S. HRG. 109–483

INDIAN TRUST REFORM ACT OF 2005, TITLES II THROUGH VI

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

S. 1439

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

MARCH 28, 2006
WASHINGTON, DC

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CONTENTS

	Page
S. 1439, text of	3
Statements:	
Cason, James, associate deputy secretary, Department of the Interior	75
Dorgan, Hon. Byron L., U.S. Senator from North Dakota, vice chairman, Committee on Indian Affairs	78
Hall, Tex, chairman, Three Affiliated Tribes Business Council	78
Gray, Jim, chairman, Intertribal Monitoring Association	80
Marshall, Sr., Clifford Lyle, chairman, Hoopa Valley Tribal Council	83
McCain, Hon. John, U.S. Senator from Arizona, chairman, Committee on Indian Affairs	1
Nunez, Austin, chair, San Xavier District, Indian Land Working Group	85
Russell, Majel, attorney, Elk River Law Office	86
Swimmer, Ross, special trustee for American Indians, Department of the Interior	76

APPENDIX

Prepared statements:	
Cason, James	93
George, Keller, president, United South and Eastern Tribes, Inc.	97
Gray, Jim	108
Hall, Tex	117
Marshall, Sr., Clifford Lyle	122
Nunez, Austin	129
Russell, Majel	139
Swimmer, Ross	93

INDIAN TRUST REFORM ACT OF 2005, TITLES II THROUGH VI

TUESDAY, MARCH 28, 2006

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

The committee met, pursuant to notice, at 9:30 a.m. in room 485 Senate Russell Office Building, Hon. John McCain (chairman of the Senate Committee on Indian Affairs) presiding.

Present: Senators McCain and Dorgan.

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

The CHAIRMAN. Good morning.

Senator Dorgan will be joining us shortly, so we will commence the hearing.

Earlier this month, the committee held a joint hearing with the House Committee on Resources on the settlement of the *Cobell* v. *Norton* litigation, which is the subject of title I of S. 1439. There seemed to be a strong consensus among the witnesses that the Congress should step forward and resolve the *Cobell* lawsuit.

We also heard from one of the witnesses that we should not resolve the funds mismanagement claims, but leave unresolved the resource mismanagement claims. I agree with the assessment that all funds mismanagement claims should be resolved, but I am troubled by the prospect of settling the *Cobell* case at a cost of billions of dollars to the taxpayers, while leaving a significant set of claims intact. Will there be a *Cobell* II filed on the heels of the settlement, thereby commencing another ten year run against the Department of Interior?

I am sure my colleagues in the Senate are going to want to know whether that can happen before supporting a settlement with a multibillion dollar price tag.

The hearing today focuses on the remaining five titles of S. 1439. Although, of course, if any witness has ideas on how to settle the *Cobell* matter, we would certainly like to hear from them. These titles deal with various aspects of Indian trust reform, creating a commission that would review trust practices within the Department of Interior and recommend changes; establish a novel demonstration project allowing greater tribal control and responsibility over trust asset management; restructuring the BIA and transferring Office of Special Trustee functions under a new Under Secretary for Indian Affairs; providing new mechanisms to deal with

the problem of fractionation; and requiring annual GAO audits of individual Indian and tribal trust funds.

Since the Indian tribes and tribal organizations, as well as individual Indians and organizations that represent trust reform, that there is interest. There are some differences in opinion in Indian country about some aspects of trust reform, but based on the comments I have received so far, I would say that there is a widespread view in Indian country that management of Indian trust assets does need to be reformed.

Hopefully, our hearing today will give us further insight on how S. 1439 should be revised so that we can put it on our markup calendar as soon as possible.

[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

1 ''(ii) the certified mail receipt for the
2 offer is returned to the Secretary unsigned
3 by the offeree.
4 ''(5) WITHDRAWAL OF ACCEPTANCE; NOTICE.—
5 ''(A) WITHDRAWAL OF ACCEPTANCE.—A
6 person that is considered to have accepted an
7 offer under paragraph (4)(A) may withdraw the
8 acceptance by depositing in the United States
9 mail a notice of withdrawal of acceptance form
10 by the date that is 30 days after the date of re-
11 ceipt of the notice under subparagraph (B).
12 ''(B) NOTICE.—The Secretary shall pro-
13 vide to any person that is considered to have
14 accepted an offer under paragraph (4)(A), by
15 certified mail, restricted delivery, to the last
16 known address of the person, a preaddressed,
17 postage prepaid withdrawal of acceptance form
18 and a notice stating that—
19 ''(i) the offer made to the person is
20 considered to be accepted; and
21 ''(ii) the person has the right to with-
22 draw the acceptance by depositing in the
23 United States mail the notice of with-
24 drawal 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.

○

The CHAIRMAN. I welcome our witnesses and look forward to their testimony. Our first panel is James Cason, who is the associate deputy secretary at the Department of the Interior, and Ross Swimmer, who is the special trustee for American Indians, on their 200th appearance before this committee. [Laughter.]

Mr. Cason, welcome. Do you want to go first?

Mr. CASON. Sure.

The CHAIRMAN. Thanks.

STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR

Mr. CASON. Thanks, Mr. Chairman.

Thank you for the opportunity to come before this committee to discuss titles II through VI of S. 1439, the Indian Trust Reform Act of 2005. We appreciate that this committee continues to advance legislation that attempts to provide a settlement of the *Cobell* v. *Norton* lawsuit, but also intends to address other challenges in managing the Indian trust.

As we have testified on several prior occasions, the department supports the efforts of Congress, as the Indian trust settlor, to clarify Indian trust management duties, responsibilities and expectations. Since the passage of the American Indian Trust Fund Management Reform Act of 1994, Interior has made progress in trust reform. Today, beneficiaries have direct access to staff that is trained in fiduciary trust matters. New procedures are in place for the management of account information and the collection and distribution of trust funds. These reforms have been implemented to provide improved service to beneficiaries.

We appreciate that titles II through VI of S. 1439 focus on other areas of trust management. However, we believe that it would take considerable adjustment of these titles to facilitate material improvement in the management reform of the Indian trust.

If a restructuring of the Indian trust is desired, we would also ask Congress to address some other crucial issues, including the lack of a clear trust agreement to guide our responsibilities and Indian country expectations; appropriations that do not align with program trust responsibilities; the lack of an operative cost-benefit paradigm to guide decisionmaking; the challenges of addressing Public Law 93–638 contracting and compacting goals; and the impediments associated with Indian preference hiring practices.

These issues have frustrated the department, Indian beneficiaries, administrators and Congress throughout the lifespan of the trust. We encourage Congress to speak clearly in developing such language and carefully consider the impacts it will have in allowing us to meet the expectations of our constituency.

The new structures and business practices being put in place at the department have improved the management of the Indian trust for future generations. We must be careful to pursue constructive change and to address the structural problems that are impeding Interior's forward motion in trust reform.

We look forward to working with you on meaningful legislation that addresses both the need to bring closure to this class action litigation before us, and the need to address some of the fundamental challenges we face.

This concludes our statement. We would be happy to answer questions.

Thank you.

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

The CHAIRMAN. Thank you.

Mr. Swimmer, welcome.

STATEMENT OF ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS, DEPARTMENT OF THE INTERIOR

Mr. SWIMMER. Thank you, Mr. Chairman.

I appreciate the opportunity to be here as well, and certainly second what Mr. Cason has said.

Just to bring to the committee's attention a few of the things that have happened and that are happening. As the committee knows, a couple of years ago, actually 3 years ago, we started a process called let's study the trust and see what is going on with it, and trying to come up with where we are today in the trust. This was three years ago, and we did what was called the "as is" study. We went out to Indian country with tribes, with individuals, with all of the players of the trust, and we put together the way the trust was operated. From that, we created what we called the "to be" model, eventually becoming the fiduciary trust model.

If you were going to have a model of how the trust could operate, if you wanted to continue it as is, this would be a way of doing that. The model has been successful. It has been implemented. It is being implemented. It has been implemented in some places now. We have lease collection of funds, the trust funds accounting, distribution of funds and tracking of title ownership, all being tied together with conversion to the new software systems and business practices throughout the Bureau of Indian Affairs and the Special Trustee's Office.

We have now beneficiary access to data and professional help available to Indian beneficiaries for the first time ever in the trust through the beneficiary call center and through the deployment of fiduciary trust officers throughout Indian country.

We have included in the fiduciary trust model responsibility of both Minerals Management Service and the Bureau of Land Management. The Bureau of Land Management is now participating by having cadastral surveyors located in each of the 12 regional offices of the Bureau of Indian Affairs to help accelerate the process of doing surveys in Indian country and getting them correct.

The tribal demonstration project has tremendous value. It is an extension of the self-determination and self-governance model that is already in use. I think the department certainly encourages continued management of the trust resources by the tribes that own those resources. The danger is, of course, that the Government's role changed from a trustee role to one of guarantor of tribes's performance. I think we have to be very careful of that in structuring how that kind of a situation would work.

If a beneficiary and the trustee basically become one and the same, there is generally considered a merger of the trust and the trust goes away. Well, that is not intended to happen here, of course, but what the role of the Federal Government is going to be

subsequent to a tribe assuming full responsibility for the management of its trust assets needs to be addressed.

We have to answer the question of incompatible systems. We have to answer the question of retrocession if the tribe decides they don't want to manage their trust assets. And we also have to know how, in fact, the issues of conflicts of interest between tribal members and tribes themselves are going to be resolved. It is not unusual at all today, in fact it is more fact than not, that individual beneficiaries own property on reservations where they are not members of that particular reservation. In fact, today the average beneficiary owns about 14 interests in land, oftentimes scattered among 1 to 14 different reservations.

So there certainly is merit in looking at moving forward on the trust self-governance concept, on self-determination, but I think we need to talk about what the role of the Government becomes after that happens. Certainly, there are a lot of options that should be satisfactory, both to tribes and to the Government.

As far as the restructure, what I would suggest is that in the last 10 years, most of the reform that we have experienced today and are experiencing has been the result of the work of the special trustee in conjunction with the BIA in bringing new systems about; in doing the cleanup of processes in the BIA; putting trust officers out in the agencies; making sure that the records management programs is effective which is now, frankly, a state of the art records program, and listening to the folks from NRA, the National Archives, that manages the storage for us, it is state of the art, and better than any records management program in the United States.

These are the kinds of things that the special trustee has brought about.

The 1994 Act provides for a sunset of the Special Trustee's Office. I think that is appropriate. The question is when, when we finish with the complete conversion of systems work, the rest of the regions in the Bureau of Indian Affairs that need to be converted to the new systems, and we get the cleanup work done, and all of the encoding done, and the probate matters caught up, and some resolution to ILCA.

We need to start looking at perhaps a different paradigm to how we manage the trust. The only thing I would suggest is that at that time, it might be appropriate for the Secretary to look at the management structure again, in consultation with tribes and individual beneficiaries. Determine what that should be and whether the special trustee goes away, gets merged into another structure within Interior, may be quite different than what we would be looking at today.

Those are my comments today, Mr. Chairman, Mr. Vice Chairman. I appreciate the opportunity to be here. I believe we submitted our official comments for the record.

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

The CHAIRMAN. Thank you very much. Both of your written statements will be made a part of the record.

Senator Dorgan.

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

Senator DORGAN. Mr. Chairman, first let me apologize for the delay. I was at a leadership meeting, and I appreciate the testimony. As always, Mr. Cason and Mr. Swimmer, thanks for your work on these issues. I think both Senator McCain and I believe that Congress has to find a way to resolve these issues. Going back for many, many, many years, we have had in some cases a shameful treatment of what should have been a trust responsibility for American Indians. We are now trying to find a way to respond to that and resolve it in a manner that is both fair and equitable.

Mr. Chairman, I will defer and send some questions to the witnesses, but we have another panel, I understand, and I want to hear the second panel.

Again, let me thank both of you. You have been to many of our hearings and described what you are now doing to try to respond this and resolve it. It certainly is our interest as well in trying to get a resolution.

The CHAIRMAN. I thank you, Senator Dorgan.

You have expressed certain reservations about some of the, both of you, on certain reservations or need for change, may be a better description, about some of the titles of the bill. What I would like from you, hopefully within days, are the specific language changes you would like to see made, and then we will see if we can incorporate those changes, if there is not any great difference. We are never going to pass this legislation unless we have agreement.

And if we settle on a number as far as the *Cobell* issue is concerned, unless we have implementing legislation of the other aspects of it, it ain't going to work either. So I would ask both of you to submit to us specific language changes you would like to see made in the various titles of this bill. In that way, we will move forward with the final drafting language, if that is agreeable, in consultation with, of course, the witnesses on the next panel.

Okay? Can we do that?

Thanks very much, and thank you for your continued good work.

Mr. CASON. Thank you.

Mr. SWIMMER. Thank you.

The CHAIRMAN. Our next panel is Tex Hall, who is the chairman of the Three Affiliated Tribes Business Council; Jim Gray, who is the chairman of the Intertribal Monitoring Association; Clifford Lyle Marshall, Sr., who is the chairman of the Hoopa Valley Tribal Council; Austin Nunez, who is the chair of the San Xavier District in Tucson, AZ; and Majel Russell, who is an attorney, Elk River Law Office in Billings, MT.

Please come forward.

We will begin with our old friend, and again many time witness before this committee, Tex Hall. Chairman Hall, welcome back.

STATEMENT OF TEX HALL, CHAIRMAN, THREE AFFILIATED TRIBES BUSINESS COUNCIL

Mr. HALL. Thank you, Mr. Chairman.

Chairman McCain and Vice Chairman Dorgan, thank you for the opportunity.

As everybody is aware, this is an issue that is 119 years old, 10 years of a lawsuit, and many, many countless hearings and many, many meetings. It is my hope that in our testimony today that we can come to some agreement on this issue of the Indian trust.

This is my third time testifying before the committee. As a former NCAI president, I am here with one of my counterparts here, Chief Jim Gray. We formed in 2005 a working group, a national working group, bringing together tribes and allotees and accountholders. We went all over the country and held hearings for those IIM accountholders to be heard because this trust is really about the 500,00 allotees, the Indian individual money account holders.

We did reach agreement on the 50 trust principles which we have submitted and work with the staff on. Recently, we had a meeting in Bismarck, ND at United Tribes College, and offered some specific comments. I won't get into the specifics, as we have already put those forward, Mr. Chairman.

I just wanted to give some general overview, and then save my time for the questions that would come later.

In the Great Plains, we comprise over 70 percent of the accounts, so we are very familiar with this trust system, the Indian trust system. I am an account holder myself, so clearly understand what happens in terms of the leasing, the grazing, of course, in our part of the country, and the distribution of the checks, and the appraisal of the trust assets, and the fair market value. I am very familiar with that.

I just wanted to give one example, Mr. Chairman, of what this means to an individual on a reservation somewhere. The lady that I am just going to reference has passed on, but she was a diabetic. This happened a couple of years ago when she needed to get her IIM account. For many people, this is their 401(k) and this is their 403(b). Otherwise, they don't have anything.

She was an elder and she had both legs amputated. All she wanted was a used van that had a hydraulic lift so she could go and play bingo. So Carol was asking the agency for her check, and it was about the time that the District Court here in Washington, DC put an injunction because of the computer system. They were concerned about firewalls. So there was a freeze on all the distribution of checks.

So normally, the checks come in December or January, and the checks finally came in May, but she passed away in April. So her children told me that there was approximately $1,500, and that is really what she wanted.

So for many members, I use her as an example, for many members that fit into that category, they are waiting for the settlement of this trust system. They are waiting for those types of a standard so that way there is timeliness, so when their land is being leased out, that on such and such a date they get a check based on the fair market. And all she had was $1,500 and that is what she wanted.

So we are very concerned about the standards and the timeliness to make sure that this does not happen again, so that the trust does not continue to be broken. So to this day, there still needs to

be a fix of the trust, let alone the settlement that, of course, Indian Country can agree with.

And then on the Title III, on the demonstration project, we fully support the demonstration project in that section. We are just concerned that it needs to have full funding, otherwise there will be no incentive for tribes to step into the Government's shoes and actually use the demonstration project where they can manage the assets themselves.

And then, on the fractionation section, title IV, we are hopeful that we can get where, if there is an individual family or individuals that have an opportunity to purchase these fractionated lands. Otherwise, you have a competing interest if the tribe and the individual family has land holdings and the tribe buys it out.

Of course, in our tribal constitutions, an individual cannot buy tribal land under our constitution. So this is a very important piece for keeping those family farmers and those family ranchers out on those school bus routes. So we are hopeful that our recommendation can be incorporated into that section.

And then in regards to just the standards, and I will conclude with that, Mr. Chairman, is that I cannot emphasize enough the need to have the specific standards and the specific duties of loyalty and so on and so forth, so the trust responsibility is maintained. Because if we don't have that, we are going to come back to this issue again and another 10 years from now we will be going over this long saga issue again.

In closing, we have submitted our comments, Mr. Chairman and Mr. Vice Chairman, and we are hopeful that they can be incorporated. We represent the national work group, working with all of the tribes in all the regions, and we are down to the end of the hearing process, and we are very hopeful, and appreciate the comments you made about the settlement figure and the reform have to go hand in hand. I agree with that 100 percent, that we can't have one without the other.

I look forward to working with the committee on the markup and getting this passed in the entire Senate.

Thank you, Mr. Chairman.

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

The CHAIRMAN. Thank you very much.

Mr. Gray, welcome.

STATEMENT OF JIM GRAY, CHAIRMAN, INTERTRIBAL MONITORING ASSOCIATION

Mr. GRAY. Yes; Chairman McCain, Vice Chairman Dorgan, members of the committee, thank you for the invitation to be here today to represent the views of the Intertribal Monitoring Association on this important legislation.

While I want to go over briefly some of my comments for the record, Senators, I want to reserve a portion of my time for some discussion on title I. I would just like to say a few words about that.

S. 1439 is an important product that reflects many years of our work to achieve meaningful trust reform. We thank the Senators for introducing this bill and for working with Indian country to make sure it meets tribal trust priorities and objectives.

