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INDIAN TRUST FUND LITIGATION

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON INDIAN TRUST FUND LITIGATION

MARCH 29, 2007
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INDIAN TRUST FUND LITIGATION

THURSDAY, MARCH 29, 2007

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

The committee met, pursuant to notice, at 9:15 a.m. in room 485 Senate Russell Office Building, Hon. Byron L. Dorgan, (chairman of the committee) presiding.

Present: Senators Dorgan, Tester, and Thomas.

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

The CHAIRMAN. Good morning. I want to begin now. I am going to make a brief opening statement, call on the secretary and others to testify, and we will likely have to have a recess, for which I apologize, but we don't have much choice.

Today's hearing will focus on the Administration's proposal to settle the *Cobell* v. *Kempthorne* lawsuit, settle the 108 tribal lawsuits that are now pending, eliminate land fractionation in Indian country, and convert the Indian Trust into an owner-managed trust. I say it will focus on the Administration proposal, it recommends these issues.

We will hear initial responses to the Administration's proposal from Elouise Cobell, the lead plaintiff, from mediators in the case, and two organizations that represent Indian tribes who have brought similar trust mismanagement cases against the Federal Government.

Senator Thomas, I just began a statement. I indicated to them, it looks like we will have a minimum of three votes, and perhaps more, so we will be required to recess at some point. So let me finish my statement. I will call on you for any additional statement, then we will have the secretary begin, if that is satisfactory to you.

Senator THOMAS. Fine. Or I can go vote and come back, or whatever. The vote is going on right now.

The CHAIRMAN. Did they just start? Well, we have a minimum of three votes, and the second two will be 10 minute votes, I understand. So it would probably be hard for us to have a continuous session.

Let me finish my statement, call on you, and then we will decide how we proceed.

The issues surrounding the management of the trusts have existed since the trusts were first created in 1887. At that time and since, the Federal Government believed that Indians were not com-

petent to manage these trust themselves. Therefore, the Federal Government as trustee would do so. It turns out the Federal Government was not capable of managing the trust accounts over the last century plus.

These management duties included the Federal Government negotiating leases for the use of lands owned by individual Indians and tribes; collecting revenues generated from those leases; creating trust accounts for those revenues; and depositing the moneys into those accounts; investing those moneys; and finally, distributing those moneys to proper beneficiaries.

Congress delegated these trust duties to Federal agencies, and as the Federal courts have held several times in the *Cobell* case, the agencies have done a poor job. In 2001, the Court of Appeals noted the following:

> The Federal Government does not know the precise number of individual Indian trust accounts that it is to administer and protect. The Federal Government does not know the proper balances for each individual Indian trust account, and the Government does not have sufficient records to determine the value of each individual Indian trust account.

In 2005, the Federal Court of Appeals affirmed that it is not disputed that the Government failed to be a diligent trustee, and noted that in the 2 decades leading up to the *Cobell* lawsuit, report after report denounced the Government's management of individual Indian trust accounts. Congress should not be surprised, then, by the court's conclusions. There have been numerous reports since 1915 to the U.S. Congress describing some of these problems in the management of Indian trusts. These reports have described horrible conditions surrounding the management of the trusts.

I would like to show a couple of examples. I have three photographs that show the storage at Fort Berthold and Fort Totten Agency of these documents surrounding the trusts. You will see from the photographs the type of storage that exists, and why the court has found the conclusions they have found.

So now we find ourselves in a very significant predicament. The *Cobell* v. *Kempthorne* case is in its 11th year of litigation, with no end in sight. The Federal courts have continued to find the Government in breach of our fiduciary responsibilities and duties. The Department of the Interior is now conducting a costly and time-consuming accounting of individual Indian trust accounts.

The legality and the adequacy of this accounting will likely be litigated for years once it is completed. The case has resulted in numerous cabinet officials being held in contempt; the BIA and other parts of Interior going years without access to the internet; several hundred millions of dollars spent so far on litigation and related activities.

The case clearly, it seems to me, is a dark cloud over the trust relationship between the Federal Government and the Indians, and will continue to be until there is a reasonable solution. Mrs. Cobell had every right to bring the lawsuit. She was justified in doing so. There is no dispute about the Federal Government's liability. The only remaining question is how to value the Federal Government's liability.

Currently, the Department of the Interior is doing a historical accounting of the individual trust accounts. This is supposed to be indicative of the value of the Government's mismanagement of the

trusts. But there is a huge difference between the accounting being done by the Interior versus the accounting that the Federal District Court thought was adequate. Photograph 4, if it will be shown, shows some of the key differences between the Government accounting approach and the approach that the Federal District Court believed to be legally adequate back in 2003.

The key difference is cost. The Government's plan would cost $335 million, while the District Court's plan would cost $6 billion to $13 billion. Another key difference is the actual trust accounts that will be provided an accounting. The Government plans to provide an accounting for those accounts that were open on or after October 31, 1994. The District Court's plan would have required the Government to do an accounting for all accounts that ever existed since 1887.

Given the limited scope of the Government's accounting effort, I worry that the results of the accounting effort will be litigated for years, and not produce an end that is justified. I raise these issues, and I wanted to make a longer opening statement because I want everyone to know how important the settlement of this issue is. If there is no settlement, this case will continue for probably more than a decade, in addition to the 11 years that has already elapsed. I would like to see a settlement of the *Cobell* lawsuit and an end to the injustice that has been dealt to individual Indians. I would like to see the Government's attention focused on the other issues, Indian health care, education, housing for which we hold hearings in this committee. But it is difficult to focus on all of those issues when so many resources are spent on litigation, and when this liability overhangs the Federal Government.

For 4 years, Congress has considered ways to settle all or part of the *Cobell* legislation. In 2003, this committee urged the parties to participate in mediation. Mediators were chosen by the plaintiffs and the Government in early 2004, and within 6 months the mediators realized that a negotiated resolution was impossible. Both mediators agree that only congressional action can resolve this dispute. We will hear more about the mediation process today from John Bickerman.

The Administration has now submitted a global settlement proposal that goes far beyond the claims at issue in the *Cobell* lawsuit. Congress, who is the ultimate trustee to the Indians, must now decide what role, if any, it will continue to play in trying to formulate-some kind of a reasonable settlement. Otherwise, I believe this case will languish, more breach of trust cases will be brought, the Department of Justice will be turned into the Department of Liability, a whole lot of plaintiffs, many in this lawsuit, will long be dead before the lawsuit is ever resolved.

My hope is that we can find through this process some constructive way to address the grievances, to right the wrongs, to provide a just settlement.

With that, I conclude my statement and call on Senator Thomas.

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator THOMAS. Thank you, Mr. Chairman. I won't do my statement right now. I think we are going to have to work out how we

are going to make the vote. It is important to have this hearing. I simply want to welcome the secretary here and I look forward to the witnesses.

[Prepared Statement of Vice Chairman Thomas appears in appendix.]

The CHAIRMAN. Let me say, Senator Tester, we apparently have 4 minutes left in this vote. So we, despite all of our best intentions, are going to have to go cast this vote. It appears as if there will be two votes following, so I think it will be a minimum 30-minute recess. We will be back as soon as we can. We apologize for the inconvenience to the witnesses and to all of those who have gathered.

Senator Tester.

STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. First of all, I want to welcome Elouise Cobell. I want to welcome James Kennedy, Mayor Kennedy; and Bill Mercer. I welcome you all to this committee meeting.

I want thank you, Mr. Chairman, for holding this committee meeting. I found out about the *Cobell* situation, oh, it has been probably nearly 2 years ago, and I can't agree with you more, Mr. Chairman. It is time to get everybody in the same room. It is time to find a constructive solution to this problem. It is not going to get better with time, and that is just my perspective. It needs to be fixed sooner, rather than later.

So with that, thank you very much.

The CHAIRMAN. The committee will stand in recess until 10 o'clock.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Our profound apologies, Mr. Secretary, Mr. Bickerman and others for the inconvenience. It turned out there were far more votes and they were 10 minute votes and there was simply no way to come back and forth. So thank you very much for your patience.

Mr. Secretary, I know you have a full schedule, so let me recognize you to begin and offer us your statement. If there are any questions, we will ask them and then allow you to depart.

Mr. Secretary, thank you.

STATEMENT OF DIRK KEMPTHORNE, SECRETARY, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY JAMES CASON, ASSOCIATE DEPUTY SECRETARY

Mr. KEMPTHORNE. Mr. Chairman, thank you very much. Thank you for your courtesy. I fully understand the dictates of the Senate schedule and votes, having lived that life for some time.

Mr. Chairman, I appreciate both the opportunity to be here today, but also the opportunities that I have had to have conversations with you about this issue. It is an issue that is particularly important to the Department of the Interior and to Indian country. As our March 1, 2007 letter states:

> The Administration strongly supports a comprehensive legislative package to resolve the issues facing us today with regard to the Indian land trusts.

I have attached my statement, the 1 page summary of the key facets the Administration believes are necessary to acceptable Indian trust reform and settlement legislation.

On June 13, 2003, then-Chairman Campbell and Vice Chairman Inouye sent a letter to tribal leaders asking for their help in attacking three major tasks that would include the management of the Indian trusts. The three items were: No. 1, stop the continuing fractionation of Indian lands and focus on the core problems of Indian probate by swiftly enacting legal reforms to the Indian probate statute.

No. 2, to begin an intense effort to reconsolidate the Indian land base by buying small parcels of fractionated land and returning them to tribal ownership. And number three was to explore creative, equitable and expedient ways to settle the *Cobell* v. *Norton* lawsuit.

We agree that these are priorities for bringing a solution to the issues facing the Indian trusts today. We would ask settling tribal trust lawsuits as well. The Administration strongly supports a comprehensive legislative package designed to strengthen the partnership between the Federal Government and American Indians.

To achieve these goals, the Administration supports providing up to $7 billion over a 10 year period. I believe it is time for the Administration and Congress to tackle an issue that has been raised by a commission, a task force, a commission for almost 100 years.

First, the overwhelming finding of almost every task force and commission that has looked at Indian economic issues say that a viable tribal land base is essential. The Indian Reorganization Act of 1934 halted further allotments and extended indefinitely the trust status of the allotted lands not yet patented. As a result, individual Indian allotments still held in trust have passed, through the generations, as increasingly smaller fractionated interests.

Since 1934, time and again witnesses have come before this Congress to detail the problems that have arisen as a result of the fractionation. Specifically, as each generation inherits interests in these lands, more and more individuals hold interests in one parcel of land. Today, we have allotments of 40 and 80 acres, with more than 1,000 ownership interests.

What this means for Interior is that we manage each of these individual interests. When its owner dies, we oversee the distribution of the owner's interests. In 2000, then-Assistant Secretary of Indian Affairs Kevin Gover said that he is an account holder, having inherited one twenty-seventh of his grandfather's share of land. He had 7 cents in his account when it opened. It had 8 cents in 2000. He told the interviewer he gets quarterly statements and that it cost the Government $435 a year to maintain his account. This is not a rare occurrence. In fact, we have tens of thousands of similar accounts. The cost of maintaining the accounts exceeds the value of the trust assets being managed.

Think about what else we could be spending that money on, Mr. Chairman. Just as you pointed out, I totally agree with you. The opportunities to invest in Indian education, fighting methamphetamines, Indian health issues, Indian housing issues. The logical answer to this problem is that we must take a far more aggressive stance on consolidating these interests and then turn

over the management of these Indian lands to Indians. That is what the Administration is trying to accomplish. These owner-managed lands would still stay in Indian ownership. They would still be exempt from State taxation. They would still be Indian country for purposes of tribal jurisdiction. With Indian owners become empowered to make the decisions on land use and leasing, the broad paternalistic roles of the Bureau of Indian Affairs [BIA] and the Office of the Special Trustee can be reduced significantly.

We recognize that many of the parcels of individual Indian land are so highly fractionated that it would be unfair to convert them to an owner-managed status at this point. That is why our proposal includes an element that would provide us with the tools to consolidate these interests before they are converted. We propose including in trust reform legislation both voluntary mechanisms and mandatory authority to consolidate highly fractionated parcels.

In addition, our proposal includes incentives to enable individual Indian landowners to undertake property management sooner, rather than later.

I have heard our proposal described as "termination" of the trust. Clearly, it is not. That policy was squarely repudiated in 1970 and replaced with the policy of self-determination. The policy that guides our relationship with tribes today. We have seen great progress in this regard. This is what NCAI President Joe Garcia said in January of this year in the fifth annual State of Indian Nations Address:

> As tribes take on major responsibilities, we find that we need to improve the way our tribal governments function. Today, tribes are governments with budgets and responsibilities comparable to State governments, and we have become more self-sufficient than we were in the past. As I traveled the country in the past year, I heard from many tribal leaders about their efforts to improve the effectiveness of their governments. Too often tribes are saddled with federally-imposed models of governance that do not fit our traditions and cultures. It is time to address the barriers caused by these mismatched governments.

He went to say:

> Many of the Federal policies that many of the Federal policies that impact tribal economic development were put into place at a time when tribal governments did not have the capacity that we have today. These policies need to be revisited and tribal governments need to be given the same tools for economic development that exist for other governments.

I couldn't agree with President Garcia more. Not only must we change our mindset about the management of individual Indian land, but we must change it with respect to tribal land as well. Frankly, I am troubled by a statutory and regulatory paradigm that places Interior employees in the position of second guessing management decisions tribal governments make regarding their lands.

As a Governor of a western State, I had the opportunity to work closely with the Indian tribes in the State of Idaho. As those of you on the committee with Indian tribes in your States know, tribes have made great strides in the last 30 years under the policy of self-determination. Today, Indian tribes are full service governments, offering Indians and non-Indians alike a broad range of services.

As most of you know, it was President Richard Nixon who ushered in the policy of self-determination for Indian tribes and Indian

people. I would like to share just a couple of excerpts from his famous special message on Indian Affairs dated July 8, 1970:

> We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. But most importantly, we have turned from the question of whether the Federal Government has a responsibility to Indians, to the question of how that responsibility can best be furthered. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

Mr. Chairman, we have an opportunity to work together to address several significant issues that are impediments to progress in Indian country. We need to address the potential for years of litigation. We need to restore the economic value of individual Indian allotments through land consolidation. We need to move beyond a century of well-meaning paternalism to recognize an Indian country capable of managing its own affairs if only we would let them.

Mr. Chairman, I look forward to working with you, the vice chairman and the members of the committee, and the leadership in Indian country to find a solution to this. Mr. Chairman, I believe you have made a very telling point, and that is that if we continue the path of litigation, the issue will outlast virtually all of us who are in this room today. But if we can find a settlement, then I believe that we can finally have a path forward that many people will benefit from, in particular Indian country.

Thank you very much.

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

The CHAIRMAN. Mr. Secretary, thank you very much.

Senator Thomas.

Senator THOMAS. Thank you, and thank you for your patience. Voting is something that interrupts our lives around here.

Mr. Secretary, what is the status of the court order that was estimated to cost $6 billion to $13 billion?

Mr. KEMPTHORNE. Mr. Vice Chairman, the status of that is that to date we have spent $250 million on this historical accounting practice. We anticipate that for the foreseeable future, some $56 million per year would allocated so that we would continue this effort. I would point out, too, if I may, Mr. Chairman with your indulgence, if I might go into a little bit of detail of what we have thus far been able to determine with that $250 million that has been expended.

The CHAIRMAN. Without objection.

Mr. KEMPTHORNE. In a $20-million examination, we did, of the five named plaintiffs in the *Cobell* case and the predecessors, we looked at 12,500 transactions. We found net overpayments of $3,250. Looking at judgment accounts, we have 77,818 of those. We have reconciled 84 percent of those accounts, totaling $413 million, and found a net underpayment of $19,100. We have reconciled 92 percent of our capital accounts, totaling about $182 million. We found a net overpayment of $2,700.

The litigation support accounting project is looking at the accuracy of land-based individual Indian money accounts, and reconciles all high dollar accounts, which would be $100,000 or greater transactions, and does a statistical sample of smaller value, those

that are less than $100,000 transactions, drawn from 1985 to 2000 land-based IIM accounts nationwide.

For the high dollar transactions, we have reconciled $483 million so far. We found a total net of $667 in overpayments. That is out of $483 million. For the statistical sample, we have looked at 4,480 transactions totaling $4.89 million and found a net overpayment of $1,194.

Mr. Vice Chairman, the Department is fully prepared to continue the historical accounting. We believe that we have the tools necessary to do so, including the records.

Senator THOMAS. Thank you, Mr. Secretary. That is basically my question.

The CHAIRMAN. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman.

I apologize for being late, so I wasn't able to hear all of your testimony, Secretary Kempthorne. So if this is repetitive of what you said in the beginning, let me know.

My question revolves around money that I think is being offered to be allocated to Indian country in this 110th Congress, and there being some, I don't know, some language around that, maybe not formally, but at least what I am hearing in the halls, some of this money is going to be allocated for purposes of the *Cobell* suit. In fact, maybe even the perspective is do we settle with *Cobell*.

I have two questions. No. 1, I envision the suit being settled by everybody getting in the same room and figuring out how to settle it, and there being some remuneration toward that settlement. So do you anticipate that being done?

No. 2, what is it about the money? Is this real? I mean, I am hearing, I think $7 billion was tossed around. To my understanding is that, well, I don't know if that is adequate or not. I am not here to say that that is adequate, but there have been figures of $200 billion being thrown around for the settlement of the Cobell suit. So is that figure something that has been agreed upon between Elouise Cobell and the department, or tribal members and the department? Where did this come from?

Mr. KEMPTHORNE. Senator Tester, I appreciate your question. The $7 billion is in a letter which was sent to the chairman and to the vice chairman, signed by both the attorney general and myself. It is a figure, $7 billion, that has been derived through a process working with the Department of Justice on their view of litigation risk on the Department of the Interior and the Office of Management and Budget.

I think what is most important, Senator, is the fact that for the first time ever on this issue that the Administration has come forward. We have said that we would like to see a conclusion. For the first time ever, the Administration has put a dollar figure on the table. It is $7 billion.

To follow through to the nature of your question, how that might be identified and what the thoughts may be, there are four major elements in that figure that we derived. The first is to settle the *Cobell* case and any other future cases related to management of individual Indian lands or assets that stem from the lands.

The second is to settle similar tribal cases. It is also to provide mechanisms and money for land consolidation, which we think is

absolutely important, so that individual Indian land becomes more economic and is put to its best use. And also then in converting Indian lands that are tied to a status where they are owner-managed.

So this is the suggested approach by the Administration with a dollar amount attached to it.

Senator TESTER. Okay. I am not going to really talk about the three or four items you talked about, the settlement of the case and other items. What I do want to ask, and I will just add this one more questions, the Department of Justice and Interior and Office of Management and Budget were the ones who came up with the figure. This wasn't arbitrarily done because you had some standards, but my question is, inclusion also means you have to bring the folks in who filed the suit. Were they brought in as part of the discussion?

Mr. KEMPTHORNE. Senator, this is a proposal that has been brought forward by the Administration.

Senator TESTER. Okay. Has there been any dialog with Cobell?

Mr. KEMPTHORNE. Senator, there has been. I will tell you that there has not been by myself personally, having been in this position for 10 months. But in the 11 years, there have been at least two different efforts at arbitration. I believe one of the individuals who was tasked with that responsibility is here on the panel and will be addressing that.

Senator TESTER. And if any of these questions can be answered, they are the members of the panel that have further information that I would like to have. It just seems to me that that is a critical component we may be missing in this whole thing.

Thank you.

The CHAIRMAN. Mr. Secretary, first of all, I agree with you that the fact that the Federal Government has propositioned that there is a potential $7 billion liability here is a very significant step, because the Federal Government has not previously indicated that kind of liability, with the exception of the Attorney General who I think testified in another venue that the potential liability could be $200 billion, as I understand it. I will ask Mr. Mercer about that. But Mr. Cason previously, and Ross Swimmer, testifying have indicated that the exposure is limited to less than $500 million perhaps. And so this is a significant change.

But let me respond to the details you were talking about with respect to the survey of the information that leads you to a certain conclusion. My understanding is that the analysis conducted by the department was focused on per capita accounts for the periods for which electronic records were kept, roughly 1985 to present. And these accounts are a very small fraction of the total accounts, and they are the ones that are the most easily administered. In short, they are not representative. In fact, I am quoting from Mr. Bickerman's testimony now: "This analysis is not representative of the potential claims."

I do want to show, if I can, photograph 2 and 3 again. My understanding as I show this is that there is a new repository, a new facility in Kansas, the American Indian Records Repository, and if I showed a picture of that we would see a very nice repository of records that are kept in perfect order.

But the question is, what kind of records went to the new repository, when this is a picture of the records at the Fort Totten Agency. Take a look at that, and ask yourself, what do you think somebody gleaned from that? And then we show the second picture, the second photograph. The reason I show these is to demonstrate how unbelievably inept the keeping of these records were, and why I said at the start of this that Mrs. Cobell and others as plaintiffs had every right to file a suit and to be very concerned about this.

The circumstances it seems to me, and thank you for the photographs, are what has been the error rate and what interest rate do you use over a period of well over a century in order to try to calculate some kind of settlement here. I want to ask you specifically, Mr. Secretary, the Administration settlement proposal goes well beyond the circumstances of the *Cobell* lawsuit.

I don't disagree at all that fractionation is a very serious problem and we have to find a way to fix it, perhaps even in these circumstances. But the proposal includes a settlement of tribal claims and the conversion of Indian trust into owner-managed trusts. In your remarks, first of all, you indicated these issues are requirements for any settlement legislation.

My question is, first of all, we don't even know the extent of the tribal claims really. Isn't that right? And I think that probably gave rise to the attorney general testifying previously in another venue in Congress that potential liability may be up to $200 billion. But to require the *Cobell* case be settled in conjunction with all tribal claims, the universe of which we don't even know, is I think one that probably means that it cannot be settled under those circumstances.

So the question is, would the Administration remain supportive of a settlement at some level if some but not all of the issues in the Administration's settlement proposal are included in a legislative bill?

