This was not the first time that investigations would target exposing the Bureau.

Even without fraud and corruption, the Indians' rights and resources have continued to be taken; either under laws of the U.S. or the states. Hidden under the takings are the fraudulent practices of corrupt officials. This truth is being proven in the Cobell case that is the topic for congressional demanded settlement today. In this case, the BIA is accused of losing six to fifteen billions dollars of Individual Indian Money Accounts, over time with a current estimated value of about one hundred billion.

The Lummi leadership is directly involved in the development of proposed federal law to be enacted by the 109th Congress. This bill will include '*draft*' language for a proposed settlement of the Cobell Case. The overall goal is to stimulate tribal/congressional action to secure Trust Reform. As a Self-governing tribe, we hope to secure an opportunity for self-governing Indian nations to assume control over their own lands and natural resources located inside their exterior boundaries. Lummi is working with the Affiliated Tribes of N.W. Indians (57 member tribes) and a coalition of twelve other tribes to at least stimulate the dialogue and debates (effective as of July 2005). Presently, these tribes are at odds with the National Congress of American Indians (200+ member tribes) and the Intertribal Monitoring Association (60 member tribes) over the process of securing legislation that would be acceptable to the tribes nationwide. Today, the tribes are drafting and debating the proposed language and other legislation or language is being drafted. The Lummi goal was to start the action and at least get the main impacted tribes back before Congressional Hearings.

All to often the 'trust system' has made the Indian people ripe for unscrupulous activities. Most always the Indian people are not reinstated to their rightful conditions prior to the wrong done them. The problem with the Cobell case is it involves a class action lawsuit for

the individual Indians and not the tribes. The main point is the 'guardian' deprived poor reservation families, elders, and children of the benefit of their accounts. Of course there are 'tribal trust funds' involved but the primary litigants are individuals with (1887 General Allotment Act) Trust Estates.

The Indian people have the highest infant mortality, shortest life expectancy, highest underemployment & unemployment, lowest levels of economic development, lowest rates of educational and vocational attainment, poorest health, highest levels of disease vulnerability, poorest housing conditions, highest teenage suicide rates, and highest levels of poverty, in America. When this is added to an insensitive federal bureaucracy, which itself is plagued by corruption and fraud, then the script worsens. The American Indians are a marginalized people that have always been asked to give more and receive less.

In the Forty-second U.S. Congress the Committee on Indian Affairs reported on "Investigation of Indian Frauds," and ordered the report to be printed as of March 3, 1873. This was entitled: *"REPORT OF THE COMMITTEE ON INDIAN AFFAIRS, CONCERNING FRAUDS AND WRONGS COMMITTED AGAINST THE INDIANS, WITH MANY STATISTICS OF VALUE IN THE MANAGEMENT OF INDIAN AFFAIRS. BY THIS INVESTIGATION AND REPORT THE COMMITTEE HOPE TO DO SOMETHING TO RID THE INDIANS AND THE INDIAN SERVICE OF THOSE HEARTLESS SCOUNDRELS WHO INFEST IT, AND WHO DO SO MUCH DAMAGE TO THE INDIAN, THE SETTLER, AND THE GOVERNMENT."*

The report to congress helped lead to the drafting of the U.S. code provisions on Indian contracting. We note one section, on page seven, that seems to exemplify why Indian wards and tribes are still, today, untrusting of the "guardian," as follows: *"From these false grounds it is the duty of the nation to server itself at once, and for all time, with these its wards and defenseless ones, whom by treaties almost without number we have, with the solemnities of supreme law, and with the nation's honor involved, promised protection. If the Indians were our prisoners of war they are entitled to protection of person and private property from despoilers. Their weakness and incapacity in financial transactions with designing and bad men is the open doorway leading to their danger and to our duty toward them, demanding, as the Indians have a right to do, our protection and the fulfillment of treaty stipulations with, and the high command of a Christian duty to a helpless and untutored people, whose history fully shows that we, as a people, are largely accountable for their present condition, and of those misfortunes we have not right to take or permit advantages. Despite the severe prejudice that has become nationalized and crystallized toward them, no honest man, who has traced the record, and considered the facts, from the discovery, considering the simple character of the aborigines when discovered, will fail to condemn the provocations that on our part drove the Indians to be the enemy of our race, and to fear and avoid a civilization that, with kind and just treatment, they would have accepted and become a part of."*

Indian tribes have a government-to-government relationship established with the United States. The foundation of this relationship is based on the U.S. Constitution. Because of the ratified treaties, there is a duty of the sacred trust of civilization assumed by the United States. This is a trust in which the majority and dominantly stronger nation owes a duty to the lesser and weaker nation to protect its rights and resources from despoilers and unjust government. On page 9 of the report it was stated: *"It is the bounden duty of the United States to see to it that no one or more of its citizens, whether officials or otherwise, and no person within our borders shall cheat, defraud, or do injustice to any Indian and Indians residing legally within our national domain. Their protection is our moral, and generally by treaty provisions and locality, our legal duty, against all persons whomsoever whether citizens of the United States or not. And any moneys or other property fraudulently, forcibly, or by exorbitant contracts taken from them by other persons, the United States is duty bound to require returned to them, and to enforce that request by the necessary powers of the Government. And especially is this true where the fraud has been perpetrated by, or with a knowledge of, or with the assistance of, or in the presence of, a United States officers, or near to the Government, where the Indians, in their untutored and dependent state, are induced to act with less freedom that if not surrounded with the evidence of our power and superiority of advantages, both national and individual, even our manners and language being not well understood by them. We must consider the Indian as they are, and not as we are."*

While the Committee on Indian Affairs conducted this investigations 117 years ago, the concerns and damages are still the same. The Indian policies of the United States has changed with nearly every congress and president. The Congress and Chief Executive are charged to legislate and implement the laws and policies applicable to Indian country. The conditions on the Indian reservations have changed very little over the past one hundred and twenty-two years since the last major investigation into contracting fraud and corruption. In 1910, the First Americans (Native Indians) were nearly brought to the edge of total extermination and extinction as a race (with less than a quarter million surviving federal policy). And, still, in 2005 the Congress holds investigations into a corrupt BIA system that continues to prey upon Indian country. These truths should argue for the wisdom of providing the tribes with permanent self-determination, self-government, and economic self-sufficiency.

There are reasons these problems continue to exist. For example, the U.S. power over Indian Affairs is considered absolute. This power is considered plenary. The President

is charged with exercising the implementation of this far-reaching power. In reality, this places the BIA employees in the position of control, to manage, and regulate the affairs, rights, and resources of not only the Indian people but the Indian tribes and nations. Thus, it is the BIA that actually implements and controls Federal Indian policy, programs, services, and functions, as federal employees.

Over time, the Bureau had continued to expand as a bureaucracy. The Bureau employees numbered 97 by the early 1860's, increased to 12,633 by 1950 (See: House Report No.2503, 82 Cong., 2d Session, Pursuant to H.Res. 698, December 15, 1952). By the 1970's, the Bureau would expand to 16,000 employees, reaching 18,000 including part-time employees (See: Final Report, Vol. One, p.254 of American Indian Policy Review Commission, Submitted to Congress on May 17, 1977).

The Bureau of Indian Affairs was reported, by the American Indian Policy Review Commission as: "*Present budgetary practices do not provide an equitable share of Federal appropriations for Indian services for the direct benefit of Indians. Instead, the ratio of one Federal administrator for every 19 Indians illustrates that the Government's massive administrative organization absorbs an inordinately large proportion of Indian appropriations to support Federal employees. Rather than benefiting the tribes directly, relatively high Federal salaries result in expenditures constituting transfer payments to civil servants" (p.227, Final Report, Vol. One, 1977).*

These employees were powerful as a result of their rights as civil service employees. Whenever congress investigates the Bureau, and considers how to transfer control to the tribes, it should address the "bureaucratic buffer system." Bureaucrats are not fired, they are transferred to another department, another agency, another level of government. Some are elevated for implementation of policy, and some are demoted for not complying. Ultimately, they see themselves as outliving each administration. They see themselves as in control over the long-term.

This political protectionism is a key hindrance to tribal governments. Many times Interior officials and corporations are in conflict with protecting the interests of the Indians versus allowing contracts that exploit Indian natural resources. There has been a lot of room for corruption, fraud, and unconscionable contracting-located along a continuum of light graft to absolute criminal activities. Most often no corrective action has been taken. This has been a common pattern.

All to often, the Department of Interior/Bureau of

Indian Affairs has been a haven for private corporations. The management of Indian natural resource opens opportunities to contacting power and influence with non-Indian corporations and private business. For example, the Secretary of Interior got President Carter to sign the Hopi/Navajo Relocation Bill and then became President of Peabody Mining and Coal Company that had contracts tied to the settlement lands that were being opened up.

During the 1980's hearing process, many tribal leaders were concerned because the hearings were closed. If the process was more fair then tribes could have addressed the real problems. To many tribes, the whole investigative process was controlled to prevent disclosure of the extent of fraud and corruption found in the administration of Indian estates. The legal test of honesty in government will be whether or not the Indian victims will be placed back into the financial position they would have been had the fraud and corruption not taken place. In the late 1980's, some leadership feared there would be BIA retaliation, if they came forward. Today the issue is raised by the Cobell Case and this fear is not felt because of the control exerted by the court.

Still, the Bureau is seen as a jungle of abuse of the 'wards' long-term interests. One fact that was brought out in the Pre-Cobell time period was that ninety-percent (90%) of all appropriations for Indian Affairs was used for the Bureau itself. This left ten-percent (10%) available for the tribes and urban Indian organizations. A majority of this then went toward setting up the tribal administration to manage the program. Administrative wages and expenses consumed most of what funds were left. This left very little for actual services to the Indian people. Deducted from this was the federal and state taxes (e.g., FICA, FUTA). Tribes were expected to perform the same services, functions, and programs under 93-638 self-determination contracts but with less money.

Thus, before Self-government came into existence, three-percent of one-billion annual BIA appropriations made it to Indian country. While tribes were highly impoverished the Bureau worried about meeting the next annual cost-of-living increases for its civil service employees. This translated in more deductions from funds available to the tribes for contracting (P.L. 93-638). Tribal inability to undo the damage done by the BIA mismanaged trust system has only added frustration to an already failing system. In addition, it is a problem to work with the neo-paternalistic Office of the Special Trustee (headed by Ross

Swimmer). Tribal hatred for this Office has resulted in tribal leadership seeking trust reform and elimination of this office. The Office has already consumed nearly a billion dollars on itself and has not accomplished any meaningful trust reform.

The BIA failed in its duty and responsibility to assure the heirs of the Indian land owners would inherit the estates. Indian lands have passed from one generation to the other without (probate) division amongst the heirs. This is the fractionated heirship problem plaguing Indian Country. Under amendments to the Indian Land Consolidation Act, the BIA argues that the tribes have to have 100% of the owners agree to all binding land contracts- even though it (the BIA) never had too. The Bureau was all powerful and could lease, rent, or even sell the Indians lands and resources without their signature. The BIA had control of the resulting revenues as "Individual Indian Money Accounts." It was suppose to have issued out payments , dividends, and financial statements. The only problem is that the BIA cannot prove it ever made the payments to the Indians. The Cobell case is currently battling this conflict. In the meanwhile, the tribal governments have inherited the fractionated heirship problem via the Land Consolidation Act, as amended. The federal government has done little to clear up the land crisis of Indian Country. It basically walked away free of any legal burdens outside of making nominal financial commitments to help tribes buy back fractionated land holdings.

In the case of the Lummi Indian Reservation, land ownership & inheritance was suppose to be in accordance to the treaty. The land was not covered by the General Allotment Act (originally and as amended). Treaty restricted fee patents were issued not "trust patents;" except in the unique case of "Davie Crow Skootah" lands. He was an ex-slave of a Lummi family and freed under terms of the treaty. He died without heirs. In that instance Congress specifically directed "issuance of patents to landless Lummi, in accordance to the general allotment laws." Under this special law a few Lummi trust patents were issued.

Lummi (Treaty Assignment) heirship has been in a chaotic state. The undivided, multiple owners, fractionated interests inherited under the "trust system" has nearly destroyed the economic value of Lummi treaty property. BIA Mismanagement of the leasing, rent, or sale contracts impacted Lummi as well. The Lummi Nation has assumed self-

government responsibility of this BIA program but the funding level is not enough to resolve the long-term problems transferred to the tribe.

Took our Land, our Fish, our Game, and now Taxation takes More:

In addition, the Internal Revenue Service had coordinated a series of direct challenges to individual Indian ownership of "trust lands and resources." The IRS had processed cases through the Tax Courts- which has methodologically attacked the tax exempt status of the tribal Indians' (See: Squire, 1956) incomes derived from their Indian lands & natural resources. The IRS is attempting to tax everything in Indian Country. The IRS position is that "Indians are citizens, all citizens pay taxes, therefore Indians pay taxes." In this process, the Bureau of Indian Affairs had been cooperative with its sister-agency (IRS) and routinely turns over records and files on accounts.

From 1982 to 1988, the Lummi Nation directed its Treaty Protection Task Force to coordinate a national and international campaign to reverse IRS actions taxing treaty-protected fishing income. This IRS activity was in accordance to an Opinion of the Department of Interior Solicitor's Office (November 7, 1940) which argued that Indian citizens had become subjected to the tax laws as any other citizen, irrespective of the constitutional limitations normally applicable to this question of the non-taxable status of Indians. In 1988, after a majority of the Indian tribes in America rallied to the Lummi's request for support, as well as many local, regional, national, and international non-Indian groups, the President signed a new law that confirmed that "Indian fishing rights income was tax-exempt" (now listed as Section 7873 of the IRC).

The big question remains as to whether or not incomes derived from harvesting natural resources reserved by Indian tribes are for the exclusive use of the Indians and tribes or does the government get another share of the treaty resources in the form of federal taxes. The IRS has been slowly processing tax cases against individual, impoverished Native Americans since the Interior's Solicitor's Opinion was issued. It singles out a tribal Indian, files a claim against him as a citizen, and blocks the tribe's intervention since it is between the government and a citizen. The individual is told to pay the assessed taxes, punished with fines and interest. Under fear the

individual settles- usually because they cannot afford a lawyer. This becomes another case precedent used against the next Indian.

There has been over sixty-five years of court cases against individual Indians, which have slowly eroded the tax base of the tribal governments in favor of the non-Indian federal government. The tribal Indians did not have to be specifically exempted from federal taxation before because of the constitutional language. Now, since they cannot point to such exemptions in the IRC they are confronted with taxation. At one time, it was a matter of canon of construction of written documents (treaties, constitution, other contracts) that if the language was ambiguous then it had to be interpreted in favor of the Indians. This is not the case in tax court.

The modern day Indian tribal governments should hold to the idea that taxation is additional federal taking from the whole resources that were set aside for the Indians exclusive use. The US got its share in the treaty cessions. To take more in the form of taxes is a treaty violation. And, as we have found, it violates the intent of the constitutional relationship with the Indians. A couple congressional leaders, during the IRS campaign, wanted the Lummi to agree to legislative language that would prevent all other tribes from arguing the treaty-protection point over taxation of income derived from the economic value of reserved natural resources- if we wanted their support for the language that became Section 7873 IRC. We refused. We clearly declared that we would rather let the bill die then to sell out the rights of other Indian Nations. We won out in the end without compromising other treaty tribes.