We also appreciate working with the committee staff. We remain committed to developing a strong proposal that can be broadly supported by Indian country.

ITMA strongly supports title IV, which addresses one of the most critical and plaguing problems in Indian country, of fractionation of Indian lands. This problem is a direct consequence of the United States's destructive policy initiated in the 1890's to break apart Indian reservations as a way to both assimilate and to gain ownership and control over valuable tribal lands and resources.

This morally corrupt and unjust policy inflicted on American Indians has created a devastating legacy that now poses many modern day problems and challenges, including the Federal Government's inability to fully and properly manage and account for fractionated interests.

Fortunately, title IV would establish meaningful incentives for purchasing and streamlining the process for consolidating fractional interests. We are fully supportive of this approach and make several recommendations. First, all land a tribe acquires within the boundaries of its reservation should be taken immediately into trust.

Second, the automatic acceptance provision for an offer for the sale of lands with more than 200 owners should be removed. Third, the application of Federal liens on pre-purchased lands should be removed because the cost and administrative burdens of these liens significantly outweigh their value. Instead, the Secretary should be authorized to make land acquisition grants, given the compelling congressional policies and goals of eliminating further Indian land fractionation and consolidating tribal land bases.

ITMA also strongly supports title V, which would consolidate all Indian Affairs functions under a single line of authority in the department. This is a fundamental component of trust reform we have advocated for and championed as a priority for many years. We also believe the creation of an Office of Under Secretary will elevate all Indian Affairs issues in the department and hopefully within the Federal Government generally.

Our written statement includes a comprehensive listing of recommendations to strengthen title V, which I will briefly summarize.

First, the Under Secretary's role as a tribal advocate, both within the department and when dealing with other departments and agencies should be clarified and strengthened. Second, the Under Secretary's authority to improve the organizational responsiveness to Indian Affairs and to bring coherence to the department's approach to developing and implementing strong Indian policy should be strengthened.

The Under Secretary must be empowered to address budgetary matters to ensure maximum support for Indian programs. This is an absolutely critical piece of the restructuring reform. He should be able to retain counsel, and to defend and uphold the trust duties and obligations owed to any beneficiaries.

With regard to title VI, ITMA has long advocated for auditing reform as an implementation of trust reform. We strongly support Title VI, with a couple of recommendations more fully outlined in our written statement.

If I could, and finally with regard to title II, our written statement provides a couple of key recommendations, principally the formation and work of the commission should be triggered in relation to title V. This approach will ensure the commission considers and assesses all trust reform undertakings that occur as a result of title V's restructuring reforms.

If I could just say a few words about the title I issue. We have long encouraged a settlement of the *Cobell* litigation. We work closely with NCAI, the counsel, the staff of this committee, in developing the 50 principles that were presented to this committee in anticipation of S. 1439. ITMA has tried to keep its own counsel on title I, hoping that the parties and the Congress would work out the details of legislation to settle the 10 year old lawsuit.

When the Government chose to raid our appropriated funds to pay the costs assessed by the court, however, we concluded we had not only a right, but a duty, to be heard. The issue that has received the most attention to date has been the size of any settlement fund that might be established by the legislation. The bill as drafted contemplated the establishment of a fund in the billions of dollars, a level that has been endorsed by plaintiffs as well as by disinterested experts invited to testify at this committee's most recent hearing.

The Government, on the other hand, has insisted that no amount in the billions of dollars is justified. One expert suggested that a process could be negotiated that could result in an actual calculation of a number for settlement purposes. ITMA suggests that the committee make clear in its legislation that all aspects of the *Cobell* case are disposed of in any settlement legislation.

If asset mismanagement claims are to be included in settlement, then ITMA suggests the plaintiffs's concerns regarding administration of the settlement fund should be overridden and that the legislation provide clear and unequivocal direction to the executive branch for administering the settlement fund.

ITMA suggests that any legislation provide an opt-out provision for any class members who choose not to participate in a mass settlement, and that a normal 6 year statute of limitation be included to accrue on the date of enactment of settlement legislation for any claims arising prior to that date.

With respect to the size of any settlement fund, ITMA suggests it is well within the province of Congress to take into consideration the avoided costs of protracted litigation, as well as the known failures, losses, thefts, previous settlements and dozens of reports by Congressional committees, GAO and Inspectors General regarding the administration of the individual Indian trust portfolio, and to make a generous offer to achieve an honorable settlement with the hundreds and thousands of members of the *Cobell* class.

Unless the plaintiffs's calculations can be demonstrably rebutted, they should be accepted for settlement purposes. Any doubts regarding the propriety of the number of the billions of dollars should be resolved in favor of the powerless class members, especially if their individual claims regarding asset mismanagement are extinguished by opting into a settlement plan.

I thank you for the time to work on this, and I would be happy to answer questions.

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

The CHAIRMAN. Thank you very much.

Chairman Marshall, welcome.

STATEMENT OF CLIFFORD LYLE MARSHALL, SR., CHAIRMAN, HOOPA VALLEY TRIBAL COUNCIL

Mr. MARSHALL. Thank you, Mr. Chairman, members of the committee. Thank you for this opportunity to testify before you today on S. 1439, the Indian Trust Reform Act.

I would first ask that my written testimony be submitted for the record.

The CHAIRMAN. Without objection.

Mr. MARSHALL. The Hoopa Valley Tribe supports the bill's intent and purpose contained in each section of the bill. We also support many of the recommended modifications of S. 1439 that have been offered jointly by the Alliance of Tribes of Northwest Indians and the United Southeastern Tribes, USET.

Let me begin by saying that this piece of legislation is monumental in scope. Its purposes are to right the wrongs of mismanagement of trust funds on Indian lands during the 20th century; to restructure the BIA; to reaffirm the trust relationship between tribes and the United States; and to reaffirm the principles of self-determination and self-governance for the 21st century. S. 1439 lays the foundation for Indian affairs for the 21st century.

We strongly support the restructuring of the BIA; the establishment of the under secretary for Indian Affairs; the transfer of functions from the assistant secretary; and the termination of the Office of Special Trustee as set forth in section 5.

The Indian nations of this country never really warmed up to the Office of Special Trustee. The tribes simply did not trust that the Office of Special Trustee, as it implemented its program for trust reform, was actually acting in their best interests. The tribes never supported its expansion by moving trust functions from the BIA to itself, or centralization of operations away from their agencies and regions. This restructuring was perceived as actions taken to protect the interests of the United States from liability, but not in the best interests of Indian people.

The Hoopa Valley Tribe also strongly endorses the Indian trust asset management demonstration project contained in section 3. Section 3 provides in section 131, Indian tribes shall be eligible to participate in the project. Section 131 was part of last year's Interior Appropriations Act, which provided that 10 tribes would remain separate and apart from trust reform reorganization because they had proven to the Secretary that they were managing their tribal trust resources 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 self-determination. The year prior, these same tribes were identified in the Appropriations Act in section 139. This year, the same tribes are identified in section 122 of the Appropriations Act.

The section 131 tribes have longstanding agreements with their respective agencies and regional offices to manage their own trust assets, and originally approached Congress in 2003 to protect those

agreements from trust reform reorganization. It is our position that trust reform should preserve what is working and should promote policies that allow tribes to address their own trust asset management issues.

The Indian trust asset management demonstration project advances the policies of self-determination and self-governance by allowing 30 more tribes to submit proposals to manage their own trust assets. If the interest is greater than 30 tribes, the legislation allows an expansion of another 30 tribes.

Section three 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. Like the section 131 tribes, tribes that participate in the demonstration project can be 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 Department of the Interior.

Section 3 maintains and encourages this concept by preserving the ability of tribes to, in our case, continue, or in the case of the 30 tribes expected to submit proposals, to begin their own successful trust resource management programs.

I have purposely avoided section 1 and section 4 because I expect these two sections to be of the greatest concern to those Indian nations with large land bases containing many allotments with fractionated interests. Let me offer these brief comments.

As we enter the 21st century, this Congress has an opportunity to right a historical wrong. Title I, in my opinion, is structurally sound. The only thing missing are the numbers, the actual settlement offer. We supported ATNI's proposal as an icebreaker to see if it would begin negotiations for an actual settlement offer. Whatever the number is, it will be a reflection of America's conscience. If the number is too low, it will leave Indian people feeling that they have been robbed again.

I also believe that section 4 is legally and structurally sound, but the concerns I hear are concerns that Indian people will not have the legal counsel to help them understand what their responsibilities are to protect their interests. Providing legal advisors from private nonprofits or Indian law programs may help alleviate these concerns.

In conclusion, I want to express on behalf of my tribe our appreciation for Chairman McCain's and Senator 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.

We believe that S. 1439 is a solid foundation for such action, and we look forward to working with the Senate Committee on Indian Affairs, the House Resources Committee, and the administration to move this vitally important legislation through the process as expeditiously as possible.

Thank you.

[Prepared statement of Mr. Marshall appear in appendix.]

Senator DORGAN. Chairman Marshall, thank you very much.

Next, we will hear from Austin Nunez, the chair of the San Xavier District Indian Land Working Group, Tucson, AZ.

Mr. Nunez, welcome.

STATEMENT OF AUSTIN NUNEZ, CHAIR, SAN XAVIER DISTRICT, INDIAN LAND WORKING GROUP

Mr. NUNEZ. Thank you, Mr. Vice Chairman.

I want to express our support and appreciation for your sponsorship of this important legislation. I would like to go directly to my comments.

Trust reform means eliminating the double standard to which our lands are used and managed. For example, on the Fort Hall Reservation, land is leased for $80 an acre, while just off reservation, it goes for $350 to $400 an acre. I would like to offer recommendations to strengthen titles II through VI of the Indian Trust Reform Act of 2005. We want to assure that the records reflect ownership of our clients and are appraised or valued according to the federally accepted uniform standards of professional appraisal practices when leased.

First and foremost, we recommend that S. 1439 include the negotiated rulemaking process as provided for in the Negotiated Rulemaking Act of 1990. ILWG believes that recordkeeping is at the foundational core of trust reform. Currently, the probate backlog is well beyond 22,000 cases and impacts thousands of Indian heirs. This is impeding recordkeeping.

Currently, or originally, there were 10 attorney decisionmakers to be hired. Now, there are only 3. Seven positions are vacant. Recordkeeping is impeded by the 2 percent Youpee interest. Today, there are varying estimates ranging from 13,000 to 18,000 cases, which equals to about 40,000.

In March 2006, the acquisition and disposable handbook was released by OST. It advises that land transactions may be implemented without certified title status reports. This is unconscionable and it is not trust reform. We were recently informed that the title plan in Albuquerque, NM has 10 vacancies and is due to close in September of this year, September 2006.

Title II, Indian Trust Asset Management Policy Review Commission. Candidates for this commission should be people who have knowledge of trust asset management, experience in the private sector trust departments, title or evaluation experience, persons familiar with mass trust system components that are involved with asset management, and familiarity with Minerals Management, BLM, or BIA operations. These type of people should be selected for this commission.

On title III, Indian Trust Asset Management Demonstration Project Act, concerns situations where the tribe may find itself in actual competition with its own members with regard to use and development of resources. There needs to be some type of recourse to establish procedures for non-binding mediation or resolution of any dispute between an Indian tribe and the United States relating to the trust asset management plan. The ILWG recommends that individual landowners should be able to access this procedure as a

possible means of resolving disputes related to a trust asset management plan.

On title IV, Fractional Interest Purchase and Consolidation Program, the ILWG views title IV as a program that could be expanded to provide additional consolidation opportunities for tribes. I would now like to comment on the automatic purchase provision for lands with more than 200 owners. We know how our constituents react to something that they don't approve of. They do not respond, and continued fractionation occurs, discouraging consolidation within families.

The ILWG proposes that title IV be implemented according to uniform standard professional appraisal practices standards. We were informed that the Office of Special Trustee appraisal services would no longer be doing individual lease appraisals. Market studies would instead be used. Market studies, however, do not take into account highest and best use for land according to its location.

The only practical legal and cost-effective way to prepare appraisals for the Indian Land Consolidation Act Program is to use a mass appraisal, which is in compliance with standard six of the USPAP. Most important [remarks off microphone] by performing the mass appraisal to USPAP standards? The fiduciary obligations of the trustee would then be met.

There are some charts that are here for your perusal which I will not go into.

On title V, and in closing, restructuring of the BIA and Office of the Special Trustee, the ILWG supports the creation of the under secretary for Indian affairs within the Department of the Interior and strongly supports the termination of the Office of Special Trustee. We consider this restructuring as a step toward improving the administration of services and programs impacting tribes and Indian individuals.

Finally, for title VI, Audit of Indian Trust Funds, the ILWG strongly supports title VI, which requires the Secretary of the Interior to prepare financial statements for individual Indians, tribal and other Indian trust accounts, as well as prepare an internal control audit. However, there is no provision for auditing the programs and processes such as leasing, acquisition and disposal, compliance improvements, irrigation title correction, which impacts trust resources, land, water and minerals.

Thank you. I will entertain any questions.

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

Senator DORGAN. Chairman Nunez, thank you very much.

And finally, we will hear from Majel Russell, attorney for the Elk River Law Office in Billings, MT.

You may proceed.

STATEMENT OF MAJEL RUSSELL, ATTORNEY, ELK RIVER LAW OFFICE

Ms. RUSSELL. Thank you. Thank you, Vice Chairman Dorgan. My name is Majel Russell. I am an enrolled member of the Crow Tribe. I really greatly appreciate the opportunity to be here today.

Trust reform has dominated the list of critical Indian issues for several years, to the detriment of individual Indian land owners and others. I commend this committee for taking the sincere effort

to resolve trust land and asset management issues and allow Indian country to focus on other critical issues, critical needs of Indian people, including health care, economic development, education and protection of tribal sovereignty.

I am an attorney with the Elk River Law Office. My career has been spent representing Indian tribes. However, today I am here as an individual landowner. I own interests in 46 tracts of trust land. I own land with my mother and my aunt and various other extended relatives. I own land in accordance with the Crow Competency Act that allows me to manage my own land with my family.

I, like a lot of other Crow people who own land in competency status, strive to be active landowners. We know where our land is at. We know what it is worth. We negotiate all our own leases. There are two services that the BIA provides for us. One is that they maintain the trust status of the land; and number two is that they record all of our lease documents.

I guess I am here today because I promote opportunities for Indians to be active landowners. I believe Indian people, given the opportunity, can be the best protectors of their land and assets.

In terms of the policy review and restructuring, I am a strong advocate of tribal government. I believe that this Policy Review Commission needs to maintain the government-to-government relationship that has been established between the United States and tribes. Recent restructuring has often overlooked tribal government and has been intended to benefit the individual Indian. I do not believe that restructuring should occur in a way that changes the standard that we have worked so hard for, which is a government-to-government relationship.

As an individual Indian, I still believe that the best advocate to protect my rights and my assets is my strong tribal government. I believe that it is only through membership in my tribe that I have the right to own land and the right to administer the assets that I do.

I am still an old fashioned person that believes in the one stop shopping concept. When I go to the BIA in Crow Agency, I would prefer to see one person at the local level who can assist me with all the land services I need. Over the years, my family and I, my grandparents before me, we were all served by people right at the BIA agency, and most of them we were related to and we knew. I have never believed that those people had any intention to steal from us, from our family. I believe the problem has always been there has been a lack of funding, a lack of training. That is the problem today.

I believe that in order to exercise true trust reform administration in this country, we need to have more money. We need to have money to train people at the local level who can be responsive to the Indian people, and for those people who want to manage their own lands.

In that regard, information access is critical. I do support the national title system. I think that we need to complete that project so that we can have accurate land ownership records. That will also allow for the best orderly and expeditious disposition of land, and to properly distribute revenues.

The Indian Trust Asset Management Project in title III I believe is a very progressive and forward-thinking concept. I support that. I work with the Crow Tribe and we actually have legislation drafted which is similar to this demonstration project in this bill. I believe that a tribe needs to set its own standards on how the trust lands on its reservation should be managed. The tribe needs to have that opportunity to undertake management and try to maximize those assets for the benefit of the tribe. I think that the demonstration projects do promote the longstanding policies of self-determination and self-government.

One caveat I would say is that I do not think that there should be broad discretion in the Secretary to disapprove management plans that don't meet certain standards that are not yet developed. I think that if this demonstration project is going to be real, it needs to go all the way and let the tribe decide for itself what should work for the tribe and there shouldn't be an opportunity to pull it back.

On land consolidation efforts, the Crow Tribe has been surveyed three times, once in the 1960's, again in the mid-1980's, and finally in 2003, about their willingness to sell their fractional interest in land. All three surveys overwhelmingly indicated that the Crow Indians who own small fractional interests preferred to sell their lands, and some even were willing to donate those lands to the tribe.

So I believe that the emphasis on land consolidation efforts is appropriate. I would like to see those land consolidation efforts expanded to allow individual Indians like myself to purchase out other fractional interests that are within the lands that I own, or even other interests available on the reservation. I also promote the concept of family trusts as a way to minimize fractionation and as a way to consolidate land.

In summary, I understand that this is a very tough and difficult issue, and often I think the people who are out actually living on the land, working the land, and utilizing the land are overlooked. There are many of us Indian landowners who are not just owners of small fractional interests, but who need real services from the Bureau of Indian Affairs. We need to be able to go into the Bureau of Indian Affairs and ask about a right of way to get to land that we are locked out of; to ask about appraisals. Those are the services that will benefit Indian people who are trying very hard to make the best of the land that they have. I think restructuring needs to focus on those efforts also.

Thank you.

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

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

Let me ask a question about title III, the demonstration project. Chairman Hall, you indicated that you would like to have that expanded, in your testimony. I assume you support the provision of the demonstration project.

Mr. HALL. Yes.

Senator DORGAN. Tell me what kind of interest you think will exist among tribes and the Indian nations for this project?

Mr. HALL. We definitely support the concept of the demonstration project, Senator Dorgan. We are just concerned that there is

not adequate funding to really have a tribe really step in place of the Government and manage the trust assets.