Mr. KEMPTHORNE. Mr. Chairman, because, as has been pointed out, this issue has been going on for virtually a century, we believe this is an opportunity based on the actions brought forward by Ms. Cobell. To reach a settlement, and because of the issues that are both individual related and tribal related are interrelated, we believe that this is an opportunity for us to look at all of these issues and how they do relate to one another so that we don't expend the resources, the time of the last 11 years and solve just one component part, and then continue what may be another decade or two decades to take each next component part.

If in fact this is an opportunity, with your leadership, and the leadership of others that have been involved with this, and see if on our watch we can find a solution, that is our preference.

The CHAIRMAN. Are the tribal claims an essential requirement for the Administration in terms of resolving this? Let me tell you why I ask that question. Mr. Bickerman, as you know, was one of the two mediators. Both mediators worked at great length and tried very hard to find a resolution, and could not. But Mr. Bickerman in his testimony today says that more time and analysis will not yield a result that is more precise or less arbitrary. He talks about a number in the range of $7 billion to $9 billion to set-

tle the *Cobell* litigation can be supported by available data using reasonable economic assumptions.

But Mr. Bickerman's proposition here of the $7 billion to $9 billion settlement does not include an analysis or any attempt at an analysis of the tribal claims, which are a completely separate set of issues.

Mr. KEMPTHORNE. I appreciate that, Mr. Chairman. We would be very interested to see what his analysis is, Mr. Bickerman's, and how he derived those figures. That would be part of this. But at the Administration, it would be our hope and our intent that we could find a solution to these issues concerning Indian country, individual and tribal, and put them together so we can have a resolution that would be a path forward for Indian country.

The CHAIRMAN. Mr. Secretary, I have a list of questions I want to submit to you, because we would like to exchange on the record answers to a series of inquiries. We regret very much the 1 hour and 45 minute delay that could not be avoided. Because you are a former member of the U.S. Senate, you understand that. But I am going to let you go, and thank you very much for being here, and say this. I think on behalf of Senator Thomas, myself and other members of this committee, we really want to continue the discussion that starts with this hearing to see if there is a way to resolve this issue, because it casts a shadow over virtually everything else that we are doing. It is going to take a substantial amount of resources. It is also going to mean a fair number of people are going to die before there is a result if this continues in the court system for 10 years.

I want to continue in an aggressive way to work with you and with everyone involved in these issues to see if there is a way to solve this, to settle it, in a manner that is fair to the plaintiffs and in a manner that is fair to the Federal Government, without requiring that other issues be resolved attendant to it, for which we don't have adequate information.

So Secretary Kempthorne, thank you very much for being with us today.

Senator Thomas.

Senator Tester? Anything else?

Senator THOMAS. No; I think I have a couple of questions, too, Mr. Secretary, that we will submit.

The CHAIRMAN. We will submit that. And Mr. Cason will remain, I expect?

Mr. Secretary, thank you very much.

Mr. KEMPTHORNE. Mr. Chairman, thank you very much. I appreciate again your reaching out as you are in this leadership capacity, and the vice chairman. We would like to see the resolution. As you point out, we may not know all of the answers. As I have gone into more and more detail on this, to try and understand the last 11 years of the history, to see how complicated it is, the fact that now have some 300 million pages of documents such as you have reflected in that picture. In 1999, yes, that is where they were, but now they are in one of the state of the art archival retrieval programs.

Therefore, again we believe now that while we have done a sample, we now can go forward with about 99 percent of the records that exist.

So Mr. Chairman, again, I except the atmosphere that you have established here, and we look forward to being a full part of it.

The CHAIRMAN. Mr. Secretary, thank you very much.

Mr. KEMPTHORNE. Thank you.

The CHAIRMAN. Next, we will hear from the two additional witnesses on this panel: William Mercer, acting associate attorney general at the Department of Justice. I know Mr. Mercer had some other engagements this morning which probably have fallen by the wayside. We appreciate your patience as well.

And then we will hear from John Bickerman, who was one of the mediators.

Mr. Mercer, why don't you proceed? Your entire statement will be made a part of the record, and we would ask you to summarize.

STATEMENT OF WILLIAM W. MERCER, ACTING ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. MERCER. Good morning, Mr. Chairman and Mr. Vice Chairman and Senator Tester.

As you know, Attorney General Gonzales and Secretary Kempthorne recently proposed resolution to a group of Indian trust issues and offered to spend up to $7 billion implementing that proposal. I know that the committee is very familiar with these issues, so I won't spend too much time on the history of these problems.

The *Cobell* and tribal trust cases and trust management issues more generally have taken up a great deal of the committee's time in recent years, as well as the time of the executive branch agencies and the courts. In fact, the Washington, DC Circuit Court of Appeals has emphasized how time consuming this litigation has been in the courts, and urged the parties to come together and find a resolution. That is what we have tried to do in developing our legislative proposal.

As Secretary Kempthorne has already discussed, our legislative proposal does more than settle the pending litigation. It also addresses the structural problems that give rise to the litigation, with the goal of getting individual Indians and tribes more control over their lands and resources. I want to say at the outset that we will work together to put together a proposal that is fair and equitable. Our proposal is to settle litigation claims, so it needs to provide just compensation for those claims of individual Indians and to Indian tribes.

At the same time, it is not fair to ask the taxpayer to pay more in settlement than plaintiffs would receive in court. The Department of the Interior's ongoing review of these accounts and of the historical record continues to confirm that the rate of error in these trust accounts is low. The United States also has a number of defenses in these cases and we are prepared to present those defenses in court should the litigation continue.

That said, we strongly support the legislative settlement which we believe is in the best interests of all the parties involved. These complex historical cases are not well suited to be handled by courts. The *Cobell* litigation has been underway for 11 years so far,

and the tribal cases before the Indian Claims Commission were not resolved for over 30 years. The process of analyzing and reading millions of pages of historical records relating to individual and tribal accounts is still ongoing and promises to be very costly.

Those costs are a deadweight loss to the plaintiffs and the taxpayers. Everyone benefits if these claims are resolved without the costs and litigation, and with the moneys going to individual Native Americans and tribes, and to otherwise advance reform.

A settlement will also provide a prompt and definite payment to individuals and tribes. By contrast, litigation could take many years and some plaintiffs will ultimately receive no recovery.

To realize these benefits, any resolution must provide finality; otherwise the benefits of settlement and perhaps the settlement money itself could be swallowed up in unnecessary litigation. Thus, our proposal seeks to resolve all of the claims together, through a streamlined and fair administrative process, and provides a number of safeguards to ensure that this is the final resolution.

Our claims settlement proposal, taken together with our proposal to resolve fractionation and improving trust management, provides an opportunity for historic change in the management of the Indian trust. The existing relationship has been dominated by litigation. That adversarial relationship has interfered with the ability of individuals and tribes who own these lands and resources to enjoy the full benefits of their own property.

Our proposal would keep these lands in trust, but provide the trust beneficiaries with more direct control over their own assets. It would also eliminate the fractionation that has burdened the management of these lands.

For many years, there has been a trend in Indian country of tribes to seek more sovereignty over their own property decisions. Our proposal is a natural continuation of that process. We hope that these changes will help break the cycle of disputes and litigation that has gone on for so long, and open the doors to productive management of these lands by the tribes, who are the true owners.

We look forward to working with the committee, and hope that by working together, we can carry out the reforms we have proposed.

Thank you very much.

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

The CHAIRMAN. Mr. Mercer, thank you very much.

Next, we will hear from John Bickerman, who was one of the mediators that was chosen by both parties. Mr. Bickerman, you may proceed, and your entire statement will be made a part of the record, and you may summarize.

STATEMENT OF JOHN BICKERMAN, BICKERMAN DISPUTE RESOLUTION

Mr. BICKERMAN. Thank you, Chairman Dorgan.

Chairman Dorgan, Vice Chairman Thomas and members of the committee, Judge Charles Renfrew and I thank the committee for giving us the opportunity to testify regarding the most recent offer by the Administration to resolve the *Cobell* litigation.

The Administration's March 1 letter provides a very valuable opportunity to advance a settlement. The committee should not hesi-

tate to seize this chance to act. Our remarks may be uncharacteristically direct for mediators used to seeing both sides of every dispute. However, the committee needs a frank, unvarnished appraisal of settlement options by a disinterested party so that it can move ahead to resolve this litigation that has done so much to poison the relationship between the executive branch and Indian country for more than a decade and two administrations.

I thought it would be useful to give just a little bit of background because I know there are some new members to the committee. Our testimony needs to be understood in light of the context of our involvement in this matter. In March 2004, this committee and the House Committee on Resources contacted Judge Renfrew and myself to mediate the *Cobell* dispute. Funding for our services was provided by the Department of Justice, but we were assured we would have complete independence in our actions and, indeed, we have enjoyed the traditional independence and neutrality that neutral mediators require.

However, our mission was much broader than a traditional mediation. From the outset, both the parties and the congressional staff requested that we periodically report back to Congress regarding our efforts and our progress. This request was made for three reasons: First, any resolution achieved through negotiation likely would require congressional action; second, Congress wanted to know if either the plaintiffs or the defendants were behaving in a dilatory manner or otherwise negotiating in bad faith; and third, Congress wanted to know whether a negotiated resolution would be possible, and that if it was impossible we needed to tell the committee so they could decide whether to take action.

In most mediations, confidentiality of negotiations is a bedrock principle. In this case, very little of the content of our discussions remained confidential. Indeed, we were expected to periodically disclose our conclusions to Congress through this committee.

Senator Tester asked before whether the parties had ever met. The answer was yes, frequently. We tried, but our efforts were utterly unavailing. Although we made some small progress with respect to information technology, after a relatively short period of time, we realized that we could not as neutrals bring the two sides to a point where they could settle the dispute.

And so within 6 months, we were back before the committee's leadership. In October 2004, we met with the leaders of the committee, at that time, Senators Inouye and Senator Campbell, the House Resources Committee leaders Congressmen Pombo and Rahall to report our conclusions, and urge the Congress to take the lead for enacting a resolution. We said then and we will repeat now that only congressional action can resolve this dispute for the benefit of the beneficiaries of the IIM Trust and allow the United States to devote its resources to the traditional services it has provided Indian country.

Nothing has changed. In the winter of 2005, we met with the chairman of this committee to urge that the committee not abandon the effort to find a legislative solution. He agreed and directed the staff to draft legislation. Throughout the last Congress, Senator McCain and Senator Dorgan devoted significant time and effort to

the development of a legislative settlement, often in the face of unfounded criticism from many quarters.

Then on August 1, 2006, Senators Dorgan and McCain and Secretary Kempthorne and Attorney General Gonzales convened a meeting. Although we weren't there, we understand that the participants of this August 1 meeting directed their staffs to draft legislation that could be passed in the last Congress. Almost immediately, senior staff from the Departments of Justice, Interior and Treasury and the Office of Management and Budget began high-level meetings with congressional staff to carryout the direction of their principals. An extraordinary amount of creative energy went into these discussions. While the final result did not produce the intended legislation, there are many worthwhile ideas that are worth retaining and that were discussed.

Complex litigation like this takes many years to pass. The time is ripe to solve this problem forever.

I want to add, this is not a partisan issue, and way too much time and resources have already been wasted and more will be wasted attempting to make a broken system work if Congress fails to act. I am often asked, well, why don't we just leave it to the courts. Well, the courts are not in the position to solve this problem, and Congress has an independent trust responsibility to do something, and that is why I believe we are here today.

No reasonable person questions whether trust beneficiaries have been harmed by the failure of the United States over many decades to account for assets and management of the assets, and many deserving beneficiaries have died in the interim. Those beneficiaries who are alive will never be made whole without your attention.

I want to skip a good chunk of what I had put in my written testimony, to address what I think are the elements of the deal, and in particular talk about the values.

While there is no serious dispute over the question of liability, the gulf that divides the parties over the magnitude of the liability is still enormous. The Administration contends that the exposure of *Cobell* is less than $500 million. The plaintiffs have been publicly asserting that the value of their claim is in excess of $100 billion. They are both wrong. Judge Renfrew and I say it unequivocally. The reason we think they are both wrong is that the Administration's $500 million number, while it focuses on the pure calculation of the accounts that are managed, that the Secretary described, it fails to account for the other pieces that are part of what the Administration calls the other related *Cobell* claims. Let me give you an example.

We have reason to believe that over the course of the last 100 and some odd years, that the Administration did not collect all of the income that the trust beneficiaries were entitled to. Indeed, after 1980, under the Grace Commission, under the direction of its chairman Mr. Linowes, reported that about 10 percent of moneys that the Department of the Interior was supposed to collect from lessees was never collected. If it was never collected from non-tribal lessees, it is reasonable to conclude that it was never collected from tribal lessees. The value of dollars 50, 75, or 100 years ago are much greater than the value of dollars now.

We looked at using that percentage of the value of the funds that were not collected, or if they were collected, were collected late. And when we used very reasonable assumptions that were in the record from the 1980's, and applied reasonable interest rates, and assumed what a certain amount of that money would return over a period of 3 years, we came up with a range of estimates based on the interest rates between $4 billion to $7 billion. Those were the numbers that were included in last year's testimony. I think that that is a reasonable place for this resolution to focus on.

But I would like also to talk about the elements of a settlement. I was very pleased to hear the Secretary talk about self-determination, because we think that without voluntary self-determination and control, a resolution of this dispute will just not be possible politically. That is a key element.

In the 109th Congress, the settlement of *Cobell* was married to trust reform and it would be a mistake to resolve the accounting litigation without fixing the basic flaws in the system. However, in doing so, Congress must be sensitive to the historical context of the relationship between the United States and its beneficiaries.

Fixing fractionated interests is a key element. There is a consensus that highly fractionated interests in trust land limits the productivity of the land, reduces the value of the land, impedes efficient trust accounting, and leads to errors because keeping track of beneficiaries with very small interests becomes almost impossible. A sensible solution here would be to encourage the voluntary exchange or substitution of fractionated interests for cash or shares of ownership in the land.

If I can digress here for just 1 minute. I just spent the last 2 days with the Yakama Nation in the Yakima Valley. We passed acre after acre of land that was often farmed as vineyards or land that was being put to good use. And then we come across some fallow land. I turned to the person who I was with, and I said, "well, why isn't that land being farmed?" And he said, "well, it takes 2 years to lease that land." I said, "why does it take 2 years?" "Well, that land is so highly fractionated, by the time all the interest owners can be collected and vote on what to do, it takes 2 years to sign a least." "Is the value of that land worth much?" This woman said, "absolutely it is worth less because it's so fractionated."

Dealing with fractionation is a hidden value that we can capture if we can resolve this litigation.

The CHAIRMAN. Mr. Bickerman, I want you to summarize. We are about out of time for your testimony.

Mr. BICKERMAN. Okay.

In conclusion, Mr. Chairman, I would just like to emphasize the importance of having voluntary self-governance, dealing with fractionation, and resolving all the pending issues. I would in closing say that we have not looked at the tribal claims and we do not have a sense of what they are worth.

Thank you.

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

The CHAIRMAN. Mr. Bickerman, thank you for your testimony, and thank you for the work that you have put in to trying to understand and work on this issue.

Mr. Mercer, in a statement to the House Subcommittee on Justice Department Appropriations in March 2005, Attorney General Gonzales estimated that the Government's liability for tribal trust claims would be over $200 billion. Is this still the Department of Justice's estimate?

Mr. MERCER. It is not, Mr. Chairman. I am familiar with the statement. I guess I have a couple of points I would like to make on the statement.

I believe that that text talks about the allegations that have been set forth in claims as part of the tribal trust litigation. Going to the question that you posed, Mr. Chairman, we have already seen dismissal of a claim for $100 billion as part of that ongoing litigation.

So we certainly believe that that figure represents claims that were set forth by the parties. We have already prevailed in one of those cases and we believe that the ultimate value is much, much, much less than what the stated claims were by those parties.

The CHAIRMAN. Do you believe that there is a liability of some type or of some quantity with respect to tribal claims?

Mr. MERCER. I think, Mr. Chairman, the proposal that the Administration set forth is a reflection that we have some reform goals that we would like to see achieved, and we also believe, as part and parcel of that settlement, that we can resolve claims brought as part of the tribal trust litigation and as part of the *Cobell* litigation.

The CHAIRMAN. Mr. Mercer, do you think there is a distinction between the plaintiffs represented by Mrs. Cobell with respect to the individual accounts that they allege have been mismanaged and for which there is some evidence of substantial mismanagement. Is there a distinction between those issues and the issues of a tribal government that makes claims on its behalf?

Mr. MERCER. Well, certainly the course of the litigation, I think, is one thing that distinguishes it. As you noted, Mr. Chairman, the litigation is now past 1 decade in terms of the case in the District Court here in Washington, DC. That litigation seeks an accounting, at least in the view of the Government. So we are at a stage in that process where the Department of the Interior is attempting to complete the accounting as ordered by the court. That is the threshold.

That is something that can then be litigated and probably will be litigated in terms of the viability of the accounting. We would then, at some point, I think individual claimants could then go to the Court of Claims or District Courts if the claims were of small value, and litigate those claims. We are concerned that this will be endless litigation because we will see not only the accounting itself being litigated, but appeals of that process, and then the litigation of the claims themselves in other courts, and the potential appeals there.

The CHAIRMAN. But Mr. Mercer, you saw the pictures that I showed, the photographs today of the condition of certain records. Unbelievable, of course. You have to see that to believe that incompetence. If you were an individual with a claim and feel you have been cheated because of improper record keeping and so on over a long, long period of time, if you were an individual you would feel the right to seek redress in the courts as an individual.

My question to you is, is that not distinct and different than a claim that a tribe will make at some point on behalf of tribal assets?

Mr. MERCER. Certainly one thing they both share in common is, as Secretary Kempthorne noted, the fact that the kind of records that are depicted there, to the extent that those records are being recovered and are being entered into this data tracking system that allows the accountants to perform the full accounting, the thing that the tribal trust cases share in common with the claims made by individuals is that there are accountings that need to be done with respect to furthering those claims. We are well down the path of completing that accounting, which certainly informs the Government's view of the value.

So that is a common theme here in developing that threshold of information, which we certainly believe is being developed in the course of the process.

The CHAIRMAN. You are still not answering the question I think I am asking. Isn't there a difference between individuals whose accounts have been mismanaged, who filed to seek redress in the courts, and the attempt to settle that? Isn't there a difference between that and tribal governments, which are sovereign governments, whose assets have been mismanaged and wish to file a tribal claim? Isn't there a difference between the two? And why do you insist on marrying the two with respect to the settlement of the *Cobell* case?

Mr. MERCER. There is a difference in that we are talking about the [inaudible] and the accounting that is being performed to determine what the error rate is and what the loss would be. I think the tribal trust claims are different in that that litigation is, although it is still tried to determine what the value of some assets are, it is true that I think the nature of the claims are the same.

The CHAIRMAN. But there is a difference in ownership? Individual ownership versus tribal ownership. That is what I am trying to get you to say. Isn't that the case?

Mr. MERCER. I think that is true, Senator.

The CHAIRMAN. And so if you were the owner of an individual trust account, felt you had been cheated on it, and it had been mismanaged and so on, and you went to the court and said, I am going to file a claim to get what is owed me. And they said, I'll tell you what, we will settle it only but we will settle it, if you are willing to settle other issues over here, the extent of which we don't even understand, and the liabilities for which accrue to a tribe that had nothing to do with individual accounts.

Do you understand their angst about that?

Mr. MERCER. I certainly do, but I think all the things that the Government has set forth in terms of principles of this proposal are related. One of the things that we are talking about is the fact that if we are going to resolve this in a fashion with full and fair compensation, there is an interest in saying, let's make a determination about the value, whether we are talking about individual accounts or whether we are talking about what is being owed to the tribes.

If we are going to continue down the litigation path, which is not what the Administration would choose to do at this point because

we believe that if we can resolve it, it inures to the benefit of all. But there isn't anything that says we can't continue to litigate. It is just not a good way to do it. It will take decades, as the Indian Claims Commission experience represents.

The CHAIRMAN. Mr. Mercer, if Mr. Bickerman, one of the mediators, concludes, having looked at what he has looked at, that $7 billion to $9 billion is probably a fair range of settlement for the individual accounts, your proposal seems to suggest that tribal accounts are worth nothing. I am talking about the potential claims.

Mr. MERCER. As Mr. Bickerman said, I think we are happy to continue the conversation in terms of his valuation, but you are right, Mr. Chairman. Our valuation based upon what we are seeing in the accounting, which may, I think, I can't remember exactly when Mr. Bickerman's work ended, but it is clear that that accounting has continued and the error rates, as Secretary Kempthorne talked about, and the fact that all these records have been entered into the system, we have a data set that would suggest the error rates are quite low. We do have a different approximation of value to this.

The CHAIRMAN. But Mr. Mercer, that set of data has virtually nothing, well, I shouldn't say nothing, but that set of data would be the kindest evaluation of the circumstances. You have taken that data which has been recorded and mechanized from 1985 forward. We are talking about liabilities for accounts that have been mismanaged for well over a century. I have looked at some of the details of that, and what has happened. I think there are plaintiffs here that have had assets stolen from them, unbelievable mismanagement.

Look, I think that working with the Department of the Interior, the Justice Department, and others, it seems to me that it is in the interests of this country to find a way to resolve this. Otherwise, we will in the next decade or perhaps 2 decades see this bouncing around forever. Those who should get redress in the courts will not get it. And virtually everything else that we try to do will be affected by it, that is trying to find funds for crises in health care and education and housing and so on.

So I want us to continue to work with the Attorney General and the Secretary of the Interior and the Administration. I want us to get to the right result, but I would like to find a way for us to constructively reach agreement if it is possible.

Senator Thomas.

Senator THOMAS. Thank you.

Mr. Mercer, I am a little confused, did the DOJ not say the Government was potentially liable for $200 billion. The Department said that the exposure was there for $200 billion. Is that correct?

Mr. MERCER. The statement that you refer to, Mr. Vice Chairman, is that the department suggests that it needed a certain amount of money to defend the claims for allegations of potential exposure in these cases. As I have noted, since the time of that testimony, we have already prevailed in a case in which the allegation by the plaintiff in a tribal trust case was for $100 billion. So it is the Government's position at this point that the exposure based upon what has been articulated by plaintiffs far exceeds what we believe the values are.