The position of the Lummi Nation is that all natural resources protected by treaty, executive order, or federal statute, for the Indian tribes and people are owned exclusively by the Indians and this includes the whole economic values of the same, that federal taxation of the income is a form of additional taking. The U.S. received more than 3.5 million square miles of land and natural resources from the tribes by Peace Treaties. It cannot take more in the form of taxation. The land and natural resources have economic value. When that value translates into actual income then the IRS works to apply the Federal Income Tax to it. This is a form of taking an additional share of the resources reserved for the Indians exclusive use. The power to tax a right is the power to destroy it. Thus, as stated above, all natural resources owned by

tribal Indians, and the incomes derived therefrom, should be covered by Section 7873.

Also, the tribal Indians were never suppose to be covered by the U.S. Constitution- i.e., as citizens or members of the society that was delegating the powers to the national government. We were excluded from being counted, being represented, and from taxation. The 14th Amendment guaranteed we were to remain tribal Indians and not citizens of the U.S. or the individual states. The 14th Amendment did not amend Article I, Section 2, Clause 3; nor did the 16th amend it, nor did the 16th amendment amend the 14th amendment. We are still tribal people and not taxable under the constitution. So, the federal income tax should not apply to tribal Indian wages and incomes originating in Indian Country. A compromise measure would to have the congress authorize incomes inside Indian Country, assessed in accordance to the Indian Tribal Governmental Tax Status Act, to be treated the same as a 'foreign income tax' and written against the federal income tax; provided that income is not directly derived from treaty, executive order, or statutory protected natural resources set-aside for the Indians exclusive use.

Lummi Leadership Demand Permanent Government-to-government status:

The Lummi leadership had worked with the Alliance of American Indian Leaders in the 1980s. We mutually saw Indian sovereignty protection as the top of the list of important issues. We explored questions as to what is the alternative to a BIA in the Department of Interior? The idea of the Department of Indian Affairs was considered a long-term goal. All BIA duties, responsibilities, functions, and trust obligations would be transferred from Interior to this new department. The other eleven federal departments and agencies would transfer their "Indian desk" operations as well. The centralization of functions and services, specially earmarked for Indian country, through this department would theoretically streamline Indian Affairs and make them more accessible to the tribal governments and Indian people. It would be the basis for real government to government relationships between the Indian Tribes and the United States.

This would, in time, help place the tribes in closer control and influence over their records, resources, and planning & implementation of the self-determination and self-government policies of the recent and current administrations and congresses (93rd to 109th). The self-

government laws have encouraged the 270 self-government tribes to more actively participate in the "Departments" development of congressional appropriation requests and the respective allocation of funds to the tribes. The main battle confronting the self-governance tribes today is the drain of BIA funds caused by the Office of Special Trustee. It is because of this office tribes are more adamantly demanding 'trust reform' along with the Cobell Case settlement.

The remedy for removing some of the tribal self-determination stumbling blocks is increasing tribal self-government. Self-governance brings the tribes into a closer status of that associated with the "Trust Territories." In their case, the U.S. assures that annual appropriations are directly sent to the trust territory governments as a whole sum for their domestic allocation based on need and mandate. The self-governance tribes seek the same congressional consideration and treatment by law.

If Self-governance is expected to really be successful then the other federal departments and agencies will have to comply. They will have to work with Indian Country to develop funding formulas that will provide for the tribes- even though they may not have had a history of helping the tribes. They historically viewed the tribes as an "Interior" matter. Their staff and personnel are less informed then the Bureau employees about Indian law, policies, rules, regulations, treaties, agreements, and history. Obligations under the Sacred Trust of Civilization Doctrine is binding upon their departments/agencies as well.

The Alliance Tribes were concerned about claims that the Constitution is the foundation of the Plenary Power over Indians. This power supposedly derived from the Indian Commerce Clause (Art. I, Section 8, Clause 3). This clause provides the ". . ... *Congress shall have the power to regulate commerce with Foreign Nations, amongst the several States, and with the Indian Tribes."*

It is true. The U.S. Congress and President can regulate trade and commerce with the "*foreign nations;*" for example, legislation on imports, exports, and foreign trade zones, or negotiation of tax treaties. The main point is that the Congress does exercise constitutionally provided power in a plenary form. This a power of the national government and not the individual state governments. But, we do not claim that the U.S. has plenary power over the foreign nations that buy, purchase, or import U.S. made goods. And, when the U.S.

enters a trade and tax treaty with another foreign state or nation that foreign power does not consider itself subjected to U.S. plenary power.

Another part of the clause is found to apply to the "*amongst the several state.*" This has had significant implications for interstate commerce and federal jurisdiction above and beyond the individual states. There is the overriding "preemption of jurisdiction" by the federal government in such interstate relationships. Interstate commerce has significant implications to the commercial health of the whole nation. The supremacy clause reinforces the congress and court conclusions on the same. But, the Congress and President do not have absolute power over the intrastate commerce- jurisdiction primarily attaches when the goods move across state borders.

In speaking of this power to regulate commerce of the individual states in the United States, in light of the idea that the states retained no rights to regulate such national and interstate aspects of commerce, under the Doctrine of Plenary Power of the U.S. Congress, John Marshall wrote, in Gibbons v. Ogden 19 U.S. (6 Wheat.) 1 (1824), that: *"This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and amongst the several states, is vested in congress as absolutely as it would be in a single government."*

But it does take state and United States cooperation. This is exemplified by development of Uniform Commercial Codes, and it enactment by the individual states (whole or partially). This system is indicative that the congress does not rule absolutely irrespective of state likes and dislikes. We can understand this in that the federal system incorporates the mutual interest of the Union and that of the individual state.

Now, we come to the part of the commerce clause that states, "*and with the Indian tribes.*" Once this was argued as the source of the plenary power over Indian Affairs. In a choice between whether or not the Congress or the individual states shall regulate commerce with the Indian tribes then it is the Congress that has the plenary power and preemptory control of this relationship. In United States v. Kagama, 118 U.S. 375 (1886) it was found that "it would be a strained construction" to make the Commerce Clause the sole source of plenary power over the Indian

tribes. The Commerce Clause is intended to regulate trade and not all aspects of life and government of the Indian tribes.

Milner Ball, in the American Bar Foundation Research Journal, Constitution, Court, Indian Tribes, 1987, stated it well on page 61, as follows: *"Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted by a fundamental contradiction between our political rhetoric and our political realities."*

The United States should continue to legislate on Indian commerce and trade positively in favor of Indian country. The Congress did this when it enacted the Indian Gaming Regulatory Act (Lummi helped secure the 'Grandfather Clause" in the legislation). It improved the opportunities for many tribes but not all. The IGRA is not a solution that benefits all tribes. There is a need for congressional authorization for Indian economic empowerment zones and tax-exempt bonding, and other ideas that shall help level the economic playing field. Indian Country has been locked out of the economic booms of the past. We need to be able to plan for and implement a better economic future.

Felix Cohen stated, in 1953, very explicitly his fear that the treatment of the American Indian is in reality a reflection of the political weakening of the whole constitutional foundations of the institution known as the United States of America, as follows: *"Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of the American Indian, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith."*

We wonder what it is that allows the constant taking of Indian rights and resources for private and public financial gains. Corporate and private interests have continued to be able manipulate changes in the laws to allow exploitation, and sometimes outright thief, of Indian natural resources. For example, there was the General Allotment Act of 1887 to 1934 (Dawes Act, 24 Stat. 388), the Alaskan Native Land Claims Settlement Act of 1971 (43 U.S.C.A., Sec. 1601-1628), the Navajo and Hopi Relocation Act, and many others.

While contrary to international and national canons of

construction of treaties and written documents, these acts of taking have been allowed by the U.S. Supreme Court. It has been considered legal under plenary power over Indian Tribes or justified by the alleged "Conquest" of the Indian Tribes (a legal fiction applied to all the tribes that treatied with the United States, as decided in the case of Tee-Hit-Ton, 384 U.S. 272 (1955)).

The financial rewards of the Dawes Act was the model for the Alaskan Native Land Claims Settlement Act. The Alaskan Natives have met the same fate that the Indian peoples of the lower 48 states encountered, under the earlier version of the allotment system. It was all about taking Indian lands. The Alaskan Natives will soon find themselves impoverished and homeless in their own native lands. They have already primarily lost their fishing rights and resources due to state control, even though the State of Alaska disclaimed this jurisdiction in its constitution. The one billion dollars appropriated for the purchase is less than the federal taxes gained off the economic boom of exploiting the native resources.

The Hopi and Navajo lost more. They were confronted with major land takings. The corporations and politicians got away with it. The Hopi and Navajos are being relocated forcibly under federal supervision and directive, so they will no any longer dispute the Joint Use Area; during all this the corporations and companies that specialized in coal, uranium and oil extraction were reaping billion dollar benefits from the opening of the lands to resource extraction. In addition, the U.S. is gaining federal taxes and fees from each transaction. The march of the Hopi and Navajo is no different then the Trail of Tears of the Five Civilized Tribes of the 1830's. it is all about 'taking more' from the poor Indian Nations and people.

We wonder how this is ignored by American society. Generally, it begins with the propaganda and indoctrination that the American Indians and the general public at large are subjected too. For example, history is taught the Indians were all savages, heathens, pagans, and ruthlessly warring upon the poor defenseless women and children of the frontier. What is not taught is the many gifts and contributions that the American Indians have made to the nation and American Society.

The United States is fond of teaching about the 1787 Constitutional Convention and the Founding Fathers. What is not taught is that the Iroquois Confederacy was a model for 1787 draft constitution. The Founding Fathers were instructed and taught the technique of government that

the Indians so readily cherished. This became a part of the American Dream. (See: Forgotten Founding Fathers, by Bruce Johanson, 1982 and his Exemplars of Liberty).

The Indian Confederacies contributed to the roots of the constitution. There was, then, an emerging reality that reflected colonial visions for every man, woman, and child to want and protect their inalienable rights. These rights were added to become the Bill of Rights (First Ten Amendments). In the beginning, the United States sought to assure that there would not be a king, a queen, a dictator, a paramount reflective of the European style of sovereignty. To assure this, the systems of checks and balances and separation of powers, as exemplified by the Iroquois Confederacy in their Great Lake of Peace, was written into the Constitution. The Founding Fathers learned from the Indian peoples about their beliefs in governments and individual freedoms.

The Lummi Tribe, and the members of the Alliance of American Indian Leaders (formed in 1986), believed that there is more to the Constitution then was being admitted. They believed there was more to the reasons certain constitutional provisions applied to the tribes governmental relationship with the United States. The Alliance and the American Indian Rights Association, in October 1987, set out to investigate the following applicable provisions of the Constitution:

APPORTIONMENT CLAUSE- INDIAN CITIZENSHIP
"Representatives and direct taxes shall be apportioned among the States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons." [Article I, Section 2, Clause 3]

"Representatives shall be apportioned among the several States according to their numbers, counting the whole number of persons in each State, excluding Indians not taxed." [14th Amendment, 1868]

TREATY-MAKING POWER- INDIAN TREATIES AND FEDERAL RESPONSIBILITY.
"He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . " [Article II, Section 2, Clause 2]

COMMERCE CLAUSE- PLENARY POWER OF CONGRESS
"The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . " [Article I, Section 8, Clause 3]

VALIDATION OF PRIOR DEBTS AND ENGAGEMENTS- TREATIES AND SUPREMACY CLAUSE
"All Debts contracted and Engagements entered into, before the

Adoption of this Constitution, shall be valid against the United States under this Constitution, as under the Confederacy.

This Constitution, the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and Judges in every State shall be bound thereby, anything in the Constitution of
Laws of any State to the Contrary notwithstanding." [Article VI, Clause 1 & 2]

THE JUDICIAL POWER
"The judicial power shall extend to all cases, in law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority; [Article III, Section 2, Clause 1]

In review of the history of the Constitution, we came to understand that the Indians were directly and indirectly written into the whole concept of the constitution. We came to understand the Indian people were part of the roots of the guaranteed freedoms and contributed to the Checks and Balances and Separation of Powers systems. The symbol of the Eagle clutching the bungle of arrows is a lesson in unity shown by the Iroquois Confederacy to the colonies.

The anti-Indian elements can dig and search and attempt to find a way to blame or deface the pride of tribal self-government and self-determination. They can deny that their challenges to the integrity of tribal leadership and tribal self-rule is not a matter that the Congress should be concerned with; but, in the end, it is all about removing land and natural resource ownership from the Indians, and the tax benefits to non-Indian government.

The Lummi Nation has been concerned about the cancer growing in the U.S. Constitution. America, in general, empowers the constitution as the mandate of the People, a grant of powers from them to their Congress, President, and the Court. Do the "People" understand the damage done to their Constitution when legal fictions are applied to Native America. If fictions can be created to govern our lives and economies then it shall eventually spread to impact their constitutional rights as well.

We appreciated when the U.S. Congress heard tribal calls for Self-governance, based on treaties reinforced by the power of the U.S. Constitution. We call for a continued dialogue on keeping the government-to-government relationship the center of Indian Affairs. In the pre-self-government era, Lummi lobbied all across the United States

and Congress during the 99th and 100th Congresses, to secure passage of Senate Concurrent Resolution 76 (introduced by Senators Inouye, Evans, DeConcini, Burdick, McCain, and fourteen other co-sponsors, on September 16, 1987, with a Senate Select Committee on Indian Affairs Hearing on December 2, 1987 (100th Congress, 2d Session, Calendar No.1026, Report 100-565) and House Concurrent Resolution #331,

Both were expressing appreciation and recognition, during the 200th Year Celebration of the U.S. Constitution, to the Iroquois Confederacy for being models for the form of constitutional government established. The House resolution passed the Congress in 1988 (after the House Interior & Insular Affairs Committee Hearing on September 22, 1980). The resolution, also, was an expression of Congressional policy to maintain and reaffirm the "government-to-government" relationship with the tribes.

On October 10th, 1988, President-elect George Bush, Sr., had written to tribal leaders. In his communication, President Bush declared his policy position to recognize the government-to-government" relationship with the Indian tribes. This policy was in pursuant of that which was established by the Reagan Administration. The Lummi are in agreement with other tribes and call for the maintenance of this policy statement during the second term of George Bush, Jr.

The June 14, 1991, the White House "STATEMENT BY PRESIDENT BUSH"- Reaffirming the Government-to-Government Relationship Between the Federal Government and Tribal Government, stated, that: "*This government-to-government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our Nation, of Indian tribes becoming what our courts have come to refer to as quasi-sovereign domestic dependent nations. Over the years the relationship has flourished, grown, and evolved into a vibrant partnership in which over 500 tribal governments stand shoulder to shoulder with the other governmental units that form our Republic.*"

Could this policy be the basis for future expansion (or rather, recovery) of tribal self-governance and self-determination, under George Bush, Jr.? We can at least rest assured that the policy is not objectionable to the Congress. Congressman Ben Nighthorse Campbell, speaking at the House hearing HCR #331, stated: ". . . *there (was) no opposition to this Iroquois Resolution. Quite frankly, the general sentiment is that the U.S. Congress will begin the*

next two-hundred years on the right footing." This statement was meant to clarify, we presumed, to those concerned about the passage of the resolution that this process not only recognized the contributions of Native Americans to the constitutional form of government but to confirm the foundations upon which the relationship is governed. We seek to have the Presidency and Congress advocate a strong, joint policy, and to ultimately influence the U.S. Supreme Court in its decisions on tribal government and jurisdiction.

The Lummi Tribe knows that 1953 House Joint Resolution 108 (passed by the Congress and signed by the President), which was the "termination policy," was allowed to remain on the federal and legislative books continuously, and up and until the 100th Congress repudiated the language in passage of Public Law 100-297. There were more than fifteen attempts to get Congress to repudiate this policy, between 1953 to 1988. While recent enactments called for "self-determination," the Termination policy remained a part of federal duality of policy. The Lummi and Quinault Nations asked Senator Evans to secure repudiation of the policy and he did. It was hoped that repudiation would impact the Congress, the President, and the Court more positively.