For example, in the Fort Berthold agency on our reservation, we have one lease compliance officer. With the Garrison Dam flooding and fractionating the reservation, it is over 110 miles from the southern district to the headquarters up in New Town. There is no way that one lease compliance officer can fully fund it. So when we ask about more lease compliance officers, their answers are there is not enough budget. There is not enough adequate funding. The budget does not allow for any more lease compliance officers.

And then when we ask about appraisals to get fair market value, I think it was Chairman Nunez who talked about market studies. That is what we end up with is market studies versus appraisals. There are no standards with market studies. They are what they are. They are a study, not an appraisal, because we have one appraisal officer in the Aberdeen area and Rapid City, SD. What you end up with is a desktop appraisal, not a reservation, onsite appraisal.

The list goes on and on, Mr. Chairman, about the lack of funding and the lack of a budget to really have a tribe, if it steps in as a demonstration project, adequately manage these resources. Otherwise, we are going to end up, if a tribe manages these resources with limited budget, we will end up like the BIA. Everybody will say, hey, the tribe is not adequately managing.

Senator DORGAN. So you are saying that if we have a demonstration project and do not provide the resources for the tribe to be able to have a management project that is credible, it won't work, just as you say it doesn't work now, because you don't have the resources there that you need from the Federal Government.

Mr. HALL. That is correct.

Senator DORGAN. Ms. Russell, is your property fractionated?

Ms. RUSSELL. At Crow, if you have land with less than five owners, it is owner managed. There is a Federal act from 1948.

Senator DORGAN. Less than five owners?

Ms. RUSSELL. Less than five owners. So the larger landholdings I have are less than five owners. I have some land, one parcel with up to 41 other owners. So the largest fractionation in my landownership is with 42 owners total on a parcel of land.

Senator DORGAN. So you are not managing that, are you?

Ms. RUSSELL. No; everything over five owners is managed by the BIA. However, you do go into the BIA and you ask them if you can get everyone to agree to pull your land from the advertisement, and allow you to do some of your own negotiation. That is something that we have done.

Senator DORGAN. But the fractionated nature of much of the lands, or at least a fair amount, especially in my part of the country, is so dramatic that it would be impossible for someone to come and sit and testify and say, "Well, I can easily manage that myself." You can't do that.

Ms. RUSSELL. No; you can't do that. That is correct. At Crow, we are still somewhat salvageable if we can still come up with some solutions to address the fractionation problem. We are about one generation behind Fort Berthold in terms of allotment, which is why we don't have quite as many owners at Crow.

Senator DORGAN. Mr. Cason, just briefly, you had at a previous hearing described, I think you described a parcel on the Wahpeton Sisseton Reservation and the number of owners, fractionated interests in that parcel. Can you give me that number off the top of your head?

Mr. CASON. We have parcels that have over 1,000 owners [remarks made off microphone]. And we have on the order of 2,000 plus parcels that have more than 200 owners.

Senator DORGAN. And they don't necessarily have to be large parcels to have that kind of fractionated ownership.

And that is why this has become just an impossible situation. It is why the legislation itself is attempting to see if we can find ways to deal with that, because if we don't deal with that, we will never get all of this straightened out.

Mr. Nunez, you raised the problem with the backlog in the probates of Indian trust estates, in your testimony.

Mr. NUNEZ. Yes, sir.

Senator DORGAN. One of the factors I understand that contributes to that is the fact that many Indians don't have wills governing how their estate should be distributed. I understand the BIA is no longer helping Indians draft wills. Is that correct?

Mr. NUNEZ. That is correct, sir.

Senator DORGAN. So what do we do about that? What is your recommendation there? Does the lack of wills, is that part of the contributing problem here?

Mr. NUNEZ. Yes; I believe it is because with the will, it is clear how the land will be transferred to family members. I believe that there ought to be some consideration of providing resources to the tribes to be able to offer the individual Indian allotees the ability to hire legal counsel to develop their own wills. I know that on our particular reservation at San Xavier that there have been some families that have done so. The lawyer that they dealt with did it on a pro bono basis. I wish there were more lawyers out there to do that kind of work.

Senator DORGAN. Chairman McCain raised the issue today of possibly including in the legislation settlement of individual Indian claims for mismanagement of lands. Let me ask each of you your thoughts about including land mismanagement claims in this bill. Let me start with you, Mr. Hall.

Mr. HALL. Senator Dorgan, I guess I am kind of hesitant to include the mismanagement of resources because that is a whole other issue that would take extensive time to research and to provide an answer based on the resource and based on the fair market value, based on the money that went through the trust account system. I think that would probably end up delaying this action on S. 1439.

So in the interest of time, I would say unless there are those kind of answers readily available, that I think for the most part we would have to say no on it.

Senator DORGAN. Chairman Gray.

Mr. GRAY. Senator Dorgan, I think what we have also heard in the past is that the Senators had, from Indian Country's response, is that we want to put the *Cobell* settlement to a legislative solution here. We support that effort. But I think the committee must

first decide what is being resolved by this and other legislation in the past where plaintiffs have been insistent that they are seeking only equitable relief in the form of an accounting, and an equitable decree to restate individual account balances.

In other words, plaintiffs have been very careful not to assert any claim for damages that might result in transferring the case to the U.S. Court of Federal Claims.

On the other hand, we note that at least one witness at a recent hearing was quite insistent that any legislation should include settlement of any asset mismanagement claims that the plaintiff class might bring. Otherwise, Mr. Eizenstat insisted that there will be renewed litigation that might well be as seemingly endless as does the current case.

Senator DORGAN. Other comments?

Mr. NUNEZ. I would just agree with Mr. Hall and Mr. Gray. But I do believe that it is an item that does need to be addressed at a later date.

Senator DORGAN. Well, we have introduced this legislation because we believe there needs to be some settlement here. Senator McCain and I are not unmindful of the century plus years of difficulties and problems, mistakes, mismanagement, incompetence, among other things.

We also understand that if no one does anything at this moment, this is in the courts and will likely be there for some long while, perhaps with or without satisfactory resolution. We don't have any idea, but we think that working together to provide a thoughtful and reasonable settlement and then a process going forward is the right thing to do.

We especially appreciate, Chairman Hall and Chairman Gray, the work that you did. We know that you travel all across the country to bring stakeholders together and hold meetings, which I think is really very important. You did that in consultation with us as you began that process. That was very helpful to this committee because it developed a body of knowledge, and also permitted the development of information going out to folks in Indian country as well about what this process is and allowed them to have a voice in this process.

So I want to, on behalf of myself and Senator McCain, thank you for all the work you have done. I thank all five of you for coming to the committee today.

The purpose of this, and I think we have accomplished the purpose, is to have you give us your specific thoughts about the six titles of this bill as it is now written; what kinds of adjustments; what kinds of approaches do you think might be made to better refine or alter if necessary some provisions. I think you have done that in your testimony.

Senator McCain and I, with our staffs, will work with other members of the committee to take the best of these recommendations. Of course, at the end of the day, the issue is also a number, but we recognize that even finding a number will not necessarily resolve all of these issues if we don't include with the number that is agreed upon, if we can find a number that is agreeable, if we don't resolve these other issues, all we are doing is postponing the day of reckoning as well.

So that is why the bill intends to be a comprehensive bill and one that is attempting to address a very knotty, difficult, thorny problem that has existed for a long time and really begs to be resolved.

Chairman Hall, your story about the member of your tribe, Carol Young Bear, I assume that story could be replicated all across this country many, many, many times, of people who died waiting for some satisfaction of money that was owed them. And yet, because all of us understand that, I think we are coming here today and have done so on a number of other occasions to try to find ways to solve this problem.

It must be solved, if it is outside of the court system, with legislation. It is not easy to do, but it is not impossible. I think the work that we are attempting to do with your help can, if all of us work in good faith, bear fruit.

So on behalf of Senator McCain and myself, I want to thank all of you for coming to this hearing.

The committee is adjourned.

[Whereupon, at 10:30 a.m., the committee was adjourned, to reconvene at the call of the chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY AND ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS, DEPARTMENT OF THE INTERIOR

Thank you for the opportunity to come before this committee to discuss titles H through VI of S. 1439, the Indian Trust Reform Act of 2005. We appreciate that this committee continues to advance legislation that attempts to provide a settlement of the *Cobell* v. *Norton* lawsuit, but also addresses other challenges faced by the Department of the Interior in managing the Indian trust. As we have testified on several prior occasions, the department supports the efforts of Congress, as the Indian trust settler, to clarify Indian trust management duties, responsibilities, and expectations.

Since the passage of the American Indian Trust Fund Management Reform Act of 1994, Interior has made great strides in trust reform. Today, beneficiaries have direct access to staff that is trained in fiduciary trust matters. New procedures are in place for the management of account information and the collection and distribution of trust funds. These reforms have been implemented to provide the best service to beneficiaries. We appreciate that titles H through VI of S. 1439 focus on other areas of trust management. However, we believe that it would take considerable adjustment for these titles to facilitate material improvement in the management and reform of the Indian trust.

Title II-Indian Trust Asset Management Policy Review Commission

Title II of the legislation would establish the "Indian Trust Asset Management Policy Review Commission" to review existing trust asset management laws, regulations and practices. Within 2 years of its creation, the commission would report to Congress on its findings and recommendations to improve trust management.

This title raises concerns. For instance, it includes language that would allow the commission's authorization to "secure [information] directly." The department is concerned with the commission having the power to subpoena the personnel and documents of the Federal Government.

While the department supports the idea of drawing on the considerable expertise in Indian country to generate solutions to the longstanding problems associated with Indian trust management, we must observe that reports similar to those described in this title have been commissioned or published on numerous occasions both by external and internal parties. More reports and commissions are not needed at this time.

As you know, recently the department undertook, and Congress funded, an extensive and expensive effort to examine current fiduciary trust business processes at all BIA agency and regional offices. This was all done with extensive involvement from tribes and other Indian representatives. Based on the results of this "As-Is" study, the department developed a model that included recommendations for new business practices to improve, streamline and add consistency to the performance of these trust activities nationwide. This new model for trust reform, called the Fiduciary Trust Model [FTM], serves as our roadmap for trust reform today.

The department is currently implementing the FTM, and developing regulations to support the new practices. We are uncertain about the benefit of conducting another study that would likely result in the same analysis or point out seemingly intractable issues that have been known long but remain unresolved. Therefore, we believe it is not in the best interest of taxpayers to finance a commission to develop another report for future action. I also understand that a commission like this one, with members appointed by both the legislative and executive branches, raises separation of powers concerns.

Much reform has occurred since "Misplaced Trust" was published in 1992 and the American Indian Trust Fund Management Reform Act was enacted in 1994. Funds would be better spent on supporting ongoing activities required to fully implement the FTM and explore legislative solutions to persistent challenges, such as the administration of small balance accounts, hindrances to leasing trust land and unclaimed property.

Title III-Indian Trust Asset Management Demonstration Project Act

This title would establish a demonstration project to further the authority and flexibility for tribes to manage their trust assets outside of the department. To participate in the project, tribes would submit to the secretary an Indian trust asset management plan outlining how they would manage the assets and allocate funding. If approved, Interior would provide funding for the tribe to carry out the plan.

Interior has long supported increased tribal self-governance and self-determination. Today many Indian trust assets are managed by tribes through Public Law 638 contracts and compacts. Self-governance tribes currently have the authority to implement Federal programs to provide services to their membership based on tribal priorities. Tribes also have the authority to withdraw funds from trust for self-management through the 1994 Reform Act. What this title appears to do differently is transfer the authority and funding for trust asset self-management, without appropriately transferring the responsibility for results, and liability for mismanagement.

We believe the United States should not remain liable for losses resulting from a tribe's mismanagement of an Indian trust asset. 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 considering this provision, we ask you to establish performance expectations that are reasonable, consistent with available resources and designed to constrain the need for litigation.

Title III also requires further discussion on issues such as how the department would take back program responsibilities if it were required to re-assume responsibility, or the kind of monitoring that will have to be conducted to ensure the tribe is adhering to the commitments in its plan.

The department is in the process of implementing new trust IT systems and processes to improve the administration of trust assets. It is our hope that tribes will seek to utilize these systems and related benefits including access to nationwide trust data, which will be useful in providing services to tribal members, wherever they, or their assets, may be located. If tribes develop individual systems, administrative support costs are likely to increase and gaps in the data for both the Federal and tribal systems could result, and neither entity would be able to serve its beneficiaries in the best way. As well, it is more common than not for individual Indian beneficiaries to own assets on more than one reservation. Thus, systems that are used by a single tribe to manage its reservation resources do not work well when trying to manage individually owned resources of nonmembers who may be located far away from that reservation. Finally, any incompatibility in systems or practices would stress our ability to monitor or reassume the management of assets or funds if a tribe relinquished its self-management role.

While we support the objectives of self-governance and self-determination, the implementation of the objectives runs counter to a traditional trust model. We look forward to discussing this title with the committee as it raises many issues that would need further discussion.

Title IV-Fractional Interest Purchase and Consolidation Program

Title IV amends the Indian Land Consolidation Act to enhance the ability of the department to purchase interests of fractionated lands. It provides authority to the secretary to make available additional monetary incentives to beneficiaries who sell their interests.

As you know, the problem of fractionation—and its solutions—are not new. In 1938, at a conference on Indian allotted and heirship land problems in Glacier Park, MT, Commissioner Collier said, "We have simply gone on, wondering from time to

time what to do. We have taken occasion before the budget and before appropriations committees to bring up the problem; to show the waste of millions of dollars a year in these unproductive operations, and the effort taken out of positive human services; and that this type of expense was bound to increase every year. Another attendee of the same meeting said, "I think we all have in mind three objectives in our discussion of land program: We want to stop the loss of land; we want to put Indian lands into productive use by Indians; we want to cut down unproductive expenses in administering Indian lands."

That was almost 70 years ago.

The Indian trust is a fractionation engine, churning out more and more fractionated land interests, of smaller and smaller sizes with each generation, requiring more resources to manage every year. This was not Congress' original intention in creating the trust, but it is without question what the Indian trust had evolved into. During a 15-year period, from 1985 to 2000, leasing payments were divided into approximately 36 million transactions that were posted to Indian accounts; 25 million of those transactions were for less than $1. The department now finds itself in the absurd position of being responsible for tens of thousands of accounts with $1 or less.

Public Law 108–374, the American Indian Probate Reform Act [AIPRA], which was signed into law by President Bush on October 28, 2004, has provided new tools to reduce the rate of fractionation. March 2005 data from the BIA showed that 126,079 tracts of land are owned by 223,245 individual owners, equaling nearly 3.2 million interests on approximately 13 million acres. Based on the information currently available, approximately 85 percent of all interests, roughly 2.7 million, are less than 5 percent of the undivided ownership. Under the new provisions contained in AIPRA, unless the interest owner chooses through a will to bequeath their interests to more than one individual, these interests should not continue to fractionate. The remaining nearly 500,000 interests of more than 5 percent will continue to fractionate.

The 2007 budget requests $59.4 million for Indian land consolidation, an increase of $25.4 million, or 75 percent, above the 2006 enacted level, which should be sufficient to purchase an estimated 80,000 interests. The estimate of the number of interests to be acquired are based on historical average cost to date, and as acquisition activities continue and additional targeted interests are acquired, the average cost per acquisition, cost per interest, and amount of interests acquired will likely change from the experience to date.

The Indian Land Consolidation Office has shown significant progress with its pilot projects, and recently the department made the decision to focus our land consolidation efforts on the most fractionated tracts in Indian country. As part of this proposal, the Department of the Interior will implement a tiered acquisition strategy, targeting selected highly fractionated tracts. There are 2,173 fractionated tracts that have 200 or more interests per tract. A focus on these tracts will begin in 2006 and target approximately 1,557 of these fractionated interests currently owned by 64,055 individuals who collectively own 520,685 individual interests located in ten geographic locations. In addition, partnership efforts will continue with tribal land consolidation efforts to leverage funding where appropriate.

S. 1439 places a priority on an aggressive program, with incentives, for the purchase of interests in individual Indian land—with the intent of restoring those interests to the tribes. These steps could help; however, care must be taken to ensure that the language in this title does not work as an inducement for individuals to fractionate their land, thereby becoming eligible for incentives. As well, we have concerns about the costs of this title. In addition, some provisions of the bill could needlessly complicate the process of addressing this difficult problem. We also request clarification regarding the apparent public policy of retaining individual Indian land within Indian country ownership versus the trust responsibility to obtain fair market value for each interest.

Title V-Restructuring Bureau of Indian Affairs and Office of Special Trustee

Title V would restructure the Bureau of Indian Affairs [BIA] and the Office of the Special Trustee for American Indians [OST], and create an under secretary for Indian Affairs within the department.

OST was created because Congress believed that Indian trust management reform would not happen under the previous structure. In fact, the past decade has seen effective reforms implemented-under the supervision of OST—including the hiring of much needed fiduciary trust officers, regional trust administrators, and cadastral land surveyors across the Nation. We have also seen the opening of a toll-free call center for all beneficiaries, the purchase and integration of new technology to

streamline and standardize all title, accounting, and asset management, a records-management program now considered one of the best in the Nation, and a Fiduciary Trust Model now being implemented in all BIA regions.

This title includes concepts that have been previously discussed by the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform in 2002. This group was formed when Interior was examining ways to restructure trust functions to provide for greater accountability in response to the trust reform elements of the *Cobell* case. The task force ended in an impasse, and was unable to support legislation because of matters that were unrelated to organizational alignment. With no legislation enacted, Interior implemented an administrative reorganization plan that accomplished the majority of the task force's goals.

Interior is receptive to the concepts of establishing an under secretary position and merging Indian programs under new leadership. We would suggest that rather than mandating the creation of this position at the department, Congress simply direct the Secretary of the Interior to create an appropriate management structure for Indian Affairs. This will allow the secretary the independence to establish a management structure that best implements Indian program requirements.