Senator THOMAS. Okay. I just wanted to make that clear.

Is it practical do you think to resolve the hundreds of lawsuits in one piece of legislation?

Mr. MERCER. Well, we believe that this reform package, which as I have noted, includes $7 billion, an amount that the Administration has set forward to try to resolve the number of claims, not only deals with the litigation that is presently ongoing in various courts, but achieves the reform agenda that was set forth by Secretary Kempthorne. We believe that as part of the conversation with this committee, and collaborating with the parties, that we can advance the goals that the chairman has talked about and that are part of the Administration's principles.

Senator THOMAS. We have this question for Mr. Bickerman.

The CHAIRMAN. Yes; let's do that.

Senator THOMAS. Mr. Bickerman, apparently your testimony indicates that the plaintiffs and the Government have taken unreasonable positions with regard to the claims. If that is the case, do you think we can compromise and negotiate? And if not, why not?

Mr. BICKERMAN. Yes; I do think that a compromise is possible, Mr. Vice Chairman. I think that the Administration's efforts with the congressional staff last year that ended in December was a step in the right direction. I think the Administration's willingness to put a number on the table on March 1 and have a comprehensive package of ideas is a further step in the right direction. I think with further work by this committee that a resolution is possible and maybe even within sight in this Congress. Absolutely.

Senator THOMAS. Of course, if it is done in this Congress, why Congress will come up with its own solution, somewhere between the two parties. Do you think either of them will ever accept that kind of an agreement? Or does it matter?

Mr. BICKERMAN. Well, if it becomes law, I think they will accept it. My sense is that at this juncture in time, everybody recognizes that the past can't be the future, that it has been so destructive. Federal policies are being made through the prism of *Cobell,* and that is not healthy, and I think that there is a willingness to work together. I think that the issues you are dealing with in your questions with respect to the inclusion of tribal claims is a very valid one to have a discussion about. I think in particular there is an issue of self-governance, and making it voluntary. I think there are ways that historically Congress has done that through Public Law 93–638, and that is a good model. It needs to be tinkered with.

I also think that the avoided costs, the amount of money that we will spend if we do nothing will swamp what we could spend to fix it now. So there is enormous incentive to get it right and do it now.

Senator THOMAS. Thank you. Do you suggest a figure somewhere between $7 billion and $9 billion, was that both for individual claims and tribal claims?

Mr. BICKERMAN. That analysis was just focused on the individual claims. It was focused on what the other *Cobell* related claims, but it was just the IIM accounts that I had looked at, and I am not, and Judge Renfrew and I have not looked the tribal claims. The tribal claims came into the picture in December for the first time.

Senator THOMAS. The proposition before us, however, applies to both. Isn't that correct?

Mr. BICKERMAN. The Administration's proposal does, yes, sir.

Senator THOMAS. Thank you.

The CHAIRMAN. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman.

For Bill Mercer, Bill, I think there is a letter, a March 1 letter that [inaudible] and future liabilities, if this is sound. Is that correct?

Mr. MERCER. It is, Senator. Yes.

Senator TESTER. Okay. And so I guess the first question would be, do you anticipate future mismanagement with [inaudible]

Mr. MERCER. Well, a big part of the reform package, Senator, is the fact that we believe that we can change the way this relationship has worked. And so, we are hopeful that in fact we will be able to reform it in a way that will be an effective change for the future.

Senator TESTER. I would hope that would be the case, because quite frankly I would hate to see us pass a law where it said that the bank can do whatever they want with my money and I would have no recourse. Do you understand what I am saying?

To make it proactive and settle all future settlements, I mean, that is a huge step. It could create some major problems.

From our conversation, in about June 2005 you were selected to be here in Washington, DC and your assistant [inaudible] I think that happened in September 2006. The dates don't matter. But in the meantime, you still filled the job as U.S. Attorney for Montana.

The question I have for you, has that had impacts on job performance here and in Montana? Are we short-changing folks in Montana or here? And as it particularly applies to each of those jobs, and as it applies to this lawsuit, is there a problem there?

I feel, because I am trying to fill two jobs right now, one 2,200 miles away, as yours was, and this one. It is very difficult to do. What is your perspective on that?

Mr. MERCER. Well, let me talk about the operations of U.S. attorneys offices first, and note that the Sentencing Commission just recently issued its data for fiscal year 2006. When you compare the work that we are doing in the District of Montana with what we have done historically, and with my peers, I am very pleased to report that production in terms of the number of cases charged that resulted in sentences has continued to go up during that time period.

If you take a look at the sentence length as a proxy for the seriousness of the case, I think you will see that the productivity of the men and women that are serving as assistant U.S. attorneys in Montana is extraordinary. I think things are going very well there. Again, if you take a look at the historic comparison, it figures out to be very favorable.

So I am happy to talk to you in great detail and give you all those statistics, but I think by any fair measure of what it is that we are doing day to day in court, it is I think going very, very well. I continue to go back. I was back last week. I continue to go back and I continue to have daily communication with the leadership team I have in place there.

In terms of issues here, I think it bridges the two in that here is an issue that as a Montanan, I have a significant amount of per-

spective on, having basically been born and raised in the State and understanding some of the challenges that this presents for Native Americans and tribes in the State of Montana. I think there is a value to having people that serve in the Administration that have that perspective from the field, if you will.

And so I think you can get value and efficiencies by having those sorts of perspectives, and I hope I can bring that to this issue.

Senator TESTER. So ultimately in the end, Montana doesn't need a full-time prosecutor?

Mr. MERCER. Montana has 22 full-time Assistant U.S. attorneys and a person as U.S. attorney that is engaged every day in terms of the work of that office. If you look at, again, 2001 data, 2002 data, and 2006 data, you will see that that productivity continues to go up every year.

Senator TESTER. Can I just ask about one specific issue as it applies to Montana and the tribes? It is methamphetamines. It is a huge issue in Indian country. It is a huge issue all over the State of Montana. How are those prosecutions been going?

Mr. MERCER. Well, I am delighted to report that ONDCP has just funded a new task force that is going to cover Crow and Northern Cheyenne. We have the Safe Trails Task Force that does Indian country meth work on the Blackfeet Reservation. We have the Tri-Agency Task Force that is based out of Havre—in your region—that does the drug investigations both on Rocky Boy and Fort Belknap. And in Fort Peck, there is Federal money that goes to something called the Big Muddy Task Force.

My office does as many felony prosecutions dealing with drugs in Indian country as presented by those task forces. We are not going to prosecute our way out of that problem. That is, number one, a prevention job. We are there as the backstop to prosecute people who distribute and who are bringing the poison into Indian country. I am happy with that cooperative effort.

Senator TESTER. It is a huge scourge on our society, but I think its impacts on Indian country are even more [inaudible] You are right. It is going to take a multi-pronged approach.

Unfortunately, over the past [inaudible], you have been in the press dealing with the Department of Justice with the U.S. Attorneys. I think there were some e-mails released by the Department of Justice that showed you were intimately involved in an effort to push out U.S. attorneys that were very capable.

My question is real straightforward. If there is a committee that asks you to come forth in Montana, are you willing just to come forth and do it in the light of day with transparency so we can find out your side of the story, without Fifth Amendments and that kind of stuff?

Mr. MERCER. Yes.

Senator TESTER. Thank you.

A question for Mr. Bickerman. Mr. Bickerman, you said that, the [inaudible] has a very good question from Senator Thomas on the $7 billion to $9 billion for individual claims only. You said the tribal claims were not involved in that $7 billion to $9 billion. Is there any estimate work being done on what that might cost?

Mr. BICKERMAN. On tribal claims? No, sir.

Senator TESTER. None. No idea what it is?

Mr. BICKERMAN. Not by me, sir.

Senator TESTER. Okay. The other question is that you said the groups got together and you couldn't get them together. Let me get the exact words. There was an opportunity to get the parties together because you thought you had an agreement, and you couldn't get them in the same room to agree on much, and so it fell apart. Why? Was it money? Was it some of the other factors—self determination, control? Or was it that it didn't address the tribal? Was it all of the above? Was it lack of respect? What was it?

Mr. BICKERMAN. Judge Renfrew and I tried assiduously to identify issues and work with the parties. We have never, and both of us have mediated a long time, and Judge Renfrew truly regrets that he couldn't be here today. But we had never seen a more emotional, acrimonious dispute as we saw here. It was impossible to get the parties to sit in the same room and negotiate.

As a result, we tried different ideas, but we never got a lot done.

Senator TESTER. Did you or [inaudible], I can't remember which, but [inaudible] that talked about a claimed dismissal of $100 billion? Which one of you said that? Was that you, Bill?

Mr. MERCER. Yes.

Senator TESTER. When was that dismissed and by whom?

Mr. MERCER. I don't have a date. We can certainly get it for you.

Senator TESTER. About [inaudible] Spring of whatever, month?

Mr. MERCER. Evidently in the past couple of years.

Senator TESTER. In the past couple of years.

Mr. MERCER. I understand the past couple of years.

Senator TESTER. Okay. If we could get data on that. And who dismissed it?

Mr. MERCER. I don't know. We will get that to you, too.

Senator TESTER. Okay. Great. Thank you very much.

And thank you, panelists for coming and being so patient. I really appreciate that.

The CHAIRMAN. Let me thank the panel for being here. We appreciate your willingness to come and testify.

Mr. Cason, you have not had to participate orally, but we know that questions we will send will have your active participation on responses.

Mr. CASON. I have had my opportunities before. [Laughter.]

The CHAIRMAN. And if this ever gets settled, you won't have to come to these hearings in the future.

Mr. CASON. That would be great.

The CHAIRMAN. We thank all three witnesses.

I would like to invite the final panelists to come forward. Elouise Cobell is the lead plaintiff in *Cobell* v. *Kempthorne.* Elouise Cobell is from Browning, MT. She will be accompanied by Keith Harper, who is a partner in Kilpatrick Stockton, LLP, in Washington, DC.

John Echohawk is the executive director of the Native American Rights Fund in Boulder, CO.

William Martin is vice chairman, InterTribal Monitoring Association on Indian Trust Funds in Albuquerque, NM. He is also first vice president of Central Council of the Tlingit and Haida Indian Tribes of Alaska.

Let me thank all of you for being with us today, and for your patience as well.

Ms. Cobell, as I have indicated to others and I will to this panel, we regret the delay today, but it was not to be helped because of the votes in the Senate.

I will ask that you proceed with your entire statements being made a part of the record. You may summarize as you choose.

Let me begin with you, Elouise Cobell.

STATEMENT OF ELOUISE COBELL, LEAD PLAINTIFF IN *COBELL v. KEMPTHORNE,* ACCOMPANIED BY KEITH HARPER, PARTNER, KILPATRICK STOCKTON, LLP; AND JAMES OTIS KENNERLY, Jr., INDIVIDUAL INDIAN TRUST ACCOUNT HOLDER

Ms. COBELL. Thank you, Chairman Dorgan and thank you Vice Chairman Thomas and thank you, Senator Tester.

I would like to thank you for inviting me here today to provide the testimony to the committee in the most critical of issues: Bringing justice to 500,000 individual Indians by resolving fairly the Individual Indian Trust Fund lawsuit, *Cobell* v. *Kempthorne.*

Mr. Chairman, I will admit that I am frustrated. Year after year, I have been asked by this committee and the Natural Resources Committee in the House to testify. Year after year, I do so, hoping that this will be the time when a fair resolution is reached and that the fraud and corruption regarding the management of individual Indian trust assets will end.

People often speak about the cost of the mismanagement in monetary terms. But as the Court of Appeals has reminded us, this case is not solely about money, but help and the very existence for the many individual Indian beneficiaries that rely on the funds for their daily existence.

Here in Washington, DC, it is a bit easier to overlook the real-life consequences of the Department of the Interior's breaches of trust. With me today is such an individual Indian beneficiary. He is a friend and a Blackfeet Indian from my reservation, James Kennerly, Jr. James is the son of James Otis Kennerly, or as the Department of the Interior referred to him as "allottee 1997." Like prisoners, Government officials often refer to us, to our people, by their number.

James Otis Kennerly, Sr., was a World War I veteran and disabled in combat fighting for this Nation. He was allotted trust land back in 1907, and it included considerable oil and gas resources in the Cutbank, a resource-rich area of the Blackfeet Reservation. Today, his son owns this land with his siblings.

As early as 1930, and most likely much earlier, oil companies pumped thousands of barrels a week off Kennerly's land. This is documented in records by the Department of the Interior's own experts. Documents established that payments were made to the Department of the Interior, in connection with the leasing of Kennerly's allotment.

However, according to the Department of the Interior's own historians, after 1946, there were no documents regarding the lease of his land, no statements, no deposits, and no files. And there was no money deposited into his account.

So what happened? There is no doubt that the oil wells continued to pump on the land of James Otis Kennerly. You can see it for yourself. He would take you out there today, tomorrow. Yet, after the 1930's, James, Sr., did not receive any payments. That continues to be the situation today with James, Jr. And every call or visit to the Department of the Interior, he recounts hundreds of visits, ends in the same way: We can't give you an explanation.

Department of the Interior's historians now speculate that his lease was unlawfully unitized with other lands of the Blackfeet Tribe and that the tribe now receives all of his moneys, but they don't really know, despite hundreds of hours of looking at his documents. This is all in a report these historians submitted in the court case of *Cobell.*

What are the consequences to the Kennerlys of this theft? For James, Sr., a disabled vet unable to work, it meant that he lived in abject poverty the remainder of his life, as he was not provided his VA benefits either. This poverty contributed to declining health, and he passed away in the 1940's.

Of course, with no money, he could not afford to take care of his children during his lifetime. So his son, James, Jr., here with us today, was raised in an orphanage. After that, he was sent to Government boarding schools, with all of the incumbent problems of that system that we in Indian country are all too familiar with.

He and his siblings share James, Sr.'s land now, but they do not receive any money from the oil that still comes from that land. James, Jr., has had more than his share of hardship. I can personally attest, based on the decades of long friendship, that he has led an impoverished existence. The Government's theft of his trust funds did not on its own bankrupt James Kennerly, Jr., but it certainly eliminated any options for improving his situation. It robbed him of his health and education and opportunity, and the abuse continues today.

He should be a millionaire, but like his father, he lives in great poverty. In many ways, the broken trust has robbed him of his life, and the pain it causes continues every day.

This is not an isolated tragedy. James Kennerly, Jr., is not alone. Indeed, there are hundreds of James Kennerlys on every Indian reservation. They, too, have been robbed of health, education, and opportunities, and the abuse continues today. They, too, like Mr. Kennerly, pay the price for a failure to resolve this matter.

Understand, Senators, that this is a life and death situation. It is for these Americans that we must try and forge a resolution. Let us end the malfeasance and the suffering. The time is to act, for now, for all the James Kennerlys across Indian country.

The $7 billion is insufficient to settle the Cobell case standing alone, particularly since the proposal contemplates paying this money over 10 years. Given the time value of money, this means that the actual figure is much lower, and the Government's own experts put their liabilities between $10 billion to $40 billion.

Of course, they do not seek to settle just the *Cobell* case with this $7 billion proposal. The Government proposes to use the $7 billion to buy much, much more, including paying for a multi-billion dollar debacle called fractionation, extinguishing all past, present and future, and indeed future trust claims against individual Indians for

mismanagement, claims that go far beyond the *Cobell* case, paying for trust reform, paying for information technology security, and redressing all tribal trust claims, which Mr. Gonzales has conceded is $200 billion standing alone.

If that were not enough, the Government proposes to end all future liability. That means irrespective of how blatant and how significant future breaches are, the Government cannot be sued. This is in no uncertain terms a license to steal provided to an entity, the Department of the Interior, which has demonstrated itself to be dishonest. This is not an offer. Instead, it is a slap in the face for every individual Indian trust beneficiary.

Now, I am here reacting to the Government's first call settlement proposal. I guess I should be happy that after 11 years of litigation, they have actually put some kind of an offer on the table, but the proposal of Secretary Kempthorne and Attorney General Gonzales is so absurd that it cannot really be called a settlement offer.

I want to conclude to talk just briefly about where do we go next. What for Congress? What is it that you can do? There is a way to proceed. You can compare a bill that puts forward a reasonable settlement. This proposal should not seek to address every issue in the sun in Indian country. Instead, it should address the matter that has brought us all to this point: The *Cobell* historical accounting and restatement of claims, and their underlying malfeasance that *Cobell* seeks to redress.

That is where we begin. We cannot begin with an unfair, unjust, insulting proposal that the Department of Interior and the Department of Justice have brought forward. We need to begin with a solution that is fair.

Thank you very much.

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

The CHAIRMAN. Ms. Cobell, thank you very much. We appreciate your testimony. As always, it is very direct.

John Echohawk, executive director of the Native American Rights Fund, Boulder, CO. Mr. Echohawk, welcome. You may proceed, and your entire statement will be made a part of the record, and we would ask you to summarize.

STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE AMERICAN RIGHTS FUND

Mr. ECHOHAWK. Thank you, Mr. Chairman.

Although the Native American Rights Fund is part of the *Cobell* legal team for the last 11 years, I am here today on behalf of 15 tribes that the Native American Rights Fund represents in tribal trust fund litigation, plus possibly 220 more tribes if the Federal District Court in Washington, DC certifies one of those cases as a class action.

I would like to make three points briefly for the committee this morning. One is just to educate them about the status of tribal trust cases. There are currently 108 of those cases pending in either Federal District Courts or the Court of Federal Claims. They are on behalf of 69 tribes, and again, if some of these cases are certified as class action cases, that number could go up to 285 tribes.

Over 70 of these cases were newly filed because of the December 31 deadline that existed for tribes to challenge these Arthur Ander-

sen reconciliation reports that were given to the tribes in 1996. I submit that there is a financial crisis in Indian country with all of these tribal cases on the table now, together with the *Cobell* case and the individual claims. I think it is in the magnitude of the range for action that the Congress provided back during the savings and loan scandal, and the bailout that Congress provided for that.

I submit, too, it is in the magnitude of this mortgage crisis that the Nation faces now and Congress is thinking about a bailout there as well. I think that we need a bailout here in the Indian trust fund mess as well.

As we have talked about in the hearing today, Attorney General Alberto Gonzales had talked about the Government's liability being potentially $200 billion. For the record, I just want to read into the record his exact words during that testimony. He said, "The United States' potential exposure in these cases is more than $200 billion." That is his exact language.

The second point I would like to make to the Committee is that this proposal by the Administration is unacceptable to our tribal clients. As has been discussed, there was no tribal consultation with tribes on this proposal to include their tribal claims in this proposal. It is arbitrary. There has been no valuation, no analysis of these tribal claims. As we have discussed as well, there are objections to the fact that there is no future Federal liability for the administration of what would be left of the trust. More than that, there would be the termination of this historical trust. Anyone familiar with Indian country knows how important the trust responsibility is to tribes.

I think at a minimum we need to talk about separating out consideration of the tribal claims from the *Cobell* settlement and all of these various proposals that are included within this settlement offered from the Administration. We have to keep tribal claims separate.

And finally, I want to suggest to the committee that it may be possible to fashion some legislative proposals for settlement of some of these tribal claims. I would submit to the Committee that that would be worth exploring. I think that exploration would have to protect the prerogative of tribes to pursue their tribal trust claims in whatever form or through whatever avenues they pursue to resolve those claims. Any settlement proposal must certainly be voluntary and not be forced on tribes.

I do think that with all of these claims potentially on the table, that it is certainly worth the time of the committee to explore a possible legislative solution for at least some of those tribal claims.

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

The CHAIRMAN. Mr. Echohawk, thank you very much for being with us.

William Martin is vice chairman of the InterTribal Monitoring Association on Indian Trust Funds in Albuquerque, NM. Mr. Martin, welcome and you may summarize.

STATEMENT OF WILLIAM MARTIN, VICE CHAIRMAN, INTER-TRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS, AND FIRST VICE PRESIDENT, CENTRAL COUNCIL OF THE TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

Mr. MARTIN. Thank you, Mr. Chairman, Mr. Tester.

My name is William Martin. I am first vice president of the Tlingit and Haida Indian Tribes of Alaska. I also serve on the board of directors for the InterTribal Monitoring Association on Indian Trust Funds.

I am pleased to appear today to present ITMA's views regarding the Administration proposal.

The Administration proposes a single initiative to address the *Cobell* litigation, pending tribal lawsuits, and the continuing fractionation of Indian land ownership. The proposal would also eliminate Government liability for future trust administration. ITMA does not regard this as trust reform, but rather as a proposal for termination or buy-out of the trust responsibility.

With respect to tribal lawsuits, more than 100 are currently pending against the Government. Some of these have been in courts for almost 30 years. Scores of them were filed as recently as December 2006, however, purely as a protection against the possibility that they would thereafter be barred by the statute of limitations. Others involve such diverse issues as range management and uranium processing.

In other words, these tribal cases are emphatically not all alike.

With regard to land consolidation, reducing the number of Indian-owned interests in trust lands is a centerpiece of the Administration's proposal. The tribes and the Government might find some common ground in addressing this issue, but not if the Government insists on driving a wedge between the tribes and their members on constitutionally protected property rights.

Based on these observations, ITMA offers the following recommendations. Regarding the *Cobell* litigation, 1 year ago this committee held an important joint hearing with the House on similar cases where lawsuits succeeded in bringing historic wrongs to the public's attention. That discussion, in which Chairman Dorgan was a very active participant, might be a helpful starting point for the committee's consideration of any role it might play in bringing about a resolution of the *Cobell* litigation.

The Administration's proposal to settle these claims or restructure trust responsibility for up to $7 billion is illusory at best [inaudible].

Finally, we do not believe there is any support for combining the settlement of *Cobell* with the settlement of tribal claims, but we believe there is a strong interest in taking affirmative steps to facilitate and encourage a settlement of the tribal claims.