The Lummi Tribe specifically calls attention to passage of Public Law 100-647, Title III, Section 301, which created the "Tribal Self-governance Demonstration Project." The tribes that originally participated in this project appreciated the consideration of the Senate Select Committee on Indian Affairs under recommendations per S.1703 and the final authorization language for the appropriations found in the Conference Report to Accompany H.J. Res. 395, on 889 (Report 100-498), which funded the Self-governance Demonstration Project Tribes. These initiatives were further indications of the willingness of the U.S. Congress to continue to honor the current policy.

It is through the type of resolutions and legislative authorization language exemplified above that that we find the Congress is in closer reality to the Founding Father's constitutional intentions. The disclosure by the Arizona Republic (1986) only forced America to consider the political truth- the 'Trust System' is a failure. The First Americans, the friends of colonialists and the emerging states, and friends of the emerging nationalists and federalists, were the models of the constitution, and were distinctively recognized as a political population set

apart from all others by the constitution. But this separate status was not intended to institute the marginalization the tribal people under the flawed federal 'Trust' system.

If the U.S. Congress digs deep then the skeleton shall be found in it's own political closet. In the past, the Congress, Presidency, and Judiciary have all weighted the value of constitutional protection and justice for Indians against the benefits of economic gain to the citizens, states, and nation. And the political formula always equated to Indian lost, even while other politicians argued for the protection of the nation's integrity and honor.

All to often, political-legal conflicts over jurisdiction and application of laws, rules, regulation, and taxing authority within the boundaries of Indian reservations have been interpreted to empower the non-Indian governmental interests- to the detriment of the "ward" and the "lesser power." When litigated the courts declare the question in favor of the states or nation. Consider the case where Washington State failed to abide by the federal law that authorized their assumption of P.L. 280 Jurisdiction over Lummi Indian lands and people. The state failed to amend its paramount law (state constitution)- which forbid assumption of such jurisdiction. The U.S. Supreme Court, instead of ordering compliance, said the State meant to abide by the state (constitutional) law- which was required at Union admission.

We may wonder how the above applies to the Indian treaties and the questions of economic development, jurisdiction, and the sacred trust of civilization assumed by the United States. It is not as difficult as it appears. The United States can, under its plenary power over interstate commerce and Indian commerce regulate trade and commerce with Indian country, such that it allows for the opportunity for Indian tribes and peoples to develop their human and natural resource base, without the interference of the individual states or federal government. Indian reserves should be allowed to develop the infrastructures and codes systems necessary to justify and encourage economic and business development, without fear of long, drawn out, expensive litigation with the states or federal governments over taxation.

Many politicians and lawyers say the questions on civil, criminal, and taxing jurisdiction is to complex to resolve. But, the question of civil jurisdiction still

rests with the Indian tribes, at least until he congress or the court decides otherwise. The question of criminal jurisdiction over non-Indians as decided in Oliphant v. Suquamish, 435 U.S. 191 (1978) left the tribes with only the power to exclude non-Indian criminals from the reservation, since they cannot prosecute in tribal court.

What is true with the Lummis is that the treaties allow for the tribe to hold and restrain violators, until the proper authorities (federal officers) take custody, if said person has violated applicable laws (federal). But, tribal officers making such arrests face lawsuit for illegal arrest and custody of the defendants/criminals person. In the end, non-Indian criminals have more rights than the tribal collective. We are not allowed as a matter of federal court made law to protect ourselves.

The Congress can deal with these issues. The Congress enacted the Trade and Intercourse Acts to govern the encounters between the races before. This is within precedence to do so to meet the modern day concerns. . . on a government-to-government basis. It is a complex process but was successful in the interstate example of the Uniform Commercial Code process. This could be a model for addressing tribal economic development within the limits of a state economy or the Nation.

A significant portion of the economic and revenue problems of Indian country could be eliminated if the U.S. Congress and President would stop the unconstitutional taxation of Indian incomes derived from Indian natural resources, commercial ventures, and governmental operations located inside of Indian Country. The state(s) and federal government drain off tax revenues before the tribes can make their own assessments and allocated revenues to support essential governmental functions & services.

America has a long ways to go before it comprehends the damage done to the rights of not just the Indians but the nation and the popular constitution. Tomorrow it will be the rights of the multi-national corporations that take precedence over all others. Thus begins the privatization of national government. But, the Lummi Nation is exercising self-determination and self-government. We are seeking economic self-sufficiency without surrendering our inherent sovereignty and the rights of future generations. We believe the Federal Indian Policy should permanently be interpreted as one that is government-to-government- as founded upon the U.S. Constitution (SCR #76 and HCR #331), as envisioned by the Founding Fathers in 1787, and as understood during the 39th/40th Congresses Reconstruction Debates over application of the 14th Amendment to the tribal Indians ('Excluding Indians not taxed').

SUPPLEMENTAL TESTIMONY OF THE LUMMI INDIAN NATION REGARDNG THE TRUST RESPONSIBILITY OF THE UNITED STATES

By Darrell Hillaire, Chairman
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Submitted to the Senate Committee on Indian Affairs
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SHIFTING JURISDICTION OVER INDIAN AFFAIRS:

After the formation of the United States, during President Washington's administration, Indian Affairs was under the jurisdiction of the War Department. Commerce with the Indian Tribes was regulated through legislation and Indian Trading Houses. Over time, the War Department proved to be in conflict with managing Indian Affairs versus going to war with the tribes. But, the main problem was that military personnel were not trustworthy. In 1848, Indian Affairs was transferred to the Department of Interior. But, first, in 1846, the Department conducted a survey of Indian Country to determine over who, what, and where it was assuming jurisdiction. At this time, it was believed that Indian Affairs may be better managed by civil servants rather than military personnel.

By the early 1870's, the Bureau of Indian Affairs was called before congressional committees. There were on-going congressional investigations into extensive fraud & mismanagement of the contracts governing access to Indian land & natural resources. It became clear that to protect the Indians' interests would require a revamping of the federal laws governing contracts with Indian Country. At this time, in search of a better system, President Grant transferred jurisdiction over Indian Country to the Churches. This lead to the institutionalization of the Religious Crimes Code (DOI Circular #1665) that deprived Native Americans of their rights to practice traditional spirituality.

Indian Affairs has been within the Department of Interior since 1848, along with fish, wildlife, and parks. All the other federal departments, until recently, failed to provide services or benefits to Indian Country because "Indian Affairs" was subject to the jurisdiction of the Department of Interior. Thus, they had little history with serving Indian Country. Indian leadership has advocated creation of a 'Department of Indian Affairs.' If created, it would require the Chief Executive assures that all other federal departments and agencies funnel a fair percentage of their services/benefits through the department as a part of the government-to-government relationship with the Indian Tribes.

POLICY CONFLICTS- FROM PATERNALISM TO SELF-GOVERNANCE:

The national debates associated with the "reorganization" and "realignment" of the Department of Interior's Trust Responsibility is one in which the Indian Self-Determination & Self-Governance Policy is challenged by BIA bureaucrats that favor "paternalism." Dictating paternalistically to the tribal leadership has been a standard mode of operation of the Bureau of Indian Affairs since it was transferred to the DOI. In the past, the Indian Reservations were governed over by the "Agent-in-charge" or "the

Farmer-in-charge" or the "the Teacher-in-charge" or the "Priest-in-charge" of the Indians and the respective reservations. The Indians were classified as incompetent and non-competent by federal law and policy. Traditional leadership was prosecuted, usually under the Religious Crimes Code (DOI/BIA Circular #1665). The leadership of a tribe needed to be recognized by the BIA agent for legitimacy. In time this expanded to require BIA supervisory powers instituted into tribal constitutions.

The 1887 General Allotment Law focused upon the destruction of tribal government and the turning of tribal people into property owning individual citizens. Tribal governments fought to exist. Contrary to federal oppression, the tribal governments continued to exist and govern over their membership. The impacts of the allotment laws were devastating to the tribal governments and to tribal property owners. In the beginning two-thirds of the tribes treaty-reserved lands were taken under authority of the General Allotment Act as surplus. More land, over time, was taken from Indians by authority of the 1910 amendments to the GAA and sold to non-Indians. In reaction to the Merriam Report (1928), the tribes encountered a sympathetic U.S. Congress that enacted the Indian Reorganization Act (1934). The congressional sympathy was short-lived as the Congress then moved toward Termination (H.J.R. #108 of 1953) as the national policy.

The next major change came in the form of the Indian Self-Determination and Education Assistance Act (P.L. 93-638 of 1975). In time, due to tribal leadership lobbying efforts, the 638 Law was amended (late 1980's and mid-1990's) to authorize tribal "Self-Governance." By national law, the DOI/BIA is obligated to honor and respect the "Self-Determining" (638 contracting) and "Self-Governing" (compacting/AFA) tribes. The current mode of operations being instituted by the BIA, as pertains to the "Trust Responsibility" conflict brings the relationship of the tribes to the federal government all the way back to the era of the General Allotment Act (1887-1934). The paternalistic domination of the BIA over the tribal governments is unacceptable. The relationship should be "government-to-government" in form. Currently, the BIA is hiding behind the bureaucratic reshuffling to avoid real exposure for the enormous damages it instituted against the native trust estates and Indian people. It has been estimated that six to fifteen billion dollars in trust funds are unaccounted for by the 'guardian.' The interest alone would bring the bill up to one hundred billion dollars, if historical accounting was performed and interest was calculated at fair market value.

THE HISTORY OF THE LEGAL FICTION OF "INDIAN TRUST ESTATES:"

At the time of "Discovery" (1492), Christopher Columbus summarized his impressions of the "Natives" found in the "New" World as, "Una Gente In Dios." This translates as "One People in God." He continued to document that the Natives were so kind and giving that he had to forbid his men from braking up ceramic jars and trading the small pieces with the Natives- for the Natives would give all they owned for those small gifts of the new arrivals. In the end, it was decided to translate the name of the Natives from a description that said "In Dios" to "Indios." Rather than being "In God" people, they became the "people east of the Indus River" (known today as Indians).

On the third ship of Columbus' journeys, a young man named "Las Casas" arrived as a "Conquistador." However, what he witnessed was a "Native People" that were "Christian" by any other name. He witnessed the atrocities being waged by the Conquistadors against the Indians. He became the "First Born Again" Christian in the New World. He would spend the rest of his life "IN DEFENSE OF THE INDIES." His major debate was over whether the Sovereign of Spain had a right to wage or authorize an "unjust war" against the Natives. His opponent was Juan Gines Sepulveda (who never stepped foot in the New World). Sepulveda was defending the rights of the Conquistadors to rape, pillage, and steal all the property of "Indians," as well as enslave them and work them to death. Sepulveda argued that in comparison to Spaniards the "Indians" were less than human and the relationship was more like "apes to humans." And, if the Indians were not animals, then their relationship to the Spaniards was more like "women were to men" or "like children to adults." He argued the teachings of Aristotle properly classified the Indians as only fit for being "slaves." Las Casas made a mistake at this time of his life that he lived to regret, he argued that it would be better to import the Blacks of Africa than to enslave the Indians. He lived to witness the birth of the Black Slave Trade into the New World.

In the 1830's, Chief Justice Marshall picked up on the argument that was debated three hundred years earlier. He ruled that the relationship between the Indians and the United States was more like "a ward to a guardian" (same as Sepulveda's "children to adults") and that the Indians "were quasi-dependent sovereignties." This ruling gave legal birth to "federal superiority" to the Indian Nations. It made law the belief that "Whites" were a superior race and the Indians were an inferior race of people. This concept of racial "superiority" would be a driving force behind the relocation of the Indians from the states east of the Mississippi and Missouri Rivers, under the Indian Removal Acts. Although the United States would continue to enter many treaties with the sovereign Indian Nations west of these rivers, it would also move toward legalizing the concept of "white racial superiority."

In 1887, the treaty tribes of the United States still owned 138,000,000 acres of territory. This was land and natural resources that was not given to them by the United States but retained by them as the original owners. They had aboriginal title and inherent sovereignty over the territories. They never ceded the lands to the United States. The General Allotment Law (Dawes Act) was enacted that year. It claimed that the United States would give to each man, woman, and child on the reservations 40 to 160 acres (depending on availability of water for farming). The U.S. was allegedly giving to the Indians that which the Indians already owned. The alleged surplus lands were then claimed by the United States and issued out to homesteading whites under the Homestead Laws. By act of congress, the tribes were forced to accept pennies on the dollar value for the lands being taken as 'surplus.'

Under the General Allotment Law, the United States claimed to own the title to the remaining "patented lands" until it, the United States, decided the Indian was competent enough to own the land (in other words, until the day the Indian was no longer inferior to the white man). Thus, the Indian's land was to be protected by the "Trust

Patent System." Under this system the "superior" white local governments could not tax the Indian's property until authorized by the United States. Almost always, whenever a fee patent was issued to the Indians then local whites and their governments found ways to defraud the Indians of their property or take the land for failure to pay local taxes. This gave birth to the checker-board jurisdiction battles that are waged across Indian Country today between Indian tribal governments and the non-Indians living inside the reservation boundaries.

To make the whole process even worse, the U.S. Congress amended the Dawes Act in June of 1910. This amendment gave the BIA complete control over the estates of any Indian person that was considered incompetent or non-competent. Bureaucratically, this meant that all Indians were either too young or too old to manage their own lands and natural resources. This law gave the BIA complete power to sell, lease, or rent the lands owned by the incompetent/non-competent Indian wards. As a consequence of this amendment, the BIA became a local real estate agent that specialized in cheaply selling Indian lands to local whites- theoretically for the betterment of the Indian ward. This process multiplied the number of land titles transferred to whites within the reservation boundaries. These "whites" today consider themselves too superior to Indians to be governed over by Indian governments. As a consequence, the local white governments always intervene to protect these "poor oppressed whites that are being unfairly subjected to the allegedly inferior governmental powers of the Indians."

The Indian Reorganization Act (1934) was supposed to end the damages imposed upon the Indians by the Dawes Act (1887, as amended 1910). Many tribes claimed their inherent sovereignty still existed and they did not need to "incorporate" under the laws of the United States. A lot of tribes were so devastated by the powers of the Dawes Act that "incorporation" was their only solution for salvation. The IRA did not return the 90,000,000 of treaty-protected lands taken from the Indians; nor did it stop the BIA from using the powers of the 1910 amendments to further alienate more Indian reservation land holdings. The BIA aggressively continued to sell Indian lands under this power. By 1948, with the firm congressional policy declaration of Termination of 1953 (HJR #108), the powers of the BIA to sell Indian lands was well entrenched. Indian elders and families, living on the reservations or off, could not even receive public assistance until the BIA sold all their reservation properties. The choice was "sell or starve." And, Indians could not receive the treaty promises of education or medical assistance unless they relocated to the cities away from the reservations.

Federal Indian Law and Policy continues to be guided by the belief that whites are superior to the Indians and that Indians are not capable of governing over themselves or managing their own properties. Las Casas argued that the Indians had an inherent, God-given right to be "Self-Governing." The United States, in response to the political pressures of the Indian Nations, began to amend the Indian Self-determination Act (1975) to provide for Indian "Self-governance." Five hundred years after Las Casas came to the New World, Indian tribes are finally getting what he sought to defend- their right to be self-governing. This transition has only been taking place since the late 1980's. In this process the BIA bureaucracy is actually being replaced by the self-governing tribes. The

BIA (Ross Swimmer, as Assistant Secretary of Interior) aggressively sought to undermine and stop the "Self-Governance Compacting" amendments that were initially introduced. They failed and self-governance is a modern day reality for tribal people.