If a restructuring is desired, we would also ask Congress to address some other crucial issues including: The lack of a clear trust agreement to guide our responsibilities and expectations, appropriations that do not align with all program trust responsibilities, the lack of an operative cost-benefit paradigm to guide decision-making priorities, the challenges of addressing Public Law 93–638 compacting and contracting goals, and the impediments associated with Indian preference hiring policies.

These issues have frustrated the department, Indian beneficiaries, administrators, and Congress throughout the lifespan of this trust. We encourage Congress to speak clearly in developing such language and carefully consider the impacts it will have in allowing us to meet the objectives of our constituents.

Title VI-Audit of Indian Trust Funds

The last title of this legislation 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.

For the last 10 years, the trust funds have been audited by independent public accounting firms. For fiscal year 2004 and fiscal year 2005, OST's Inspector General contracted with KPMG to audit OST's financial statements. The contract required KPMG to "conduct its audit in accordance with auditing standards generally accepted in the United States of America, and the standards applicable to financial audits contained in the Government Auditing Standards, issued by the Comptroller General of the United States." The audit also includes an examination of the department's internal controls over financial reporting, compliance and other matters. The results of this audit of the tribal and individual Indian moneys trust funds financial statements are made widely available. In fact, the law requires that an annual letter reporting the results of the audit be sent to each account holder.

All fiduciary trusts are accounted for on a cash basis. The departmental systems currently in place would not support the preparation of financial statements in accordance with generally accepted accounting practices on an accrual basis, as this title of the legislation requires. Such statements would be misleading to the reader, as they would include information about assets that are not currently in a trust account. We prepare financial statements on a cash and modified cash basis, just as private sector trust companies do. We look forward to working with the committee to discuss and clarify this requirement.

Conclusion

The new structures and business practices being put in place at the department have greatly improved the management of the Indian trust for all future generations. We must be careful to pursue constructive change and to address the problems that are impeding Interior's forward motion in trust reform. We look forward to working with you on meaningful legislation that addresses the fundamental challenges we face. This concludes our statement. We would be happy to answer any questions you may have.

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TESTIMONY OF KELLER GEORGE, PRESIDENT
UNITED SOUTH AND EASTERN TRIBES, INC. (USET)

THE SENATE COMMITTEE OF INDIAN AFFAIRS
THE INDIAN TRUST REFORM ACT
(S. 1439)

MARCH 28, 2006

Thank you Chairman McCain, Vice-Chairman Dorgan and distinguished members of the Senate Committee on Indian Affairs for the opportunity to provide written testimony on Titles II-VI of Senate Bill S. 1439.

My name is Keller George. I am President of the United South and Eastern Tribes, Inc. (USET) and USET representative from the Oneida Indian Nation. 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 reorganizations. Along with USET Executive Director James T. (Tim) Martin, I represented the tribes of the Bureau of Indian Affairs (BIA) Eastern Region on the DOI/Tribal Trust Reform Task Force (Task Force). USET has testified on trust reform matters several times, including as recently as March 1, 2006 when I offered abbreviated remarks encouraging this Committee and the House Committee on Resources to take leadership to settle the *Cobell* lawsuit. Additionally, USET provided this Committee with our preliminary comments on S. 1439 just after its introduction in July 2005.

USET understands the Committee's interest in convening two hearings to focus on the complex issues at stake in the *Cobell* settlement provisions contained in Title I of S. 1439 as well as to provide thoughtful consideration of the provisions in Titles II through VI that implement institutional reforms for improving the federal government's management of trust functions. For USET member tribes, however, these two components of the bill are integrally linked: without properly addressing each one, the trust relationship between tribes and the United States will not be adequately repaired. Only by addressing both the *Cobell* settlement and DOI administration of the trust, can

we expect to enter a new and more positive era for the trust relationship. Consequently USET only supports the bill if both components remain in the bill.

In light of this view, USET's written testimony for the March 1 hearing on the Cobell v. Norton settlement highlights key USET concerns regarding Titles II-VI. Likewise, in these comments on Titles II-VI, I will raise several points with respect to Title I. Moreover, all comments in this testimony are directed to issues that have emerged since the March 1 hearing and are based upon USET's consideration of the March 1 and March 28 testimony, as well as our further discussions with tribal leaders in other regions, most notably our meeting with the Great Plains Tribal Chairman's Association and Affiliated Tribes of Northwest Indians at the Standing Rock Sioux Reservation on March 24.

Title I – Cobell Settlement

An important consensus emerged from the March 1 hearing: Tribal leaders, independent expert witnesses and Members of Congress all indicated that the *Cobell v. Norton* class action lawsuit by Individual Indian Money (IIM) accountholders must be resolved as soon as possible -- and that it must be resolved not by the Courts, but by Congress. All witnesses in the two-panel hearing made clear that after ten years of litigation, the federal government and the *Cobell* Plaintiffs are not going to settle their differences on their own. Witnesses stressed that a judicial resolution will take too long and will likely have too many damaging side effects to allow it to continue. Congress, witnesses urged, must pass legislation that ends the lawsuit. USET agrees with these views.

As I stated in my March 1 testimony, it would be ideal for the parties to agree on a settlement amount. At that time, not only did the parties to the case present vastly different views about the amount at stake, but there appeared very little about the case on which they could agree. The gulf between the parties' views may not be as large, however, as both present.

In her testimony Ms. Cobell identified several significant points of agreement between the parties -- $13 billion in collections through 2001, agreement on the timing of the collections,[1] and agreement that IIM accounts earn interest.[2] By identifying interest rates schedules with respect to the IIM accounts, Ms. Cobell points to source documentation useful in determining applicable interest rates. Ms. Cobell's testimony then seeks to isolate one remaining variable for determining a particular settlement amount: the error rate. USET believes Congress should utilize the agreements of the parties to the extent possible so that Congressional effort is focused on the means to bridge the differences and achieve a fair and equitable resolution of this case this year.

In this respect, we agree with Ambassador Stuart Eisenstat and John Bickerman in their recommendation for prompt action on a settlement in the billions of dollars without undertaking an extended effort to develop and apply a methodology to derive a number (that would provide little more accuracy than information currently available to the Committee). We urge the Committee to move forward utilizing the agreed-upon amount of $13 billion as the "throughput" to IIM accounts up to 2001, and that the Committee

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[1] Relying on DOI figures, John Bickerman's testimony identifies the $13 billion amount as being received over the following time frame:

1887-1939 $0.5 billion
1930-1970 $2.5 billion
1970-2001 $10.0 billion

[2] While there may be agreement that interest applies to IIM accounts, Mr. Bickerman's testimony notes that the use of compounded interest is a "hotly contested issue between the parties."

apply relevant interest rates according to the agreed upon time periods for receipt of that throughput, and that the Committee determine an estimated error rate.

As to determining an error rate, the Committee should seriously consider Sandra Johnigan's observation that error rates would not likely be the same for the electronic period (1985 forward) and periods when records were kept manually and, indeed may not be the same during periods when record keeping was handled at the Agency level (before 1950) and when it was transferred to the Area Office level. We also support Ms. Johnigan's suggestion that the Committee (and the parties) review General Accounting Office (GAO) audits conducted from 1950 to the present for contemporaneous assessments of BIA management practices and procedures in order to help determine an error rate. These audit reports should be among the documents considered in establishing error rates for each period of time. Review of these reports would not constitute the kind of "extended effort" Mr. Bickerman urged be avoided. Rather, they might provide one basis along with other sources to provide for a reasonable approach to establishing an error rate in a cost effective and timely manner.

We further concur with Ambassador Eisenstat's recommendations for the administration of settlement funds, particularly with respect to creating an independent administrative tribunal to administer settlement funds (rather than Departments of Treasury or Interior). Additionally, as Ambassador Eisenstat suggested, Congress should provide clear guidance as to the amounts individuals claimants are entitled to receive. To the extent a formula distribution is incorporated into the settlement provisions, USET encourages the Committee to provide clear parameters rather than leave this to regulation.

Non-monetary Trust Asset Claims Settlement

In introducing the March 28 hearing, Chairman McCain stressed the need to include individual Indian landowners' trust asset mismanagement claims in the trust reform legislation. His introductory remarks pointed out that it would not be in anyone's interests to use "billions of taxpayer dollars to settle *Cobell* only to have *Cobell* II filed days later" in which the same class of Plaintiff's would allege a breach of trust by the United States for the DOI's mismanagement of their trust assets. Ambassador Eisenstat also strongly recommended a separate capped fund to settle non-monetary mismanagement claims related to the lands of IIM account holders. We generally agree with these recommendations.

We would like to point out that existing terms in Title IV authorize offers to settle claims an individual owner may have against the United States relating to specific tracts of land. *See* Sec. 401 (creating a new subsection (f) in 23 U.S.C. § 2213). We are not aware of any other terms contained within S. 1439 that provide for settling non-monetary trust asset mismanagement claims. We believe, however, that these claims are of such significance that these provisions should be presented in a stand-alone title, with a separate source of funding (even if the measure was to be drafted in the form of amendment to the Indian Land Consolidation Act, as are the other terms in Title IV).

We would support new terms in S. 1439 establishing a separate capped fund to resolve all claims of (non-monetary) trust asset mismanagement pertaining to those parcels of lands associated with currently-existing IIM accounts. We believe that terms for such asset mismanagement claims give every beneficiary ***a choice of remedy,*** for instance, a claimant may either:

- receive a per capita distribution from the trust asset mismanagement fund;
- pursue an individualized action for land mismanagement in an newly-created administrative tribunal; or
- preserve the option of pursuing an action in the United States Court of Claims, but with a statute of limitation for filing (within three years of enactment of the legislation).

We encourage the Committee to consult with tribal leaders and representatives of the *Cobell* Plaintiffs and other Indian landowner organizations as well as the DOI regarding proposed language as soon as possible.

Title II – Policy Review Commission

USET disagrees with the DOI March 28 testimony that suggested that the Policy Review Commission would be a waste of money by producing yet another study to be stuck on a shelf. Indian Country would also object to more pages collecting dust. Provisions must be included in this legislation that prevent DOI's cynical assumption from becoming reality.

The Commission must issue recommendations and a Tribal Task Force must be created to monitor implementation of those recommendations, as we presented in our Joint USET-ATNI comments on S. 1439 (our proposed Section 210). We further disagree with DOI's claim that implementation of its Fiduciary Trust Model (FTM) based on its "As-Is" and "To Be" studies would be a better use of taxpayer dollars. Rather, we view Title II as an important element of S. 1439's measures to reconsolidate the Agency and rebalance its responsibilities for the Indian trust as a whole, not simply its fiduciary duties.

S. 1439 would appropriately place OST, and the FTM, under the authority of an Undersecretary. Under such structure, we would expect that the FTM would continue to

improve the fiduciary trust administration, without doing so in a manner that is a detriment of the other programmatic aspects that implement the DOI's trust responsibility to American Indian tribes and individuals. Allowing the DOI to implement its FTM under the current structure is not acceptable. Rather, since all BIA programs fall within DOI's trust responsibility, a rational balancing of programmatic and fiduciary responsibilities must be undertaken in administering the trust relationship.

The Policy Review Commission should offer recommendations for a more pragmatic and overarching perspective of the trust relationship. With the creation of a Tribal Trust Reform Task Force (as proposed by USET-ATNI), the legislation would empower a monitoring body that can assure that the Commission's recommendations to improve the system are implemented.

We also note that DOI's testimony with respect to Title V of S. 1439 calls for Congress to address "other crucial issues" that USET believes would be appropriate for the Policy Review Commission's study and recommendations. Specifically, DOI stated:

> "if a restructuring is desired, we would also ask Congress to address some other crucial issues, including:
>
> - the lack of a clear trust agreement to guide [DOI] responsibilities and expectations
> - appropriations that do not align with all program trust responsibilities
> - the lack of an operative cost-benefit paradigm to guide decision-making priorities
> - the challenges of addressing P.L. 93-638 compacting and contracting goals, and
> - the impediments associated with Indian preference hiring policies."

Testimony of Cason and Swimmer, March 28, 2006.

Title III – Tribal Trust Asset Management Demonstration Project

We previously identified several concerns regarding the inconsistencies between Title III of S. 1439 and the Indian Self-Determination and Education Assistance Act (ISDEAA). The ISDEAA provides an excellent time tested framework that is working in Indian country and works for trust asset management.

DOI's testimony appears to object to Title III because it argues that multiple tribal management systems would pose an obstacle to adequate monitoring. DOI misses the point, however, that Title III is designed to introduce new approaches to the management of trust assets and that DOI's "monitoring" responsibility would be quite limited in scope (as it currently is under the Section 122, previously Sections 131 and 139, demonstration project). Moreover, as a demonstration project, the number of tribes participating is limited.

USET expects that DOI's concern with monitoring is tied to its view that liability still rests with DOI when the tribe manages the trust asset. The express terms of Section 305 of the bill, which provides that there will be no diminishment or increase in liability, suggest otherwise.

Title IV – Land Consolidation

In previous testimony we have consistently stressed that reforming the trust requires addressing the problem of fractionation. As Title IV amends the Indian Land Consolidation Act, we believe it essential that title to any land acquired shall be taken immediately into trust by the United States for the Indian tribe where the land is located pursuant to section 210 of ILCA (25 USC § 2209). This process should be designed in such a manner that enhances the stability of the tribal government exercising jurisdiction

over the land base. We are concerned that the repayment provisions of S. 1439 may result in excessive land use restrictions or introduce unintended financial burdens on tribes.

Title V – Restructuring DOI

We previously commented extensively on Title V and will focus here only on one issue: the need for terms in S. 1439 that assure that funding provided to OST remain within the Agency once the OST and BIA are consolidated. We call particular attention to Sections 504(g) and 505(h) of the bill. The second paragraph of each of those provisions states that:

> "unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds where originally authorized and appropriated."

Given that S.1439 provides for the settlement of Cobell "in lieu of performing an accounting" (sec. 101(7)), we do not believe it would be appropriate, for example, for unexpended funds originally authorized for the purpose of historical accounting to be limited to that purpose (and thus returned to the Treasury). Trust operations are severely under-funded throughout the agency. To the extent possible funding authorized for OST should be realigned and made available for other trust-related matters.

Conclusion

Resolving the *Cobell* litigation and reconsolidating the DOI's administration of trust functions must both be achieved in order to repair the trust relationship between the United States and Indian tribes. USET supports the Committee for developing terms in this legislation to address both elements. The March 1 hearing provided sound analytical tools to determine a fair settlement amount. As stated above, we believe it is incumbent

upon the Committee to put those tools to use now in order to settle the *Cobell* lawsuit this year. We also call on the Committee to resolve not only fund mismanagement, but also mismanagement of the assets that generate funds for those accounts. The significance of such mismanagement claims merits a stand-alone title in the legislation and should provide claimants with a choice of remedy.

With respect to the Policy Review Commission in Title II, we condition our support upon the Committee including terms to establish a Tribal Task Force to provide a mechanism to ensure that Commission recommendations are implemented. We endorse the Demonstration Project contained in Title III, however, its procedural mechanisms must be consistent with the Indian Self-Determination Act. Meanwhile, Land Consolidation under Title IV must assure that lands are placed immediately into trust and that its provisions enhance rather than compromise the stability of tribal governments with jurisdiction over those lands. Finally, when reconsolidating the OST under the authority of an Undersecretary, the legislation must ensure that current overall funding levels for BIA and OST are retained or expanded and that appropriations to OST for historical accounting activities are realigned and fully available to the DOI for its use in carrying out responsibilities to fulfill the broad range of fiduciary and Indian program trust functions.

By addressing these concerns and those USET presented in our March 1, 2006 testimony and our December 12, 2005 letter, we believe S. 1439 could mark the beginning of a positive new era for the trust relationship.

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REVISED
STATEMENT
of the
INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

Presented by
The Honorable Chief Jim Gray, Chairman, ITMA

On
S. 1439 "The Indian Trust Reform Act of 2005"

Before the
United States Senate - Committee on Indian Affairs

March 28, 2006

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following 64 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, Paiute Tribe of Nevada, 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.**

Testimony of ITMA
Senate Committee on Indian Affairs
March 28, 2006

I. INTRODUCTION

This statement is submitted by the Intertribal Monitoring Association ("ITMA") to apprise the Committee of ITMA's position on Titles II through IV of S. 1439, the Indian Trust Reform Act of 2005, and to make recommendations on this important legislation. ITMA was organized in 1990 by tribes determined to actively monitor and have a voice in the activities of the Federal government to ensure fair compensation to tribes for the historical trust funds mismanagement. Today, ITMA is a representative organization of 64 federally recognized tribes that are interested in continuing efforts to reform the administration of the Indian trust estate by the federal government.

In July 2005, ITMA previously testified before the Committee on S. 1439, and appreciates the Committee's willingness to continue an open dialogue with tribes on the topic of trust reform. Throughout 2005, ITMA worked closely with the National Congress of American Indians ("NCAI") and the *Cobell* Plaintiff Attorneys in a National Trust Reform and *Cobell* Settlement Workgroup. The workgroup met on numerous occasions to discuss the specifics of the legislation and develop substantive recommendations for achieving meaningful trust reform legislation. In January 2006, ITMA held a general membership meeting in Albuquerque, New Mexico to obtain additional input from our member Tribes.

ITMA also takes this opportunity to present our comments on **Title I – Settlement of Litigation Claims - of S. 1439:**

ITMA has long encouraged a settlement of the *Cobell* litigation. One of ITMA's principal concerns is that while Title I proposes to make a payment to class members in lieu of the accounting for which they have sued for in federal court, the provisions would not bring an end to any matter that is actively being litigated, or that is currently under appeal. ITMA urges the Congress to bring the *Cobell* litigation to an end.

The *Cobell* Plaintiffs insist they are seeking only equitable relief in the form of an accounting and an equitable decree to restate individual account balances, and have been very careful not to assert any claim for damages that might result in transferring their case to the U.S. Court of Federal Claims. The Plaintiffs also equally insist that any settlement fund should be administered by the court. If the Congress elects to include claims for damages arising from asset mismanagement in any settlement legislation, then the Committee will have to decide whether to confer jurisdiction on the district court to administer such a settlement fund or to override plaintiffs' objections to settlement plan administration by the Executive Branch.