ITMA would like to propose certain affirmative steps that Congress can take to encourage settlement of the tribal claims. These would allow more Indian tribes to postpone the filing of additional lawsuits, result in voluntary dismissal of a number of tribal lawsuits, and create a process for resolving many tribal claims without litigation.

We do not think that tribal claims should compete for a settlement pot. The principle in that is any number should be the result

of deliberations, not legal. Congress should first break apart the issues into manageable-size pieces, starting with the *Cobell* litigation. If Congress chooses to wade into the fray, it should deal with its resolution separately.

Regarding land consolidation, Congress should consider following up on the successes of its voluntary purchase program of recent years. This program should be greatly expanded and the Government should look to the tribes themselves for approaches that will work on a tribe by tribe basis and will not diminish human service programs in order to ameliorate a bureaucratic problem of the Government's own making.

Regarding tribal litigation and settlement alternatives, first, the committee should not do anything pending the Arthur Andersen Act providing tribes with the opportunity to delay the filing of additional lawsuits, until a lot of these tribes have [inaudible] agreements to dismiss these lawsuits.

Second, Congress should authorize tribal trust fund settlements outside of litigation and provide authorization to access the U.S. Judgment Fund for payment of such settlements. In cooperation with the Department of the Interior, ITMA has been engaged in developing and implementing a tribal trust funds settlement project to develop a methodology by which the Government and non-litigating tribes could assess and negotiate resolution of tribes' fiscal claims against the Government.

Both parties have expressed hope that, if a resolution of fiscal claims could be reached on the basis of an intellectually rigorous methodology applied to empirical data, then even broader settlements as well might be within reach. Both ITMA and the Government look forward to continuing to develop a settlement methodology contemplated by the tribal trust fund settlement project.

In order to avoid setting up a system that results in the raiding of existing tribal programs for payment of these settlements, ITMA strongly believes that Congress must authorize payment of these settlements through the U.S. Judgment Fund, with a directive that any replenishment to the Fund not be charged to or otherwise offset by existing or future appropriated or budgeted funds for Indian programs.

The committee should begin dialog between interested Indian tribes and the Administration to authorize a voluntary settlement procedure for those Indian tribes that wish to take advantage of such an opportunity. Such efforts should recognize that every Indian tribe should have the opportunity to brings its claim in the court or courts of its choice, but that many Indian tribes would probably prefer a more expedient and certain claim settlement process.

On a related issue, ITMA reiterates its position in regard to the DOI proposal, regulatory initiative part 112, Tribal Trust Fund Accounting and Appeals. ITMA objects to the rule and has requested the Administration withdraw the draft regulation. The rule would greatly diminish the ability of Indian tribes to access Federal courts with regard to Federal management and administration of tribal trust fund accounts. ITMA questions whether DOI has the authority to unilate-rally through an administrative rule undermine the Indian Tucker Act.

ITMA also recommends that Congress eliminate administrative fees on Indian trust transactions.

In closing, Mr. Chairman, ITMA is eager to work with this committee in a new Congress to bring a new sense of trust to the Indian trust, and bring an end to a period of contentious litigation; and to bring honorable resolution to claims too long evaded.

Thank you, Mr. Chairman.

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

The CHAIRMAN. Mr. Martin, thank you very much.

Ms. Cobell, you referred to Mr. Kennerly in your testimony. Did you indicate he is with us?

Ms. COBELL. Yes;, he is.

The CHAIRMAN. Could you identify him? You are Mr. Kennerly? And do you still own the land that was previously owned in the family on which oil and gas was produced? Is that correct?

Mr. KENNERLY. Yes.

The CHAIRMAN. Is there currently oil production on that land?

Mr. KENNERLY. Yes there is.

The CHAIRMAN. Are you receiving any benefits from that oil production?

Mr. KENNERLY. [Remark made off microphone.]

The CHAIRMAN. Thank you for being with us today.

Mr. KENNERLY. Thank you.

The CHAIRMAN. I think, Ms. Cobell, your story is compelling. We always deal in the aggregate with large numbers, but actually these accounts are all accounts that deal with real human beings who have ownership, and have an expectation that the trust responsibility is being met. I thought I heard you say that he was in the audience. I appreciate your identifying yourself.

Well, Elouise Cobell, you have, as I indicated, been very direct with the committee, once again. You say you are frustrated. You are not the only one that is frustrated. That is not a condition that inures exclusively to yourself. I am frustrated. I think that a lot of people are very frustrated by this situation.

I feel that if something isn't done, this will go on at least for 1 decade and perhaps more. But what I want to ask you about is this. There are areas of liability, one of which is represented by you as a plaintiff, and the case that has now been I guess in the courts for 12 or 13 years. That is the individual Indian trust accounts case and the claims of irresponsible treatment of those accounts and those claims encompass a lot of things.

Second, there are the issues raised in the tribal claims that are now being filed and have been filed, last year especially.

Third, there is the other issue with respect to individual land mismanagement claims. That is separate and apart from the trust accounting claims.

Let me ask you, with respect to the individuals. Now, set aside tribal claims for a moment. Individuals, their trust accounts and the land management claims, do you feel like there is a capability of merging those two, at least as the *Cobell* case is settled with respect to the trust accounts, that there could also be some settlement with respect to land management claims?

Ms. COBELL. I think that we are dealing with just the money in the *Cobell* case, the mismanagement of money. And we have never

in fact, as the Department of the Interior reminds us all the time, is the damage to the trust assets are not part of our case. What we have talked about is the fact that trust asset claims could be included if there was an amount of money set aside and that *Cobell* plaintiffs could opt out and take on the other Indian trust assets, put claims on the trust asset damages that they have received, because our case is not about the damages. So that is one idea.

But to lump them together, I don't think that we can do that. We have to take into consideration that that is a separate issue on the damages.

The CHAIRMAN. I understand your point. You understand that those of us who represent all of the taxpayers in this country and are trying to figure out what the potential liability is here, and indeed there is a liability. I think the last thing anyone wants is to have settlement after settlement after settlement, and then there is the next claim.

My personal feeling is I don't think tribal claims have any role to play here at all. I think they are different. I was asking the representative of the Justice Department those questions, and he finally admitted they are distinct and different and should not be related.

There is, it seems to me, a relationship with respect to the individual claims, both with respect to the trust fund accounts, which is about money, but also the management of the assets. At least some here in Congress would say, wait a second, you are going to settle this and the management of the assets is not part of the settlement? So then we are right back into the same issue, and you will have filings on behalf of class actions, and we will be right back in the same situation as we are now.

I want you to understand. That is why some would believe there should be some connection between the money accounts and also the land management with respect to individuals.

Ms. COBELL. The problem that I have is that I don't represent those individuals on these issues. Our lawsuit has been concentrated on the mismanagement of the money, the money that came in, and it is very difficult for me to answer that question. You know, I certainly think that the solution that I gave you a little bit earlier if the settlement amount was substantial, it would give an opportunity to have individual Indians opt out of our lawsuit and take on the claims that they feel has been mismanaged on the land assets. But that has to be substantial.

The figures that we have come up with and the $10 billion to $40 billion that the Government's experts have come up with, all have been related to the money that went into these accounts.

The CHAIRMAN. What do you say to the statement by the mediator this morning that with respect to the individual trust accounts, he thought $7 billion to $9 billion was a range that was plausible?

Ms. COBELL. Versus to the $10 billion to $40 billion that the Government experts have come up with?

The CHAIRMAN. I am asking you not about that. I am asking you about the testimony this morning by the person who had been involved in the mediation.

Ms. COBELL. I think that I felt good about the fact that Mr. Bickerman separated the tribal from the individuals, and he said he would at least take $7 billion to $9 billion to settle *Cobell* alone.

The CHAIRMAN. How do you feel about that statement?

Ms. COBELL. I think that is a very good statement. Is that what we would settle for? Is that the real question? I would like an opportunity to talk about it and visit with you about it a little bit more. I think that we all understand that we are never going to get what is owed us as individual Indians.

The amount is surmountable, and every time the report that I just explained, Mr. Kennerly's case is very crucial because that would never have been found by Mr. Bickerman, anybody. It just happened the Government hired some experts to take a look at the accounts and they pulled out Mr. Kennerly's account to take a view, and all the documents were missing. They found out where the pump was pumping, and the oil money was being transferred from USGS and illegally unitized with the tribal lease and the money didn't come to Mr. Kennerly.

Those things will never be found. And so to say, as Mr. Bickerman did, right on $7 billion to $9 billion, at least he is getting in the ballpark.

The CHAIRMAN. And those records would not be included in a part of the discussion the Secretary mentioned, and also the Justice Department mentioned this morning, because what they described were records that were from 1985 forward. You are describing a circumstance where you can't find records dating back to the early 1900's for Mr. Kennerly's father.

I am tempted to ask Mr. Cason, but I will not do that. I will ask him some questions about these kinds of things in writing, not about the individual accounts, but the likelihood of the error rate being very substantial when you start going back to the 1930's, the 1910's, the 1890's.

The photograph I showed, I showed for a reason today. I think what was going on there was almost criminal. Whoever was responsible for keeping those records on behalf of the Indians and maintaining the accounts and being honest with the people who owned these assets, that kind of record keeping was almost criminal. No one is going to sort through those bags and boxes in that old building and come up with the right set of records.

That describes, I think, the concern that there is substantial liability by the Government. The question is what is it, and how is it resolved.

I promised that this committee will provide transparency, and part of that is open hearings where we will hear from witnesses and try to evaluate what can we do to try to resolve this. Some have asked me, why on earth are you involved in this? Why not let the courts decide whatever they decide? Well, we are involved as a committee because we have been asked to be involved by the parties, number one.

And number two, if this languishes another 5 years, 10, or 15 years, the consequences of that are very significant and very detrimental, in my judgment, to all of the things that we care about on this committee with respect to our trust responsibilities for American Indians. So that is why we are involved.

Will we be able to participate in resolving this? I don't know the answer to that, but I am determined, I continue to be determined to try. And this hearing I wanted to hold today to develop some additional information and get some additional thoughts on the record. And then from this hearing, Senator Thomas, I and others will be discussing the next steps.

The three of you have presented I think thoughtful testimony with respect to your perspective about how we might proceed. I know all of you have come a long distance, Albuquerque, Denver, Boulder, and Montana. So I appreciate very much your being here today to help us try to think through this and give us your testimony.

I am going to call on Senator Tester for any comments and questions he has.

Senator TESTER. Thank you, Mr. Chairman. I think your comment about openness and transparency in Government is probably one of the reasons why we are here. So I appreciate your perspective on that.

I have to ask. I wasn't going to, and then it came up again and so now I have to ask it. When you are getting $70 a month, this is the fellow that didn't testify, that is in the audience, James, you are getting $70 a month. Where is the rest of the money going, to whom?

Mr. KENNERLY. The BIA.

Senator TESTER. The BIA? All right.

Well, the hearing has gone on for quite a while. There have been a lot of good questions asked, and there has been a lot of good testimony given. I want to echo the Chairman's comments about expressing my appreciation for you to be here.

I am just going to ask one question, and you all three can answer it, or one of you can answer it if that is adequate. I will direct it to Elouise to begin with.

Elouise, you have been at this for 11 years. What is the key? What are the keys to bringing this to a conclusion so you can find a solution that is equitable for the folks that are involved?

Ms. COBELL. I think that there are two things. We have to figure out the historical wrong, the historical accounting that we can settle. But going forward, we are going to have to really, really think about how we are going to have trust reform that will probably be done. And I am going to tell you right now, the Department of the Interior is not capable of managing our assets. They are not. They have proven it over the 100 years. We have zillions of reports that have been filed with this committee, and the Department of the Interior is not capable.

And so we need to look at ways that we move forward in the future, and I think that we need to take them out of the trust business. Let's look at something totally different. Let's look at a receiver. What is wrong, I mean, with this horrible, horrible mismanagement that has been going on for hundreds of years. Senator Dorgan, you have done a great job in recapping it.

Will we ever get to the bottom of all this corruption? I don't think we will until we move it out and we like moving it out to a receiver and start over. That is what big financial institutions do when there are huge problems. They move it out. They put the people on

the bench and look at and move to a fresh way of correcting historical problems.

So that is, I know, a long answer, but I needed to tell you how I felt.

Senator TESTER. Would anybody else like to respond to that? Nobody disagrees? Then that is fine.

The issue about parties not being able to get together. I asked why that was to the gentleman who was sitting over here in the first panel, why that was the case. From your perspective, why is that the case?

Ms. COBELL. Because this is the first proposal that the Government has ever brought forward. They have never, and I think Mr. Bickerman said that, they have never put anything on the table for us to respond to. We have put proposals on the table that the Government would not respond to. So we have always been ready to sit down and negotiate.

Senator TESTER. Good. So you actually see the direction that even though there is some question of whether the offer was adequate or fair, you do see it as a step in the right direction, and there is some progress here after 11 years, but we have more to do. Right?

Ms. COBELL. I guess I do see at least the fact that there is a proposal on the table, but it is a horrible proposal. I just want to make sure that you understand that I don't endorse that proposal.

The CHAIRMAN. Ms. Cobell, it appears to me you have called it an insult, but positive. So it is a positive insult. [Laughter.]

Ms. COBELL. See? I knew I would get trapped.

The CHAIRMAN. I don't expect you to answer that, and I don't mean to make light of any of this. This is very serious business.

Let me on behalf of Senator Thomas and myself say that both of us appreciate that Senator Tester has joined us on this committee, and has expressed a real significant interest in trying to help. It takes a lot of effort on this committee to be active and involved and to really dig into some of these things. I think, Senator Tester, we very much appreciate your involvement, both Senator Thomas and myself.

We are going to keep the record open for 2 weeks. We would invite any other submissions for the record to this hearing. We will then, Senator Thomas, myself and other members of the committee, we will then convene and begin some discussions about what the next steps might be.

I say to all of you who gathered, that this has been an exceptionally busy morning here in the Senate, which explains the absence of many of our colleagues. We have many other committee hearings being completed today because this will be the last day, really, for any Senate business prior to next week in which the Senate will be in recess. So as a result, Senator Thomas and myself and Senator Tester wanted to proceed with the hearing even though we had the disruption of votes.

Mr. Kennerly, thank you for traveling all the way to Washington, DC to be a part of this testimony.

Ms. Cobell, Mr. Echohawk, Mr. Martin, thank you very much. We appreciate very much the attendance of those who have come.

This hearing is adjourned.

[Whereupon, at 12:25 p.m., the committee was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Good morning, and thank you Chairman Dorgan for holding this important hearing today.

Earlier this month I received the letter dated March 1 2007, and signed by both Secretary Kempthorne and Attorney General Gonzales regarding the Administration's proposal for resolving Indian trust litigation and reforming the trust asset management system.

The problems relating to the management of individual Indian and tribal trust lands, resources and funds have been present for over 100 years. Many if not most of the laws creating the current system for trust land and resource management were enacted many decades ago, some over 100 years ago. One can only wonder whether modern, 21st Century land and resource use transactions are compatible with a management system created for an earlier time.

The Administration's proposal is ambitious, if nothing else, and I do appreciate that we have Secretary Kempthorne and Mr. Mercer from the Department of Justice with us today to discuss the proposal further. I am also very interested in hearing from the representatives of the plaintiffs and the tribes, and from the two mediators who worked to resolve the *Cobell* case during the 108th and 109th Congress. In the months ahead I am sure we will be hearing from other voices in Indian country about the trust litigation and trust reform as well.

It is clear from the testimony of the non-Federal witnesses and from some feedback we have already gotten back from the tribes and other stakeholders that the Administration's proposal has some strong critics in Indian country. Nevertheless, it is a serious proposal involving a lot of money, and I look at it as an excellent opportunity to begin the settlement dialog yet again. I would like my staff to work with yours, Chairman Dorgan, to see whether we can come up with some acceptable solutions to these problems, which have been around far too long.

I thank all of the witnesses for attending the hearing to provide their views on the proposals and look forward to their testimony.

Thank you, Mr. Chairman.

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

Good morning Chairman Dorgan, Vice Chairman Thomas, and distinguished members of the committee. My name is Ernest Stensgar and I am the president of the Affiliated Tribes of Northwest Indians [ATNI]. Today, I am pleased to provide ATNI's views on the Administration's proposed legislative settlement as set forth in the March 1, 2007 letter from Interior Secretary Kempthorne and Attorney General Gonzales to the chairmen of the respective committees of jurisdiction. I am also

pleased to provide ATNI's views on how the committee can continue to pursue trust reform in the 110th Congress and our thoughts on the pending tribal trust lawsuits.

BACKGROUND ON ATNI'S TRUST REFORM EFFORTS

Founded in 1953, ATNI represents 57 tribal governments from Oregon, Idaho, Washington, southeast Alaska, northern California, and western Montana. As the committee is aware, ATNI and its member tribes in the Pacific Northwest have been outspoken supporters of a legislative settlement to the *Cobell* litigation and forwardlooking trust reform, and invested substantial time and resources in the 109th Congress securing tribal support for S. 1439.

ATNI's support for trust reform legislation has been and is grounded in the negative impact the Department of the Interior's [Department's] response to the *Cobell* litigation has had on our member tribes' day-to-day business. Problems associated with the Department's current trust policies continue to negatively impact non-trust issues on our member tribes' reservations, such as economic and social development within our communities. Our support for trust reform legislation is also grounded in our desire to reign in what has been the unchecked growth of the Office of the Special Trustee [OST].

THE ADMINISTRATION'S $7 BILLION PROPOSAL

ATNI understands that what this Administration ultimately demands for a multi-billion dollar settlement of the *Cobell* litigation may never be acceptable to ATNI or to Indian country under any circumstances. The Administration's March 1 letter essentially attaches a $7-billion figure to the package of concepts that was disseminated late last year in the form of a 2-page paper. As the committee will recall, that 2-page concept paper was—as a single, complete proposal—rejected by ATNI and Indian country as a whole. Like that concept paper, the theme behind the Administration's $7 billion dollar proposal is for the United States to phaseout the trust relationship with Indians and ultimately "get out of the Indian business" entirely. For ATNI, this is simply a non-starter. Even assuming that the March 1 letter allows some room for negotiation, the breadth of the Administration's demands now makes clear that a multi-billion dollar settlement of the *Cobell* litigation alone will not be possible during this Administration.

On February 15, 2007, ATNI unanimously enacted a resolution at its Winter Session in Portland, OR that supports the reintroduction of legislation with the key provisions that were included in S. 1439 in the 109th Congress—but without provisions relating to settlement of the *Cobell* litigation. That resolution also advocated that any new legislation provide for new voluntary authority for tribal management of tribal trust lands and related assets as an amendment to the Indian Self-Determination and Education Assistance Act of 1975.

The key trust reform concepts in S. 1439 that ATNI would like to see the committee pursue in the 110th Congress include the following:

- **Elimination of OST**—ATNI strongly supports the elimination of OST and the merging of its functions back into the BIA. OST has grown exponentially since the mid-1990's. This growth has adversely affected ATNI's member tribes' ability to carryout day-to-day business with the BIA and has resulted in the siphoning of funds from programs that serve Indian people.
- **Land Consolidation**—ATNI reaffirms its support for efforts to consolidate individual Indian trust lands and recognizes that a simple, aggressive land consolidation program must be implemented to reduce the costs of administration of fractionated lands. ATNI strongly disagrees with the Administration's view that the consolidation of fractionated lands must necessarily include the termination of Federal responsibilities over individual Indians and tribes. However, ATNI agrees with a goal of consolidating allotments into a manageable number of owners. While a Secretary initiated sale may be appropriate for highly fractionated trust lands [that is, land with more than 100 owners], any sale of trust lands with a manageable number of owners should be initiated by one or more of the owners, not by the Secretary.
- **Beneficiary-Managed Trust**—ATNI continues to oppose any proposal for a mandatory beneficiary-managed trust that would encompass unallotted tribal trust lands. The voluntary demonstration project set forth in title III of the last redraft of S. 1439, if adequately funded, provides, in ATNI's view, an attractive incentive to encourage tribal management of tribal trust lands and resources. This type of tribal management regime would also encourage tribal economic development for those tribes that choose to participate by reducing the need for time consuming Federal approvals.

For individual Indian trust lands, ATNI agrees in principle with a program that would provide for a beneficiary-managed trust so long as the program maintains the Federal trust obligations to tribes and Indian people. Such a program, however, must in the first instance be voluntary and be adequately funded to ensure that beneficiaries are fully informed and equipped to manage their lands. ATNI also reaffirms its support for a related concept that would provide for a land exchange program whereby interests in highly fractionated tracts would be transferred to—and the corresponding tract managed by—a separate, tribal-affiliated entity with a separate board of directors.

ATNI strongly opposes any attempt to arbitrarily and prospectively limit the liability of the United States for mismanagement of trust resources. A "trust relationship" as memorialized in Federal law includes the ability to seek redress against the trustee for breach. A "trust" relationship without this element is not a trust relationship at all, but rather an entirely different relationship. ATNI supports, however, the voluntary authority of Indian tribes to manage their trust resources.

SETTLEMENT OF TRIBAL TRUST CLAIMS

ATNI strongly opposes the mandatory settlement of tribal trust-related claims in any legislation, whether or not part of a trust reform package or an appropriations bill. The filing of the 103 Federal court lawsuits that are currently pending is a foreseeable result of the Administration's failure to support the extension of Public Law 107–153, which provided that any reconciliation report received by an Indian tribe shall be deemed received by the tribe on December 31, 1999. Faced with the possibility that a court could construe the Arthur Andersen reports to be an "accounting" for purposes of the 6 year statute of limitations, Indian tribes with potential trust claims had no other choice than to file lawsuits to preserve their rights.

The pending tribal accounting and mismanagement lawsuits stand on their own merits, and each tribe's trust accounts vary widely in terms of account activity and the underlying nature of the trust assets. These lawsuits therefore do not lend themselves to a mandatory, "one-size-fits all" settlement. However, ATNI supports legislation that would provide for a voluntary settlement regime of tribal trust claims for those tribes that do not wish to litigate or otherwise expend resources pursuing their claims.