FOUNDATIONS TO INDIAN SOVEREIGNTY ARE FOUND WITHIN THE PEOPLE AND THE LAND:

As a part of its political theory of how to protect the Indian People from unscrupulous dealings by non-Indians and their governments, the U.S. government had placed Indian lands into "trust status." This status, along with the state constitutional disclaimers of jurisdiction over Indian lands, was believed to be an adequate means to protect "treaty or statutory" set-aside of land for Indians only. A part of the statutory theory was that the Indians, and their tribal governments, were too "incompetent or non-competent" to manage their lands and natural resources. The Indians had to be "civilized" and "Christianized" before they could be considered and treated the same as "mature, white people." This view of Indian Affairs is a main part of the development of federal Indian law and policy. As noted above, the major part of this system of governing over Indians land holdings was instituted by the Dawes Act (1887, as amended 1910). Taking the away the Indians' control over their own lands and natural resources, by federal law, undermined a foundation stone to inherent Indian self-government.

In addition, the Indian Citizenship Act (1924) claimed to make "tribal Indians" citizens of the United States. For tribal government, Indian people are the foundations to their delegated form of sovereign (popular) governance, as is their tribal relationship to their aboriginal territory. However, by unilateral action, the national government declared both Indian lands and individual Indians as properly under the paternalistic control of the BIA (acting in the place of the U.S. proper). To apply the same theory of federal power over local non-Indian communities would undermine the theory of U.S. constitutional republicanism. It has only been acceptable because it was applied to what non-Indians considered the "savage, uncivilized, un-Christianized, tribal Indians" that were kept by the federal government on the reservations to protect good white folk.

Since the BIA was managing the Indian estates, it had the "legal authority" to control all contracts (sales, leases, rents, etc) on those properties. The funds that derived from these contracts became "trust funds" and were placed in Individual Indian Money Accounts." The conflict over the "trust funds" of individual Indian estates reveals a claim of BIA mismanagement of nearly fifteen billion dollars in lost accounts. The number of individual Indians impacted by the "Cobell" case ranges from 300,000 to a half million. The BIA was supposed to track the heirs of the tribal Indians; as a part of their legal duty to probate the estates of deceased Indians and assure their heirs received titles to the land. But the BIA is not even sure how many 'Indian heirs' exist. The heirs were dependent upon the BIA. The estate and accounts records were important in the end distribution of the revenues derived from trust land sales, rents or leases. Now the BIA claims to have lost the records, on land & natural resources sold, and the correlating financials on revenues derived from rents, leases, and sales contracts. The BIA is uncertain as to the number of Indian estates it must account for or damaged.

The eleven (to fifty) million or more acres of trust lands addressed in the Cobell case symbolizes the tip of the bureaucratic iceberg. There remains the fact that the BIA mismanagement of Indian lands (trust and restricted fee patent) has destroyed the economic value the reservation lands have for Indian owners and tribal governments. Because of the fractionated ownerships, the only way the lands can make income for the owners is for the BIA to issue contracts to non-Indians to exploit the lands and natural resources thereon. An individual Indian heir is rarely in the position to secure enough of a consolidated number of heirs to demand control over contracts tied to the estates. But, the BIA can do this because the 1910 amendment to the Allotment Act authorizes the BIA to sign for incompetent and non-competent Indians- which by law covered all Indians that did not have a Certificate of Competency issued by the BIA. And, now the Indian Land Consolidation Act is suppose to help undo this damage to Indian Country.

The value of land is directly associated with its use. You can harvest the natural resources from it. You could develop it for industrial use. You can use it for housing. These are examples of economic/social factors that could benefit the owner. However, the economic value of inherited Indian lands has been destroyed by the BIA's failures in processing probates, and the BIA mismanagement of the lands, the contracts, and the applicable accounts. These problems are compounded by the BIA failure to secure clear titles for the individual heirs (fractionated ownership). Indian Country suffers the highest socio-economic ills in the United States. Our people and tribal governments are kept impoverished by the federal control over our lives and resources. However, the alternative in the "white mind" is that the Indian must accept the "trust status" or lose it and have to pay taxes on their Indian lands to local white governments. Why is it such a leap of imagination for the non-Indians, and their representatives in government, to understand that Indian lands simply should remain a part of "Indian Country" and not be subjected to any alienation, zoning, jurisdiction, or taxation by external local, white governments.

Three hundred and seventy ratified treaties set the reservation lands aside for the exclusive use and occupation of the "treaty Indians." Additionally, since the 1871 congressional limitation on treaty negotiations with the Indian tribes, the use of congressional enactments or executive orders had added additional lands to Indian Country. Regardless of the type of legal authority that set the land aside for Indian Country- it was intended to be Indian land for Indians. These lands, and the assessed economic values, were not intended to be land reserves or set-asides to be used to stimulate local white economies as needed. The treaty reservation lands were set-aside by the Indians for their own use. The Indian treaty-ownership of land was intended to extend in perpetuity, for all future generations of "tribal Indians." Any treaty wording to the contrary was added the treaties contrary to the Indians' understanding.

Thus, it should be concluded that Indian lands, whether set-side by treaty, executive order, or federal statute, are reserved as a permanent part of Indian Country. Said lands are absolutely intended for the use and occupation of tribal Indian people. All Indian lands, currently not in fee status, should remain a part of Indian Country. Sales by Indians of trust or restricted land should only be to the tribal government henceforth. The

tribal government should pay current assessed value per acreage, unless otherwise agreed. Non-Indian ownership of reservation lands should have their lands subjected to a tribal governmental first right to purchase. Failure of the tribal government to purchase said land would free the current owner to accept the next offer. The Indian Land Consolidation Act should be more appropriately amended to help implement this federal policy intent. And, Congress should authorize and finance these purchases of non-Indian fee lands. The U.S. Congress, supported by the Administration, should annually appropriate five hundred million dollars for tribal governments to purchase fee lands located inside the exterior boundaries of the reservations. Said funds should annually be appropriated until all fee lands within the exterior boundaries of all the Indian Reservations are brought back into Indian ownership. And, finally, all lands inside Indian Country should be placed completely under tribal governmental control- whether in trust or fee status. No non-Indian government should exercise any right of taxation or jurisdiction over said lands. As a part of this separation, and to ease the fears of local white economies, the Congress should exercise it's Article I, Section 8, Clause 3 powers to "regulate commerce with the Indian tribes" and establish an interstate/intertribal commission to develop, by negotiation, an Indian Commerce Code that respects the conflicting sovereignties per questions of jurisdictional authority.

WHEN THE SACRED TRUST OF CIVILIZATION IS VIOLATED THE VICTIMS HAVE TO PAY BASED ON CONGRESSIONAL PRECEDENCE.

Once again, the U.S. Congress has been forced (in attempts to resolve legal, political, and financial problems created by the Cobell Case) to investigate "fraud, corruption, and mismanagement of Indian Affairs" within the BIA/DOI. The BIA has had a major but small role in Indian Affairs. Indian Affairs is more then BIA functions. It should be reflective of the government-to-government relationships the United States has with the Indian nations. The BIA should have been held responsible for coordinating the implementation of the "sacred trust of civilization" duty assumed by the United States, as well as more specific statutory-imposed trust responsibilities & duties; but in cooperation with all other federal departments and agencies. These duties are direct consequences of the United States entering treaties with the Indian Nations. The conflict associated with the mismanagement of Indian Affairs was behind the intent for transferring Indian Affairs from the Department of War to the Department of Interior, in 1848. In less than thirty years following that transfer, the Interior Department found itself subjected to congressional investigations (1870's)- due to fraudulent and gross mismanagement of the Indian estates and contracting. This gave foundation to President U.S. Grant's transfer of BIA control over Indians Affairs to the Christian Denominations in 1872. He believed that the moral underpinnings of Christian leadership would help prevent fraud and abuse from resurfacing in the management of Indian Affairs and estates. So the numerous Christian denominations divided up Indian Country between themselves. Indian reservation had their church priest or minister in charge of their Indian affairs. In the mean while, the Congress continued to investigate the contracting frauds and mismanagement claims against the BIA.

In the Forty-second Congress, the Committee on Indian Affairs ordered to be printed (March 3, 1873) a report entitled: "REPORT OF THE COMMITTEE ON

INDIAN AFFAIRS, CONCERNING THE FRAUDS AND WRONGS COMMITTED AGAINST THE INDIANS, WITH MANY STATISTICS OF VALUE IN THE MANAGEMENT OF INDIAN AFFAIRS." On page 8, it was noted" "*A guardian who wasted his ward's estate as we have wasted and permitted to be wasted that of the Indians, who are by treaty stipulations with them put under our care and protection, would be mulched in damages by any court examining his accounts and held to be responsible on his bond.*"

This report was seven hundred pages long and justified the drafting of new U.S. Code provisions on Indian Contracting. We note the statement from Page 7: "*From these false grounds it is the duty of the nation to server itself at once, and for all time, with these is wards and defenseless ones, whom by treaties almost without number we have with the solemnities of supreme law, and with the nation's honor involved, promised protection. If the Indians were our prisoners of war they are entitled to protection of person and private property from despoilers. Their weakness and incapacity in financial transactions with designing and bad men is the open doorway leading to their danger and to our duty toward them, demanding, as the Indians have a right to do, our protection and the fulfillment of treaty stipulations with, and the high command of Christian duty to a helpless and untutored people, whose history fully shows that we, as a people, are largely accountable for their present condition, and of whose misfortunes we have no right to take or permit advantages. Despite the severe prejudice that has become nationalized and crystalized toward them, no honest man, who has traced the record, and considered the facts, from the discovery, considering the simple character of the aboriginies when discovered, will fail to condemn the provocations that on our part drove the Indians to be the enemy of our race, and to fear and avoid a civilization that, with kind and just treatment, they would have accepted and become a part of.*"

The report continued on page 9 to state: "*It is the bounden duty of the United States to see to it that no one or more of its citizens, whether officials or otherwise and no person within our borders shall cheat, defraud, or do injustice to any Indian and Indians residing legally within our national domain. Their protection is our moral, and generally by treaty provisions and locality, our legal duty, against all persons whomsoever whether citizens of the United States or not. And any monies or other property fraudulently, forcibly, or by exorbitant contracts taken from them by other persons, the United States is duty bound to require returned to them, and to enforce that request by the necessary powers of the Government. And especially is this true where the fraud has been perpetuated by, or with the knowledge of, or with the assistance of, or in the presence of, a United States officer, or near to the Government, where the Indians, in their untutored and dependent state, are induced to act with less freedom than if not surrounded with the evidences of our power and superiority of advantages, both national and individual, even our manners and language being not well understood by them. We must consider the Indians as they are, and not as we are.*"

In the 101st Congress, a congressional investigation was began in the aftermath of the 1986 Arizona Republic Newspaper expose on fraud and corruption associated with the BIA management of the Indian Trust Funds (Individual Indian Money Accounts).

During the congressional inquiries, the national media was diverted toward focusing public attention to claims of fraud associated with the President of the Navajo Nation. The focus was no longer upon the multi-billion federal fraud conducted by the BIA, against the Indian wards' estates under the Trust Management system. Now the general public focus was upon the fact that an Indian leader may have received a gift from a corporate interest that had a contract with the Navajo Nation.

During this hearing process, the Alliance of American Indian Leaders was monitoring the testimonies being presented. It was, at that time, Ross Swimmer, as Assistant Secretary of Indian Affairs presented testimony that "we (the BIA) did not lose billions of dollars, we only lost hundreds of millions of dollars, and that if the Indians could do better, we would like to see them try!" This arrogant challenge did not go unheeded and eventually gave birth to the "Self-governance" amendments to the Indian Self-determination and Education Assistance Act (P.L. 93-638). Today, different aspects of the BIA and the Indian Health Services are subjected to the authority of the Self-Governance amendments, to the benefit of the Indian Tribes that choose to participate in the self-governance initiatives. These are great 'first' steps away from the dominating paternalism of the past exercised by the BIA and I.H.S.

The Interior Assistant Secretary continued to testify that the BIA diverted ninety-percent of all Appropriations for Indian Affairs to cover the operational costs of the Bureau; with only ten percent going to help the Indians. With this ten percent, the tribes were required to create mini-bureaucracies that would be held accountable to the BIA (93-638 Contracting). This tribal bureaucracy would then use a majority of the small contract funds on itself, with little authorized for indirect costs. The appropriations for "Indian Affairs" have always been extremely under-funded in comparison to the ratio of funds appropriated for non-Indian populations. This 93-638 contracting process resulted in very little direct services to the dependent tribal communities and people.

Following this logic, it does not take a genius to figure out why the tribal leadership worked to secure the "Self-governance" amendments. Self-governance has resulted in more funds passing from the BIA and going into tribal governments and societies directly. This new process has helped but it is not the completed solution. Indians are still suffering because of other forms of mismanagement that has not been corrected. And, other federal departments and agencies have not been required to participate in the self-governance initiatives. The other federal departments and agencies have a history of providing very little or absolutely no funding and services to Indian people or tribal governments. So, the process of identifying a historically based funding level for Indian tribes would not exist. Congress and the self-governing tribes would have to devise a financial formula to help meet the need for tribal communities.

Examples of on-going problems is evident in the BIA's "guardianship" over Indian trust lands and natural resources. The BIA exercises control over the land records. It controls the heirship and probate of Indian estates. It controls legal "contracting" over trust land and natural resources development. These "trust responsibilities" are directly tied to the individual Indian whose land is held in 'trust' because he or she is classified

incompetent This system does not consider the long-term tribal economic interests. This process hinders rather than stimulates economic development. Tribal control and management of land and natural resources would be more feasible and successful because of their local position and identification with the land and people. Most often, because the BIA failed to properly maintain the land records, probate records, and assure the heirs received benefits from their inherited estates, the "Indian lands" became useless to the owners. Some fractionated land have thousands of people inheriting a piece.

Because of "BIA Relocation" of Indian members into the major cities, during the Termination Era (1948-1975), many of the Indian Heirs could not be located. And, just as many heirs are located on other reservations, away from the respective reservation estates of their parents or grandparents, or they are resident Indians of Canadian Bands. Thus, it has become impossible for on-reservation tribal members to secure enough authorization from the collective owners to secure permission to develop, lease, or rent the lands or natural resources. All to often, the BIA simply exercised the authority of the Act of June 25, 1910. This gave it the power to sign off for incompetent or non-competent Indians. The BIA had the power to sell the land, or lease or rent the land, or authorize harvest contracts, without the Indians' actual consent. Theoretically, the funds would go into the "trust accounts" and be dispersed to the individual heirs by the BIA.

Congress recognized that the majority of inherited Indian lands were trapped in this legal maze and causing severe problems for Indian Country. The Congress has recognized that the BIA had created a legal nightmare that could not readily be resolved to the benefit of the Indian wards/heirs. So, the Congress enacted the Indian Lands Consolidation Act in the mid-1980's (as recently amended). The act gave authorization for tribal governments to begin buying out fractionated shares of inherited Indian lands. However, the Congress has not appropriated adequate funds to pay for the fractionated lands. The tribes end up paying the fair market price for the land. Thus, by buying out fractionated shares the tribes end up paying for the damages caused by the BIA mismanage of trust lands. If the tribes choose not to purchase the shares then the lands remain in limbo. In the meanwhile, the tribes are also caught in the struggle to purchase the 'fee status lands' in order to secure their homelands for future generations. Once again, the victim pays for the damages done to them.