With regard to the settlement figure, the approach in Title I to establish a fund in the billions of dollars range, has been endorsed by the Plaintiffs and is generally supported by the accounting experts familiar with the case and who has testified before this committee. The government, however, has insisted that no amount in the billions of dollars is justified. One expert suggested that a process could be negotiated that would result in actual calculation of a number for settlement purposes. Due to the level of contention and acrimony in the case as well as the difficulty in dealing with dated, unreliable and/or missing documentation, another expert suggested that Congress "pick a number" and compel the parties to live with it.

ITMA urges Congress to reject the approach of arbitrarily picking a settlement figure. Based on the input and experience of expert forensic accountant Sandra Johnigan, ITMA instead supports the development of a process by which to determine the ultimate settlement figure. The starting point

in developing this process could be a number that all parties agree with, that is the $13 billion base which is considered to be the known receipts processed through the system. This amount could be increased by factors for amounts not received and for late payments, and further adjusted by a payment rate.

Other factors that could be considered include the time value of money, and the avoided costs of protracted litigation and other legal risk considerations. Other factors could be gleaned from other known data. For example, from the 1972-1992 fill the gap information, there are known, demonstrated problems with income not received. Factors might be developed from that work and applied to determine some ranges. (Though it should be noted that since this work was not objectively performed in a manner that would result in a statistically valid outcome.) With regard to payment rates, some subjective amounts could be applied based on rates that could be obtained from performance by the government. In other areas, some have suggested IRS statistics in collecting revenue based on the concept of looking at another process that the government doesn't necessarily do will and let its own statistics in the area be used in the computation.

Other known information that could assist Congress in developing a process could include the known failures, losses, thefts, previous settlements, and dozens of reports by Congressional Committees, GAO, and inspectors general regarding the administration of the individual Indian trust portfolio. In the development of such a process, Congress must also ensure that any doubts regarding the propriety of a number in the billions of dollars should be resolved in favor of the powerless class members, especially if their individual claims regarding asset mismanagement are included in the settlement plan. Any provision in settlement legislation dealing with attorneys' fees should be addressed with a sum certain to provide complete transparency, taking into consideration amounts already paid to plaintiffs' attorneys by order of the court. And finally, and like most importantly, Congress must provide that the settlement figure and related cost come out of the Judgment Fund and further mandate that funds otherwise appropriated for Indian programs are prohibited from being tapped to satisfy any portions of the settlement.

ITMA believes Congress should quickly move forward with developing a process that would result in a generous offer to achieve an honorable settlement with the hundreds of thousands of members of the *Cobell* class.

The following is a summary of our position on each of Titles II through IV in S. 1439 and provides our recommended changes to the bill.

II. TITLE II - INDIAN TRUST ASSET MANAGEMENT POLICY REVIEW COMMISSION

Title II would establish an Indian Trust Asset Management Policy Review Commission ("Commission") whose purpose, composition, powers and directives would include the following:

- Review all federal laws and regulations and practices of the Department of Interior ("DOI") relating to the administration of Indian trust assets.
- Consists of twelve persons, four appointed by the President and eight appointed by the majority and minority leadership of the House and Senate, respectively.

- Have the power to hold hearings and gather information on improving the management and administration of Indian trust assets and be required to consult with Indian tribes, the Secretary of Interior, and organizations representing individual Indian owners of trust assets.
- Required to submit a report and recommended changes to Congress for improving existing laws and practices, including proposing Indian trust asset management standards.

The Commission appears to be modeled after the 1970's Indian Policy Review Commission that issued a report leading to the enactment of landmark federal legislation such as, for example, the Indian Health Care Improvement Act, Indian Child Welfare Act, Indian Self-Determination and Education Assistance Act amendments. Congress's approach in establishing this Commission over thirty years ago was indeed a significant undertaking that resulted in the fundamental, modern day framework for federal – tribal relations.

In that vein, the Commission established in Title II may be a very useful tool for a long term review of Indian trust administration. To effectuate meaningful trust reform, the formation and work of the Commission should be triggered in relation to the implementation of Title V, Restructuring of the Bureau of Indian Affairs and Office of Special Trustee. This approach will ensure the Commission considers and assesses all trust reform undertakings that may occur as a result of the restructuring set forth in Title V. Furthermore, the Commission should be appointed by, and be strictly a creation of Congress, to avoid the current policymakers from holding key posts in a deliberative body composed specifically to review DOI's current practices.

As a matter of trust reform priorities, however, ITMA and Indian Country, generally, have long sought trust reform legislation that includes independent oversight of DOI's administration and management of Indian trust assets. ITMA advocates for trust reform legislation that includes: (1) a true oversight commission; (2) trust standards; and (3) a cause of action in federal court for breach of those standards. Title II falls short in this regard by limiting the Commission's authority to reviewing and assessing the current legal framework for the administration of trust assets, and further lacks discrete, enforceable standards governing the trustee's administration and management of Indian trust assets.

Rather, the legislation contemplates establishing a *process for developing standards* through the work and recommendations of the Commission, ostensibly, to be implemented by Congress at some point in the future. This step may be unnecessary in light of the existing body of relevant authority. For example, the Tucker Act [28 U.S.C. 1491 (2005)], the Indian Tucker Act [28 U.S.C. 1505 (2005)] and the Administrative Procedures Act [5 U.S.C. 551 et al. (2005)] provide some standards and a right to sue for breach of those standards. Based on these authorities and others, the Supreme Court recently upheld federal liability for breach of trust standards. *U.S. v. White Mountain Apache,* 537 U.S. 465 (2003). In the interest of justice and fairness, Congress should codify these standards and establish a mechanism for their enforcement. Such mechanism could entail authorizing a cause of action in federal court or establishing alternative dispute resolution processes. Both would work as an incentive for compliance with trust standards, and as a means for resolving trust-related disputes in a manner more efficient than litigation, since litigation consumes time and resources for both parties involved and can take decades to reach a resolution.

III. TITLE III – INDIAN TRUST ASSET MANAGEMENT PROJECT

Testimony of ITMA
Senate Committee on Indian Affairs
March 28, 2006

Title III would create a demonstration project enabling up to thirty (30) Indian tribes to submit an application to the Secretary to develop their own Trust Asset Management Plan ("Plan"), unique to their respective situation and specific trust assets. Each tribal applicant would be required to:

- Identify the tribe's trust assets,
- Establish the tribe's objectives and priorities, and
- Ensure that the tribe appropriately allocates the funding made available to it for trust asset management.

In reviewing and considering a tribe's application, the Secretary would be required to consider whether the respective plan meets specific standards, including:

- Protecting trust assets from loss, waste, and unlawful alienation,
- Promoting the interests of the beneficial owner,
- Conforming to the preferred use of the beneficial owner, to the extent practicable,
- Protecting treaty rights and others relating to use, access or enjoyment, and
- Requiring that any activity be carried out in good faith and with loyalty to the beneficial owner.

A duly approved Plan would enable contracting and compacting tribes to establish their own management systems, practices and procedures that differ from any such systems, practices and procedures used by the Secretary in managing the trust assets so long as the plan is consistent with all federal laws, treaties and regulations.

In general, ITMA supports the concept and objectives of Title III, and recommends a couple of changes to enhance these provisions for the benefit of our member tribes, as follows:

- The bill should provide for automatic approval of a plan if the Secretary does not disapprove the plan within 120 days, rather than providing for automatic disapproval if the Secretary does not act within that time.
- The bill should require the Secretary to consider all resources and sources of funding before making a decision to disapprove a tribe's plan on this basis.
- The bill should direct the Secretary to propose an adequate budget submission that provides sufficient resources and other technical assistance to participating tribes.
- The bill should require Congressional oversight and evaluation of the implementation and progress of the demonstration project. ITMA is concerned that there is no requirement under the bill to integrate the demonstration project into the budget development or evaluation systems employed by the Office of Management and Budget (OMB) (currently the Performance Assessment Rating Tool, or "PART", under GIPRA). ITMA believes that, because the performance measures have never been applied to the demonstration project and fail to consider many of the project's goals, the current system could potentially work against tribes since funding is typically reduced when performance measures are not satisfied.
- The bill should provide a directive that the government provide funding, support and other resources for tribes seeking to assume regulatory primacy through these plans. Currently, there is no requirement or mechanism that would compel the government to provide such support. One approach would be to more fully harmonize the provisions with the authorities and mandates of the ISDEAA and the American Indian Agriculture Resource Management Act to ensure that the government provides tribes who pursue these plans with sufficient resources and support to ensure that the implementation of the plan is successful.

IV. TITLE IV - FRACTIONAL INTEREST PURCHASE AND CONSOLIDATION PROGRAM

Title IV would amend the Indian Land Consolidation Act to establish incentives for purchasing fractional interests and streamline the process for consolidating fractional interests. The key provisions in Title IV are summarized, as follows:

- Authorizes the Secretary to offer more than fair market value as an incentive to encourage voluntary sales of undivided trust of restricted fractionated interests in any parcel of land owned by not less than 20 separate individuals. If an owner agrees to sell such interests, the Secretary is further authorized to include an additional incentive of up to $2,000 in the offered purchase price.
- Establishes a specific process for acquiring highly fractionated lands with 200 or more undivided interests, which includes comprehensive notice and offer requirements. Pursuant to these specific procedures, an offer to such lands would be deemed automatically accepted unless it is affirmatively rejected by the owner.
- Establishes a process for the Secretary to make an offer to settle any claim that the owner may have against the United States relating to the specific tract of land, but specifically excludes claims for an accounting described in Title I (settlement of Cobell).
- Provides that any payment a landowner receives under the land repurchase program is not subject to any state or federal income tax and would not affect eligibility for any programs including social security and welfare.
- Provides that any land acquired by the Secretary under this section would be held in trust for the tribal government that exercises jurisdiction over the land involved.

ITMA strongly supports provisions in Title IV which authorize the Secretary to offer greater than fair market value because they provide meaningful incentives for individuals with very small parcels of land that are otherwise not economically viable, for ultimate return back to the Tribe. This process will lead to true consolidation of fractionated interests. Currently, many interests are of such small value that the landowner often does not consider it in his or her best interest to seriously consider such an offer. The provisions in Title IV will dramatically change that dynamic.

ITMA makes several recommendations on Title IV, including the following:

- In order to promote consolidation, all land a Tribe acquires within the boundaries of the reservation should be taken immediately into trust by the United States.
- The provision establishing the "automatic acceptance" of an offer for sale of lands with more than 200 owners should be removed because it raises concerns about unfair treatment of landowners.
- The bill should be amended to remove the application of federal liens on repurchased lands because the cost and administrative burdens of these liens significantly outweigh their value. Rather than creating another cumbersome, bureaucratic system to account for and track the repayment of each interest acquired, the Secretary should be authorized to make land acquisition grants, given the compelling congressional policies and goals of eliminating further Indian land fractionation, and consolidating the land base of tribal governments.
- The bill should do more to provide new programs for individual land owner repurchase and consolidation opportunities in order to encourage the further loss of lands from trust status.

ITMA also takes this opportunity to express support for S. 1501, the Crow Tribe Restoration Act, a tribal specific proposal to reduce fractionated interests and consolidate tribal lands. The Crow Nation is a member of ITMA, and is pursuing this specific approach due to special considerations relating to their land holdings.

V. TITLE V – RESTRUCTURING THE BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE

Title V would restructure the Bureau of Indian Affairs ("BIA") and the Office of Special Trustee ("OST") by creating a new position of "Under Secretary for Indian Affairs." Title V consists of the following key provisions:

- Creates a single line of authority under the Office of Under Secretary for all functions that are now divided between the BIA and the OST by replacing the Assistant Secretary and eliminating the Office of Special Trustee by 2008.
- Authorizes the Under Secretary to be responsible for supervising any and all activities related to Indian affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service.
- Requires that all positions within the office of the Under Secretary be subject to Indian preference.
- Recognizes and directs the need to devote more resources and funding to the reservation level. The bill should clarify that all budgetary savings achieved by eliminating OST would be available for field positions, and utilize the Trust Asset Management Plans set forth under Title III as a tool for devoting those resources to the reservation level.

ITMA strongly supports Title V because it would consolidate all Indian affairs functions under a single line of authority, a fundamental component to trust reform that ITMA has advocated for and championed as a tribal priority for many years. To reflect and incorporate the concerns and views of our member Tribes, ITMA recommends modifying the legislation, as categorized below:

Purposes:

- The bill should include as a purpose: to improve and enhance the delivery of services to Indians.
- The bill should also include as a purpose: to provide a single line of authority and accountability for coordination and policy direction on Indian affairs for all programs and agencies of the Department and for Inter-Departmental activities affecting or involving Indian Affairs.

Appointment:

- The bill should require tribal consultation in the appointment of the Under Secretary.
- The bill should be amended to remove the exception (503(b)(2)) which allows the Assistant Secretary of Indian Affairs to become the Under Secretary without the advice and consent of the Senate.

Responsibilities:

- The bill should require the Under Secretary to inform decision makers across the Department as to the implications of their action for the trust obligations of the United States.

- The bill should require the Under Secretary to represent, protect and advocate for Indian interests through all bureaus and agencies of the Department, not just those enumerated in the bill. This responsibility would not be limited to activities pertaining to trust administration, but would also encompass all programs providing services to Indians and the capacity for Indian tribes to exercise federally reserved rights.
- The bill should require the Under Secretary to exercise guidance and provide oversight for the demonstration project to be established under Title III.
- With respect to the restructuring activities, the bill should include language that requires the Under Secretary to foster and promote progress under Self-Determination and Self-Governance programs for all Departmental programs affecting Indians.
- The bill should designate the Office of Under Secretary to serve as a liaison with federal agencies outside the Department of Interior on matters pertaining to Indian Affairs (e.g. Departments of Commerce, Treasury, Agriculture, EPA, and FERC) and direct the Under Secretary to:
    i. Advocate for Indian interests;
    ii. Ensure that Agencies are informed of trust obligations;
    iii. Review and comment on proposed policies; and
    iv. Improve coordination and promote integration of federal programs that provide services to Indians.

Authorities:

- The bill should authorize the Under Secretary to retain outside counsel and to establish a position of trust counsel.
- The bill should authorize the Under Secretary to utilize all budgetary savings achieved by eliminating OST for field positions, and to use the Trust Asset Management Plans in Title III as the vehicle for devoting those resources to the reservation level.
- The bill should authorize the Under Secretary to provide policy direction on matters pertaining to Indian Affairs to all entities of the Department and to coordinate activities of such entities to improve the effectiveness and efficiency of service delivery to Indians.
- The bill should authorize the Under Secretary to coordinate with federal entities outside the Department on Indian affairs matters.

Separate operational and oversight functions in the Office of Trust Reform Implementation and Oversight (OTRIO):

- The bill should establish an Office of Trust Reform Implementation (OTRI) as the entity responsible for developing policies, procedures, and programs for trust administration and make them operational in the BIA; transfer programs and functions currently under the supervision of the OST to OTRI; and establish a sunset date for completion of the work.
- The bill should establish an Office of Trust Administration Oversight as the entity responsible for oversight and include an ombudsman position with authority to investigate and report to the Under Secretary on recommended resolution to problems and issues related to trust administration.

Guidelines for organizational restructuring:

- The bill should specify objectives for restructuring, including: (a) consolidation of functions and operational authorities at the BIA field office levels; and (b) clarification of the lines of authority

for Departmental personnel responsible for delivering services to Indians and those responsible for providing oversight of trust administration.

- The bill should require tribal involvement in the restructuring of national, regional, and agency operations to provide local flexibility in allocating available resources (including measures to provide oversight for trust administration).
- The bill should specify that tribal contracting and compacting are not to be diminished, but should be enhanced.
- The bill should require that trust administration functions be performed in accordance with tribal law and management of reservation-specific resource management plans, unless otherwise prohibited by federal law.

VI. TITLE VI: AUDIT OF INDIAN TRUST FUNDS

Title VI 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.

ITMA has advocated for auditing provisions as an important element of trust reform. ITMA strongly supports Title VI and recommends the following changes:

- The bill should set forth statutory purposes for requiring financial statements: to promote and foster meaningful communication of financial information and transparency in the administration of trust funds and the sources of those funds.
- The bill should empower the Comptroller General with both the authority and the responsibility to ensure broad audit coverage of all categories or stratified trenches of trust funds.
- The bill should require public availability of audit reports, audit findings, and management letters.
- The bill should require negative assurances or third-party assurance statements from auditors regardless of whether they are government employees or contract workers. This requirement is intended to pierce the government's opaque shield of reliance on third-party work that cannot be examined by account holders and to prohibit accounting firms from escaping any accountability to the known end users of their work because "the government, not the account holder, is the client."

VII. CONCLUSION

In closing, the Intertribal Monitoring Association on Indian Trust Funds appreciates the opportunity to present this statement to the Committee. ITMA respectfully requests the Committee's favorable consideration of the recommendations made herein. If you have any questions, please do not hesitate to contact ITMA's Executive Director, Mary Zuni-Chalan at (505) 247-1447 or your staff can contact our legal counsel in Washington D.C., Shenan Atcitty at (202) 457-7128. Thank you.

PREPARED STATEMENT OF TEX G. HALL CHAIRMAN, THE MANDAN, HIDATSA & ARIKARA NATION, COCHAIRMAN, TRIBAL WORKGROUP ON TRUST REFORM

Dosha. Good morning.

This is my third time testifying before you Chairman McCain, Vice Chairman Dorgan and committee members this Congress on the issue of Trust Reform. I am glad to say that each time we I have met, we have done so under circumstances which have brought us all closer to our goal.

I am here not only as chairman of the Mandan, Hidatsa & Arikara Nation, but also as the cochairman of the National Tribal Work Group on Trust Reform and *Cobell* Settlement. On this panel, I am joined by the cochairman of the Work Group, Chief Jim Gray, of the Osage Nation.