The Department has indicated that it intends to promulgate new regulations relating to historical accounting of tribal trust funds. The most recent discussion draft of these regulations would establish an administrative process whereby the Department would furnish statements of historical account to Indian tribes. If an Indian tribe does not object or otherwise respond to the statement furnished by the Department, the tribe is deemed to have accepted the account balances set forth in the statement.

ATNI understands that the Department my attempt to apply these regulations to those tribes that have already filed trust accounting lawsuits. The validity of such a *post hoc* administrative action to affect previously filed Federal court lawsuits is dubious at best. Nonetheless, ATNI asks that the committee monitor the Department's initiative closely to ensure that the Department is not allowed to use this rulemaking as a backdoor attempt to impose settlement on the pending tribal accounting claims and divest tribes of their day in court.

ATNI is grateful for the committee's attention to trust reform in the 110th Congress and has appreciated the consideration the committee has given to the proposals and input offered by ATNI and its member tribes. ATNI looks forward to working with the committee in any way it can in addressing these issues.

Testimony of Hon. Charles Renfrew and John Bickerman

Chairman Dorgan, Vice-Chairman Thomas, and members of the Senate Committee on Indian Affairs, we thank the Committee for giving us the opportunity to testify regarding the most recent offer by the Administration to resolve the *Cobell* litigation.

The Administration's March 1, 2007 letter provides a valuable opportunity to advance a settlement and this Committee should not hesitate to seize the chance to act. Our remarks may be uncharacteristically direct for mediators used to seeing both sides of every dispute. However, the Committee needs a frank, unvarnished appraisal of settlement options by a disinterested party so it can move ahead to resolve this litigation that has done so much to poison the relationship between the Executive Branch and Indian Country for more than a decade and two administrations.

Background

Our testimony needs to be understood in light of the context of our involvement in this matter. In March 2004, this Committee and the House Committee on Resources contacted us to mediate the *Cobell* dispute. Funding for our services was provided by the Department of Justice, but we were assured we would have complete independence in our actions and, indeed, we have enjoyed the traditional independence and neutrality that neutral mediators require.

However, our mission was also broader than traditional mediation. From the outset, both the parties and Congressional staff requested that we periodically report back to Congress regarding our efforts and our progress. This request was made for three

reasons: first, any resolution achieved through negotiation would likely require Congressional action; second, Congress wanted to know if either the plaintiffs or the defendants were behaving in a dilatory manner or otherwise negotiating in bad faith; and third, Congress wanted to know if a resolution was impossible, so that it could decide whether to take action. In most mediations, confidentiality of the negotiations is a bedrock principle. In this case, very little of the content of our discussions remained confidential. Indeed, we were expected to periodically disclose our conclusions to Congress through this committee and its staff.

Unfortunately, our efforts were unavailing. Although we made some small progress, especially in the area of developing a model to resolve the information technology disputes regarding the security of Individual Indian Money ("IIM") Trust data, within six months we realized that a negotiated resolution was impossible. While we concluded that neither party behaved in a dilatory manner or otherwise in bad faith, their widely different perceptions of the case and its value led us to conclude that a legislative resolution was the only possibility of resolving this dispute.

In October 2004, we met with the leaders of this committee, Sens. Innoye and Campbell and the House Resources Committee, Congressmen Pombo and Rahall to report our conclusions and urge that Congress take the lead in crafting a resolution. We said then that only Congressional action could resolve this dispute for the benefit of the beneficiaries of the IIM Trust and allow the United States to devote its resources to the traditional services it has provided Indian Country. Nothing has changed. In the winter of 2005, we met with the Chairman of this Committee to urge that the Committee not abandon the effort to find a legislative solution. He agreed and directed the staff to draft

legislation. Throughout the 109th Congress, Senator McCain and Senator Dorgan devoted significant time and effort to the development of a legislative settlement, often in the face of unfounded criticism from various quarters.

On August 1, 2006, Sens. McCain and Dorgan met with Secretary Kempthorne and Attorney General Gonzales. We understand that the participants of the August 1st meeting directed their staffs to draft legislation that could be passed in the last Congress. Almost immediately, senior staff from the Departments of Justice, Interior and Treasury and the Office of Management and Budget began high level meetings with Congressional staff to carry out the directions of their principals. An extraordinary amount of creative energy went into these discussions. While the final result did not produce the intended legislation, many worthwhile ideas that are worth retaining were discussed. Complex legislation takes many years to pass. The time is ripe to solve this problem forever.

This is not a partisan dispute. Too much time and too many resources have already been wasted and more will be wasted attempting to make a broken system work if Congress fails to act. No reasonable person questions whether trust beneficiaries have been harmed by the failure of the United States over many decades to adequately account for assets held for the benefit of American Indians. Many deserving beneficiaries have died in the interim. Those beneficiaries who are alive will never be made whole without your attention.

The Department of Interior's ability to serve Indian Country has been and will continue to be compromised. So much of the policy affecting Indian Country seems now to be made through the prism of the *Cobell* litigation. The beneficial trust relationship

between the federal government and Indian Country is in jeopardy as a result of this litigation.

The Positions of the Parties

The failure to reach a resolution is a result of misperceptions and faulty analyses by both the plaintiffs and the Administration. There is no dispute that the historical conduct of the United States in managing and accounting for the IIM Trust has been flawed. The federal District Court of the District Columbia has so held and its judgment has been affirmed by the Court of Appeals. Indeed, Congress recognized the problem when it passed the Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. § 162a et seq. & § 4001 et seq.) in 1994. More than 10 years later, the problem persists. Substantial sums have been spent, some would say wasted, trying to fix a system that, without legislatively mandated changes, may be beyond repair. The legislation that was pending before this Committee at the end of the 109th Congress would go a long way toward addressing the underlying structural problems and compensating IIM beneficiaries for the government's past negligence by restating the account balances for individual beneficiaries. Without legislation to fix the system, the problem will continue to grow exponentially.

The plaintiffs have made inflated statements about the value of the case and did not acknowledge the litigation risks they have if they proceed.

The Executive Branch has used the litigation to try to argue that the trust responsibility is an anachronism that should be terminated. They have done so in the face of clearly defined legal obligations found in treaties, decisions of the federal courts,

including the United States Supreme Court, and countless Acts of Congress, including several that were enacted in recent years. In these efforts, the Executive Branch sometimes seems determined to repeat the tragic mistakes of federal polices from the earlier eras of allotment and termination, in spite of the fact that those policies have been repudiated by the Congress because they were found to be unworkable. One of the ironies of the behavior of the Executive Branch is the fact that it comes at the time when the benefits of the policy of self-determination are becoming most evident. The foundation of that policy was the recognition by the Congress that the most effective way to provide for the management of the trust assets of the tribes is for the tribes themselves to be the managers. History teaches that termination of the trust does not lessen federal liability or responsibility. The great and emerging lesson of the policy of self-determination is that empowering the tribes to be effective beneficiary co-managers of the trust will result in both improved management and diminished federal liability. Testimony of Prof. J. Kalt, Committee on Appropriations, Subcommittee on Interior, Environment and Related Agencies, House of Representatives, March 13, 2007. The Executive Branch has been wrong to ignore these lessons. The Administration's March 1, 2007 letter reflects this error and the Administration's frustration with the inflated claims and rhetoric of the *Cobell*. plaintiffs.

Valuing the Plaintiffs' Claim

While there is no serious dispute over the question of liability, the gulf that divides the parties over the magnitude of the liability is enormous. The Administration contends that its exposure for *Cobell* is less than $500 million. The plaintiffs have

publicly asserted that the value of their claim is in excess of $100 billion. Both sides are wrong.

The Department of Interior has spent considerable funds to trace the record of transactions in the IIM system to determine if the payments made to the accounts of trust fund beneficiaries accurately reflects what should have been paid. The possible outcomes include both underpayments and overpayments. The preliminary results of this investigation are that the observed error rate is very small. Testimony of James Cason, Associate Deputy Secretary and Ross Swimmer, Special Trustee for American Indians on the *Cobell* Lawsuit, before the House Committee on Resources Hearing on HR 4322, Indian Trust Reform Act of 2005, December 8, 2005, at 3-5. The conclusion that their exposure is limited to less than $500 million has led the Administration to include in their March 1, 2007 settlement offer a variety of other provisions that they would like to see accomplished. While some of these ideas may be worthwhile, if significantly revised to comport with the policy of self-determination, they cannot rest on the faulty assumption that the underlying liability exposure is less than $500 million. Among other things, the analyses conducted by the Department have been primarily focused on the land claim and per capita accounts for the periods during which electronic records have been kept, roughly 1985 to present. These accounts are both a small fraction of the IIM accounts and those that are most easily administered. In short, they are not representative of the problems found in the great majority of the IIM accounts.

There are three potential sources of error in the IIM system: 1) money was not collected; 2) money was not properly deposited; and, 3) money was not properly disbursed. With respect to the money that was not collected ("funds mismanagement"),

funds due IIM beneficiaries either never made it into the system in the first place or may have been collected late. The missing funds or the interest due beneficiaries for late payments could reflect a very significant amount of money in the billions of dollars. This is particularly true in the land-based IIM accounts. To the best of our knowledge, the Administration has made no attempt to calculate the value of these claims. Funds mismanagement is sufficiently related to the claims in the pending litigation that it should be resolved under any legislation.

A second potential source of error is that once in the system, the funds were not properly deposited in the beneficiaries' trust accounts. This has been the focus of the efforts of the Department of Interior to value the plaintiffs' claim. While analyzing the administration of funds that have been received by the Department is a good start, it is not sufficient. Moreover, the government appears not to have included in its analysis the land-based accounts where logically many more of the errors should arise. Because the analysis by the Office of Special Trustee only considers the second step of the process and does not analyze land-based accounts, we believe its estimates significantly understate the true exposure of the United States.

The third source of error is whether beneficiaries actually received the disbursements that they were intended to receive. Did the beneficiaries get their checks and cash them? We have been advised by the Department of Treasury that the amount of checks that go un-cashed is relatively small. Nonetheless, there is no way of knowing whether these checks reached the intended payees. If the Court were to conclude that strict common law principles were to apply, the United States would be hard pressed to demonstrate that funds were actually received by many beneficiaries.

Lastly, there is another type of liability that relates to claims by individual beneficiaries over the failure of the United States to negotiate a fair compensation for their oil, mineral, grazing, real estate, or other assets that have been held in trust by the United States. While "lands mismanagement" claims have never been asserted by plaintiffs, these claims should also be included in a comprehensive settlement.

In defense of these arguments, the Administration contends that while the plaintiff's arguments supporting liability may be true, especially those relating to funds mismanagement, evidentiary hurdles might be too significant for plaintiffs to overcome. Therefore they limit their estimate of liability. Relying on evidentiary barriers should not be the basis for a Congressional resolution of these issues if the underlying arguments are valid.

We believe that plaintiffs' underlying arguments are generally valid. While the Administration understates its exposure, the plaintiffs have unrealistic expectations about the value of their claims if there is no settlement. The plaintiffs' assumptions about how a court is likely to act are unlikely to be realized.

In December 2005, the plaintiffs presented a settlement demand of $27.5 billion, assuming for settlement purposes a 20% rate of funds not paid to beneficiaries as a measure of "rough justice," but we have not found any data supporting this rate. Testimony of Elouise C. *Cobell* before the House Committee on Resources Hearing on HR 4322, Indian Trust Reform Act of 2005, December 8, 2005, at 7. The plaintiff's choice of assumptions regarding the distribution of unpaid funds over the course of the trust fund, the "error rate," the rate of interest used, and whether the interest is

compounded annually dramatically impact the settlement value. There are serious questions as to the values chosen by the plaintiffs.

Elements of a Settlement

In the e 109th Congress, the settlement of *Cobell* was married to trust reform and it would be a mistake to resolve the accounting litigation without also fixing the basic flaws in the system. However, in doing so, Congress must be sensitive to the historical context of the relationship between the United States and its trustees. *Any effort to terminate this trust relationship faces insurmountable political hurdles that will doom a legislative solution.* Moreover, trust termination is not an essential or desirable element of a deal. Trust reform can be achieved so that there is no meaningful risk of future litigation.

1. Fix the Underlying Problem of Highly Fractionated Interests

There is a consensus that highly fractionated interests in trust land limits the productivity of the land, reduces the value of the land, impedes efficient trust accounting, and leads to errors because keeping track of beneficiaries with very small interests becomes almost impossible. A sensible solution would be to encourage the voluntary exchange or substitution of fractionated interests for cash or shares of ownership in the land. A majority of the ownership interests in a trust parcel should be able to consolidate the undivided interests for fair compensation to all holders of interests in the land. There will be an economic gain to the IIM Trust beneficiaries. Because the value of the consolidated land will be greater than the value of the highly fractionated parcel, beneficiaries will be in a better position to realize the economic returns from the land.

Every dollar spent on resolving highly fractionated interests should yield more than a dollar in benefits to beneficiaries.

2. Encourage Voluntary Self-Governance While Maintaining the Historical Trust Relationship

Indian self-governance of all trust assets is a desirable and achievable goal. Tribes have demonstrated their ability to exercise self-governance under P.L. 93-638. Although voluntary, many tribes are responsible for administering many of the programs that the federal government would otherwise administer. The same mechanism should be applied to ownership and management of trust assets. P.L. 93-638 should be amended to remove the restrictions on Tribal administration of trust assets. The 1994 Trust Reform Act should be amended to repeal the provisions relating to the termination of the trust responsibility when tribes administer their own trust funds. As Presidents Johnson and Nixon and the Congress recognized more than thirty years ago, removing the threat of the termination of the trust is essential to both reducing federal liability and improving the administration of Indian assets and services. This Committee and this Congress should build upon that legacy and encourage voluntary self-governance. P.L. 93-638 deals with the allocation of liability between the federal and tribal governments through the blunt instruments of retrocession and reassumption. We understand that these have generally proven to be effective in the few instances where they have been used. These tools were refined in the Forestry Resources Management Act (25 U.S.C. 3101 et seq.) and more recently in Title V of the Energy Policy act of 2005 (P.L. 109-58). These more recent enactments rely upon the mechanism of tribal management under specific plans that are developed by the tribes and approved by the Secretary. If the Secretary fulfills the trust

responsibility in the review and approval of the plan, there is no federal liability in the event of a loss that arises because the tribe does not administer the trust assets in conformity with the plan. In any event, the assets remain trust assets at all times. There is no termination of the trust. There is no threat to the federal-tribal relationship.

3. Resolve All Pending and Potential Claims Arising Out of Historical Accounting

Frequently, mediators are asked to value a settlement in a dispute. In many instances the value of a case may depend on the litigation risk or the probability of a party prevailing at trial. What seems certain is that there will not be a quick end to this litigation. If Congress does not act, there will be many more rounds of appeals. Inevitably, one of the parties will petition the Supreme Court for review. By then, many more of the IIM beneficiaries will be dead.

The parties agree that approximately $13 billion should have been paid to beneficiaries over the time the IIM trust has been in existence. Neither side disagrees that a portion of these funds was indeed paid to the IIM beneficiaries. Where there is disagreement is in calculating the amount still owed trust beneficiaries. Last year, we testified that small changes in economic assumptions such as the interest rate applied to payments in arrears can have a huge impact on the value of a settlement. *A number in the range of $7 billion to $9 billion to settle the Cobell litigation can be supported by the available data using reasonable economic assumptions. More time and analysis will not yield a result that is more precise or less arbitrary. However, we continue to believe that the $7 billion to $9 billion estimate is reasonable.*

Since 2001, the BIA, including the Office of Special Trustee, has received more than $3 billion to reorganize and reform the management of trust funds and assets.

Because the number of potential beneficiaries continues to grow exponentially, the annual administrative costs will continue to rise. If this litigation is not settled, how much more will Congress spend to comply with its legal obligations to perform an accounting? These funds would be better directed to the IIM beneficiaries. In light of the avoided costs alone, a *Cobell* settlement value in the range of $7 billion to $9 billion is justified. However, it is unlikely that the money will be spent in a single year. It will take years to fix the system. Consequently, the funding may be spread over years as well, so that the budgetary impact in any one fiscal year would be minimal.

Hopefully, the past several years have laid the foundation for settlement. The Administration's proposal is an important first step in resolving the disputes with Indian Country. They are to be congratulated in making such a constructive move. The $7 billion in its proposal, while perhaps on the low side of a settlement range, must be understood to be the value of the settlement of the *Cobell* litigation.

We note that the issues of tribal trust claims, highly fractionated interests in trust lands and lands mismanagement are not part of the *Cobell* case, although they are included in the Administration's March 1 proposal. These are issues – important issues - that need to be carefully reviewed as to the bases of liability if any, their need and significance, the extent of exposure and the costs of resolution. We have not had the benefit of such an analysis. No one has, including the Administration. They present constructive ideas that should be refined in the legislative process. Thank you again for the opportunity to testify today. I will be pleased to answer any questions the Committee may have.

Responses to Questions from Vice-Chairman Thomas
by John Bickerman

Question 1: Your written testimony indicates that both the plaintiffs and the Government have taken unreasonable positions in regard to the claims presented in the *Cobell* case.

- Do you think that they will ever be able to negotiate a compromise of their positions without some sort of intervention of Congress? If not, why?

Response:

No, the parties will never be able to negotiate a resolution. They are both wedded irrevocably to their positions such that neither side is able to credit the other side's arguments or properly assess the risk of their own positions. Without Congressional action, they will resort to the Courts for finality. Unfortunately, the Courts are ill equipped to provide a final resolution. Every decision will be just another battle in a war that will last for a long time. The plaintiffs are sufficiently well funded and creative enough that even a final order in the *Cobell* litigation now before Judge Robertson will not prevent them from filing new lawsuits seeking similar relief.

Moreover, without restructuring the IIM Trust, the underlying causes that precipitated the lawsuit will remain. New suits seeking relief for the same causes of action are inevitable. The United States will spend money administering a broken system that will inevitably generate new lawsuits that, in turn, will hamstring the resources of the Departments of Justice and Interior to defend. No benefit to IIM beneficiaries or Indian Country will come from further litigation. Instead, the resources that could be used to encourage economic development, pay for education and medical care, or other important initiatives will be diverted to defending the *Cobell* litigation and its progeny. It's hard to imagine a more wasteful use of resources.

- It seems that both parties claim to want a settlement of their claims through Congressional action - but they want it on their own, very different terms. If Congress gets involved, and comes up with its own solution, somewhere between the two parties, do you think either side would ever accept it?

Response:

Yes, bi-partisan Congressional action is the only way to resolve *Cobell*. It is a maxim of good resolutions that neither side gets everything it wants, but Congressional action might give them enough of what they need to accept settlement.

The Senate Committee on Indian Affairs has a long tradition of working in a bi-partisan manner to solve difficult problems confronting Indian Country. While *Cobell* may be among the most difficult challenges the Committee has ever faced, if truly bi-partisan legislation emerges with a settlement amount between of $7 billion to $9 billion, it will have an excellent chance of being accepted.

From the perspective of the plaintiffs, a Congressional resolution has the advantage of giving individual class members a meaningful, certain, and relatively immediate recovery (cast as a restatement of their IIM accounts). Certainty and recovery in the near term are very valuable. If there is no settlement of *Cobell*, litigation in some form will continue for decades. Many IIM beneficiaries will not outlive the litigation. Judge Renfrew and I are reasonably confident that a settlement between the parties' demand and offer would be accepted by the plaintiffs.

From the perspective of the Administration, the challenge of accepting a Congressional settlement is more complicated. The Administration does not want to pay for a settlement of *Cobell* unless it can be assured that there is total peace. To assure that no future accounting claims would be brought in the future, they have proposed trust reform that would effectively extinguish its role in acting as a trustee for IIM assets. The Administration has also established a settlement value for the *Cobell* plaintiffs that grossly understates the risk both of the instant litigation and of possible future claims. Its analysis ignores the reasonable, if potentially unprovable, losses that IIM beneficiaries experienced by the failure of the United States to collect payment due IIM beneficiaries. Moreover, the Administration does not properly calculate the avoided costs of continuing to account for IIM beneficiaries for decades if there is no resolution. The funds for IIM accounting now and in the future would be used far more productively in settlement. In addition, the trial courts' unwillingness to lift the injunction disconnecting parts of the Department of Interior from the internet is a real cost in the ability of the Department to do its business. If the trial court concludes in October that the government has erred in not including pre-1994 beneficiaries in their accounting efforts, the costs of compliance may be much higher than what the Administration anticipates.

If this Committee reports legislation on a bi-partisan basis that addresses the underlying causes of the *Cobell* litigation through trust reform, gives tribes incentives under Public Law 93-638 to assume responsibility for managing IIM trust assets, decreases the number of highly fractionated parcels held in trust, and extinguishes the *Cobell* litigation, the mediators are optimistic that the Administration would adopt a resolution. Because funds needed to implement a settlement could be spread out over many years, the annual budgetary impact would not be severe.

In sum, the short answer is that bi-partisan Congressional action would serve many positive goals. By proposing an end to the fight that neither party could publicly acknowledge on its own, the benefits of settlement would attract both parties to accept a deal. The benefits of a deal far outweigh its costs and are far superior to doing nothing.

Question 2: Your testimony suggests a settlement range of between $7 and $9 billion.

- Please describe in detail how you calculated that range.

Response:

The calculation of the estimates provided in my testimony is straightforward. Initially, a spreadsheet was constructed that included actual and estimated IIM payments from 1887 to 2005, an assumed error rate and an inflation rate. Because both parties agreed that approximately $13 billion in payments was made to IIM beneficiaries since inception of the Trust, it was assumed that $3 billion was paid out to beneficiaries prior to 1971. It was further assumed that of the $3 billion paid out prior to 1971, $500 million was paid to beneficiaries in the time period of 1887 to 1994. The $500 million was distributed equally for each of these years. Actual reported annual payments were included from 1971 to 2005.[1]

A ten percent error rate was assumed for the analysis. Support for a ten percent error rate was found in an extensive analysis done by the Fiscal Accountability of the Nation's Energy Resources Committee of January 1982, commonly referred to as the Linowes Commission. While it was impossible to state a known error rate because data were unavailable, the Linowes Commission reported ten percent as a conservative estimate. Since the Linowes Commission issued its report it is possible to argue that the error rate changed in either direction. It could have gone down because better management practices have improved collections. However, it could also have risen because fractionation of IIM interests has increased the number of beneficiaries and made accounting and collections more difficult. Absent newer and better data, the Linowes report is the best information we have and comports with the experience in other federal agencies.