This is pretty much the same pattern of federal settlements of Indian land claims. The payments ultimately come out of intertribal funding allocated in the BIA budget. As a first step, settlement is paid out of the U.S. Settlement Account. But the federal department responsible for the damage claim has to reimburse the funds into the account. This means, for Indian Claims, that DOI/BIA appropriations are diverted back to pay for the settlement. This is the process favored by the Department of Justice as a policy matter. It will not support payments directly from the U.S. Treasury. It always results in funding for Indian programs/services being cut from Indian Country. This process is punitive to Indian Country. When a tribe wins and the federal government is forced to pay damages Indians and tribal governments end up with even less services.

The Lummi Indian Nation is very concerned about the Congressional investigations on BIA Mismanagement of Trust Accounts. The Cobell Case has brought the matter to a head. Congressional and Administration demands for a case settlement have been circulated. It has been stated that there will 'be no Cobell settlement without trust reform and no trust reform without settling Cobell.' It has been estimated that fifteen billion IIMA dollars is unaccounted for by the BIA. And, the interest on the missing funds, if historical accounting is successful, would amount to one hundred billion dollars owed to the 'wards.' If the past is any example then the future resolution of this problem will result in retaliation against Indian Country for being the victim. Will the U.S. Congress appropriate one hundred billion dollars to cover these accounts? No! But it legally should since the funds were held by the 'Guardian' in trust.

Congress will appropriate one hundred billion annually for supplementing the War on Terrorism; but it will not honor its past commitments with Indian County. What type of message is this to the World? We, as Indian People, cannot rely on the Administration- since it cannot even keep its commitments to countries that are currently helping in the War on Terrorism. Indian Country has suffered under the "Terror" of "U.S. racial superiority" for five hundred years, and over two hundred years since the U.S. Constitution, and over one hundred and seventy years since the "ward to the guardian" ruling of Chief Justice Marshall. In the sixty-nine years since the IRA (1934), no treaty-lands and natural resources unlawfully taken by the Dawes Act (1887-2003) have been returned to the Indian Country. The many tribes have sued for recovery of their treaty protected lands but have only found settlements at pennies on the dollar. Tribes continue to deny acceptance of the settlements ordered by the Indian Court of Claims or Indian Claims Commission. Some are forced by congress to take the settlement offers. These funds, whether accepted or not, have been held by the 'guardian' for the 'ward' until the ward comes to their sense and accepts the unconscionable offer.

The socio-economic conditions of the Indian people, living within the reservation boundaries, are just as bad as those existing in any third or fourth world country. The poverty, the desperation, the misery of survival on the reservations are direct reflections of failed Federal Policies. Instead of respecting native inherent sovereignty, the federal government has continued to institutionalize and exercise "paternalistic plenary power" over Indian Affairs. Added to this is the "states rights activists" that argue Indian jurisdiction over reservation lands, natural resources, and over commerce/civil actions taking place upon those lands are a threat to non-Indian landowners and local white government & economies. The non-Indians willfully entered Indian Country to buy cheap land from the BIA and then claimed they should not be subjected to Indian governmental jurisdiction. How many more centuries can "constitutional government" and "Christian Society" sanction claims that the "Indian" is the enemy, a threat to Christian government and society? How much longer can the Indian People continue to be victimized and then forced to pay for the damages done to them by the federal and state governments, and their citizens?

Felix Cohen once said: "*Like the Miner's Canary, the American Indian marks the shift from fresh air to poison gas in our political atmosphere; our treatment of the Indian,*

even more than our treatment of other minorities, marks the rise and fall in our democratic faith." It cannot be repeated enough, "The suffering of the Indian people on the reservations is a direct reflection of the impact of federal Indian laws and policies." Reading behind the scenes and in between the lines, these laws and policies have always been drafted to protect the non-Indian more than the Indian. These laws have been intended to 'kill the Indian and save the man.' The Indians have been brainwashed, over the centuries, to believe they have to become a non-Indian, Christian farmer & citizen. Is this racist- well think of "Indian Reservations" and then the "Jewish concentration camps in Europe" and the "Japanese relocation camps in the United States." Tomorrow there may well be concentration & detention centers for 'alleged terrorists and their co-conspirators.' The only real difference is that Indians reserved their lands for homelands. It was not land given to the Indians by the United States. It was land set aside by the Indians for future generations. Today, the Indian people still refuse to surrender their reserved lands to non-Indian governments. Tribal governments still deny non-Indian governments have any lawful jurisdiction inside reservation boundaries. This sovereign right is so engrained in the tribal people that they choose to suffer rather than surrender what little treaty-protected land that is left in their care and ownership.

THE TREATMENT OF THE AMERICAN INDIANS SHOULD BE A STATEMENT TO THE WORLD BY THE UNITED STATES ABOUT HOW FIRST WORLD NATIONS SHOULD ADDRESS RELATIONSHIPS WITH INDIGENOUS PEOPLES.

The United States is one of the first (written) constitutional forms of government that had proclaimed that sovereignty was derived from the "People" represented. The Constitution is a conglomerate of Old World and New World beliefs about the endowed rights of humankind, and that leadership is responsible to and held accountable by the people (See: SCR #76 of 1987 and HCR #331 of 1988). Shortly after the 1776 American Revolution, the French People were moved to revolt and establish the same form of government. All this time, England continued to support and debate its unwritten constitution as an acceptable & flexible form of stable government. While the written constitutional governments favored the incorporation of articles authorizing processes for amendments so that the constitutions mature with the people represented. After WWI, U.S. President Wilson helped lead the world in the formation of the League of Nations- which was modeled on a concept borrowed from the Iroquois League of Nations. The Wilson League failed, and after the Second World War, the United States led the world in the formation of the United Nations (modeled and improved upon the idea of the League of Nations). Since then, more than 160 nation/states of the international community have moved to constitutional governments (primarily Republican Forms of Government). In all these nation/states there are indigenous peoples that have been colonialized as minority groups that have been regulated to near extinction or marginalized to the fringes of society. Some of these people(s) have resorted to the formation of "liberation movements"- to voice their needs, concerns, and to protect the little they have kept or regained, over the centuries, in land and religious freedom. The status quote in these countries, as in the United States, has been continued acceptance of the domestic laws that had been enacted by the colonial governments to govern and marginalize these indigenous populations to inferior status. However, there have been successful de-

colonialization movements. The diplomatic trick for the U.S. is to develop Native American Self-governance as a de-colonialization movement without hinderance to U.S. domestic, national governance; but with definite changes in the laws to eliminate the racial undertones of federal Indian law that undermines true self-determination.

The United States is a colonial government that has regulated the lives and property of its indigenous peoples. It has created more laws about the Native Indians than any other (minority) group in the continental United States. The majority of these laws were drafted with the intent of taking land and natural resources owned by the natives but desired by the non-Indians (individuals, corporations, or states). Because of the constant demands to take more and more from the Indians, many laws were enacted to protect the Indians from the unscrupulous dealings of non-Indians and local & state governments. While the Constitution empowers only the national government to deal with the Indians, many laws have been enacted or amended that have placed states in a position to apply their laws (e.g., P.L. 280, General Crimes Act, etc.). Other laws allowed non-Indians to inherit Indian estates (e.g., Dawes Act, 1887 & 1910 amendments).

Theoretically, the United States should have been bound by the "sacred trust of civilization" in all decisions to protect the native people and their lands & natural resources. However, because of fluctuating federal policies, even the federal officials that were charged with the management of Indian Affairs were found to be incompetent or untrustworthy in their relationships with the Indians. For example, the Department of War was not managing Indian Affairs properly so the responsibility was transferred to the Department of Interior in 1848. Eventually, the civil servants of Interior would be charged with improper conduct (1870's), so President Grant transferred Indian Affairs to church inter-denominational leadership for management. In a short time, the churches would secure and implement the Religious Crimes Code (DOI/BIA Circular #1665) to stop Indian traditional religious practices. During this time, the Dawes Act (1887) was enacted to tale alleged surplus lands owned by the Indians (basically, the U.S. nationalized Indian lands because they decided Indians could survive with less). Maybe all U.S. citizens or corporations that "have too much" should be nationalized as well. In forty-seven years, the Dawes Act devastated Indian land ownership, tribal government, tribal societies, and tribal economies. In reaction to public shock over the conditions of the American Indians, the Indian Reorganization Act (1934) was enacted to try and stabilize tribal society and government.

After WWII, the United States repaid our Indian War Veterans with "Termination" of their tribal governments. Their lands were sold and the families were relocated into cities all across the nation. Tribal Indians entered the class of landless, inner-city, blue-collar working, poverty-stricken families. Many faced unemployment and ended up on general assistance. This supposedly assimilated the tribal Indians into mainstream society. The Termination era lasted from 1948 to 1975. The impacts of "Relocation" were suppose to be permanent. But, beginning in the 1970's, many natives returned to the reservations for a lack of a better life off-reservation. The promises the BIA made to these "relocation Indians" were never fulfilled. Upon their return, they

found much of their family lands had been alienated. The elders left behind had to sell their lands to get health services or public assistance.

The United States enacted the Indian Self-determination and Education Assistance Act of 1975 in order to provide Indian people, and their governments, the opportunity to help deliver essential governmental services to the people in lieu of the BIA. The theme was to place Indians in charge of their own affairs. The BIA was to fade into the background, occupying a monitoring position, and significantly decreasing its level of federal employees to a minimum. However, the self-determination regulations that were applied were inadequate and were not accomplishing the intent of the law. The BIA continued to operate Indian Affairs under "paternalistic" management styles. The bureaucracy grew even more dependent on securing their Cost of Living Allowance (COLAs) pay increases each year. Eventually, under tribal pressure, the Congress enacted the Self-governance laws in the 1990's. Also, it authorized several amendments to the American Indian Religious Freedom Act to reverse negative Supreme Court Decisions. Both movements were returning basic, human rights back to the Indian people, and re-empowering tribal people with inherent rights to self-government and spiritual freedom.

The U.S. message to the world should be a model of how other first and second power Nations should treat their indigenous peoples as colonialized populations. Like the Statue of Liberty, the U.S. should stand tall and be reflective of honor and respect, amongst nations, across all racial or religious barriers. The words "Life, Liberty, and the Pursuit of Happiness" should be more than a paper dream. The Nation's integrity should be reflected in its actions. It should not be a model of deception, corruption, mismanagement, or insensitivity to the plight of the first Americans. The American Indian has the worse socio-economic conditions in the United States. On the reservations exist the highest levels of poverty, highest infant mortality, highest unemployment or underemployment, lowest levels of educational and vocational attainment, highest levels of suicide, poorest housing, poorest infrastructure development essential to economic development. Additionally, economic development is hampered because the lands are very isolated in desolate/rural locations; compounded by local to federal claims to taxation authority over all economic activity inside Indian Country. What type of model is this to other First and Second World Nations on the treatment of their indigenous peoples? It is a model of marginalization of indigenous peoples that is close to genocide.

If the United States has a message to the world it should proclaim that our nation is one that holds governmental honor and respect above all else. And, that all members of the international community must live in respect to the international laws of justice, as a global community. The U.S. should diplomatically be a model to the other member states of the United Nations. It should be a positive role model on how to address domestic, internal affairs, in a manner that protects the interests of the nation but respects the inherent rights of the indigenous people. It should show other nations how to establishment and maintain government-to-government relationships with the indigenous people- one that allows the native nations to be self-determining and self-governing. It should show the world that the "sacred trust of civilization" duties owed to these oppressed, colonialized, marginalized populations can be honored and implemented. The

United States owns half of the North American Continent, all secured by treaty-relationships with the Indian Nations. It can afford to be honorable and generous in its dealings with the Native Nations. Currently, instead of legislating to improve the economic opportunities afforded Indian commerce, the Congress is influenced by the anti-Indian sentiments and rationalizations. All this while, the Internal Revenue Service annually extracts hundreds of millions of dollars in illegal federal income taxes from within Indian Country. Tribal Indians are still constitutionally classified as "excluding Indians not taxed." The Indian Citizenship Act (1924) is unconstitutional as legal authority to apply federal income taxes to Indian commerce activity in Indian Country.

We, as indigenous, native people and nations have demanded that our voices be heard in all hearings and investigations that were being held as pertains to the creation of the Office of Special Trustee. Indian people have always been federally regulated as second-class humans by the United States. We were kept under the "trusteeship" of the guardian. In addition to the lands and natural resources taken by law or thieves, we had billions of dollars that was suppose to be in government bank accounts, under the protection of the U.S. Department of Interior. Now, we find the funds have disappeared. The government is court ordered to develop a better system and to conduct historical accounting of missing funds and accounts. Indian Country wanted to be involved in the solutions. Instead, w are told that the government is creating the Special Office of Trust Responsibility- whether we (the tribes) want it or not. This is a strict act of paternalism. This year alone the new Office of Special Trustee will consume over three hundred million dollars on itself. It has consumed nearly a billion dollars since it was created. All these funds are cut from Indian programs and services. Return the funds first and then negotiate with us about the creation of a new "paternalistic guardian system." Return the lost accounts first. How can the government lose billions of dollars in Individual Indian Money accounts? Is it fraud or mismanagement? Did someone simply stuff billions of dollars in a drawer and simply forget which drawer it was in? Yes it is ridiculous unless you admit fraud. Does this only happen to the Indian people, or is the U.S. in the habit of letting their Department heads loose untold billions of dollars on a regular basis?

We, the Lummi Nation, believe that the continuation of government-to-government relationships, as based on congressional enactments about Self-governance, is an absolute necessity. We should be allowed to hold the national government accountable for its actions- and not just the Department of Interior. Holding the government accountable is an inherent right of the people that delegated the governance powers by the 1787 written Constitution. If we are really "U.S. Citizens" then we have a right to demand the accounting for damages and lost estates. It is a requirement of constitutional governance. However, in the past, when there was wrong done against the Indians, usually the Indians ended up paying the bill for damages done to them (the victim paid the restitution for damages done to them, rather than the predator). We should not be confronted with "terminationist and paternalistic" policies because of this federal sham. But, this is what Indian leadership is witnessing, once again. Based on historical patterns, we can expect that Indian Country will be punished for the wrongs done to the Indians whose accounts were lost or stolen by federal officials and departments. We ask the Congress to find a higher standard of fair dealing with the Indians. We ask the

Congress to not hide behind the "political question doctrine" and continue to believe they can do with us as they choose fit or decide what is best for us- even when we protest against these "good intended actions." Remember, "power corrupts and absolute power absolutely corrupts!" Forcing the Office of Special Trust Responsibility upon the Indian Nations is an absolute exercise of "plenary power" in an absolutely corrupt manner. This is outrageous since we live in the time that "Indian Self-governance" has been guaranteed as a matter of federal law. So long as the Office of Special Trustee exists the tribes will annually loose hundreds of millions of dollars in services direly needed within the poverty stricken communities.

THE INDIAN NATIONS HAVE HISTORICALLY HAD A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE UNITED STATES.

The truth that the government-to-government relationship between the Indian Nations and the United States was based on the U.S. Constitution was proclaimed in S.C. R. #76 in 1987 and H.C.R. #331 in 1988. The U.S. Congress acknowledged that Native Nations were contributors to the type of constitutional government created in 1787. The contributions of the Iroquois and Choctaw Confederacies to the conception of popular sovereignty and personal liberties were specifically referenced by the Congress in the resolution of celebration for two hundred years of the Constitution (1789-1989). This does not deny the significant European contributions that were initiated as far back as the Magna Carta, or the revolutions that sought to limit the kings' attempts to tax the people without their representation in the decision-making. We all must acknowledge that millions and millions of people died during the Age of Reformation- in attempt to secure religious freedom and to create societies that practiced religious tolerance, with the people having the right & liberty to read the bible themselves. However, the form of government created in the new United States was a blending of Old World and New World ideas and beliefs in the inherent rights of man. The United States of 1787 became a world model that would give birth to the true concepts of popular (constitutional) sovereignty. Popular sovereignty became even more entrenched, as time and experience led to several U.S. constitutional amendments. The amendments were placing the power to choose and remove the national leadership into the hands of the average citizen (e.g., changing of the Electoral College to popular voting systems, or direct election of Senators, securing the franchise to all colored persons, women, and youth 18 and older). Additionally, this pattern of popular sovereignty was the required form of government state governments under Article IV of the U.S. Constitution.