Background

In March 2005, we testified before this committee that we had organized a workgroup comprised of the largest group of tribes with trust assets, individual allottees, and individual trust account holders. The purpose of this workgroup was to bring together Indian tribes, allottees, and account holders and provide Congress with a clear and concise roadmap to a trust reform that works, and a settlement that is fair. We did so, and in June 2005, we released the 50 principles for trust reform and *Cobell* Settlement.

Those 50 principles remain today as the most definitive statement of the will of Indian country on this matter.

Eight months ago, we testified before this committee that we were pleased with the general thrust of the S. 1439, the Indian Trust Reform Act of 2005, and that many of the bills provisions adhered to the 50 principles.

Later, we hosted further meetings of Indian tribes to review the Indian Trust Reform Act of 2005 and discuss amendments and settlement figures. Earlier this year in Bismarck, ND, I hosted a regional meeting of Great Plains Tribes with staff from the Committee on Indian Affairs.

I believe that as we gather again today, many more of the pieces have fallen into place and we are nearing the finish line. The committee's hearing earlier this month shed a great deal of light on reasonableness of picking a settlement number similar to the way sums were determined in both the Holocaust Survivors' claims and the Japanese American Internment claims. In the case of the 120,000 Japanese American Internment victims, Congress passed the Civil Liberties Act of 1998 which provided for an apology and a sum of $20,000 to each surviving Japanese American victim for reparations, as well as $12,000 to each Alaska Native survivor.

The point is that the United States because of its greatness and because of its courage, has been strong enough to own up to its mistakes and provide redress compensation when its laws were broken.

This is such a time. This is the time for our country, once again, to demonstrate its capacity for justice and wisdom. This is our chance to reform the system, once and for all, so it finally works. This is our chance to provide a historic justice to those who lost the chance to go to college, to get medical care, to open a store, or to pay their mortgage simply because the U.S. Government failed to take care of their money.

We can forge a legacy of justice, or we can leave a legacy of neglect.

The Indian Trust Reform Act of 2005

As I mentioned, I have worked over the years, as chairman of my tribe, as NCAI president, and as cochairman of the Tribal Trust Reform Workgroup. Together we worked with tribes from across the country and held consultations in every single region of the country. And now, with the support of organizations like the Inter-Tribal Monitoring Association and the Council of Large Land Based Tribes, we represent approximately 70 percent of all tribal trust assets and the majority of all tribal trust account holders. As I have mentioned many times—I am one of those trust account holders.

But more importantly, like most tribal leaders, I have a constituency of thousands of Indian people who are dependent on their trust account payments coming through.

I want to take 1 minute to describe what happened to one of my tribal members. Her name was Carol Young Bear and she had diabetes. She was also an individual trust account holder. For a long time, her trust account checks never arrived. She used to come visit me and ask me what was happening with those checks. The reason is that she was in poor health and needed assistance getting around on her wheelchair. What she really wanted was to use those checks to buy an automated lift for her van that would allow her to get out of the house and travel around our beautiful reservation and visit her friends and family. I called and tried to get an

answer for Carol with our local and regional and finally national BIA officers. By the time they had gotten back to me with their answer, poor Carol had passed away from her diabetes.

Every tribal leader here knows tribal members and even family members with similar stories. People who cannot afford to wait. People who need a system that they can depend upon. So what I am calling for on behalf of people like Carol and everyone in Indian country who is or knows someone like them is this—"A Reform That Works." In other words, I am talking about a reform of the United States trust system that does not require revisiting every 10 years. I am saying, that in order for this to work, it has to be done right.

Title II—The Indian Trust Asset Management Policy Review Commission

This section would create a commission to review all Federal laws and regulations and the practices of the Department of the Interior relating to the administration of Indian trust assets. The commission would recommend to Congress changes to Federal law that would improve the management and administration of Indian trust assets. Importantly, the commission must consult with Indian tribes and organizations representing individual Indian owners of trust assets.

The MHA Nation recommends that the entire, rather than two-thirds, of the commission be appointed by Congress. Instead of four presidential appointments, we would recommend that the chairman and vice chairman of the Senate Committee on Indian Affairs make one appointment each, and so should the chairman and ranking member of the House Committee on Resources.

We also recommend that the commission reflect the importance of trust assets and management to Indian country by requiring that at least 8 members of the commission be members of an Indian tribe.

Because grazing, timber, fishing, and mineral rights are so important to the continued economic survival and growth of tribes, we strongly recommend that the committee retain the requirement that at least one-half the commission be from tribes with reservation lands managed for trust assets. At the January Great Plains roundtable on trust reform, the tribes recommended that at least three tribes be from large land-based tribes.

The tribes also voiced their strong recommendation that Congress and the administration consult with tribes on the nomination process and that, further, the individuals have experience in trust asset management or ownership.

We also recommend that the committee amend the bill to ensure that the commission is bi-partisan in nature, with six members of each party serving.

Furthermore, we recommend that section 204(a) be amended at the end to include the authority of the commission to review and assess the responsiveness of the Department of the Interior to the trust needs of Indian tribes and individuals.

We also recommend that the commission review and assess the progress and implementation of the Indian Trust Asset Management Demonstration Project authorized under title III of the bill.

In section 205, we would recommend providing the commission with subpoena power to obtain documents, records, and information, if necessary.

Finally, we would strongly recommend that the committee add a new section 206 to this title that provides authority for the commission to make specific resource-specific, generic standards where possible much like the sustained yield requirements for Indian timber provided in the National Indian Forest Resources Management Act. This is in accordance with recommendations 15 and 31 of the 50 principles.

Title III—The Indian Trust Asset Management Demonstration Project

This section creates a demonstration project so that an Indian tribe establish its own "trust asset management plan" that is unique to the trust assets and situation of the tribe and its reservation. The plan would identify the trust assets, establish objectives and priorities, and allocate the available funding.

This section adheres to the goals and visions of the 50 principles and we strongly support this title.

The MHA Nation, however, strongly recommends that the committee increase the number of tribes that can participate from 30 to 50. In the Great Plains Region alone, I believe that all 17 tribes that I believe would be willing and ready to submit their own trust asset management plans. Furthermore, the demonstration project should reflect the varied nature of tribes with large trust resources as well as their varied locations. Thus, the committee may wish to provide that, in addition to timeliness, the secretary may consider tribal size, land base, amount of resources, and region in selecting participants under section 303(b)(2)(B)(ii)(II).

The MHA Nation strongly supports the streamlined model for submission and approval of tribal plans under the bill.

The MHA Nation makes the following recommendations that it believes will enable tribes to more fully embrace this opportunity.

First, in the event that the secretary disapproves a trust asset management plan under section 304(b)(2) then the secretary's notice should specifically identify and offer assistance to the tribe to overcome the deficiency, similar to the self-governance and self-determination procedures.

Second, and in keeping with the self-governance and self-determination procedures, the secretary should afford the tribe a hearing on the record to determine whether or not the tribe's application should be approved.

Third, and this is critical, if the secretary does not approve or disapprove a tribe's application within 120 days, the tribe's application should be deemed approved, not disapproved, under section 304(b)(3). This is exactly how self-governance and self-determination works and we see no reason to deviate from these processes.

Fourth, under section 304(b)(4), a tribe should have immediate access to judicial relief and not be forced to exhaust administrative remedies. Thus, this section should be amended to provide tribes with immediate access to the Federal district courts which should be authorized to hear disputes arising under this act and be further authorized to provide all necessary relief.

Fifth, we recommend that the committee provide a burden of proof of "clear and convincing evidence" on the department the secretary when defending a decision to reject a tribe's application.

Sixth, we have performed our own needs assessment on the Fort Berthold Reservation and the results point to a clear need for more natural resource officers. For instance, we have not had a range assessment since 1982. Providing more local officers would not only assist with the actual trust management responsibility, but it would also enable the tribe to grow economically faster and more efficiently. But, as you know, officers cost money and therefore the MHA Nation strongly recommends that Congress specifically authorize a level of funding of at least $20 million annually for tribal assistance and local resource officers under this title.

Seventh, the management plans in section 304(a)(2) should include specific functions such as appraisals.

Eighth, we recommend that all tribes, not just self-governance tribes be allowed to utilize the redesign provisions of section 304(a)(3) as long as the new elements meet the trust requirements of section 304(c). As you know, many large land-based tribes, which control a majority of the trust resources, are not self-governance tribes. They should not be penalized for their decision to adhere to direct service programs.

Title IV—Fractional Interest and Purchase Consolidation Program

This section would amend the Indian Land Consolidation Act to expand the program for acquisition of fractionated interests. As you know, there are about 4 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. We believe that an investment in land consolidation is critical to a reform that works.

We strongly support the new incentives for voluntary sales of fractionated interests by allowing the secretary to offer more than fair market value.

We also recommend that the committee consider adding an additional subsection that authorizes the issuance of guaranteed or low-interest loans to individuals to purchase fractionated land.

Based on testimony received at the January Great Plains Tribes roundtable, the MHA Nation further recommends that Indian families should have an opportunity to purchase lands under this title. We recommend that the committee consider directing the department to establish a national ownership data bank and provide assistance to Indian families who wish to consolidate their land interests.

And that the notice requirements are not sufficient. Section 401 should be amended so that the notice provisions in section 213(e)(3)(B) of the Indian Land Consolidation Act include an express consent form. An offer should not be considered accepted simply because of the offeree does not sign the rejection notice. Rather the offer shall be considered rejected under section 213(e)(4)(B) if the offeree does not sign the consent form included in the notice package.

Finally, the MHA Nation recommends that the title should include a provision that ensures that the premium price for fractionated land shall not have an effect on the appraisal value which would otherwise place Indian tribes who want to buy back land at a disadvantage. The legislation should not unintentionally place tribes in a weaker position to buy lands than the Federal Government. We believe that

ultimately, Indian tribes, not the Federal Government, make better landowners out West.

Title V—Restructuring Bureau of Indian Affairs and Office of Special Trustee

This title executes most of the actual reform at the Department of the Interior. This title would create a new under secretary for Indian affairs who would replace the assistant secretary for Indian affairs. The title would also sunset the Office of Special Trustee for American Indians at the end of 2008 and transfer the functions of the special trustee to the under secretary.

This title of the bill meets many of the goals of our 50 trust principles for reorganization, including the creation of a single line of authority and clear responsibility and accountability.

The MHA Nation has a number of additional recommendations to offer.

First, the MHA Nation supports the creation of the position of under secretary with the caveat that the under secretary be given clear authority over everyone in the department except the secretary, and deputy secretary. The under secretary should not be a glorified assistant secretary. Otherwise, the MHA Nation recommends that this position be created as one of deputy secretary.

Second, we recommend that the under secretary be given authority under section 503 over the U.S. Fish and Wildlife Service, the National Parks Service, the U.S. Geologic Service, the Office of Surface Mining and the Office of Surface Mining. The reason is that there are trust assets that are affected by these agencies and there is often conflict between Indian tribes and these agencies.

Third, we strongly recommend that the under secretary be charged with managing tribal trust assets in accordance with certain common law trust principles. Specifically, we recommend that the committee include a new section in title 5 that sets the standards for the administration of trust funds.

The importance of the trust responsibility to all Indian tribes cannot be overstated. Almost nothing can be considered more sacred.

In 1985 the U.S. Supreme Court said in the *Mitchell* case:

"Where the Federal Government takes on or has control or supervision over tribal moneys or properties, the fiduciary relationship normally exists with respect to such moneys or properties unless Congress has provided otherwise, even though nothing is said expressly in the authorizing or underlying statute or the fundamental document."

And in the 1942 *Seminole* case the Supreme Court said that the conduct of the United States as trustee for the Indians should "be judged by the most exacting fiduciary standards, not honesty alone, but the punctilio of an honor the most sensitive."

Thus, it is clear to me and to all the tribes who created the 50 Trust Principles that trust standards should apply. We reviewed the Restatement of Trust, case law, and sought expert advice from academics, litigators, and judges. Based on the advice we received, we recommended that Congress enact a number of well-known and understood trust standards that govern nearly all trust transactions.

These standards should be added in a new section 503 (10) and include the following:

- Duty of Loyalty and Candor
- Duty to Keep and Render Accounts
- Duty to Exercise Reasonable Care and Skill
- Duty to Administer the Trust
- Duty not to Delegate (this does not negatively impact compacting or contracting.)
- Duty to Furnish Information
- Duty to Take & Keep Control
- Duty to Preserve the Trust Property
- Duty to Enforce Claims and Defend Actions
- Duty to Keep Trust Property Separate
- Duty with Respect to Bank Deposits
- Duty to Make Trust Property Productive
- Duty to Pay Income to Beneficiaries
- Duty to Deal Impartially with Beneficiaries
- Duty with Respect to Co-Trustees
- Duty with Respect to Persons Holding Power of Control

Fourth, we recommend that the committee provide access to the Federal courts by authorizing a cause of action in Federal district court for breach of fiduciary duties and granting of equitable and legal relief The importance of this recommenda-

tion lies in the fact that it provides IIM account holders accountability and redress for failure. We understand that the department strongly opposes this provision on the grounds that it could create the "Son of Cobell" and so on. We believe, however, that liability could be phased in over a period of years, in accordance with the recommendations of the Policy Commission and the independent review agency discussed below. At a minimum, the committee should authorize the Federal courts to order prospective relief when necessary.

Fifth, we recommend that the committee amend title 5 at the end to provide for an independent agency or office with the authority to review and report on the department's administration of its trust management responsibilities.

Such an agency or office could be located an independent agency or could be housed in an investigative arm of the Justice Department. The important point is that there is an inherent conflict in self-regulation by the Department of the Interior, no matter how well meaning it may be. Thus, an independent entity with oversight and enforcement authority over the Department of the Interior is needed.

In addition, 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. As you know, the special trustee has no independence, and simply certifies whatever budget is submitted by the administration. It is likely that the under secretary would simply continue this practice. Thus, we strongly support the need for an independent agency or office vested with the responsibility to review the Federal budget for trust management and report to Congress on the budget's adequacy.

Sixth, we recommend deletion of subsection 503(b)(2) which would allow the new under secretary to avoid Senate confirmation and public scrutiny. The importance of this new position is such that all of Indian country must be given an opportunity to have a voice on his or her appointment.

Seventh, Congress should direct the new under secretary to revise the current tribal consultation model within 100 days of enactment of the bill by amending section 503(c)(6).

Eighth, Congress should include tribe in a negotiated rulemaking process that guarantees that Indian tribes have a say in exactly how the under secretary reorganizes under sections 504(e), promulgates rules and regulations under section 504(f), and recommends new legislation under section 504(m). Congress should also create a similar rulemaking process for the reorganization of the functions of the Office of Special Trustee under section 505(f), promulgates rules and regulations under section 505(g), and recommends new legislation under section 505(n).

The message our recommendations send is clear—in order to have a reform that works, there have to be standards, accountability, and a price for failure to meet those standards. If our collective experience has taught us anything, it is that the Federal bureaucracy is not going to reform the system if they don't have to. That means, tribes should have access to the courts if necessary to compel compliance with trust reform and trust standards.

But there is a bigger picture here. This is about justice and treating Indian people with fairness. Standards go to the very nature of the Trust Responsibility itself. Standards stand for the fact that Indian treaties are still the law of the land and that the United States' promises mean something.

Title VI—Audit of Indian Trust Funds

We support this title and recommend that the committee direct the Comptroller General to enter into the contract with the independent auditor within 120 days of passage of the bill.

Conclusion

I am glad to be able to say that I have been privileged to work with the chairman, vice chairman, members and staff of this committee on this most important of issues.

This is an issue that has a direct bearing on our tribal resources and assets—in other words, the bedrock for our future economic growth and opportunity. Today, we are not simply considering bank statements, checkbooks, and empty BIA desk drawers. What we are talking about is the chance to restart the economic engine of Indian country. And what we are also talking about is—at the same time—to bring justice home to Indian country.

This is the chance to say that, at the crossroads, we were men and women of vision and hope. That we worked together to make Indian country a place of hope and that we honored the humanity and dignity of our Indian people.

As I have pledged before, I will work with you day and night to ensure that we get legislation that all of Indian country can support.

Thank You.

Hoopa Valley Tribal Council

HOOPA VALLEY TRIBE

Regular Meetings on the First and Third Thursday of Each Month

P.O. Box 1348 • HOOPA, CALIFORNIA 95546 • Phone 625-4211 • Fax 625-4594

Clifford Lyle Marshall
Chairman

TESTIMONY OF CLIFFORD MARSHALL,
CHAIRMAN, HOOPA VALLEY TRIBE,
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING S. 1439
THE INDIAN TRUST REFORM ACT
MARCH 28, 2006

I thank you for the opportunity to submit testimony on S. 1439, the Indian Trust Reform Act. The Hoopa Valley Tribe, one of the original self-governance tribes, a Section 131 tribe and member of the California Trust Reform Consortium and the Affiliated Tribes of Northwest Indians (ATNI), commends Chairman McCain and Senator 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 asset management. We appreciate the time and energy that the Senate Committee has put into S.1439. The Hoopa Valley Tribe supports the bill's intent and purpose contained in each section of the bill. We also support many of the recommendations to S. 1439 that have been submitted jointly by ATNI and the United South and Eastern Tribes (USET). We strongly urge Congress to move this vital and necessary piece of legislation forward in this Congressional session.

S. 1439 presents a plan for remedying the wrongs of the past relating to trust management while proposing a positive, structured and systematic way to resolve current issues of trust asset management. It seeks to ensure that problems surrounding the United States' management of trust assets and resources, which have afflicted Indian Country for so long, will not plague us in the future. The bill reinforces the government-to-government relationship between tribes and the United States, adheres to the federal government's trust responsibility to tribes, and furthers the principles of tribal self-governance and self-determination. Unlike past short-sighted trust management approaches that gave rise to the breach of trust claims, S. 1439 is a balanced approach to addressing the issues of *Cobell* while also establishing a meaningful governmental structure for managing trust assets.

S. 1439 also preserves the rights of tribes, as inherent sovereign governments, to participate in the management and protection of their territories and resources. The bill acknowledges that the United States must account for

past wrongs and that true reform is needed for proper trust management in the future. It also recognizes that tribal governments are an indispensable party to trust reform if it is to be successful. We believe S. 1439 is a meaningful vehicle for accomplishing that reform.