For each year, the error rate was applied to reported or projected receipts to generate the amount of receipts that were uncollected. Trust receipts were adjusted to constant 2005 dollars. Simple interest was applied to the amount that went uncollected and aggregated to a total. Small adjustments between an interest rate of 4.4% and 4.9% produced totals of between $7 billion and $9 billion. Additional sensitivity analyses were conducted assuming that some of the uncollected amount was collected, but just late. The exercise led Judge Renfrew and me to conclude that small changes in the interest or error rates could result in large changes in the bottom line. We believe that $7 to $9 billion is as reasonable an estimate as any that could be calculated from the available data.

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[1] "Report to Congress on the Historical Accounting of Individual Indian Money Accounts". Trust receipts 2002-2005 were projected using DOI's reported receipts for 2001.

- Even though you and Judge Renfrew do not attempt to address Tribal claims in your testimony, do you think that it would be possible to settle both individual Indian claims and Tribal claims in one piece of legislation?

Response:

It would be very difficult to include Tribal claims with IIM claims in one bill. Very little is known about the tribal claims. The tribal claims, collectively, have never been a part of any discussions between the parties until late last year when the Committee sought consultation for proposed legislation. Moreover, there may be cost effective ways to manage tribal claims that do not require that they be extinguished as part of a *Cobell* settlement. There are far fewer claims than there are in *Cobell*. If the claims are brought individually, and not certified as a class, then adjudication of them should be much more straightforward and efficient. Because tribes have never been included in negotiations, the political opposition to include them now would make passage of legislation extraordinarily difficult. At a minimum, inclusion of tribal claims in the pending legislation would delay Committee action such that passage of legislation would be all but impossible in this session of Congress.

Respectfully submitted,

John Bickerman

TESTIMONY OF ELOUISE C. COBELL, LEAD PLAINTIFF IN *COBELL V. KEMPTHORNE*

INTRODUCTION

Good morning, Chairman Dorgan, Vice-Chairman Thomas and Members of the Committee. Thank you for inviting me here today to provide testimony to the Committee on this most critical of issues – bringing justice to 500,000 individual Indians by resolving fairly the Individual Indian Trust Fund lawsuit, *Cobell v. Kempthorne.*

Candidly, Mr. Chairman I come before you today frustrated by this process. We have waited 120 years to end the abuse and obtain redress from the United States for the malfeasant mismanagement of our property. We have come to this body year after year asking for relief from this continuing ill-treatment and the pervasive fraud that surrounds the mismanagement of the individual Indian Trust. We hear year after year pledges of support and promises by Administration after Administration that they will redress what the Congress of the United States itself has admitted is "fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension" in the handling of 10 million acres of resource-rich lands (and the proceeds thereof) belonging to individual Indians, but held in trust and managed by this most unscrupulous of trustees. Still today, everyday, we continue to endure the broken trust that robs our individual Indians of their birthright.

We have worked with this Committee for many years now to forge a fair settlement. I do not understand why more progress has not been made. I feel like every year we are asked to state our position, but our position has not changed. Indeed, my testimony to this Committee on March 9, 2005 is equally relevant to today's proceedings as it was then:

> **There is nothing that I want more than an immediate and fair resolution of the *Cobell* case**. It is a matter of record that the government has mismanaged this trust for over a century. In November 1989, this Committee explicitly found that fraud and corruption pervades the management and administration of this Trust.

> In the Fall of 1995, Mr. Chairman [Senator McCain], you yourself noted during the confirmation hearing of the first Special Trustee, that the management of this trust has been "criminal." Sadly, nothing has changed. *Cobell v. Norton* has shed further light on the gross mismanagement of this Trust and has raised this serious problem from the deepest and most secluded shadows of government bureaucracies to the light of day, where everyone can see the extraordinary injustice and abuse. A century of deplorable mismanagement is far, far too long.[1] A century with no accounting of trust assets is unconscionable and unprecedented. A century of harm to hundreds of thousands of this nations poorest citizens in inexcusable. And the harm done to the plaintiff class everyday is unquantifiable. This is often a matter of life and death. A resolution is long past due. I, along with other class representatives and our counsel who have aided us in pursuing our rights will work with whomever is capable of achieving a fair resolution.
>
> Moreover, I want to emphasize that this is not a new position. From inception, we have always sought an expeditious resolution of this case. We continue to do so. We have been and continue to be willing to participate in any resolution process conducted in good faith that is reasonably calculated to lead to resolution of this matter in an expeditious and fair manner – whether that be working with Congress for acceptable legislation, mediation, arbitration or continuing litigation. Simply put, plaintiffs have no interest in prolonging these proceedings.
>
> While we will remain steadfast in our commitment to seek a prompt resolution of this case, we have an unconditional ethical obligation to ensure that any settlement is fair. We and our counsel will, of course, vigorously resist "settlement" that allows pennies on the dollar to the beneficiary class or that fails to address in a meaningful way the on-going and profound mismanagement of their trust assets. It is my obligation as lead plaintiff and my lawyers duty as class counsel to work towards immediate settlement, while at the same time forcefully resisting any resolution that would further harm the beneficiary-class.

Oversight Hearing on Trust Reform Before the S. Comm. on Indian Affairs, 109th Cong. 2-3 (March 9, 2005) (statement of Elouise P. Cobell) (emphasis original).

Nothing I say today will depart from my words offered to this Committee two years ago. But what I will add is that now we have further incontrovertible evidence that the Administration is not serious about settling this matter. What we now know with unmistakable clarity is that –

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[1]*See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.").

unlike you and the rest of Indian Country – the Administration prefers combative litigation where they can indefinitely obfuscate, delay and obstruct. While we would prefer to resolve this matter, we are prepared to give the Administration what they ask for and continue to move forward vigorously in the Courts. With a newly assigned judge, the Honorable James Robertson, we have asked for an accounting trial date. We believe that the directive of the appellate court to move this case to resolution "expeditiously and fairly" will be heeded and a final trial scheduled soon.[2] But make no mistake – it is the Administration's continuing refusal to discuss a *fair* resolution that makes vigorous and full-blown litigation inevitable.

I am here today, once again, on behalf of myself and one-half million citizens represented in the *Cobell* lawsuit that we filed nearly eleven years ago in the Federal District Court of the District of Columbia. In that lawsuit, we have prevailed time and again on the merits. Precedent-setting decisions have established, among other things, three fundamentally important conclusions: (1) that the United States has substantial trust obligations including an unqualified duty to provide a complete and meaningful accounting of all trust assets belonging to *Cobell* class members; (2) that the United States is in woeful breach of its fiduciary duties and others duties and has "unconscionab[ly]" delayed providing the requisite accounting; and (3) the Federal Courts have the power to provide appropriate redress to the beneficiary-class and take whatever affirmative steps are necessary to ensure the United States is brought into compliance with its legal duties and fiduciary responsibilities. In other words, that the plaintiffs will ultimately prevail is not in question.

The only question is when. The only weapon the government has is to delay the proceedings indefinitely, by abusing its authority. Unfortunately, the Courts have shown

[2] *Cobell v. Kempthorne*, 455 F.3d 317, 336 (D.C. Cir. 2006).

reluctance to force them to act within reasonable timeframes and the Administration abuses this leniency. They cannot win, only impede for a time. But everyday they are successful in doing so, is another day that human beings who comprise the beneficiary class suffer. That is why I support a fair resolution through any possible avenue available.

But, candidly, I am disappointed not only in the Administration, but at this body for failing to take the necessary steps to end the trust fund mismanagement debacle. We want action, not mere words. The time for promises and commitments has come and gone. Doing the right thing will require real political courage. We have prevailed in Court and established a record that serves as a sufficient basis for a fair settlement and justifies the redress we seek. The malfeasance and resultant suffering must be ended. Promises to individual Indians about how committed politicians are to attaining redress for this well-documented injustice and righting this wrong is not enough. Mr. Chairman, the time for action and leadership is now.

My testimony will address three issues. First, I will discuss the absurd "offer" for settlement proposed by Secretary Kempthorne and Attorney General Gonzales. Second, I discuss what it will take to move this congressional effort forward. Third, I will inform this Committee about the tragic impact of further delays.

ADDING INSULT TO INJURY

On March 1, Interior Secretary Dirk Kempthorne and Attorney General Alberto Gonzales sent a letter to this Committee proposing that Congress spend $7 billion over 10 years on various Indian programs. This "offer" is an insult, plain and simple. It is not a starting point and it is not worthy of consideration.

While $7 billion is certainly not a small amount of money generally-speaking, it does not come close to being sufficient given the extent of mismanagement and the potential liability counted in the hundreds of billions involved here.

First of all, $7 billion is insufficient to settle the *Cobell* case standing alone. Consider that the Interior Department's own experts, SRA International, have estimated that the government's liability in the *Cobell* case (excluding all other claims) to be at least $10 billion, and that it could exceed $40 billion. We believe that low-balls the true value of the redress we are entitled to, but what it demonstrates conclusively is that when Interior's own consultants review the facts, they agree that $7 billion is insufficient. Moreover, since Interior envisions to pay out this money over 10 years, the time value of money dictates that this is actually not $7 billion, but rather, far less.

But, of course, the proposal is not to settle *Cobell* for $7 billion. Interior would expect to use that same pool to address "all existing and potential individual and tribal claims for trust accounting, cash and land mismanagement, and other related claims, along with the resolution of other related matters . . . that permit recurrence of . . . litigation." The scope of this rights extinguishment is breathtaking.

For a mere $7 billion, they would extinguish *Cobell* and all mismanagement or breach of trust claims whatsoever that an individual Indian could possibly bring against the United States. There has never been any valuation of the non-*Cobell* claims, but reports by the Special Master in *Cobell* indicate that such other claims would in and of themselves be worth tens of billions of dollars.

The proposal would also use part of the $7 billion to address fractionation. By any estimation, to properly address fractionation would cost hundreds of millions, if not billions. It is

a problem of the government's own creation by forcing this broken trust on Indian people so non-Indians could exploit our lands without our consent. Indeed, this issue is not even part of the *Cobell* litigation. Yet, the Administration includes this issue as a part of the "*Cobell*" settlement package. The Indians did not create fractionation problems, the government did. Now, they want us to pay for the resulting mess that they created.

In addition, by its terms, the Administration's proposal would utilize part of this same $7 billion pool to settle all tribal trust claims as well. Ironically, exactly two years ago to the date of the Kempthorne-Gonzales letter of March 1, 2007, Attorney General Gonzales testified before the House Committee on Appropriations regarding the 2006 Budget for the Department of Justice. In discussing the litigation portion of the budget and the impact of tribal trust claims, Attorney General Gonzales pronounced that the "United States' potential exposure in these cases is more than $200 Billion." Yet, somehow he now thinks Indian Country should accept pennies for it.

One additional point about including tribal trust claims in a *Cobell* settlement must be highlighted. Even if the pool was not ridiculously low relative to liability as here, having one pool for Indian Country – tribes vs. individuals to fight over is not a recipe for success. And, unfortunately, given how this Administration plays politics with peoples lives, I suspect it is set up this way purposefully to have individual Indians and tribes battle one another. Simply put, it is yet another government divide-and-conquer technique that, unfortunately, Indian Country is all too familiar with.

Of course, the absurdity of the proposal does not end there. With this same finite $7 billion pool, the government proposes to pay for trust reform and fixing their broken IT security infrastructure – and whatever else government officials might think up in the meantime.

And if that were not enough, the government proposes to end all future liability. That means irrespective of how blatant and how significant future breaches are, the government cannot be held accountable in court for their misdeeds and dereliction. This is in no uncertain terms license to steal provided to an entity – the Interior Department – which is an unscrupulous trustee-delegate with a astonishing record of unconscionable malfeasance.

What this trust needs is more accountability, not less. But the government's proposal would eliminate accountability altogether. Without accountability, as long recognized by courts of equity, there is no trust.[3]

There is still more bad news in this proposal. The "offer" letter, in its plain terms, seeks to terminate the individual Indian Trust. If there are no fiduciary responsibilities, there is no trust. The euphemism used by Secretary Kempthorne and the Attorney General – owner managed trust – is Orwellian indeed. This proposal is not about empowering individual Indians. This is about making the trust, which Interior has broken through its unfitness as trustee and unscrupulousness, become our problem to resolve. If Interior wants to get out of the Indian Trust business, then the appropriate solution is receivership, where the beneficiaries' property can be protected.

In short, this is no offer. Instead, it is a slap in the face of every individual Indian trust beneficiary. Truth be told, however, it is also not a surprise. The nature of the proposals in the Kempthorne-Gonzales letter are perfectly consistent with the abusive attitude long shared by the Departments of Interior and Justice in dealing with Indian people. The *Cobell* case was filed because this proposal is precisely how the government has managed this Trust – without

[3]*Bogert, The Law of Trusts & Trustees (rev 2d ed),* § 973, pp 462-464, 467 ("A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself."). *See also, e.g., Wood v. Honeyman*, 178 Or. 484, 566, 169 P.2d 131, 166 (1946) ("We are completely satisfied that no trust instrument can relieve a trustee from his duty to account in a court of

accountability for the rampant fraud, corruption and theft that has defined Interior's reign as trustee. *Cobell* has been and continues to be about infusing accountability after more than a century of documented fraud, incompetence and mismanagement.

APPROPRIATE NEXT STEPS FOR CONGRESS

We have said for a very long time, in sworn testimony to this body and others that the Administration will *never* come to the table with a fair offer. Never. If this Committee won't act without the tacit or express support of the Administration, then you might as well not waste your time or ours. The Kempthorne-Gonzales Letter of March 1 is simply yet another demonstration of this well established reality.

In dealing with their trust mismanagement, the Interior Department has a long history of foot-dragging topped off with, as here, a watered-down do-nothing proposal. Indeed, as the Vice Chairman will recall, he too has called for immediate congressional action in the face of Interior's continuing recalcitrance and inertia in properly addressing Indian trust matters. On September 26, 1994, then-Congressman Thomas explained to the House Subcommittee on Environment, Energy, and Natural Resources the need to act on this issue of trust reform without further delay:

> We have had two hearings on trust management--or, more properly, mismanagement--in the Native American Affairs Subcommittee this Congress .... Since the Government Operations Committee released its report, "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," I have seen precious little change in this sad state of affairs. Instead, I have seen promised deadlines come and go; I have seen promises to reform go unfulfilled. Despite statements made in the early days of the Clinton administration, two years later neither the [Interior] Department nor the BIA has brought us one step closer to resolving the trust fund problem. All we have seen is a continuation of the BIA's one unchallenged specialty: *inertia.*

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equity.").

> We have seen the pattern repeated over and over. The Department and BIA promise to act, fail to, we are forced to introduce legislation to deal with the issue, and then when passage of the legislation seems imminent they come to us and ask for more time, quote, "because we're working on the problem, really we are," unquote, or they offer their own, watered-down, legislative proposal in the hope of heading ours off....
>
> I am sure that this morning we will hear more of the same excuses and promises, more requests to just give it a little more time, from the Department that we have been hearing for the last six years. But, Mr. Chairman, shame on us, shame on this Congress, if we delay any further.
>
> The Department told us in August, and I am sure will repeat this morning, that they have everything under control. Well, Mr. Chairman, my response to that is an explicative which decorum prevents me from using here but which I will paraphrase: cow manure! .... Mr. Chairman, the Department needs to pull itself out of denial, pull itself out of its fantasy world, and come to grips with [reality]. It is clear that they are incapable of doing it themselves. I sincerely hope that we can do it for them, and will do everything I can to move a bill before Congress adjourns.

140 CONG. REC. 27, 243 (1994).

The unfortunate history is that even after these powerful words, Congress was only able to enact a watered-down version of the 1994 Act that undermined key accountability features of the initial bill. More to the point, this Congress is faced by a similar intractable Administration – refusing to come to the table in good faith to resolve fairly the disaster they and their predecessors created.

There is a way to proceed. You can prepare a bill that puts forward a reasonable settlement of the *Cobell* case. This proposal should not seek to address every issue under the sun – *e.g.*, tribal trust matters, trust reform, IT security, fractionation, and individual claims outside of *Cobell*. Instead, it should address the matter that has brought us to this point, the *Cobell* historical accounting and restatement claims and the underlying malfeasance that *Cobell* seeks to redress. That is simple and doable. Loading a bill up with these other areas will make it impossible to get agreement with all stakeholders, which is precisely why last year the

Administration attached all these provisions to the McCain-Dorgan Bill (S. 1439) in a blatant attempt to kill it. Now, the Kempthorne-Gonzales letter operates in the same fashion.

It is also critical that you not allow yourself to be held hostage by the recalcitrance of this Administration. You must move forward with or without its support. Come forward with what you and the entities who have worked in good faith agree is a fair resolution. Push that forward. If the Administration wants to continue to stand in the way of an equitable resolution to a justice so long denied, then at least force them to do it in the open and on the record.

I understand that it requires courage to take such bold action. But if not on this matter, then on which one? If not now after the Administration has yet again demonstrated their unwillingness to take this process seriously, then when?

THE COST OF DOING NOTHING

So often in Congress, with respect to this trust mismanagement issue, people talk about the cost of moving forward with a fair resolution. They don't dispute that billions of dollars are owed, but they point out that billions is a lot of money. Last year, this Committee proposed an $8 Billion *Cobell* settlement. Some in Congress thought it was too much; not that they didn't believe we were aggrieved that and more, but that in these days of cost cutting and the Iraq War, it was simply more than the Nation could afford. However, some people seem to forget that what we are seeking the return of *our* own money.

Mr. Chairman, what is curious is how few ask and discuss the costs of failing to resolve the *Cobell* case. There has already been hundreds of millions of dollars wasted on a so-called "accounting," which, because of missing trust records, will never be sufficient to discharge the United States' fiduciary responsibilities. And more than a billion has been wasted on Ross

Swimmer's version of "trust reform" – and still the system is fundamentally broken. There have been many employees of the Department of Interior under attack in retaliation for coming forward to tell the truth with respect to Interior's failed trust reform effort. Additionally, Interior has retaliated against personnel who tell the truth with respect to the insecure information technology systems that put the trust data of individual Indian beneficiaries at grave risk of destruction, manipulation and illicit modification. All of these are costs – extraordinary costs – that will continue to mount every day the case is not fairly and expeditiously resolved.

But these are, by far, not the most important costs resulting from the enduring failure to settle the *Cobell* case fairly and bring justice after a century of abuse. All of these costs pale in comparison to the suffering of individual Indian trust beneficiaries all across this nation. As the Court of Appeals recognized, the consequence of government malfeasance is harm to interests that "are not merely economic interests ... but [involve] personal interests in life and health."[4] Since this broken trust robs some of the poorest Americans of the little they have, the human costs outweigh all others.

Here, in Washington D.C., it is a bit easier to overlook the real life consequences of Interior's breaches of trust. But the reality is that every day Indians are dying because they cannot afford adequate medical care and Indian children go hungry because parents lack money to put basic staples on the table. This is not an overstatement and it is not an exaggeration. If you do not take anything else with you today, understand this: Indian beneficiaries are dying and men, women and children are suffering because of the government's abuse and malfeasance.

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[4] *Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) (internal quotations and citations omitted).

I know the people that suffer this way. They are at every Indian reservation I have visited throughout this country – from Wind River to Fort Berthold to my reservation – the land of the Blackfeet Nation.

Accompanying me here today is one such individual Indian trust beneficiary. He is a close personal friend, a Blackfeet Indian from my reservation, James Kennerly, Jr. James is the son of James Otis Kennerly – or as the Interior Department referred to him, "allottee 1997." James Otis Kennerly was a World War I veteran wounded and disabled in combat fighting for this Nation. He was allotted trust land in 1907 and it included considerable oil and gas resources in the Cut Bank, a resource rich area of the Blackfeet reservation. Today, his son owns this land with his siblings.

As early as 1930, and most likely much earlier, oil companies pumped thousands of barrels a week off Kennerly's land; this is documented in records by the Interior Department's own experts. Documents establish that payments were made to Interior in connection with the leasing of Kennerly's allotment. *Some* of the money even went to Kennerly over sixty years ago. However, according to Interior's own historians, after 1946 there are no documents regarding the lease of his land – no statements, no deposits, and no files. And, there was no money deposited into his account. So what happened?

There is no doubt that the oil wells continue to pump on the land of James Otis Kennerly; you can see it for yourself. His son, James Jr., will take you out there tomorrow if you're interested. Yet after the 1930s, James Sr. did not receive any payments. That continues to be the situation today with James Jr. And, every call or visit to Interior (he recounts hundreds of visits) ends the same way – "we can't give you an explanation." Interior's historians now speculate that his lease was unlawfully unitized with other lands of the Blackfeet Tribe and that the tribe now

receives the income. However, despite hundreds of hours looking for his documents, they don't really know. This is all in a report these historians submitted to the Court in *Cobell.*

And what have been the consequences to the Kennerlys of this theft? For James Sr., a disabled vet, unable to work, it meant that he lived in abject poverty the remainder of his life, as he was not provided his VA benefits either. This poverty contributed to declining health and he passed away in the 1940s. Of course, with no money, he could not afford to take care of his kids during his lifetime, so his son, James Jr. - here with us today - was raised in an orphanage. After that he was sent to government boarding schools, with all the incumbent problems of that system with which those of us from Indian Country are all too familiar.

Now James Kennerly, Jr. and his siblings share their father's land, but they do not receive any money from the oil that still pumps from that land. James Jr. has had more than his fair share of hardship. I can personally attest based on our decades-long friendship that he has led an impoverished existence. The government's theft of his trust funds did not on its own bankrupt James Kennerly, Jr., but it certainly significantly contributed and eliminated any options for improving his situation. It robbed him of his health, an education and opportunity and the abuse continues today. He should be a millionaire, but like his father lives in great poverty. In many ways, the broken trust has robbed him of his life. And the pain it causes continues every day.