Before the formation of the Union, establishing diplomatic relationships with the Indian Tribes was under the complete sovereign power of the King, and under popular constitutional government the People (represented by the national government) replaced the King. Based on the debates of the Founding Fathers, the colonies (as new states under the Articles of Confederation) could not to be trusted with the management of Indian Affairs and the establishment of treaty-relationships with the Indian nations. This position was made more definite in the new Constitution- with the Union securing the power to establish & govern relationships with the Indian Nations. The individual states could not be trusted to exercise this power for fear of wars being started, just as the earlier colonial governments could not be trusted with this power under the King. At the

Constitutional Convention, the states' rights advocates lost their bid for power. The states' rights advocates argued that state sovereignty predated the sovereignty of the people they represented. Today, however, every school child is taught that the Constitution was founded upon popular sovereignty. This is why it begins with the words "*We the People of the United States,...*". Under this constitutional plan, Indian Affairs was permanently made a subject of national governance and not subject to states' rights or powers. At this time, the proclaimed Congressional Policy was the Northwest Ordinance which stated that "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress."

Now, the N.W. Ordinance played an important role in the formation of all future states that would enter the Union as well. It provided the original draft process for the governance of new territories and the eventual qualifications moving toward acceptance into the Union as an equal member state. With the discovery of gold in California, Manifest Destiny became the national policy banner. As the United States continued to expand further and further westward into Indian Country, the formation of more and more territories transpired. New states were created in those territories. Each state would have a "guaranteed Republican form of government" (i.e., constitutional government based on popular sovereignty). Each new state that entered the Union would do so on an "equal footing" with the original states-as required by the U.S. Constitution. This equal footing included not having jurisdiction or sovereign authority to deal with the Indian Tribes. Before a new territory could be formed the United States had to negotiate peace and land cession treaties with the Indian Tribes. These treaties were essential to secure lawful title to the territory based on national and international laws of nations. Until that happened, the Indian Nations retained aboriginal title and the only right the United States had was the right to negotiate with the tribes based on the Discovery Doctrine (see: Johnson v. McIntosh, 1823). Thus, only by treaty would legal title transfer to the U.S.. In addition, the treaties were essential to secure peace for the protection of the non-Indians arriving and occupying the territory. However, as history proves the truth, treaty negotiations usually only happened due to the massive number of trespasses taking place by trappers/gold diggers/settlers moving into the Indian territories. Peace Treaties were used to prevent war with the Indian Nations. The U.S. chose the more diplomatic government-to-government path of treaty negotiation and ratification as the means to secure permanent peace and to avoid the massive costs of war on multiple fronts.

The new states had to disclaim jurisdiction over Indian Affairs in their organic territorial government documents. Indian Affairs was a national power not to be shared with the states. Nor could this power be delegated to the individual stats- not unless the Constitution is amended (to amend Article I, Section 2, Clause 3; Article I, Section 8, Clause 3; Article I, Section 10, Clause 1; Article II, Section 2, Clause 2; and, Section 2 of the 14th Amendment). The states created between the original thirteen states and west to and along the Mississippi and Missouri Rivers accomplished the "disclaimers" by territorial legislative enactments made a part of their organic state documents preceding their written & approved constitution. As experience became the teacher, the new western

states would be required to permanently add "Disclaimers" into their state constitutions (e.g., Washington, Idaho, Montana, North Dakota, South Dakota, New Mexico, Alaska, etc.) as a matter of national policy. Thus, the disclaimers could only be removed by a proper constitutional amendment of the state constitution.

What is important here is the fact that historically, under the state and national constitutions, the states did not have a legal right to interfere with the management of Indian Affairs and relationships. States' rights advocates had lost power under the new 1787 Constitution. States that sought recognition by the national government had to comply with the process created. This processed assured that they, like the original states, did not have sovereignty or jurisdiction over Indian Affairs and their property. The tribal Indians were governed over by their own tribal governments. Tribal Indians were separate from the United States. The Indians governed over their own territories. Anyone entering their territory was subject to their jurisdiction. Thus, the U.S. would use statutory powers to regulate the trade and activities of its "citizens" that did enter Indian Country. But, this was an exercise of power over its own "citizens." It was exercising powers delegated to it by the "We the People of the United States." The people of the individual territories, states, and Union can only delegate those powers they have. They cannot delegate powers to the national government over Indian territories- since the same was outside their domain.

This is important. The national government has never ceded complete control or sovereignty over Indian Affairs to state governments. And, the national government could only cede that authority which the Indian Nations granted them inside the respective treaties. The only reason states can justify the violations of Indian exclusive jurisdiction over the reservations, otherwise forbidden by treaty and the Constitution is due to the 1924 Indian Citizenship Act. This was accomplished by legislative language even though the 14th Amendment was drafted to prevent this very thing from happening. Section 1 of the 14th Amendment forbids the national government from making tribal Indians U.S. Citizens. Section 2 forbids the states from making tribal Indians state citizens. But, under the theory that a "state" has jurisdiction over it's citizens, the making of tribal Indians U.S. or state citizens then allegedly allows those governments to cross-over tribal boundaries since the people therein are "their citizens." But, the 1924 Act did not authorize states to ignore the 14th Amendment. Making tribal Indians state citizens is still unconstitutional. The 1924 Citizenship act did not amend the (14th) Amendment to the U.S. Constitution. It is constitutionally invalid. Two wrongs do not make a right. Just because the national government chose to ignore the national constitution does not relieve the state governments & officials of the duty to honor the Constitution.

Tribal Indians are still under the national power of the United States, as consequence of established treaty relationships. Tribal Indians are still protected by the "sacred trust of civilization" duty of the United States. Tribal Indians are members of their Indian Nations first and foremost. Their relationship with the United States, established by and through their tribal government, is one of government-to-government. This relationship is established by a combination of treaties, executive orders or federal statutes. The tribal lands and natural resources owned by the individual tribal member or

tribal government is still protected under the federal "treaty trust responsibility." This "treaty trust responsibility" is derived from the numerous peace treaties ratified. The power of the Indian Nations to retain some of their aboriginal lands and natural resources for their permanent homelands was diplomatically recognized by the treaty-reservations being set-aside and not included in the ceded lands. The "reservation" of these lands and natural resources for the tribal people should and must continue because of the impoverished conditions suffered by the Indians. It should continue as a "treaty trust responsibility" because "individual states" still seek to eliminate the Indian holdings and titles for the benefit of state taxation schemes and economic expansion. Removal of the "treaty trust status" enriches the state and expands control over Indian Affairs to the state governments. The state, after the trust status removal (from restricted fee or trust title to fee status), begins exercising jurisdiction over said lands and resources- to the detriment of tribal government and individual tribal Indian ownership. Why, in this day and age, is it popular to believe that an Indian is only competent if he or she walks, talks, works, and worships just like the white man? And, why can they only be "competent" if and only if they are paying taxes to the very white governments that have always been their historical enemies? The answer, obviously, is that the foundations to federal Indian law and policy are cemented to "racism" and not Indian self-determination and self-governance.

THE GOVERNMENT-T0-GOVERNMENT RELATIONSHIPS WITH THE INDIAN TRIBES IS CONSTRUCTED BY THE U.S. CONSTITUTION.

The U.S. Constitution is based on the Power of the People, and not states. It is a constitution that enumerates/delegates certain powers to the national government, and reserves all powers not delegated... to the people. Article I creates the Congress (Senate and House of Representatives). Article II creates the powers of the Chief Executive, Presidency, and Commander-in-chief. Article III creates the national Judiciary. Article IV addresses states and new states. Article V addresses the power to amend the Constitution. Article VI addresses prior debts, engagements, the "supreme law of the land" and obligations of oath and allegiance of all national and state officials. Article VII provided the system for ratification of the Constitution. Of course, in order to secure the number of states needed to ratify the Constitution, the commitments to add the first ten amendments (The Bill of Rights) was conceded and eventually added to the Constitution. And, U.S. Constitutional History is full of evidence as to the necessity of adding more amendments to the Constitution. The amendment power assures the Constitution is a living document that expands with the best interests of the People represented.

Thus, the Constitution structured the national government and limited "states rights." It is important to keep in mind that the constitutional power was derived from the people and not the states. In this scheme it is evident that the "checks and balances" and the "separation of powers" doctrines were structured in light of Indian Affairs and the established or potential to establish government-to-government relationships as well. The relevant applications of Article I, II, III, IV, V, VI, and the Fourteenth Amendment is proof enough that the Constitution is a foundation stone to the government-to-government relationship with the Indians. It is the Constitution that has kept this power over Indian Affairs out of the hands of the individual states. It has been the individual, and sometimes collective, actions of the Presidency, the Congress, and the Court that

have periodically transferred jurisdictional power over Indian Affairs to the individual states. At times, the nation or congress would politically mobilize and seek to undo some of the damage done to Indian Country. The resulting action was always "for the best interests of the Indians."

Article I, Section 2, Clause 3 provided the language of "*excluding Indians not taxed.*" This language was retained in the intent and wording of the 14th Amendment. The wording referenced those Indians that were in tribal relationship with their own nations and not citizens of the United States or individual states. The Indians were always governed by their own people and maintained traditional forms of governance. Article I, Section 8, Clause 3 was provided "*To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.*" Article I, Section 10, Clause 1 provided that "*No State shall enter into any Treaty, Alliance, or Confederation.* This was an absolute constitutional negative upon any state attempts to treaty/compact with the tribes as well (See: Constitutional Convention Minutes). It was not even possible with the consent of congress for states to exercise this power. Article II, Section 2, Clause 2 empowered the President to negotiate *treaties* with the tribes, and the Senate to ratify. The proof of this power was reflected when several hundred treaties were negotiated and 370 treaties were ratified by the Senate. Article III, Section 2, Clause 1 empowered the Supreme Court to review the Constitution, the laws of the United States, *and treaties made*. These three types of laws were classified as the "*supreme law of the land*" under Article VI, Section 2. Article IV provided for the creation of *new states* and the *guarantee of a republican form of government* for each of those states admitted into the Union. These new states were created once the Indians ceded territory to the United States by lawful treaty. Of course, admission into the Union required the *State Constitutional Disclaimers of Jurisdiction* over Indians and their property. The process was governed by the structure created by the N.W. Ordinance. If there was a problem with the constitutional system, then the amendment provision under Article V could be applied. In the case of Indian Affairs, the application of it under the *14th Amendment* (by wording of "*subject to the jurisdiction thereof*" in Section 1 and "*excluding Indians not taxed*" in Section 2) was to maintain the constitutional negative on tribal Indians becoming citizens of the United States and the non-Indian states. The amendment did not recognize tribal Indians as members of the population represented by the national or state governments. Tribal Indians were not a part of the 'We the People' that were delegating their authority to the national or state governments. And, all state and national governmental officials were/are required to take an *oath* swearing their allegiance and support of the Constitution by Article VI, Clause 3.

THE INDIAN NATIONS HAVE BEEN SUBJECTED TO MANY DIFFERENT POLICIES INTENDED TO RESOLVE THE INDIAN PROBLEM.

As noted in the beginning, the evolution of the Federal Indian Policy/laws began five hundred years ago with racism as its foundation. As addressed in the opening of this testimony, in the beginning Columbus said, "Una gente in dios" (One People in God). But, he needed gold to repay the debts for the exploration. The conquest of the Indians began from that day forward. Following Columbus came the Spanish Conquistadors. The "Conquista" (Conquering) began with the Blessings of the Pope. During this time, the

Church and Pope had to find a new source of "souls" for the "bank of souls" that was being emptied by the impacts of the "Reformation" that was started by Luther and Calvin, and others. Indians, if they were declared humans, would be the source to replenish the bank. However, if they were "Christian by any other name" then the Conquistadors should not be allowed to enslave or kill them. Bartolome' de Las Casas become the defender of the Indians. He argued, in "In Defense of the Indians," that the Indians were endowed as children of God with the same inherent rights as the Spanish, and with the rights to "Self-governance." The chosen representative of the Conquistadors was Sepulveda (who never came to the New World). He argued that the Indians were only deserving of conquest, enslavement, and death. He believed Indians were not any better than the beasts of the wilds. He would be proud to know that, today, "Indians" are placed in the very federal department that is charged with management of parks and wildlife (Department of Interior).

Spain, at the time, was still debating the contents of the Laws of the Indies- which would become the cornerstone for modern federal Indian law and the "trust doctrine" that came to characterize U.S. law after the 1830's Marshall Court Indian Cases. *The common concept being that Indians could not be trusted to protect and care for their own interests. They needed guardians. But, in reality, it was the failure of the Spanish Crown, the Catholic Church, and later the U.S., to control their people that mandated the development of the "trust relationship."*

THE INDIAN NATIONS ARE CONCERNED ABOUT THE MISMANAGEMENT OF THE NATIVE AMERICAN INDIVIDUAL INDIAN TRUST ACCOUNTS.

The United States has the burden of the "sacred trust of civilization." The Indian Nations and individual tribal members have relied upon the Department of Interior, Bureau of Indian Affairs, to assure that the management of the revenue from contracts, leases, and rents from Indian trust lands and resources would be competently handled and accounted for. It is the duty of the guardian not to waste away the estate of the ward- this holds true for the United States as the trusted guardian of the Indian estates. In the case of the Individual Indian Money Accounts, Indian Country has witnessed federal financial mismanagement of the trust funds. The lands and natural resources that have been the source of the revenues were suppose to be protected as a requirement of treaty, executive order, or federal statute. The U.S. Constitution has made treaties and acts of congress the "Supreme law of the land" under Article VI, in conjunction with the Constitution itself. All personnel of the federal agencies and departments are required to swear an oath of allegiance to honor this commitment of constitutional government. The failure to adhere to the obligations assumed by solemn treaty and federal statute creates a situation of dishonor for the Nation itself. The numerous pieces of legislation intended to implement treaty commitments to protect these resources or revenues were drafted to assure that the "utmost good faith shall be extended to the Indians." The United States and individual states have not kept the "utmost good faith." The "sacred trust of civilization" has not protected the Indian interests in land, natural resources, and trust accounts. Currently the Office of Special Trustee argues that Indian Tribes have to live up to the same standards that the federal government has had too; but, what standard- the standard of BIA mismanagement and fraud, and then blaming the victim?

The Indian Nations are righteously concerned and indignant. It appears that the greatest effort to address this subject matter has been more focused on federal diversionary tactics. This is most manifest by the necessity of tribal filings of federal lawsuit to secure compliance with the law. We ask, "where is the money"? When will the Individual Indian Money Accounts be reconciled in a fair and equitable manner? We want justice not promises of a better tomorrow. The same problems of mismanagement lead to major congressional enactments in the 1870's to govern contracting with Indians. Decades after that, the Nation reacted to the findings of the Merriam Report on the impacts of the General Allotment Laws- resulting in the Indian Reorganization Act of 1934. The Federal/Congressional solution has always been to enact new administrative policies, draft new legislation, but never return the property taken. The resolutions never provide restitution for the lost funds, resources, and damages done to the native communities and people. Why not give the ward what was unlawfully taken from him by the guardian? Why should the guardian benefit from his unlawful gains? Is this justice?