Below, we discuss three overarching points of the bill and then provide brief comments on certain provisions with emphasis on the Title III Demonstration Project. Specifically, we believe S. 1439 rightfully refocuses trust reform to the original objectives and intent of the 1994 Trust Fund Management Reform Act, and moves away from recent policies which have resulted in duplications of effort, increased administrative costs and the creation of a bloated bureaucracy. Second, we believe S. 1439 protects self-governance and the rights and abilities of tribes to participate in trust management. Finally, we are hopeful that S. 1439 frees up substantial funds that could be used to address the many trust asset management issues in Indian Country where it is needed most: at the local level.

Refocusing Trust Reform

We believe S. 1439 correctly refocuses trust reform 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 that the Office of Trust Fund Management (OTFM) should operate from within the BIA. Trying to account for funding in one agency (OST) for trust transactions that are developed by another agency (BIA) simply invites confusion, conflict and mis-coordination between agencies.

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 the 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. The 1994 Act states in nineteen different places that OST was to assist in the reform of systems of the BIA. There is nothing in the Act that suggests that one of OST's purposes is to become an overarching agency that transfers inherent trust functions to itself or takes over the administration of BIA programs or duplicate those functions, staff and budgets in the name of trust reform. But, this is precisely what is happening today.

With *Cobell* as its impetus, the OST in recent years abandoned its intended role as a coordinating oversight and independent trust budget certification entity. The OST has become an entity directly engaged in the delivery of trust services, a role originally reserved for the BIA. This has resulted in a fragmentation of appropriations and functions for Indian trust programs, a dismantling of the Indian service delivery system and unnecessary duplication of

bureaucracy. This is in direct contradiction to all 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 DOI from liability.

Tribes do not want more bureaucracy, nor can we afford it, particularly in today's budget environment. OST has been operating under a "bright line" philosophy which 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 that are located in different agencies. Any bright line plan that separates management of trust assets from management of programs for services to Indian people will conflict with the goals of economic development, providing adequate services, and reducing poverty in Indian Country. Simply put, development in Indian country occurs on trust land whether it is a house, a business, a school or a hospital.

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, however, also created trust officers to perform the same functions in the Regional and Agency Offices. Today, we hear more and more complaints from Indian Country that fewer trust services are actually being completed and there is a significant amount of confusion about who is really in charge under the OST reorganization. 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 clear actions to restructure the BIA. 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. 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. The termination of the OST is specifically intended by the 1994 Act, which demonstrates that OST was supposed to help fix trust programs, instead of taking them over. 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 this 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

help coordinate the various aspects of trust management. Further, we support the effective merger of OST functions and budgets back into Indian programs of the BIA, under the Under Secretary. This would eliminate the duplication of duties and promote more efficient 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 was 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 Title III of S. 1439 and will assist in any manner to address areas of concern that Congress or the Administration may have with this title.

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."

The Hoopa Tribe has several examples of how it has worked with the BIA PRO and other federal agencies to develop real and lasting trust improvements which provide significant benefits to the tribe, our members, and the federal government. Some of these examples are as follows:

Forest Management - The Tribe assumed control of our resource programs under the Indian Self-Determination Act in 1986 and later merged those programs under our Self-Governance program in 1990. Since taking over the forestry program, the Tribe worked with the BIA to develop a progressive forest management plan that has been in effect for nearly fifteen years. Like other tribes, we use our forest lands for multiple purposes, including for generating tribal revenues from timber sales, for hunting, for gathering of food and religious materials, for fish protection, and for cattle grazing. Our forest

management plan was designed to balance all of these factors. It exceeds environmental standards required by federal law and has been recognized internationally as a state-of-the-art forest management program. Since forest management includes forest protection, we created our own Wildland Fire Protection Program; all of our tribal fire fighters meet the same qualification requirements of the United States Forest Service.

Public Utilities – We established our Hoopa Valley Public Utilities District (HVPUD) in the mid-1980's and later compacted our irrigation program from the BIA. The HVPUD manages the BIA's irrigation projects, compacts IHS sanitation services, and works with the EPA on water quality and service delivery systems. The HVPUD operates in an environment where there is competition for water for public and private domestic and irrigation needs and for fisheries and ESA demands. Among all these seemingly conflicting factors, the HVPUD continues to stand as a self-sufficient tribal program which has never failed to meet the various needs of our community.

Road Maintenance - The funding level of our road maintenance program is only meeting 11.5% of need. We have decided to try to fix this problem rather than simply manage a failing program. Since compacting the roads maintenance program in the mid-1980s, we have expanded it to include revenue generating components. The Tribe invested in an aggregate plant which not only puts our gravel supplies to use, but subsidizes our Roads Program by paying the program employees with revenues from sales of gravel, sand and cement.

We know of many other similar successful programs that have been implemented by tribes around the nation. Section 131 has been an appropriate way to showcase these successful models of trust management. It is an example of how local decision-making and combined efforts with the BIA can result in significant trust management improvements that benefit tribes and their members. Tribes can properly implement trust management even though they may use different practices and methods than the DOI. Title III of S. 1439 acknowledges and encourages this philosophy by preserving the ability of tribes to continue their own successful trust resource management.

We believe the Title III Demonstration Project will provide a useful model for how tribes can assist the United States with proper trust assets management and create an understanding on the federal government's part 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 and breach of trust claims against the United States. 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 or curtail the negotiation process.

Under S. 1439, Much-Needed Monies Might Become Available to Address the Many Trust Management 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 might become available to be used for initiatives in Indian Country to address the many needs of tribes and their members. 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 streamline trust management rather than expand federal bureaucracy. With this, monies that would have been put toward centralizing bureaucracies, it appears, would be available for spending at the local level on trust asset management improvements. This, in turn, will further tribal economic development and efforts to reduce poverty among tribal members, as well as reduce breach of trust claims by tribes and individual Indians against the United States.

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.

The Tribe supports the establishment of the Settlement Fund and appointment of the Special Master, as provided in Section 103 of the legislation. We also support the ATNI/USET recommendations for Section 103. ATNI previously recommended that an initial deposit to the Settlement Fund be $14.0 billion. We supported this recommendation as a starting point for discussion; the intention was to ask the question of whether this is enough. Any offer made by Congress to the Indian people will be a reflection of this nation's conscience. If Indian people are to feel that they have been treated justly, the settlement offer contained in this bill should be a sincere and generous one.

With respect to Title II of the bill, 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 and as modified by the ATNI-USET recommendations, it seems the Trust Asset Management Policy Review 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 make sure that there is no risk of the Commission 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 Hoopa Tribe strongly supports resolving the problem of fractionated interests of trust allotments, and supports the recommendation of ATNI and USET to Title IV. 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 government.

Conclusion

We want to express our appreciation for Chairman McCain and Senator 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 strongly support this legislation and urge Congress to move it forward and enact it this session. We believe that S. 1439 is a solid foundation for true trust reform, and we look forward to working with the Senate Committee, the House Resources Committee and the Administration to move meaningful legislation through the process as expeditiously as possible.

Testimony on The Indian Trust Reform Act of 2005, S.1439
before the
U.S. Senate Committee on Indian Affairs

By Austin Nunez, Chair of the Indian Land Working Group
And Chair of the San Xavier District of the Tohono O'odham Nation
March 28, 2006

Honorable Chairman and Members of the Committee, I appreciate the opportunity to address this Committee on these very important and complex matters related to trust reform. I also want to express our support and appreciation for your sponsorship of this important legislation.

The ILWG was founded in 1991 to address issues related to restoration, use and management of tribal and individual trust lands We are very interested in this legislative initiative as our organization seeks to reform the standards and practices which impact our tribal and individually owned trust lands.

Trust reform means eliminating the double standard by which our lands are used and managed. This standard allows prime agricultural lands on the Ft. Hall Reservation to be leased out for $80. an acre, while just off the reservation, comparable land is leased for $350 - $400. an acre. As Chair of the ILWG, I could give you countless examples occurring across Indian Country, but we are here today to offer support for, and offer recommendations to strengthen Titles II through VI of the Indian Trust Fund Reform Act of 2005.

The ILWG would like to recommend ways this legislation can assure that the situation just described, is remedied. We would suggest, that if the standards by which private trust assets and trust accounts are managed, is applied in the management of the Federal Indian Trust, we will see great improvement. In other words, we want to assure that the records which reflect the ownership of our clients – tribes and individuals - are managed by the standard used by the Chicago Land and Title Company, for its' clients. We want to assure our lands are appraised or valued according to the federally accepted Uniform Standards of Professional Appraisal Practices (USPAP) when leased. Our land and resources are no less valuable.

NEGOTIATED RULEMAKING CRITICAL FOR IMPLEMENTATION OF ALL TITLES II –VI

First and foremost, we recommend that S.1439 include the negotiated rulemaking process as provided for in the Negotiated Rulemaking Act of 1990. In passing the Negotiated Rulemaking Act, Congress noted that the ordinary rulemaking procedures used by agencies tend to discourage the affected parties from meeting and communicating with each other.

Negotiated Rulemaking has been successfully built into the development of rules for the following statutes: The Indian Self-Determination Act; the Tribal Self-Governance Act; development of the Transportation and Highway allocation formulas for Tribes; and currently for Indian education allocations under the "No Child Left Behind" initiative.

Inclusion of negotiated rulemaking, or "reg-neg"within the Trust Fund Management Reform Act of 2005, will assure that the parties impacted by this trust reform initiative – the U.S. Government, Tribes, and Indian individuals - are at the table. Rules for implementation can be developed within a level playing field; experts can be called upon; studies can be initiated - all towards the goal of developing fair, equitable and sound rules.

We are submitting Exhibit A for the record, which is a resolution, passed by the National Congress of American Indians in 2000, which supports "Establishment of a Negotiated Rulemaking Committee to Develop Trust Reform Regulations with the Full Participation of Indian Tribes and Individuals they are intended to Benefit".

TRUST LAND RECORDS MUST BE CURRENT, SAFEGUARDED, AND ACCESSIBLE FOR IMPLEMENTATION OF ALL TITLES IN S.1349

ILWG believes that record keeping is at the foundational core of trust reform. Trust income is derived from trust land and resources. A trust land inventory needs to be in place whereby all calculations and transactions related to assets, can be made based on a current, or certified Title Status Report. Several severe backlogs related to records, are having a detrimental impact on management of trust assets.

Probate Backlog: It is estimated that the current probate backlog is well beyond 22,000 cases impacting thousands of Indian heirs. Exhibit B is correspondence from Aurene Martin to the Regional Directors stating "...The estimated backlog is now well over 22,000 cases and the BIA must take immediate action to develop and implement a plan to eliminate the backlog... Elimination of this backlog is a key component to our trust reform initiatives and compliance with Cobell mandates." The 22,000 backlogged cases are those that have not reached the Office of Hearings & Appeals for hearing

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To address the backlog, the 1999 Probate Re-invention team recommended that Attorney Decision-Makers (ADM's) be hired. Ten ADM's were hired and housed within the Bureau of Indian Affairs. The High Level Implementation Plan provided that the authority of the ADM's would be expanded so they could take testimony under oath during probate hearings.

Then in 2003, ADM's were transferred to the Office of Hearings and Appeals (OHA) to "consolidate" probate functions. All were hired through Indian Preference. Originally 10 were hired, now only three remain. Seven positions are vacant.

Shirley Mosho, a tribal member from the Ft. Hall Indian Reservation is one of the thousands caught up in the backlog. Her mother, Anita Mosho passed away 5 years ago. When Shirly inquired about the estate she received correspondence from the Fiduciary Trust Officer stating that the probate "judge waits until there are 30 – 40 probates ready for adjudication before he will schedule a hearing and come to Fort Hall". See Exhibit C.

2% Youpee Interests: In 1997 the Supreme Court declared the escheat provision of the Indian Land Consolidation Act unconstitutional. In October 1998, then Assistant Secretary of Indian Affairs, Kevin Gover, issued a memorandum "Reopening of all Probates in which Property Escheated to an Indian Tribe under 25 U.S.C. Sec. 2206".

To date there are varying estimates ranging from 13,000 to 18,000 as to the number of 2% or less interests that have yet to be returned to the rightful heirs. Tribes and landowners are both experiencing havoc as lease negotiations are disrupted, land consolidations halted, and gift deeds curtailed waiting correction of the title records. Each interest not returned is time and money for Tribes, landowners, lessees, and the U.S. Government.

Certified Land Title: In March 2006 the Acquisition and Disposal Handbook developed as part of the Fiduciary Trust Model (FTM) – Office of the Special Trustee (OST) was released at the National BIA Realty Conference. Due to the backlogs described above, the handbook advises that land transactions may be implemented without certified title status reports. This means that because of the current probate and recordation backlog, the Government is implementing a lesser standard on trust lands. This is not trust reform.

Unfilled Positions: We were recently informed that the Title Plant in Albuquerque, NM has 10 vacancies because of budget constraints, and is due to close in September 06. This title plant is responsible for land records in the BIA Southwest, Western and Navajo Regions. This is not trust reform.

Recommendation: Staff all Title plants at levels necessary to address the recordation and certification backlog. Staffing would include title examiners, surveyors, recordation and related staff needed for title certification. Fill vacant ADM positions. We request the Committee to work with OST and the Budget Committee to fill these positions.

Recommendation: That no transfer of Indian trust records be made from any federal facility without being imaged. Several Tribes have reported to us that lease records are being transferred to the American Indian Records Repository without first being imaged. Imaging will prevent further loss of records.

Recommendation: The Department of the Treasury records of the financial transactions that occur while the trust funds are managed by the Federal government should be protected. Treasury records are scheduled to be destroyed after the records are 6.5 years old. We recommend that no Treasury records be destroyed relating to tribal and individual trust land income.

Recommendation: The American Indian Records Repository (AIRR) is not easily accessible to Tribes and individual Indians. Records should be locally accessible as imaged copies or received in electronic format by BIA Agency or Tribal Offices.

Title II – Indian Trust Asset Management Policy Review Commission

Title II establishes a Commission for the purpose of 1) reviewing trust asset management laws (including regulations) in existence on the date of the 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; 2) making recommendations to the Secretary of the Interior and Congress for improving those laws and practices.

This Commission is tasked to do several things that Congress provided for in the American Indian Trust Reform Management Act of 1994 by establishing the Office of the Special Trustee. It gives the illusion of oversight without any degree of responsibility and accountability.

Membership selection would be very political and we are suspect of any positive effort. We recommend that qualifications for such a group, such as consideration for people with trust asset management experience in the private sector trust departments; title or valuation experience; persons familiar with master trust system components that are involved with asset management; and familiarity with Minerals Management, BLM, or BIA operations be selected for this Commission.

Another alternative would be for a Negotiated Rulemaking Committee (usually numbering 20 – 25 persons), to be charged with the selection of the members of the Commission. Under the Negotiated Rulemaking Committee Act of 1990, the Committee, can also call for the formation of advisory groups or special studies to assist in formulation of rules.

Title III – Indian Trust Asset Management Demonstration Project Act

The requirement for Secretarial approval of Trust Asset Management Plans would give the Secretary a very broad discretionary authority to refuse. This contrasts with federal legislation such as the Indian Self-Determination Act (ISDEAA), which gives narrower authority to the Secretary to disapprove a tribal contract or compact, or the American Indian Probate Reform Act which gives narrower authority to disapprove a tribal probate code.

It is important to build standards such as described in Section 304: Standards (2)(E) which 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". In certain situations the tribe may find itself in actual competition with its own members with regard to use and development of resources. Individual tribal members want to be assured that management plan requirements do not put them at a disadvantage if there is competition for the same resource, be it timber, oil and gas, water, etc.

In addition, there needs to be some type of recourse such as described in "Section 304: Contents(2)(E) establish procedures for nonbonding mediation or resolution of any dispute between an Indian tribe and the United States relating to the trust asset management plan". The ILWG recommends that individual landowners be able to access this procedure as a possible means of resolving disputes related to a trust asset management plan.

This section can be beneficial to the Tribes if there is adequate funding to assure proper and effective implementation of the management plans. Resource Management Plans provided for in the National Indian Forest Resources Management Act – NIFRMA, and the American Indian Agricultural Resource Management Act – AIRMA, just as with the Indian Trust Asset Management Project need to be tied to realistic budgets in order to be successful.

The Congressional Authorizing and Budget Committees would need to become strong advocates if adequate appropriations were to be obtained; OMB needs to be convinced.

Title IV – Fractional Interest Purchase and Consolidation Program

The ILWG views Title IV as a program that can be expanded to provide additional consolidation opportunities for Tribes and individual landowners. We explore these opportunities later in our testimony, but first we would like to comment on the "automatic purchase" provision for lands with more than 200 owners. This provision should be stricken. Having worked with individual beneficiaries for years, we know how they react to something they don't approve of – they do not respond. The purchase of fractionated interests in an allotment dooms that parcel of property and the individuals that own the rest of the allotment, into continual fractionation because it discourages consolidations within families.

The legislation should reconsider the federal liens on repurchased land. In most cases the costs and headaches of administration of these liens generally outweighs their values.

The ILWG proposes that Title VI be implemented according to Uniform Standard Professional Appraisal Practices (USPAP) standards. Just recently we were informed that the Office of Special Trustee – Appraisal Services, would no longer be doing individual lease appraisals. Correspondence to members of the Ft. Hall Reservation reads, "...OST has provided our office with a general overall appraisal that covers the Fort Hall Indian Reservation, and from this appraisal, our office is to set a recommended lease value for each lease..." See Exhibit D. This means that Market Studies will now be used to provide valuation for trust resources instead of appraisals.

Market Studies are now being used to assess land interests purchased under the Fractional Interest Acquisition Program , 25 U.S.C. 2212. The use of Market Studies, which provide evidence of the range of values for general land types located in various areas, is not a substitute for an appraisal of an undivided fractional interest in a specific tract. Under the Indian Land Consolidation Office (ILCO), the office that administers the purchase program,

Market Studies are provided to the BIA Agency realty staff who are required to select a price within the market study range for a specific undivided fractional interest. This selection is not reviewed nor approved by the authorizing authority. It does not comply with USPAP. It is in violation of most state laws because the realty staff is exercising the rights of a licensed appraiser.