This is not an isolated tragedy – James Kennerly, Jr. is not alone. Indeed, there are hundreds of James Kennerlys on every Indian reservation. They too have been robbed of health, education and opportunity and the abuse continues today. They too, like Mr. Kennerly, pay the price for government unfitness as a trustee and the failure to resolve this matter.

Understand Senators that this is a life or death issue. It is for these Americans that we must try and forge a resolution. Let us end the malfeasance and the suffering. The time to act is now for all the James Kennerlys across Indian Country.

What is more tragic still is that if the Department of the Interior had its way, none of this would ever be brought to life through the multi-million dollar, so-called "accounting" they say they are performing. In actuality, they are now engaged in a fraud of historic proportions. Under their scheme, no accounting and no restatement of James Kennerly Jr.'s trust account will ever occur. Since no transactions are reflected on his account statement (if they are even able to locate all his account statements), there is no way to sample the missing revenue. This should be contrasted to the nature of the accounting ordered by the U.S. Court of Appeals which requires an accounting of "all funds." Nevertheless, at the conclusion of the accounting process, some Interior official will wave a magic wand at Kennerly and pronounce his statement "accurate," without ever examining the massive theft that continues to occur today.

It is a devious scheme that Interior has set in motion. It should be clear to all that the accounting determinations made by the Secretary have powerful and detrimental consequences to this class of individual beneficiaries.

We, of course, will work to ensure that Interior's truly diabolical scheme fails. And that is why vigorous litigation will continue unless an alternative fair resolution can be reached.

CONCLUSION

I committed long ago to work with this Committee to bring resolution – to bring justice. That is an outcome I intend to obtain by any means necessary. I ask you today to be a partner, not by saying what needs to happen, but by making it happen.

Thank you.

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

John E. Echohawk
Executive Director, Native American Rights Fund
March 29, 2007

Good morning Mr. Chairman and members of the Committee. Thank you for the opportunity to offer testimony at this oversight hearing on Indian trust litigation. I am pleased to assist the Committee in understanding this litigation and in exploring the role of Congress in resolving the litigation.

The Native American Rights Fund (NARF) serves as legal counsel to the plaintiffs in the *Cobell* litigation, which involves the trust claims of individual Indians. NARF also serves as legal counsel to Indian tribes in three separate cases: 1) *Chippewa Cree Tribe of the Rocky Boy's Reservation, Little Shell Band of Chippewa Indians, Turtle Mountain Band of Chippewa Indians, and White Earth Band of Minnesota Chippewa Indians v. United States*, No. 92-675L in the U.S. Court of Federal Claims (filed Sept. 30, 1992); 2) *Chippewa Cree Tribe v. Kempthorne*, No. 02-00276-JR in the U.S. District Court for the District of Columbia (filed Feb. 11, 2002); and, 3) *Nez Perce Tribe, et al. v. Kempthorne, et al.*, No. 06-02239 in the U.S. District Court for the District of Columbia (filed Dec. 28, 2006). *Nez Perce Tribe, et al. v. Kempthorne, et al.*, was filed by eleven named tribal plaintiffs as a class action on behalf of about 220 tribes that have not filed their own trust accounting lawsuits. I am here today only on behalf of NARF's trust claim client tribes; not the *Cobell* plaintiffs.

My testimony today makes three points: 1) there are now over 100 trust claim lawsuits against the United States in federal courts on behalf of over 285 federally-recognized tribes. The Committee needs to understand these tribal trust claims and the

potential accountability and liability of the United States; 2) at least with respect to a legislative settlement of the trust claims of Indian tribes, the Administration's letter proposal to this Committee of March 1, 2007 is unacceptable; and, 3) at least some tribes are willing to explore legislative efforts to settle their trust claims that respect the rights, claims, and options of each tribe. I now will discuss these three points in more detail.

1. <u>There now are pending against the government 108 tribal trust claim lawsuits</u>

"Tribal trust accounts" and "tribal trust funds" generally include: 1) monetary payments required by treaty or in satisfaction of judgments against the United States, such as Indian Claims Commission awards; and, 2) income or proceeds earned by tribes from land and natural resources that the government holds in trust and manages for tribes. Tribal trust accounts and trust funds also include income earned on interest earnings and investments by the government of the funds themselves. The point here is that tribal trust accounts and trust funds are not taxpayer dollars and they are not appropriated federal program funds. They are the tribes' own money secured through treaties, court cases, statutes, and other federal law. The government's misaccounting and mismanagement of tribal trust accounts and funds strikes at the very core of the federal trust responsibility to Indian tribes.

The United States unilaterally assumed fiduciary trusteeship of tribal trust accounts and funds in 1820. Since then Congress has delegated responsibility for the fiduciary trusteeship of tribal trust accounts and funds primarily to the Departments of the Interior and the Treasury. Last month the Government Accountability Office testified

before the House Natural Resources Committee that the United States presently holds about $2.9 billion in about 1,450 trust accounts for over 250 tribes. *See* U.S. Government Accountability Office, Testimony before the Committee on Natural Resources, House of Representatives, Department of the Interior Major Management Challenges 10, GAO-07-502T (Feb. 2007).

With respect to tribal trust accounts and funds, the United States is like a bank with a trust department. In fact historically under federal law tribes have had no choice but to bank with the United States. Tribes' economic well-being hinges upon proper fiduciary care of their monies by the government, just as private investors, states, and local governments depend on banks, savings and loan companies, and investment houses to ensure that their assets are properly accounted for and managed. Imagine the widespread outcry if banks, savings and loan companies, and investment houses that were chosen by investors were to fail to meet their fiduciary obligations. Undoubtedly such harm would be corrected.

There are pending in federal courts against the government 108 tribal trust accounting and trust mismanagement lawsuits. Sixty-one (61) of these cases are in the U.S. Court of Federal Claims seeking money damages. Thirty-seven (37) cases are in the U.S. District Court for the District of Columbia seeking accountings and other forms of equitable relief. Another ten (10) cases seeking accountings and other forms of equitable relief are in other federal district courts. NARF has been tracking these cases. Attachment A to my testimony today shows these 108 cases. The U.S. Department of Justice also has been tracking these cases and has filed in court similar lists of "Current Tribal Trust Accounting and Trust Mismanagement Cases" as Exhibits to its Motions in

the cases. Attachment B to my testimony today is one of the Justice Department's lists. The Justice Department's count is five lower than ours apparently due to some case consolidations and categorization differences.

Many tribes have been affected by the alleged federal misaccounting for and mismanagement of their trust accounts and funds. Trust claim cases have been filed on behalf of over 285 federally-recognized tribes. Sixty-nine (69) tribes have filed their own cases. Of the 69 tribes that filed their own cases, twelve (12) filed cases only in federal district courts. Twenty-two (22) tribes filed cases only in the Court of Federal Claims. Thirty-five (35) tribes filed cases in both federal district court and the Court of Federal Claims. NARF filed a case in the U.S. District Court for the District of Columbia for full and complete trust fund accountings on behalf of eleven named plaintiff tribes, *Nez Perce Tribe, et al. v. Kempthorne, et al.,* which seeks class action status on behalf of all other tribes that did not file their own cases for full and complete accountings and that do not wish to exclude themselves from the class for their own reasons.

Over seventy (70) of these 108 tribal trust claim cases are relatively new. They were filed late last year. As you know, Congress has codified the inherent obligation of the United States as the trustee for tribal trust accounts and funds to provide "full and complete accountings" to tribal beneficiaries. *See Cobell v. Norton,* 240 F.3d 1081, 1102 (D.C.Cir. 2001). For the past twenty years Congress has told the government to provide full and complete trust accountings to tribes. *See, e.g.,* Pub. L. No. 100-202, 101 Stat. 1329 (1987); *see also* 25 U.S.C. Sec. 4044. NARF is extremely concerned that to date no tribe has received a full and complete accounting of its trust accounts and funds.

Back in the 1990s, unable to comply with these congressional mandates on its own, the Bureau of Indian Affairs (BIA) within the U.S. Department of the Interior contracted with the accounting firm of Arthur Andersen to examine transactions in tribal trust accounts for the limited time period of July 1972 through September 1992. In 1996 the BIA provided tribal account holders with Arthur Andersen "Agreed-Upon Procedures Engagement Reports" of their trust accounts for this limited time period.

Even though everyone – including Arthur Andersen itself, the BIA, the Office of the Special Trustee, and the Government Accountability Office – has admitted that the Arthur Andersen reports are not full and complete accountings, the government has tried to get tribes to agree that the Arthur Andersen reports are full and complete accountings.

More importantly, the general statute of limitations for claims against the government provides that civil actions against the government shall be barred unless filed within six years after the right of action first accrues. 28 U.S.C. Sec. 2401. In 2002, six years after the Arthur Andersen reports were sent to tribes, Congress enacted legislation to "Encourage the Negotiated Settlement of Tribal Claims, Public Law No. 107-153." This legislation provided, among other things, that, "Notwithstanding any other provision of law, for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statue of limitations, any such report provided to or received by an Indian tribe in response to section 304 of the American Indian Trust Fund Management Report Act of 1994 (25 U.S.C. 4044) shall be deemed to have been received by the Indian tribe on December 31, 1999." In 2005,

this legislation was amended to provide that the reports shall be deemed to have been received on December 31, 2000. Pub. L. No. 109-158.

But in the last congressional session, there was no further extension of the date in this legislation. By late last year, many tribes were concerned that their right to claim that the Arthur Andersen reports are not "full and complete accountings" sufficient to commence the running of any applicable statutory limitations period on their trust claims would be lost forever after December 31, 2006. Tribes feared that this would jeopardize their right to have the government ever provide full and complete accountings of their trust accounts and funds. The result of this predicament was a 200% increase in the number of trust claims filed by tribes against the government. As stated earlier, now there are 108 tribal trust claim lawsuits. This is a financial crisis in Indian country and for the United States.

This financial crisis is not new. The legislation to Encourage the Negotiated Settlement of Tribal Claims merely informed the timing of the many recently-filed tribal trust claims lawsuits. Tribes have been filing such lawsuits for years. With good reason. Scores of reports – some dating back to the early 1900s -- of the Government Accountability Office, the Interior Department's Office of the Inspector General, and the Office of Management and Budget, as well as reports of this Committee and other Committees of Congress have well-documented the tremendous problems of the government's misaccounting for and mismanagement of tribal trust accounts and funds. What is new is the phenomenal number of lawsuits. Not since the Indian Claims Commission have so many tribes filed lawsuits against the federal government about the same problem; in this instance fiduciary misaccounting and mismanagement.

The pending tribal trust claims in federal district courts seek various forms of equitable relief. They seek: 1) declarations that the government has fiduciary obligations to tribal beneficiaries; 2) declarations that the government is in breach of its fiduciary obligations; 3) full and complete accountings of tribal trust accounts and funds; 4) restatement of or restitution to trust account and trust fund balances as if there had been no breaches of trust; and, 5) declarations of future lawful and proper fiduciary accounting for and management of tribal trust accounts and funds.

The tribal trust claims pending in the Court of Federal Claims seek determinations of liability for misaccounting and mismanagement of tribal trust accounts and funds and determinations of money damages for the misaccounting and mismanagement. Exactly two years ago this month (March 2005), when he testified before the House Subcommittee on Justice Department Appropriations, Attorney General Gonzales at that time estimated that the government's liability for these tribal trust claims could be over $200 billion. *See* Statement of Alberto R. Gonzales, Attorney General of the United States before the U.S. House of Representatives, Committee on Appropriations, Subcommittee on Science, the Departments of State, Justice and Commerce, and Related Agencies (Mar. 1, 2005).

Over the years tribes have turned to the courts for resolution of their trust claims because the government historically and consistently has failed to perform its fiduciary trustee duties; ignored the mandates of Congress in laws like the American Indian Trust Management Reform Act of 1994; and, simply is unable or unwilling to resolve what is perhaps this nation's biggest financial crisis ever. As I will discuss next, this is still par for the course for this Administration.

2. <u>The Administration's proposal of March 1, 2007 is unacceptable</u>

NARF has reviewed carefully the Administration's proposal to settle Indian trust litigation as set forth in the letter from Secretary Kempthorne and Attorney General Gonzales to this Committee dated March 1, 2007. The March 1, 2007 proposal of the Administration is very sketchy. In many respects it is similar to a proposal that the Administration proposed to Congress five months ago (October 2006) in response to what was then Senate Bill 1439. There is, however, at least one glaring difference. The Administration's October 2006 proposal would have provided for resolution of all Indian trust litigation and other trust reform matters such as Indian land fractionation, presumably at a cost set by Congress of $8 billion. The March 1, 2007 proposal proposes to resolve all Indian trust litigation and other trust reform matters for an "investment" of $7 billion or less. In short, the new proposal offers to do at least much but for at least a full billion dollars less than the old proposal. Once again, we see the Administration taking a step backward.

In comparison to the Administration's parsimonious offer of up to $7 billion to address all of its own past, present, and future Indian trust misaccounting and mismanagement, in very recent times the government expended $125 billion to bail out the savings and loan institutions industry from a scandal in which the government had no fiduciary trust obligations. *See* Timothy Curry and Lynn Shibut, The Cost of the Savings and Loan Crisis: Truth and Consequences, FDIC Banking Review (Dec. 2000). The government's honor to vindicate its own neglect and mishandling of Indian trust accounts and funds that it chose to manage surely rises at least to the same level as extrication from a disgrace not of its own making.

Of course the Administration's March 1, 2007 proposal also is unacceptable for the same reasons that the October 2006 proposal was unacceptable. These reasons include: 1) the proposal was developed without consultation with tribal governments; 2) the proposal seeks to resolve arbitrarily trust claims which *never have been adequately analyzed or valued* due to the government's failure to provide full and complete accountings; 3) the proposal would set unprincipled and impractical limits on federal liability for any and all tribal claims of past and present federal neglect and mismanagement of tribal trust accounts and resources, and it would preclude any future liability for such claims; and, 4) the proposal would negate thirty-five years of federal law and policy promoting Indian self-determination and adhering to federal-tribal government-to-government relations by forcing on tribes involuntary termination of the federal trust responsibility.

Another reason that the Administration's proposal is fundamentally flawed stems from its comprehensive "packaging." For several reasons, efforts to settle the *Cobell* lawsuit, which involves the trust claims of individual Indians, and efforts to settle the trust claims of tribes, should be kept separate. Congress already treats the trust accounts and resources of individual Indians and tribes separately in its many Indian trust statutes. The *Cobell* lawsuit has its own history – over a decade long now. Before and after the *Cobell* lawsuit was filed, tribes have pursued their own trust claims, and they must be allowed to continue to do so. Combining resolution of the *Cobell* claims and tribal trust claims into a single legislative settlement is unrealistic and unwise.

Moreover, the Administration's March 1, 2007 proposal remarkably makes no reference to the over 70 new tribal trust claims filed in court since the October 2006

proposal. This 200% increase in the number of lawsuits and the potential accountability and liability of the federal government should give the Administration every reason to begin good faith negotiations directly with the tribal plaintiffs to develop trust claim settlement proposals which tribes can support. The Administration's March 1, 2007 proposal simply does not reflect a good faith effort. It blithely ignores the horrendous financial crisis that has prompted a whole-scale legal war being waged by tribes throughout the country to make the government accountable for its basic fiduciary obligations – obligations which have been rectified honorably when breached on the same level by financial institutions responsible for holding and managing the accounts and funds of non-Indians, states, and local governments on deposit and entrusted with their care and safe-keeping.

On behalf of its tribal trust claim clients, NARF hopes that, regardless of what the Administration does on this matter, the Senate Committee on Indian Affairs will play a responsible leadership role in acting on behalf of the United States to foster and support government-to-government and good faith settlement of tribal trust claims. I now will talk about how that can be accomplished.

3. Exploration of Legislative Settlement Efforts that Tribes can Support

NARF believes that NARF and many tribes and their attorneys have a wealth of experience in and expertise regarding tribal trust claims that could be valuable to the Committee. NARF strongly encourages a dialogue between the Committee and interested tribal trust claim attorneys to explore the viability of legislative measures that are constructive in facilitating resolution of these complex claims.

Just as the Administration attaches a list of "Key Facets of Acceptable Indian Trust Reform and Settlement Legislation" to its March 1, 2007 proposal, NARF believes that there may be consensus among tribal attorneys regarding at least a preliminary list of their "Key Facets of Acceptable Tribal Trust Claims Legislative Settlement." At this time this list includes the following:

- Tribes are committed to further educating the Committee about their trust claims, which are legitimate legal claims notwithstanding attempts to label them as "unreasonable;"
- Any legislative settlement effort must respect the claims, rights, and options of each tribe, including the prerogative of tribes to pursue their own claims in court, in alternative dispute resolution forums, in administrative settings, through negotiated settlements, or through other forms of claim resolution;
- As long as legislative settlement provisions are voluntary for each and every tribe, at least some tribes and their attorneys are willing to work together to help the Committee determine what, if anything, can be done legislatively to resolve tribal trust claims.

NARF strongly urges the Committee to consider the above tribal Key Facets as a foundation for approaching and resolving the national tribal trust accounts and funds crisis. NARF stands ready and willing to work with the Committee and other interested tribal attorneys to develop an informal process for exploring a role for Congress in resolving the tribal trust claims crisis.

Thank you for this opportunity to submit testimony. I am available to answer questions at this time.

TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Oversight Hearing on Indian Trust Litigation

John E. Echohawk
Executive Director
Native American Rights Fund

March 29, 2007

ATTACHMENT A

ATTACHMENT A : John E. Echohawk's Testimony for Senate Committee on Indian Affairs

#	Tribe	Court	Case No.
	PENDING CASES IN U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA		
1	Ak-Chin Indian Community	D.D.C	06-2245
2	Assiniboine & Sioux (Fort Peck)	D.D.C	02-35
3	Cheyenne River Sioux	D.D.C.	06-1897
4	Chippewa Cree of Rocky Boy's	D.D.C.	02-276
5	Coeur d'Alene	D.D.C.	06-2242
6	Colorado River Indian Tribes	D.D.C.	06-2212
7	Confederated Tribes of Colville	D.D.C.	05-2471
8	Confederated Tribes of Goshute	D.D.C.	06-1902
9	Crow Creek Sioux	D.D.C.	04-900
10	Eastern Shawnee of Oklahoma	D.D.C.	06-2162
11	Gila River Indian Community	D.D.C.	06-2249
12	Iowa (KS and NE)	D.D.C.	06-1899
13	Lower Brule Sioux	D.D.C.	05-2495
14	Muscogee (Creek) Nation	D.D.C.	06-2161
15	Nez Perce et al.	D.D.C	06-2239
16	Northern Cheyenne	D.D.C	06-2250
17	Northwestern Band of Shoshone	D.D.C.	06-2163
18	Oglala Sioux	D.D.C.	04-1126
19	Omaha of NE	D.D.C.	04-901
20	Onondaga, & Haudenosaunee (Six Nations)	D.D.C	06-2254
21	Osage	D.D.C.	04-283
22	Passamaquoddy	D.D.C.	06-2240
23	Pechanga Band of Luiseno Mission Indians	D.D.C.	06-2206
24	Prairie Band of Potawatomi	D.D.C.	05-2496
25	Red Cliff Band of Lake Superior Chippewa	D.D.C.	06-2164
26	Rosebud Sioux	D.D.C.	05-2492
27	Salt River Pima-Maricopa Indian Community	D.D.C.	06-2241
28	Shoshone-Bannock of Ft. Hall	D.D.C.	02-254
29	Sokaogon Chippewa	D.D.C	06-2247
30	Standing Rock Sioux	D.D.C.	02-40
31	Stillaguamish	D.D.C.	06-1898
32	Te-Moak Tribe of Western Shoshone	D.D.C.	05-2500
33	Three Affiliated Tribes of Fort Berthold	D.D.C.	02-253
34	Tohono O'odham	D.D.C.	06-2236
35	Winnebago of NE	D.D.C.	05-2493
36	Wyandot of KS	D.D.C.	05-2491
37	Yankton Sioux	D.D.C.	03-1603
	PENDING CASES IN U.S. COURT OF FEDERAL CLAIMS		
38	Ak-Chin Indian Community	C.F.C.	06-932
39	Arapahoe of Wind River	C.F.C.	79-459 (cons. w/ 79-458)
40	Blackfeet	C.F.C.	02-127L
41	Cheyenne River Sioux	C.F.C.	06-915
42	Chippewa Cree of Rocky Boy's/Little Shell/Turtle Mountain	C.F.C.	92-675

March 29, 2007

ATTACHMENT A : John E. Echohawk's Testimony for Senate Committee on Indian Affairs

#	Title	Court	Case No.
43	Coeur d'Alene	C.F.C.	06-940
44	Colorado River Indian Tribes	C.F.C.	06-901
45	Confederated Tribes of Goshute	C.F.C.	06-912
46	Confederated Tribes of Warm Springs	C.F.C.	02-126L
47	Crow Creek Sioux	C.F.C.	05-1383
48	Delaware Indian Tribe	C.F.C.	02-26
49	Eastern Shawnee of Oklahoma	C.F.C.	06-917
50	Eastern Shoshone, Northern Arapaho	C.F.C.	06-903
51	Gros Ventre Tribe, Assiniboine Tribe of Fort Belknap	C.F.C.	06-931
52	Hoopa Valley Tribe	C.F.C.	06-908
53	Hopi	C.F.C.	06-941
54	Iowa (KS and NE)	C.F.C.	06-920
55	Jicarilla Apache	C.F.C.	02-25L
56	Kaw Nation, OK	C.F.C.	06-934
57	Lower Brule Sioux	C.F.C.	06-922
58	Makah	C.F.C.	06-889
59	Miami Tribe of OK	C.F.C.	06-939
60	Muscogee (Creek) Nation	C.F.C.	06-918
61	Navajo Nation	C.F.C.	06-945
62	Navajo Nation	(C.F.C,) now in Fed. Cir.	(93-763) 06-5059
63	Nez Perce	C.F.C.	06-910
64	Northwestern Band of Shoshone	C.F.C.	06-914
65	Oglala Sioux	C.F.C.	05-1378
66	Omaha of NE	C.F.C.	06-911
67	Onondaga, Haudenosaunee (Six Nations)	C.F.C.	06-909
68	Osage	C.F.C.	99-550 (cons. w/ 00-169)
69	Osage	C.F.C.	00-169 (cons. w/ 99-550)
70	Otoe-Missouria	C.F.C.	06-937
71	Paiute-Shoshone Indians of Bishop Community	C.F.C.	06-897
72	Passamaquoddy	C.F.C.	06-942
73	Pawnee Nation of OK	C.F.C.	07-2
74	Pueblo of Laguna	C.F.C.	02-24L
75	Pueblo of Santa Ana	C.F.C.	06-892
76	Prairie Band of Potawatomi	C.F.C.	06-921
77	Quechan Tribe of Fort Yuma	C.F.C.	06-888
78	Red Cliff Band of Lake Superior Chippewa	C.F.C.	06-923
79	Rosebud Sioux	C.F.C.	06-924
80	Round Valley Indian Tribes	C.F.C.	06-900
81	Salt River Pima-Maricopa Indian Community	C.F.C.	06-943
82	San Manuel Band of Serrano Indians	C.F.C.	06-893
83	Seminole of OK	C.F.C.	06-935