The Indian Nations find it very difficult to place "trust" back into the very federal system that has caused so much damage over and over again. Resolution of the "Indian Problem" has always been driven by the "paternalistic demands" of a federal government that has supported "takings" of Indian rights and resources more often then it has provided protection of those same rights or resources. No government official could seriously believe that there are no grounds for native suspicions over proposed solutions completely originating from federal officials. The modern tribal leadership demand a participating role in the securing of solutions to the problems created by unscrupulous or incompetent federal officials. Consultation with the tribes is more then listening to their grievances or advice. It is important that the tribal concerns be understood and given serious consideration. The majority of the tribes do not appreciate having Ross Swimmer forced upon them in the role of "Special Trustee." He is a terminationist.

The new "Office of Trust" division is a threat to Indian Country. It drains funds away from Indian Country, funds needed for other dire needs of Indian Country. And with the war on Terrorism occupying center stage in world and U.S. politics, it is unlikely there will be new money appropriated for Indian programs. It has been a congressional and administrative pattern to provide financial restitution for wrongs done to Indian Country by taking funds away from other parts of the Indian services, programs, and essential governmental functions. The "victims" witness remedial actions being taken at the expense of other Indians (who in turn become the new victims). Thus, more of Indian Country becomes victimized in the resolution process. The proposed three hundred million or more dollars taken this year from other parts of the BIA causes great stress for Indian Country because it deprives tribal people of needed services. Indian Country cannot provide essential services to the tribal membership under current funding.

We, the Lummi Nation, believe the Congress should continue to indirectly authorize the Office of Special Trustee. The real solution would be to remove the Bureau of Indian Affairs completely out of the Department of Interior and create a Department of Indian Affairs (DIA). The DIA would draw a share from all other federal departments'

appropriations to assure Indian Country is qualified for and secured the same respective services delivered to other Americans by the whole federal government. All federal departments and agencies would be obligated under the "sacred trust of civilization" to assist Indian Country. The Department of Interior is, most often, at odds with Indian Country as pertains to the delivery of its duties and responsibilities within the subparts and agencies housed under it. With the Administration's packing of its appointments heavily from the energy/fossil fuel industries, it is evident to Indian Country that Interior would willfully dismantle Indian Affairs in favor of its other clients- those that seek to exploit these resources. This conflict of interest is a threat to Indian Country. It is becoming more evident as the energy industries move into the Executive Office, with no support coming from the Administration for a positive "Indian Policy" that is endorsed by tribal leadership nationwide.

TERMINATION OF INDIAN TRUST RELATIONSHIPS AND THE ELIMINATION OF LEGAL PROTECTION OF NATIVE AMERICAN NATURAL RESOURCES IS AT THE HEART OF INDIAN FEARS.

There have been more than 370 treaties of peace and friendship with the Indian Tribes ratified by the U.S. Senate. These treaties provided for cession of nearly four million square miles of land over to the United States. The ceded lands became apart of the common land holdings belonging to the people of the United States. The lands not ceded remained the exclusive property of the Indian tribes. From the ceded lands, or territories, derived the formation of the individual states that would enter the Union on an equal footing with the original states. The residue of land/territory left to the tribes amounted to one hundred and thirty-eight millions acres. These lands, and natural resources, were to be protected from encroachment by the states and their citizens (remember, until the 14th Amendment there was only state citizenship), or any non-Indian corporations. However, the Indian/Non-Indian relationship has been one of deception and mass takings. The hunger for more Indian land and natural resources has continued.

After the treaty era, the Congress unlawfully confiscated 90,000,000-plus acres of land and natural resources taken in violation of treaty agreement. Believe it or not, the taking of treaty-protected lands was always rationalized as in the best interests of the Indians. These takings were, also, justified as a part of the "political question doctrine." The United States, as a Nation, always suffered short-lived shame for their illegal takings. This national shame, once acknowledged, never resulted in return of the lost lands and natural resources. In the Laws of Nations, the United States held a greater claim, as Victors in Lawful War, to the lands of Germany and Japan- post-World War II, than it did to the Indian peace treaty lands it took under the general allotment laws.

Many tribal leaders believe that the proposed creation of a new office of trust is simply a diversionary tactic to isolate the "trust resources" and "trust accounts" in such a manner as to allow the congress and administration to terminate its long-term treaty obligations and dismantle the BIA in the near future. History has taught Indian Country that it cannot believe in the very system that was charged with the duty to fulfill the treaty commitments or protect trust resources of Indian Country. As the aboriginal peoples, whose nations have government-to-government relationships with the United States, the

Indian Nations deserve to have a "Department of Indian Affairs." Presently, the Indian Nations are coordinating their own "National American Indian Embassy." Indian Country is organizing for long-term survival. As Nations, the Indian Tribes deserve to have all the lands within the exterior boundaries of their reservations subject exclusive to the "self-governance authority" of the resident tribe, to the exclusion of foreign, non-Indian governments (i.e., individual states and exercise of limited federal jurisdiction). Intertribal support of each other has been one of the main reasons tribes continue to exist today. The tribes have always recognized the 'divide and conquer' strategy used by the administration, as well as the historical 'scorched earth policy' to starve Indians into submission and relocation upon the reservations. Tribes will surrender their rights to be self-determining, self-governing, and to become self-sufficient. The BIA is an important mediator between the tribes and the Congress and Administration.

THE FEARS OF THE AMERICAN INDIAN PEOPLE RESIDE IN THE PERCEIVED WAR ON TERRORISM AND INFIDELS.

The Republican White House is filled with administrative appointees that came right out of the energy industry. The energy industry considers Indians as a problem that stands in the way of progressive development. Indian ownership of vast fossil fuels or uranium resources is perceived as a hindrance under the theory of the old Trilateral Commission. The crisis created by the collapse of Enron proves that "energy" and "politics" combined can accomplish anything. In addition, the White House is becoming obviously anti-Indian and pro-states' rights in philosophy and policy. Indian Affairs seems to be placed on the backburner for later termination when the time is ripe. Now, with the War on Terrorism, it appears that the White House can do no wrong in the eyes of the polled public. This means, to Indian leadership, that Indian Country could easily be depicted, once again, as an enemy to be subdued, or at least forced to assimilate into mainstream America. Local governments always rejoiced when this happened because it expanded their jurisdiction and added to their tax base and stimulated local economy.

We are confronted with a "Republican War" since that party controls the Congress. Opposition to the war budget could become a stigma to politicians trying to hold out and protect the Indian Affairs budget. Indian Country does not want to be a victim of the War on Terrorism. Indian Affairs is already extremely under-funded. The finances to cover the costs are appropriated by both parties in Congress Assembled. Indian Country does not want to witness an 'appropriation rider' in which the Office of Special Trustee is authorized permanently and allowed to continue to raid the budgets for Indian Affairs (BIA). And, yet, an appropriation rider placed on the War on Terrorism appropriation request would eliminate any opportunity for the Indian tribes to testify in opposition. This 'rider' system should not be used to force Indian Country to accept an unfair settlement of the Cobell Case or to accept unfair 'trust reform' that favors the Office of Special Trustee and not Indian Country.

Thus, Indian Country fears that almost anything advocated to eliminate programs, services, functions, activities and the rights to self-governance secured to the Native Americans would be forgiven by the public if it is perceived as beneficial to the soldiers and resolution of the War on Terrorism. This was the lesson learned by the

returning WWII Indian Soldiers, as they came home only to witness rapid institutionalization of terminationist policies. This was the same policy pattern witnessed by our Indian Veterans that participated in the Korean Police Action. The same held true for our veterans returning from Vietnam. The past reward for Indian patriotism has been the lost of more lands, natural resources, and self-government under the Termination Policy implemented by the Presidential Administration and Congress. There limited congressional friends willing to defend Indian Country from budget cuts and the resulting elimination of Indian programs and services. It is difficult for a politician to argue against the national interests (the War on Terrorism). Everyone is expected to share in the budget cuts but Indian Country was never funded at equal levels of non-Indian Country.

The American Indian Nations live in constant fear of extermination, termination, genocide, relocation, forced assimilation, and severe "Christian" policies of "civilizing the savage." Why? Because this has been the inherited history since Columbus "discovered the New World." It was not a world that could justifiably be taken over under the doctrine of "Terra Nullis." The western continents were unquestionably occupied by an estimated 100-plus million non-Christian natives in North, Middle, and South America. The wars between the dominant religions of the world have resulted in the slaughter of hundreds of millions of innocents over the past two thousand years-especially during the Age of Reformation. The American Indians were and have continued to be victims of this religious mind-set that justifies the actions of the more powerful over the weaker. We have witnessed the formation of a nation that used "God" to justify their conquests, their takings, their slaughters, and their destruction of native societies. It was 'Christian-made law' that has justified our 'trust status' as 'unfit people.' In the modern global community, and within the nation itself, the average American can always argue that that was ancient history and not today. They disown the responsibility of their collective actions as a nation. They refuse to surrender the plunder taken. They claim that the power they hold justifies the takings from a weaker people. The power to ignore past injustices or the failure to acknowledge and deal with pass conflicts is manifest in the roots of the current conflict with terrorism. A Great Nation must deal with all factions and facets of their constituency. The same holds true with the United States' relationship with the American Indians.

The history of government-to-government relationships between the United States and the American Indians has been one of conquest by deception. We were deceived in the value of the treaty relationships with United States. When wars could no longer be justified then deceptive peace treaties were used to conquer the native Nations. When treaties would no longer be honored then legislation became the new form of conquest. When legislation could no longer protect the rights, resources, and governments of the native people then court decisions became the weapon of choice. Today, the Native American Nations are unsure if they can trust the President, the Congress, or the Courts. Concern for the rights of Indians has most often been quickly forgotten when the public demand for more native resources heightened in popularity.

We fear that if the American People, the electors, consolidate the power of all three branches of the national system (the Presidency, the Congress, and the Court) into

one party then we will be confronted with a bleak future. The potential for the rebirth and implementation of the "Final Solution to the Indian Problem" through termination policy actions is ever in the mind of Native America. We believe that as long as the powers of national governance are divided between the Republicans, Democrats, and the few independents that occasionally surface, we have a chance to survive for another decade, another generation. While Indian Country has been making a difference in some congressional elections, the collective number of Indian votes is too few to make major changes in the composition of either house. Indian economic might and strategic planning have made some differences- e.g., the removal of a senior, anti-Indian U.S. Senator (R-WA) echoed a significant message in the halls of the Senate.

However, currently, we are confronted with a "Holy War of Retaliation" against the infidel enemy that has attacked everything that reflects the American Dream. This war on terrorism is consolidating public support for the Presidency. We fear that much of the states' rights movement (which has always been anti-Indian) is finding favor with the President. We are, already, seeing it manifest in proposed termination of Indian programs and services directly. We fear that the War on Terrorism shall spill over into Indian Country and be used to depict the American Indian as un-American. We fear that it will be too easy for congressmen to ignore the voice of the American Indian. *We are not "Terrorists" we are "Patriots!"* We deserve to be heard. Our Indian people have served in every modern war confronting or threatening the United States. Our people are America's decorated war veterans. They fought for the values of life, liberty, and justice. They fought for constitutional government. They were "Code Talkers" and a part of America's line of defense.

Indian Country has a right to be worried about the state's rights movement that is permeating the current Administration. The state's rights argument goes all the way back to the time of the "Articles of Confederation." In that time, the states claimed sovereignty derived from their expulsion of the king, and not from the people. But, the 1787 U.S. Constitution was founded upon "Popular Sovereignty" and not sovereignty delegated from the states. Thus, U.S. sovereignty is founded upon the collective will of the American People. Representative government then is a manifestation of the people's collective beliefs. We cannot believe that the dominant majority of the U.S. Citizenry still believes there exists an "Indian problem." We cannot believe that they collectively want to exterminate or terminate our rights to exist. In fact, recent national public polling has shown a large majority of the public in support of the Native Indians. The only threat we pose, as Indian people, is that we still collectively own natural resources and territory that is jealously desired by corporate America and their plans to exploit all sources of energy fuels and resources. The others that see us as a threat are the non-Indians that buy land inside our exterior boundaries and then do not want to be subjected to our tribal governmental jurisdiction. However, the consolidation of the Administration with the energy industry poses a very serious threat to Indian land and natural resource ownership and protections. We do not believe the "Office of Special Trustee" would be immune to such undue influences, especially without a Presidential Policy protective of Indian rights and a favorable government-to-government policy.

Our lands and natural resources are covered by the "sacred trust of civilization" that has been assumed by the United States. Neither the Republican or the Democratic Parties should be individually or collectively empowered to simply secure enough congressional votes to eliminate our rights to these lands and resources as a matter of political prerogative or economic necessity. A part of the "sacred trust of civilization" must extend to the conscience and morality of the individual congressional members that exercise the power entrusted to them by their constituents. Additionally, this duty extends to the members of the Administration as much as the Courts. All have sworn allegiance by oath. All have sworn to honor and uphold the U.S. Constitution as the "Supreme law of the land." The same holds true of all public personalities that represent state governments and citizens. It is constitutionally required that each state have a "Republican form of government" with "Disclaimers of Jurisdiction" over Indian Affairs. Both the individual state and the national constitution have to be honored and respected.

We believe the "sacred trust of civilization" presumes that the United States would be governed by high moral standards and integrity that would be a model of governmental behavior amongst the Nation-States of the world community. The United States is the undisputed "Super Power" of the world. This power is reflected both in its policies & laws that govern internal relationships as much as external relationships. If World War II taught the global community anything then it is the fact that a nation cannot be left to simply do anything it wants to its "undesired" citizens (as in the Nazi treatment of the Jews). Presidential, Congressional, and Court treatment of the "American Indians" is a message to the world. The message is either "Do as I say" or "Do as I do." If the United States used its paternalistic "Indian Policy" as the model to govern over and rebuild or Iraq then the populations of that nation would arm themselves and form a militant liberation movement that would never surrender. The most appropriate policy is the one that advocates indigenous self-determination and self-governance based on popular sovereignty. This is a model that can be respected.

Now, more than ever, the message to the world is important. The President has declared in the recent past that there exists an "evil" group of nation/states that are a direct threat to the world community, and the interests of the United States. If these dozen of more nation/states that have been publicly identified perceive the United States as a nation that is unfair and untrustworthy in its international dealings, then there may be a reason for their formation of a united front and an international network. It is obvious that the "evil empire" concept that has been forged in the Administration is a spin off on the Reagan application of the concept to the Soviet Union. *Indian Country, during the process of demanding justice, does not want to be grouped or included in the "evil empire" group. The enemy came from outside the continental United States. It is not the American Indians.*

A NATION MUST JUDGE ITSELF IN LIGHT OF NATIONAL HONOR.

The membership of the U.S. Senate and House of Representatives are like most Americans- they have learned what they know about the history of the American Indians based on selective concepts of U.S. historical truth. The United States advocates that it is a "Christian" Nation. This is evermore manifest during the recent public statements of the

Presidential Administration after the horrid attack upon the World Trade Center, the Pentagon, and the crash of Flight #93 in Shanksville, on September 11th. We were being warned that this may be a Christian Nation at war with an Islamic Nation, and we regretted this statement as soon as it set within our memory. The whole world is bearing witness to the retaliation that the United States has waged upon "Terrorism" no matter where it may hide upon the globe. The war in Iraq, the means by which it is managed, and the results of victory, should create a mirror that should cause the United States to look inward. The civilians of Afghanistan and Iraq are not all Terrorists. They are a people that find faith in their own concepts of right, wrong, and religious persuasion. We, as an American People, as a Christian Nation, are confronted with a dilemma- how shall we pass judgment upon the defeated? This is not five hundred years ago- a time in which conquest in the name of the Christian God (Jesus the Christ) was the banner leading toward victory and enslavement of the natives or their genocidal demise. Nor was this a war waged for plundering the land, the people, and securing all their wealth in gold (oil), as happened to the Native Americans. The Iraq people are not the new conquerable "Indians" of today! They cannot simply be discarded or disposed of as the U.S. sees fit. The whole world is watching. The United Nations is watching. The globe has become the home of the international laws of nations. And, the world watches it play out on international news and within international diplomatic circles.