We have been informed that you if you are participating in the ILCA Project, within a agency that is servicing a tribe with a large fractionated land base, that you can expect ownership transactions to increase by as many as 5,000 per year.
This means that the traditional methods for preparing appraisals, title reports, deeds, and recordings will be overwhelmed by the ILCA project.

The reaction of some Regional Directors to the ILCA avalanche is to:

1) Adopt appraisal methods that are not compliant with the Uniform Standards of Professional Appraisal Practice (USPAP), violate state laws, and ignore BIA Appraisal regulations.
2) Misrepresent their capacity to provide title and recording services;
3) Deny the realities of preparing notices, letters, and conveyance documents.

Appraisals are an essential part of the ILCA acquisition process because of the Government's fiduciary responsibility to owners of land interests held in trust by the United States Government.

1) The prices for the interests that the Government is offering to buy must be supported by Government approved appraisal reports that comply with federal and state appraisal standards;
2) The universally accepted standard is the Uniform Standards of Professional Appraisal Practice (USPAP);
3) The cost of a single appraisal for each interest acquired by ILCA would be between $300 to $800 for agricultural land and $1,500 to $10,000 for commercial land. Most fractionated interests have values of less than $100. A single appraisal for each land interest is not a practical solution;

The only practical, legal and cost-effective way to prepare appraisals for the ILCA program is to use a Mass Appraisal, which is in compliance with Standard 6 of the USPAP. Most important, by performing the Mass Appraisal to USPAP standards, the fiduciary obligations of the Trustee would be met.

Below, you will find two charts, which show the differences in cost and time between the BIA and the MAD appraisal systems.

Cost to Process Real Estate Transactions of Owner Interests using Current BIA Methods

		Cost per Owner Interest Transaction								
Estimated Value of Fractionated Owner Interest in a Tract	Total Owner Interests	Apply	Appr-aisal	Deed Prep	Record Docs	Update Owner Records	Total Cost/ Interest	Total Cost to Process All Interests	Total Value of All Interests	Ratio of Cost/Total Value
Less than $1	3,070	$5	$350	$20	$20	$5	$400	$1,228,000	$1,427	86036.57%
$1 to $10	12,328	$5	$350	$20	$20	$5	$400	$4,931,200	$58,663	8405.93%
$10 to $50	17,678	$5	$350	$20	$20	$5	$400	$7,071,200	$458,218	1543.20%
$50 to $100	9,245	$5	$350	$20	$20	$5	$400	$3,698,000	$676,842	546.36%
$100 to $1,000	30,868	$5	$350	$20	$20	$5	$400	$12,347,20	$11,523,724	107.15%
Greater $1,000	18,441	$5	$350	$20	$20	$5	$400	$7,376,400	$122,851,554	6.00%
Totals	91,630							$36,652,000		

The cost to complete an application, prepare a deed, update owner records on the computer is based on the time required for a GS-7 Realty Specialist to accomplish those tasks.

The appraisal cost is the contract rate used for non-BIA appraisers to prepare an appraisal report. BIA appraisal staff costs are about the same as contract appraisal costs.

These costs are not the only problem. The time required to accomplish the tasks under current BIA methods will not keep up with the creation of new fractionated interests. In some BIA Regions requests for appraisal reports are over two years old. BIA Title plants are up to one year behind on recordings.

		Cost per Owner Interest Transaction								
Estimated Value of Fractionated Owner Interest in a Tract	Total Owner Interests	Apply	Appr-aisal	Deed Prep	Record Docs	Update Owner Records	Total Cost/ Interest	Total Cost to Process All Interests	Total Value of All Interests	Ratio of Cost/Total Value
Less than $1	3,070	$5	$1	$1	$20	$5	$32	$98,240	$1,427	6882.93%
$1 to $10	12,328	$5	$1	$1	$20	$5	$32	$394,496	$58,663	672.47%
$10 to $50	17,678	$5	$1	$1	$20	$5	$32	$565,696	$458,218	123.46%
$50 to $100	9,245	$5	$1	$1	$20	$5	$32	$295,840	$676,842	43.71%
$100 to $1,000	30,868	$5	$1	$1	$20	$5	$32	$987,776	$11,523,724	8.57%
Greater $1,000	18,441	$5	$1	$1	$20	$5	$32	$590,112	$122,851,554	0.48%
Totals	91,630							$2,932,160		

Using the appraisal module on the MAD system appraisal costs are reduced from $350 per report to $1.00 per report. The time required for an appraisal is reduced from months and years to about 5 minutes.The MAD system will print the deed. It looks up owner name, owner interests, and property legal descriptions in seconds and prints the Deed.

The MAD system has an owner update module that allows a realty staff to update records, recalculate fractions, check fractions for unity, and print status reports.

The Great Plains Region is the only region in the nation that has a functioning mass appraisal model It is part of the Great Plains Management, Accounting and Distribution (MAD) system.

Currently, the MAD program is being used in the Great Plains Region. However, the Great Plains Region is not complying with the USPAP to run the ILCA program. Project staff runs the MAD mass appraisal program without verifying the accuracy of the data or having the reports approved by the appropriate delegated official. Appraisals are being made by staff that are not licensed; staff is representing the results to owners of undivided fractional interests in trust land as a fair market value.

In managing the Indian Land Consolidation Act pilot project authorized by Congress, BIA allows purchases of individual Indian interests to be made without certified titles. The lack of standards in the purchase process results in confusion as to that are the real owners and holds up leases that would produce income.

Recommendation: Implement the MAD or like program according to USPAP standards to implement the ILCA program on reservations.

Support Needed For Tribal Land Consolidation Efforts: Just recently the Confederated Salish & Kootenai Tribes (CSKT) were informed by Director of the BIA, Pat Ragsdale, that the Tribes ILCP project was terminated. Correspondence to the Tribes reads, "This is to reply to you letter of February 9, 2006, in which you requested reconsideration of the Bureau of Indian Affair's January 24, 2006 notice of the decision to terminate the Indian Land Consolidation Program (ILCP) and the related Cooperative Agreement with the Salish-Kootenai Tribes on the Flathead Reservation..." The letter goes on "...The Termination of both the federal ILCP and the Cooperative Agreement will be effective February 28, 2006." See Exhibit D. The Tribes were targeting purchases of fractionated interest within allotments where they are large interest owners. It appears they didn't fit into the ILCO priorities of purchasing 2% or less interest shares and were thus terminated. The ILCO Project needs to support Tribal land consolidation efforts.

Support Needed for Individual Owner Consolidations: on the Flathead Reservation tribal member Kay Johnson owns 75% of allotment # 1941. The Confederated Salish & Kootenai Tribes (CSKT) who up until just recently were part of the ILCP Program, asked if they could use a portion of their ILCP project dollars for a loan to Ms. Johnson, who is trying to consolidate – become sole owner – in the allotment. I might mention that the other 25% is co-owned by approximately 71 other owners, including the Tribe. The Indian Land Consolidation Office (ILCA) said no.

Recommendation: ILCA purchases should be tied to a tribal or individual consolidation plan. Currently, the ILCA project is prioritizing purchase of 2% or less interests of low value. The project ignores consolidation efforts by both tribes and individuals. ILWG also recommends that co-owners should be notified regarding opportunities to purchase from willing sellers in their allotment. If there are no will buyers, then the Secretarial purchases can be made.

Recommendation: Tribes and BIA ILCA Projects need to be able to use ILCA dollars for low-interest loans to individuals. Financing is not readily available to Indian landowners wanting to purchase fractionated interests. Banks are hesitant to lend to individuals who are owners of undivided interests on trust property. The benefit to this would be an increase in landower consolidations and a reduction in number of owners/records.

Title V- Restructuring Bureau of Indian Affairs and Office of the Special Trustee

Title V of S. 1439 creates an Under Secretary for Indian Affairs position that is directly subordinate to the Secretary of the Interior. The Under Secretary for Indian Affairs would replace the Assistant Secretary and the functions of the Special Trustee would be transferred to the Under Secretary. The Office of the Special Trustee would be terminated in 2008.

The ILWG supports the creation of the Under Secretary for Indian Affairs within the Department of the Interior and strongly supports the termination of the Office of the Special Trustee. We consider this restructuring as a step towards improving the administration of services and programs impacting Tribes and Indian individuals.

However, we will continue to advocate to change this position from Under Secretary for Indian Affairs to Deputy Secretary for Indian Affairs, and to give the Deputy Secretary authority to supervise any activities relating to Indian Affairs carried out by the Commissioner of Reclamation, Director of BLM, Director of MMS, the Fish & Wildlife Service and the National Park Service. Our sense is that this would go a great deal further in terms of resolving the administrative conflicts of interest that currently exist within the Department.

As proposed, this restructuring creates a single line of authority for all functions that are now split between the BIA and OST. The Office of the Under Secretary would have the responsibility of supervising 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

ILWG recommends that the Under Secretary also have the responsibility of supervising any activities related to Indian Affairs that are carried out by the Fish & Wildlife and the National Park Service.

The ILWG strongly supports Section 505 of the legislation, which would terminate the Office of the Special Trustee by the end of 2008. It was certainly never the intent of Congress within the Trust Fund Management Reform Act of 1994 to set up a permanent office for this position. The budget to support the trust reform efforts of this Office has drained millions of dollars in resources from the local level. The Office of the Special Trustee has continued with a reorganization plan that was opposed by both Tribes and individual Indians. Section 505 is a welcome change and we urge the Committee to pass this important provision.

We support the suggestions made by the National Congress of American Indians to this Committee related to the proposed authorities and responsibilities of the Under Secretary. These authorities and responsibilities can be formulated and implemented within a Negotiated Rulemaking Committee process.

Title VI – Audit of Indian Trust Funds

The ILWG strongly supports Title VI which requires the Secretary of the Interior to prepare financial statements for individual Indians, tribal and other Indian trust accounts, as well as prepare an internal control audit. This Title directs the Comptroller General of the United States to hire an independent auditor to audit the Secretary's financial statements and report on the Secretary's internal controls.

The current DOI Reorganization Plan does not address the auditing of trust funds being held for Tribes, individual Indians, and Alaska Natives within the Department of the Interior. In addition, there is no provision for auditing the programs and processes i.e. leasing, acquisition and disposal, compliance, improvements, irrigation, title correction, etc., which impact, trust resources - land, water, and minerals. For example, the oil and gas production impacting assets owned by Tribes and individuals, are not audited to the producer level - in either a compliance audit or a financial audit - by any independent auditor.

Tribal and individual leases administered by MMS governing hard minerals production and non-standard leases standard leases that do not fit the MMS compliance model, are not audited. As a result, thousands of individual Indians have their trust assets reviewed in only a cursory manner by external auditors who are unfamiliar with the legal history of these trust assets held and managed by the Secretary.

Trust resource audits need to be performed in a timely and professional manner paralleling the standards applied to private sector financial trust departments. Trust audit standards, comparable to those applied to private sector financial trust departments, need to be applied to tribal and individual trust assets.

This would mean that the Office of the Comptroller of the Currency, as well and the internal and external independent auditors would audit programs in a manner which met strict trust audit standards. This would mean that auditing the trust funds and other types of trust assets at various times during the year. Today, that coverage is practically non-existent for the trust funds.

This Title is a good beginning towards implementing federal trust audit standards and internal controls as described above.

PREPARED STATEMENT OF MAJEL M. RUSSELL, MEMBER, CROW TRIBES OF INDIANS AND INDIVIDUAL LANDOWNERS

Greetings, Honorable Chairman McCain, Vice Chairman Dorgan and members of the committee. My name is Majel Russell. I am an enrolled member of the Crow Tribe of Indians and own trust lands on the Crow Indian Reservation in Southeastern Montana. I thank you for the invitation to provide testimony today and am honored to participate with the other prestigious members of today's panels. Trust reform has dominated the list of critical Indian issues for several years to the detriment of individual Indians, landowners and others, who rely on the services of the Bureau of Indian Affairs [BIA]. I commend Senator McCain and the committee for this sincere effort to resolve trust land and asset management issues that will allow Indian country to focus on the many other critical needs of Indian people, including health care, economic development, education and protection of tribal sovereignty.

I am an attorney and have represented Indian tribes, primarily the Crow Tribe, for most of my legal career and have been familiar with various efforts over the last 5 years to reform trust administration by the Department of the Interior [DOI]. However, my comments today are from my personal viewpoint as an owner of trust land within the exterior boundaries of the Crow Indian Reservation. I own interests in 46 tracts of trust land. Tracts of land that I own with less than four other owners, my mother and aunts, are managed by us as competent landowners in accordance with the Crow Competency Act of 1948. We decide who will utilize our land, what it will be used for, negotiate leases of our land at rates we determine fair, and collect payments directly from the lessees. For the lands we self-manage, the BIA provides two critical services; to insure that the land remains in trust and to record our leases.

I have interests in other tracts of trust land with varying numbers of owners and one tract with 41 other owners. All lands with more than five owners are managed by the Crow Agency BIA, including advertisement of the lands for lease, accepting bids from lessees, negotiating and approving leases, collecting rental payments, distribution of payments to owners, and recording of lease documents.

With my family members, like many other Crow people who own land in competency status, we strive to be active landowners, to know where our lands are located, what the lands are worth and how best to utilize and protect the lands. I endorse efforts that will allow other Indian landowners to become active, engaged landowners as the best means of protecting Indian reservation lands.

Policy Review and Restructuring

Recent restructuring of the Department of the Interior to reform trust administration has been driven by the on-going, contentious *Cobell* litigation rather than by Indian tribes and the users of the beneficiary services of the BIA. Thus, the department has been forced to restructure in a manner that is focused on avoiding liability rather than on a more effective, efficient delivery of services to individual Indians and tribes. Settlement of *Cobell* must occur to prevent continued restructuring in a manner that diminishes the United States' veil of protection over trust assets.

Further, restructuring of the Department of the Interior for trust administration must occur in a manner that strengthens the government to government relationship between the United States and tribes. Restructuring should not shift the longstanding, hard fought standard of government to government relationships to a government to individual Indian standard. Although the General Allotment Act and other allotment acts altered the relationship between tribes and their members, trust reform efforts should not follow suit.

I believe strong, effective tribal governments will insure that Indian people remain distinct political groups in this country rather than becoming another of the many racial groups in the United States. Only through my tribal membership do I have rights as an individual Indian, including the right to own trust land. I believe that my tribal government is the best advocate to protect my interests as a trust landowner. Tribe's must be actively engaged and in the "driver's seat" on developing policy and reviewing regulations for trust asset management. The proposed Policy Review Commission must be formed and focused to insure that tribal desires for reform are paramount.

As an individual utilizing the BIA for land services, I remain interested in the "one-stop shopping" concept. Services to assist landowners with various land transactions must be accessible, streamlined and with one entity at the local level. The current framework of various entities for different beneficiary services is confusing and often counterproductive when the roles for the various entities are not clearly defined. Presently, confusion exists as to the decisionmaking authority of the various entities available to trust beneficiaries. Over the years, my family and I and

my grandparents before me [who were original allottees] were served at the BIA by people we knew and were related to. These Crow people had no desire or intent to steal, lie or cheat to deprive landowners of revenue. Their services were simply subjected to an extreme lack of funding, resources and training. Today, the problem remains the same—the local agency BIA simply needs sufficient funding to best deliver services rather than the creation of new and different entities.

Information access, specifically access to title records is of critical importance both to tribes and individual Indians. Thus, I support the efforts to improve title records and believe a national title system must be completed to insure the orderly and expeditious disposition of lands to heirs and devises, to properly distribute revenues and to access landownership information.

In the last several years, incredible amounts of limited DOI resources have been spent on trust accounting. While I understand that system flaws must be addressed, resources must also be applied to services that assist landowners with the beneficial use of their lands including access to title information, timely processing of land exchanges, partition applications, completion of appraisals, and approvals of rights-of-ways. In addition, DOI resources should be available to assist landowners with accessing trust lands and to address trespass issues. Presently, without efforts to improve and streamline these services within the available budget, DOI is proposing that fees be assessed for many of these services. I support a reprioritization in budgeting that accommodates land related services.

Indian Trust Asset Management Project

The Indian Trust Asset Management Project in S. 1439 will allow a tribe greater control over the management of trust assets on each particular reservation and facilitate a unified management approach for tribal and individual trust assets. Allowing tribes to establish particularized trust management plans enhances the longstanding policies of self-determination and self-government. However, this effort to endorse tribal control must be sincere and not derailed by broad discretionary authority of the Secretary of the Interior to disapprove a tribal asset management plan based upon yet to be developed overall standards. Tribes should be empowered to develop applicable standards for trust administration on their particular reservations.

Land Consolidation Efforts

Owning fractionated lands defeats the goals of land ownership. Fractionated lands usually cannot be actively managed or utilized by the owners. The proposed amendment to the Indian Land Consolidation Act to purchase fractionated interests at more than fair market value would likely be most attractive to owners of fractional interests. The Crow Tribe has been surveyed three times, once in the 1960's, again in the mid-1980's and finally in 2003 about the willingness of individuals to sell their fractional interests in land. All three surveys overwhelmingly indicated that Crow Indians who owned small fractional interests of lands preferred to sell the lands and in some cases to even donate the interests to the tribe.

As an individual landowner, I propose expanding land consolidation efforts to include financing for individuals to purchase fractionated interests. Developing mechanisms for individuals to consolidate lands, invest capital and practice good stewardship of land would most effectively protect trust land while also benefiting tribes through stabilizing and protecting the reservation land base. However, to promote the efforts of individuals, the current DOI proposal to deny fee to trust applications by individuals must be revisited.

Conclusion

In summary, true reform of trust administration involves the daunting task of balancing competing interests and will likely be an evolving process. S. 1439 illustrates this committee's commitment to take on this task and provides a positive starting point. Thank you.

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