No matter what, the American People shall continue to bear the burden of rebuilding the defeated country after the war. This is a subject matter of great concern for all nations of the world. We hold ourselves out to be an enlightened, democratic, republic that is governed by the honorable will of the people. We believe ourselves to be guided by the Laws of Nations and it's more modern manifestations found within the United Nations Charters, and the multitude of multilateral treaties, conventions, and covenants governing the conduct of "states" toward other states and peoples, even in times of war. *It would be so easy for the American mind-set to believe that the people of Iraq are the modern savages, heathens, or infidels that must be subdued, conquered, and brought into the Christian light.* However, America can no longer clothe itself in the racism that stimulated the actions and policies of President Andrew Jackson, the tactics of General Custer, or the fears generated by the "red scare" created by Congressman McCarthy. Nor can the United States turn the middle-east over to Christian Denominations as was done by President U.S. Grant for the management of Indian Country. The whole world shall bear witness to whether or not the United States shall use this "War on Terrorism" to completely subdue and dominate the Peoples of Iraq or help rebuild the country into a form that will respect human freedoms and differences, and allow the "natives" to institute a government of their own choice. This is what Indian Country demands- respect, basic human rights, rights of self-determination and rights of self-governance. We retained inherent rights to our lands and natural resources. What we want and demand today is what the people of Afghanistan, Iran, and Iraq will want in the post-war era of rebuilding.

The duty to the conquered is politically, socially, legally, and morally a very difficult task and must be shared with the guidance of the United Nations. To rebuild the conquered governments, in forms that are acceptable internationally, does not mean these

nation/states must become a micro-version of the United States in form of governance (popular sovereignty based on a written constitution, with corporate underpinnings)- as was tried after the "Police Action" in South Korea. Any government that is installed must reflect all aspects of the indigenous society. There shall continue to be the dissatisfied that shall flock to the "militant" or "liberation" movements that shall manifest over time.

Could it even be conceived, in this time and age, that the dispossessed sovereignty of the most recent governments can be simply assumed to have been transferred to the conquerors- not guided under the current international law of nations. Many may believe this is a trivial question- and, yet, the United States has continued to maintain a position of "absolute power" over its own Indigenous Peoples. By legislative act it has assumed the sovereignty of Indian nations. It is not exercising "sovereign powers" the Indian Nations delegated to the United States. If the treatment of the American Indians is a model, then perhaps, the dispossessed governmental officials and their religious colleagues should all be placed within "Iraq Reservations" and a policy of U.S. paternalism and "trust duty" installed. This latter could then be used to justify U.S. plenary power over indigenous governance. This cannot and should not happen. It would be unacceptable under the international laws accepted by modern nation/states. And, yet, this type of control over Indian Affairs is considered acceptable in U.S. domestic standards and federal policy. Indians are still the "incompetent and non-competent" wards. *Ironically, the Indian Nations were never "conquered in war." The Indians were conquered by the Supreme Court decision in Tee-hit-ton. We were conquered by judicial decree and legal fiction generated by nine justices, not the armed forces of the United States. Thus, the international laws that apply are still treaty laws and not the laws of conquest.*

We ask, "What will govern the actions of the United States and any participating states sanctioned by the United Nations, in their plans to rebuild Iraq? It will be the international laws of Nations/States, and it will be the "sacred trust of civilization." In this light, the lesser nation (Iraq) will be guided by the more powerful nation (the U.S. and/or participating UN States). Successful rebuilding of Iraq shall be a message to the world that "terrorism is unacceptable" and civilized resolution of differences of belief in God is more profitable for the peoples impacted. Any actions that may take place, after the war, that treats the people of Iraq as less than human and undeserving of Christian mercy will only further perpetrate the belief that this really is a "religious war" between infidels and the followers of the true god. *America's treatment of the Indians, as a Christian Nation, seems to stimulate the idea that "Jesus the Christ" was a War God of Righteous Conquest, and no restitution is owed to an inferior, non-Christian people.*

The United States must take time to reflect upon their treatment of the American Indians, in light of Afghanistan and Iraq. As Felix Cohen said, "*Our treatment of the American Indian, even more than our treatment of other minorities, mark the rise and fall of our democratic faith.*" This same truism holds value in the estimate of the aftermath treatment of the Peoples of Afghanistan and Iraq. What "enlightened form of self-governance" shall be advocated to meet the needs of the sovereign peoples of Iraq as consolidated collectives? The modern constitutional governments of the world work because of their ability to incorporate religious tolerance and differences. Popular

sovereignty is founded upon the collective will of all the people in the country. It is founded upon concepts that all people, members of that collective, are equal participants in the delegation of authority and powers to the national government. How will the collective will of the Iraqian peoples be generated into new or modified forms of government that shall discourage "terrorism" and prevent the permanent institutionalization of religious fanatic liberation movements? The UN Bon Accords have helped structure the process for redesigning "constitutional" governance of the proposed "Islamic Republic of Afghanistan. We can imagine that the same process will follow in the war-aftermath period of Iraq. The proposed solutions must incorporate the inclusion of respect for Iraq sovereignty over their own peoples, territories, and forms of social/theological governance. A micro-American version of "religious tolerance" in governance will most likely not work or be completely incorporated in these constitutional governments. But, there are 160 member states of the UN that have collective constitutions that may be models for resolution. However, they can only be models for the acceptable solution must be derived from the belief system of the people to be governed or it shall only result in accusations of "imperialism" and "colonialism" and an attempt in "Christian domination." The Indian Nations demand no more than that. We seek to have our solutions incorporated in the resolutions of the "Trust" problem. We have our own belief systems and value systems that govern our treatment and use of our lands and natural resources, regardless of the artificial "trust relationship" controlled by the U.S. Department of Interior.

The Native American Indian Nations have begun to secure "self-governance" rights only in the 1990's. These are inherent rights that were never lawfully taken by conquest or surrendered by treaty. We are very experienced with the defeating and suffocating atmosphere created by negative federal Indian policies that viewed Indians as savages, uncivilized, or unworthy of self-determination and self-government. Any past wars that were fought by a very limited few individual Indian Nations were wars of self-defense or retaliation for great injustices perpetrated against them by U.S. citizens and states. Very few of the Indian Nations ever fought wars against the United States. And, yet, they experienced over two hundred years of federal policies of domination as if they were conquered people, conquered nations. Starvation and disease conquered our people. We have been treated as an inferior race that is not qualified to manage our own affairs. And, in reality, the reason there have been so many legal/economic problems in Indian Country is because federal policy has consistently favored the non-Indian over Indian interests. Federal transfers of jurisdiction to individual states resulted in the destruction of Indian self-governance. The guardian has been hesitant to protect the estate of the ward when their racial brothers needed access to the estates and reserved lands & natural resources.

IN CONCLUSION

*All lands, whether in trust or fee status, inside Indian Reservation boundaries should be placed in the complete jurisdiction of Indian Tribal governments, to the exclusion of non-Indian governments. No right of taxation attached to the land should extend beyond tribal governance and reservation boundaries. Tribal governments should have a "first right of refusal" to purchase all restricted, trust, or fee status lands located inside the reservation

boundaries- primarily using federal funding for the same (as a settlement in the Indian Land Consolidation Act problem).

*Congress should create an interstate/intertribal commission to draft an Indian Commerce Code, based on its Article I, Section 8, Clause 3- Indian Commerce Clause powers. This code would be negotiated with the intent to respect the conflicting sovereignties and encourage inter-jurisdictional economic cooperation. In the meanwhile,

> Amendments to the Indian Tribal Governmental Tax Status Act should be enacted to provide that (1) all tribal income tax assessments shall be written off as a foreign tax against the U.S. Income Taxes applied in Indian Country; (2) All income derived from natural resources owned by an Indian or Indian tribe, located within the exterior boundaries of the respective Indian Reservation, shall be exempt from federal and state taxation the same as the exemptions provided for the fishing resources under Section 7873 of the Internal Revenue Code.

*The United States is and should continue to be a model form of popular sovereignty based on written constitutional forms of Governance. And, its domestic treatment of the American Indian, as a matter of federal policy and law, should be a prime model for other nation/states of the global community in their treatment of similar native populations.

*The United States is undeniably a colonial government that has maintained government-to-government relationships with the indigenous (American Indian) nations of the continent. Indian people will never completely submerge themselves as U.S. nationals. They will continue to owe their allegiance to their own nations, governments, and people first and foremost. This concept should be recognized not only in the treaty relationships but considered when laws of commerce are enacted to govern the commercial relationships with the Indian Nations and people.

*The United States is bound by the "Sacred Trust of Civilization" and had assumed that responsibility based on the three hundred and seventy-plus treaties entered into with the Indian Nations and ratified by the U.S. Senate. And, that the Indian Nations paid for all "trust protections" in perpetuity at the costs of vast land and natural resources being ceded to the Nation. Therefore,

> The Indian Land Consolidation Act should be amended "to provide for the legal right of all tribal governments to have the first right of refusal to purchase reservation fee lands being sold on the common market. And, that all lands located within the exterior boundaries of any Indian Reservation, whether created by treaty, executive order, or federal statute, shall be subjected to the exclusive criminal and civil jurisdiction of the Indian Tribe, except as provided under the Major Crimes Act; nor shall any local or state taxation or zoning authority apply thereon."

*Since formation of the Union, the development of Federal-Indian Policies have constantly fluctuated, usually to the detriment of Indian land and natural resource ownership, and the demise of their inherent rights as human beings living in tribal collectives. The Congress and Presidential Administration should both work cooperatively to institute federal Indian policies that seek to permanently protect and expand Indian Self-governance. Thereby,

> The Congress should expand the Indian Self-governance laws to assure that all federal departments and agencies are obligated to assure funding and services are ear-marked for Indian Country, and shall be set-aside under Annual Funding Agreements with the Indian Nations participating in the Self-governance system.

*The way the United States treats and relates to the Native American Indian Nations should be a positive model for member states of the United Nations; especially when those nation/states have large minority groupings of colonialized indigenous populations that believe they have no recourse but to join liberation movements.

*The voiced concerns of the Indian Nations should always be given due regard and serious consideration through a permanent process of government-to-government consultation with the Indian Nations. Indian Affairs is a national power and should be managed with the integrity of the whole United States in mind. As it now stands, Indian Affairs is a minor division of the Department of Interior.

*Self-determination, Self-governance, and basic human rights protected by international conventions, covenants, and treaties should be a permanent feature of all federal governmental policies and laws made applicable to the domestic Indian Nations. The U.S. should police it's own actions to be the international role model for other nation-states.

*Indian Nations were great contributors to the type of constitutional government formalized by the U.S. Constitution. And, Native American Veterans have fought in every war and police action entered into by the United States, receiving most often the highest decorations for combat duty. Indian People have always supported the protection of life, liberty, and the pursuit of happiness. Indian People have earned a right to be recognized as honorable members of the Union and the People of the United States, without having to surrender their allegiance to their tribes first and foremost.

*The U.S. Constitution had structured the government-to-government relationship with the Indian Nations, within the confines and aspects of the "Separation of Powers" and "Checks and Balances" doctrines. And, without constitutional amendment, the scheme designed by the Founding Fathers at the Constitutional Convention is still binding today.

*Indian Affairs has always been a national power of the United States and new states that joined the Union on an equal footing were always required to "disclaim jurisdiction" over Indian Affairs as the price paid for entering the Union. Any laws or policies attempting to reverse these requirements, without due regard for the amendment processes, are contrary

to constitutional intent. Because of the intended separation and treaty-relationships, Indian Nations should not be required to go through state governments to secure services, benefits, and programs offered other Americans. Federal funding should go directly to the Indian Nations.

*The "Sacred Trust of Civilization" is a part of the established international law of nations and is applicable to the government-to-government relationship between the Indian Tribes and the United States. Such trust duty is a matter of the honor and integrity of the whole nation and not simply the BIA, Department of Interior. All federal departments and agencies are obligated to assist in implementing the "sacred trust of civilization" duty of the United States.

*The "Trust Protection" extended to the Indian People and their lands & natural resources was intended to prevent unscrupulous actions of non-Indians and assumption of jurisdiction by state governments over the same. All trust protection should be extended to the Indian people and their property indefinitely, as a permanent part of the National Indian "Treaty" Policy. All laws and policies that attempted to transfer any aspect of Indian Affairs to the state governments should be reversed, to assure compliance with national constitutional intent.

*The United States should not continue to authorize the Office of Special Trustee. The U.S. Congress and the Administration should seek to create and establish a permanent Department of Indian Affairs- what would then include a permanent office of trust responsibility that abides by and implements the "Sacred Trust of Civilization."

*The Department of Indian Affairs would incorporate all current functions of the BIA/DOI. The DIA would be expanded by congressional authorization to include those aspects of the other federal departments and agencies that deliver services to the American Population of which the Native Americans would be qualified to receive. The purpose and goals of DIA would be to deliver the same services to the Indian People but through the consolidated operations of the DIA. Each department or agency would have an "Indian Desk" inside the DIA, and a respective allocation of funds to implement their duties and responsibilities.

*Indian Country, their rights, and resources, should never again be subjected to anti-Indian policies- as are advocated by the states' rights movements, racist organizations, or self-seeking corporate interests. These policies have always alleged they are for the best interests of Indian Country but in reality sought to deprive tribal people of the ownership of their land, natural resources and jurisdiction over people entering Indian Country. Indian Nations should be recognized 'state governments' as argued by Chief Justice Marshall in the Cherokee Cases and the use of the constitutional 'compacting' powers (Article I, Section 10, Clause 3) shall be directly applied to all state/tribal agreements as an extension of the national control over Indian Affairs.

*The United States should declare that after five hundred years of alleged conquest, and two hundred years of constitutional government, it recognizes that Indian People are not

savages, heathens, atheists, agnostics, incompetent, non-competent, the enemy, or terrorists. Indian people and their traditional governments should be recognized as welcomed members of the family of governments that compose the United States, as structured by the U.S. Constitution.

*The U.S. Indian Policy of Self-determination (which incorporates Self-governance) is a matter of inherent right, and a legitimate exercise of Indian sovereignty. The U.S. should continuously and permanently recognize and expand the Indian entitlement to these rights as a matter of national policy and law. As a matter of international law, the treatment of American Indian Nations should be a model of how other member nation/states of the United Nations should treat their indigenous peoples or colonialized or marginalized populations. These policies should be an example of how government-to-government relationships between nation/states and indigenous peoples could be structured- so as to prevent or discourage such peoples from ever having to resort to liberation movements to secure such basic inherent rights.

*The development of a separate Office of Trust Special Trustee, without the support of Indian Country, will never be fully supported by the Indian Nations. The United States should guarantee to the Indian Nations that they will never again be subjected to genocide, extermination, termination, assimilation, enculturation, and domination by paternalism as a matter of Federal-Indian Policy. The United States, by act of Congress, should require direct consultation with the Indian Nations in all subject matters that impact tribal status and rights as a matter of national law. The creation of a Department of Indian Affairs would be sure indication that the American Indians will no longer be regulated as "incompetent wards" but entitled to their complete human and sovereign rights as a part of the national political/legal landscape of the United States.

The Unite States should replace the lost Individual Indian Money Accounts by new appropriations from the Treasury and not by diverting funds/appropriations already ear-marked for Indians Affairs. Indian Country should not be penalized for the gross mismanagement by the "Guardian."

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