March 29, 2007

ATTACHMENT A : John E. Echohawk's Testimony for Senate Committee on Indian Affairs

#	Tribe	Court	Case No.
84	Shoshone of Wind River, Arapahoe of Wind River	C.F.C.	79-458 (cons. w/ 79-459)
85	Soboba Band of Luiseno Indians	C.F.C.	06-894
86	Sokaogon Chippewa	C.F.C.	06-930
87	Stillaguamish	C.F.C.	06-916
88	Swinomish	C.F.C.	06-899
89	Three Affiliated Tribes of Fort Berthold	C.F.C.	06-904
90	Tohono O'odham	C.F.C.	06-944
91	Tonkawa	C.F.C.	06-938
92	United Keetoowah Band of Cherokee	C.F.C.	06-936
93	Ute Indian Tribe of Uintah and Ouray Rez.	C.F.C.	06-866
94	Western Shoshone, Battle Mountain Band, Dann Band, Elko Band, South Fork Band, Te-Moak Tribe, Timbisha Shoshone,Winnemucca Indian Colony	C.F.C. (now in Fed. Cir)	05-558 (07-5020)
95	Winnebago of NE	C.F.C.	06-913
96	Wyandot of KS	C.F.C.	06-919
97	Yankton Sioux	C.F.C.	05-1291
98	Yomba Shoshone	C.F.C.	06-896
	PENDING CASES IN IN OTHER U.S. DISTRICT COURTS		
99	Alabama-Quassarte Tribal Town	E.D. Okla	06-558
100	Chickasaw & Choctaw Nation	W.D. Okla.	05-1524
101	Kaw Nation, OK	W.D.Okla.	06-1437
102	Miami Tribe of OK	N.D. Okla	06-698
103	Otoe-Missouria	W.D. Okla.	06-1436
104	Ponca Tribe of OK	W.D. OK	06-1439
105	Seminole of OK	E.D. Okla	06-556
106	Tonkawa	W.D. Okla.	06-1435
107	United Keetoowah Band of Cherokee	E.D. Okla.	06-559
108	Western Shoshone, Battle Mountain Band, Dann Band, Elko Band, South Fork Band, Te-Moak Tribe, Timbisha Shoshone,Winnemucca Indian Colony	D.N.V (now in 9th Cir.)	04-702 (06-16214, 06-16252)

TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Oversight Hearing on Indian Trust Litigation

John E. Echohawk
Executive Director
Native American Rights Fund

March 29, 2007

ATTACHMENT B

EXHIBIT 1

CURRENT TRIBAL TRUST ACCOUNTING AND TRUST MISMANAGEMENT CASES

I.

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
1	*Ak-Chin Indian Community v. Kempthorne* No. 06-cv-02245-JR
2	*Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Kempthorne* No. 02-cv-00035-JR
3	*Cheyenne River Sioux Tribe v. Kempthorne* No. 06-cv-01897-JR
4	*Chippewa Cree Tribe of the Rocky Boy's Reservation v. Kempthorne* No. 02-cv-00276-JR
5	*Coeur d'Alene Tribe v. Kempthorne* No. 06-cv-02242-JR
6	*Colorado River Indian Tribes v. Kempthorne* No. 06-cv-02212-JR
7	*Confederated Tribes of the Colville Reservation v. Kempthorne* No. 05-cv-02471-JR
8	*Confederated Tribes of the Goshute Reservation v. Kempthorne* No. 06-cv-01902-JR
9	*Crow Creek Sioux Tribe v. Kempthorne* No. 04-cv-00900-JR
10	*Eastern Shawnee Tribe of Oklahoma v. Kempthorne* No. 06-cv-02162-JR
11	*Gila River Indian Community v. Kempthorne* No. 06-cv-02249-JR
12	*Haudenosaunee, Onondaga Nation v. Kempthorne* No. 06-cv-02254-JR
13	*Iowa Tribe of Kansas and Nebraska v. Kempthorne* No. 06-cv-01899-JR

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
14	*Lower Brule Sioux Tribe v. Kempthorne* No. 05-cv-02495-JR
15	*Muskogee (Creek) Nation of Oklahoma v. Kempthorne* No. 06-cv-02161-JR
16	*Nez Perce Tribe, Mescalero Apache Tribe, Tule River Indian Tribe, Hualapai Tribe, Yakama Nation, Klamath Tribes, Yurok Tribes, Cheyenne-Arapaho Tribe, Pawnee Nation of Oklahoma, Sac and Fox Nation, and Santee Sioux Tribe of Nebraska v. Kempthorne* No. 06-cv-02239-JR
17	*Northern Cheyenne Tribe of Indians v. Kempthorne* No. 06-cv-02250-JR
18	*Northwestern Band of Shoshone Indians v. Kempthorne* No. 06-cv-02163-JR
19	*Oglala Sioux Tribe v. Kempthorne* No. 04-cv-01126-JR
20	*Omaha Tribe of Nebraska v. Kempthorne* No. 04-cv-00901-JR
21	*Osage Tribe of Indians of Oklahoma v. United States* No. 04-cv-00283-JR
22	*Passamaquoddy Tribe of Maine v. Kempthorne* No. 06-cv-02240-JR
23	*Pechanga Band of Luiseno Mission Indians v. Kempthorne* No. 06-cv-02206-JR
24	*Prairie Band of Potawatomi Nation v. Kempthorne* No. 05-cv-02496-JR
25	*Red Cliff Band of Lake Superior Indians v. Kempthorne* No. 06-cv-02164-JR
26	*Rosebud Sioux Tribe v. Kempthorne* No. 05-cv-02492-JR

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
27	*Salt River Pima-Maricopa Indian Community v. Kempthorne* No. 06-cv-02241-JR
28	*Shoshone-Bannock Tribes of the Fort Hall Reservation v. Kempthorne* No. 02-cv-00254-JR
29	*Sokaogon Chippewa Community v. Kempthorne* No. 06-cv-02247-JR
30	*Standing Rock Sioux Tribe v. Kempthorne* No. 02-cv-00040-JR
31	*Stillaguamish Tribe of Indians v. Kempthorne* No. 06-cv-01898-JR
32	*Te-Moak Tribe of Western Shoshone Indians v. Kempthorne* No. 05-cv-02500-JR
33	*Three Affiliated Tribes of the Fort Berthold Reservation v. Kempthorne* No. 02-cv-00253-JR
34	*Tohono O'Odham Nation v. Kempthorne* No. 06-cv-02236-JR
35	*Winnebago Tribe of Nebraska v. Kempthorne* No. 05-cv-02493-JR
36	*Wyandot Nation of Kansas v. Kempthorne* No. 05-cv-02491-JR
37	*Yankton Sioux Tribe v. Kempthorne* No. 03-cv-01603-JR

II.

No.	Names and Civil Docket Numbers of Cases Filed In United States District Courts in Oklahoma
1	*Alabama-Quassarte Tribal Town v. Kempthorne* No. 06-cv-00558-RAW (E.D. Okla.)
2	*Chickasaw Nation and Choctaw Nation v. Department of the Interior* No. 05-cv-01524-W (W.D. Okla.)
3	*Kaw Nation v. Kempthorne* No. 06-cv-01437-W (W.D. Okla.)
4	*Miami Tribe of Oklahoma v. Kempthorne* No. 06-cv-00698-JHP-SAJ (N.D. Okla.)
5	*Otoe-Missouria Tribe of Oklahoma v. Kempthorne* No. 06-cv-01436-C (W.D. Okla.)
6	*Ponca Tribe of Indians of Oklahoma v. Kempthorne* No. 06-cv-01439-C (W.D. Okla.)
7	*Seminole Nation of Oklahoma v. Kempthorne* No. 06-cv-00556-SPS (E.D. Okla.)
8	*Tonkawa Tribe of Indians v. Kempthorne* No. 06-cv-01435-F (W.D. Okla.)
9	*United Keetoowah Band of Cherokee Indians in Oklahoma v. United States* No. 06-cv-00559-RAW (E.D. Okla.)

III.

No.	Names and Docket Numbers of Cases Filed In United States Court of Federal Claims
1	*Ak-Chin Indian Community v. United States* No. 06-cv-00932-ECH
2	*Blackfeet Tribe of the Blackfeet Indian Reservation v. United States* No. 02-cv-00127-LSM
3	*Cheyenne River Sioux Tribe v. United States* No. 06-cv-00915-NBF (ADR Judge Marian B. Horn)
4	*Chippewa Cree Tribe of the Rocky Boy's Reservation; Little Shell Tribe of Chippewa Indians; Turtle Mountain Band of Chippewa Indians; White Earth Band of Chippewa Indians v. United States (Pembina Judgment Fund)* No. 92-cv-00675-ECH
5	*Coeur d'Alene Tribe v. United States* No. 06-cv-00940-EJD
6	*Colorado River Indian Tribes v. United States* No. 06-cv-00901-LAS
7	*Confederated Tribes of the Goshute Reservation v. United States* No. 06-cv-00912-EGB
8	*Confederated Tribes of the Warm Springs Reservation of Oregon v. United States* No. 02-cv-00126-SGB
9	*Crow Creek Sioux Tribe v. United States* No. 05-cv-1383L-MCW
10	*Delaware Tribe of Indians and the Delaware Trust Board v. United States* No. 02-cv-00026-FMA
11	*Eastern Shawnee Tribe of Oklahoma v. United States* No. 06-cv-00917-CFL
12	*[Eastern] Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States / [Northern] Arapahoe Indian Tribe of the Wind River Reservation, Wyoming v. United States* No. 79-cv-00458-ECH

No.	Names and Docket Numbers of Cases Filed In United States Court of Federal Claims
13	*Eastern Shoshone Tribe v. United States, Northern Arapaho Tribe v. United States* No. 06-cv-00903-ECH
14	*Gros Ventre Tribe and Assiniboine Tribe v. United States* No. 06-cv-00931-NBF
15	*Haudenosaunee v. United States* No. 06-cv-00909-TCW
16	*Hoopa Valley Tribe v. United States* No. 06-cv-00908-LMB (ADR Judge Marian B. Horn)
17	*Hopi Tribe v. United States* No. 06-cv-00941-CFL
18	*Iowa Tribe of Kansas and Nebraska v. United States* No. 06-cv-00920-EJD
19	*Jicarilla Apache Nation v. United States* No. 02-cv-00025-FMA (ADR Judge Eric G. Bruggink)
20	*Kaw Nation of Oklahoma v. United States* No. 06-cv-00934-FMA
21	*Lower Brule Sioux Tribe v. United States* No. 06-cv-00922-LB
22	*Makah Indian Tribe of the Makah Indian Reservation v. United States* No. 06-cv-00889-LJB (ADR Judge Marian B. Horn)
23	*Miami Tribe of Oklahoma v. United States* No. 06-cv-00939-ECH
24	*Muscogee (Creek) Nation of Oklahoma v. United States* No. 06-cv-00918-JFM
25	*Navajo Nation v. United States* No. 06-cv-00945-FMA
26	*Nez Perce Tribe v. United States* No. 06-cv-00910-CFL

No.	Names and Docket Numbers of Cases Filed In United States Court of Federal Claims
27	*Northwestern Band of Shoshone Indians v. United States* No. 06-cv-00914-LB
28	*Oglala Sioux Tribe v. United States* No. 05-cv-1378L-RHH
29	*Omaha Tribe of Nebraska v. United States* No. 06-cv-00911-NBF
30	*Osage Nation of Oklahoma v. United States* No. 99-cv-00550-ECH (consolidates 00-169)
31	*Otoe-Missouria Tribe of Indians of Oklahoma v. United States* No. 06-cv-00937-LAS
32	*Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California, v. United States* No. 06-cv-00897-MCW
33	*Passamaquoddy Tribe v. United States* No. 06-cv-00942-LJB (ADR Judge Marian B. Horn)
34	*Pawnee Nation of Oklahoma v. United States* No. 07-cv-00002-SGB
35	*Prairie Band of Potawatomi Indians v. United States* No. 06-cv-00921-LJB (ADR Judge Marian B. Horn)
36	*Pueblo of Laguna v. United States* No. 02-cv-00024-FMA (ADR Judge Eric G. Bruggink)
37	*Pueblo of Santa Ana v. United States* No. 06-cv-00892-LAS
38	*Quechan Tribe of the Fort Yuma Indian Reservation v. United States* No. 06-cv-00888-SGB
39	*Red Cliff Band of Lake Superior Chippewa Indians v. United States* No. 06-cv-00923-JPW
40	*Rosebud Sioux Tribe v. United States* No. 06-cv-00924-JFM

No.	Names and Docket Numbers of Cases Filed In United States Court of Federal Claims
41	*Round Valley Indian Tribes v. United States* No. 06-cv-00900-SGB
42	*Salt River-Pima-Maricopa Tribes v. United States* No. 06-cv-00943-LMB (ADR Judge Marian B. Horn)
43	*San Manuel Band of Serrano Missions Indians v. United States* No. 06-cv-00893-CCM
44	*Seminole Nation of Oklahoma v. United States* No. 06-cv-00935-GWM
45	*Soboba Band of Luiseno Indians v. United States* No. 06-cv-00894-NBF
46	*Sokaogon Chippewa Community (aka Mole Lake Band of Lake Superior Chippewa Indians) v. United States* No. 06-cv-00930-LJB (ADR Judge Marian B. Horn)
47	*Stillaguamish Tribe of Indians v. United States* No. 06-cv-00916-NBF (ADR Judge Marian B. Horn)
48	*Swinomish Indian Tribal Community v. United States* No. 06-cv-00899-FMA
49	*Three Affiliated Tribes of the Fort Berthold Indian Reservation v. United States* No. 06-cv-00904-LJB (ADR Judge Marian B. Horn)
50	*Tohono O'odham Nation v. United States* No. 06-cv-00944-EGB
51	*Tonkawa Tribe of Indians of Oklahoma v. United States* No. 06-cv-00938-BAF (ADR Judge Marian B. Horn)
52	*United Keetoowah Band of Cherokee Indians in Oklahoma v. United States* No. 06-cv-00936-TCW
53	*Ute Indian Tribe of the Uintah and Ouray Reservation v. United States* No. 06-cv-00866-MCW
54	*Winnebago Tribe of Nebraska v. United States* No. 06-cv-00913-MMS

No.	Names and Docket Numbers of Cases Filed In United States Court of Federal Claims
55	*Wyandot Nation of Kansas v. United States* No. 06-cv-00919-LMB (ADR Judge Marian B. Horn)
56	*Yankton Sioux Tribe v. United States* No. 05-cv-1291-LB
57	*Yomba Shoshone Tribe v. United States* No. 06-cv-00896-EJD

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May 16, 2007

The Honorable Craig Thomas
Vice Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

VIA e-mail to testimony@indian.senate.gov
And Regular Post

Re: Questions for John Echohawk (Native American Rights Fund – "NARF")
March 29, 2007 Over sight Hearing: Indian Trust Fund Litigation

Dear Senator Thomas

Thank you for your continued interest in and leadership on the important issues related to Indian trust litigation both on behalf of individual Indian people, as in the *Cobell* case, and now as it relates to tribal claims reflected in the 100 plus cases on behalf of 70 Tribes in the federal courts. You have proffered a series of questions related to the testimony provided at the above referenced hearing. The questions and our responses are in the attached document. Your letter indicated that responses were needed by April 27, 2007. We did not, however, receive the letter until May 7, 2007. David Mullon, Jr., Minority Staff Director assured us by phone on May 8, 2007 that our response would be acceptable if provided within the 10 days following the call. If you have further questions or require addition information, we would be pleased to respond.

Sincerely,

John E. Echohawk

Attachment

Questions for John Echohawk (Native American Rights Fund – "NARF")

Q. How long has NARF represented Ms. Cobell and the class members in the *Cobell* case?

Response: NARF served as legal co-counsel in the *Cobell* case from its inception in 1996 until July 2006. Since that time to the present we have served as "of-counsel" in the case.

Q. How long has NARF represented tribes in the trust accounting litigation described in your testimony?

Response: NARF has represented and presently represents the following Tribes:

1. The Chippewa Cree Tribe, the Little Shell Band of the Chippewa Tribe, The Turtle Mountain Chippewa Tribe and the White Earth Chippewa Tribe in a lawsuit that was filed in 1992.

2. The Chippewa Cree Tribe in a separate lawsuit that was filed in 2002.

3. Twelve named plaintiff Tribes in *Nez Perce Tribe, et al v. Kempthorne, et al,* as described in the March 29, 2007 testimony, since December 2006.

Q. In the *Cobell* case, NARF has been asking for the appointment of a receiver to manage the Indian trust and has been successful in its efforts in that case to have the BIA and some other Interior computers disconnected from the Internet.

* Does NARF intend to demand a receiver in the tribal litigation?

Response: It is impossible to know until the case develops enough to see how the United States responds to the Tribes' claims. No receiver would be needed or requested unless the trustee cannot or will not fulfill the legal responsibilities required by law.

* Will NARF be asking the courts in the tribal cases to disconnect Interior computers from the Internet?

Response: It isn't possible to know until the response and actions of the United States to the lawsuit are apparent, but it is not presently contemplated that such a request would be necessary.

Q. Your testimony indicates that NARF is not now seeking or asking for legislation dealing with Tribal claims, correct?

Response: That is correct.

Q. ITMA, on behalf if (sic) its 65 member Tribes, has proposed that Congress enact another extension on the statute of limitations on Indian trust claims and also authorize an alternative process outside of litigation to settle Tribal claims.

Would NARF support the sort of legislation ITMA is asking for – i.e. legislation that would extend the statute of limitations and provide the Tribes with another process that would avoid the cost and delay of conventional litigation?

Response: NARF would support that an extension of any possible statutes of limitations related to tribal trust claims. NARF expresses no view, however, on whether any lawsuits would as a result be voluntarily withdrawn. NARF agrees that a congressional declaration that the Arthur Anderson "Agreed Upon Procedure Reports" sent to Tribes in 1996 and 1997 are not full and complete accountings sufficient to commence the running of any possible statute of limitations, would simply clarify the matter and save unnecessary judicial review of that issue.

NARF concurs with the principles in the "ITMA Recommendation" commencing at page four of ITMA's testimony submitted on March 29, 2007. We do not, however, think those recommendations to be an exhaustive explication of all that would be needed to provide a viable remedy for those tribes that want such a simplified process, while protecting the interests and rights of those tribes that do not. Nor do we suggest that ITMA intended them to be. We believe that what is most important is that there be a dialogue with the Committee and representatives of the Tribes and the Administration to more fully develop all of the details needed to structure an equitable and complete remedy for the legal breach of trust claims of Tribes.

TESTIMONY OF
DIANE ENOS, PRESIDENT
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARING ON TRUST FUND LITIGATION AND THE PROPOSED SETTLEMENT OFFER OF INTERIOR SECRETARY DIRK KEMPTHORNE AND ATTORNEY GENERAL ALBERTO GONZALES

MARCH 29, 2007

Chairman Dorgan, Vice-Chairman Thomas and Members of the Committee, my name is Diane Enos and I am President of the Salt River Pima-Maricopa Indian Community ("SRPMIC") and I submit this Testimony on behalf of the SRPMIC for the record of the March 29, 2007 oversight hearing on the recent proposed settlement offer from U.S. Department of Interior Secretary Dirk Kempthorne and U.S. Attorney General Alberto Gonzales submitted to the Committee by letter dated March 1, 2007 ("March 1 Offer"). I commend you Mr. Chairman and this Committee for holding this hearing. The mismanagement of Indian trust assets by the United States and the often devastating ramifications to Native communities is an issue that we must address and address it together. It is a situation that has been allowed to continue too long and with consequences to our Community that are too severe to ignore.

As you know Mr. Chairman, the Salt River Pima Maricopa Indian Community is located near Scottsdale, Arizona. For many decades, like most tribes, the United States was deeply involved in the management and administration of SRPMIC's trust assets – including our trust funds. Also like other tribal communities, we faced frustrations with the failure of our trustee, the federal government, to fulfill its most basic fiduciary duties. Our trustee's incompetent

management created grave obstacles to economic development of our Community and often robbed us of the value of our resources. Still today, we have many unanswered questions about the nature and scope of the mismanagement of our assets because we have never been provided an accounting of them, even though the law is crystal clear that our trustee must provide such an accounting.

As a result of the government's continuing malfeasance with respect to our trust assets, SRPMIC was forced to look at the impact on the Community. We simply could not afford to continue to sit idly by and wait for our trustee to begin acting conscientiously and in compliance with fundamental trust principles. To allow such malfeasance to continue would amount to a breach of trust responsibility that we, as a tribal government, owe to our own Community members.

Instead, we decided to take over (through 638 contract, and then self-governance compact) certain aspects of the management of our resources ourselves in the 1990s. Even before the self-determination and self-governance laws were passed, the SRPMIC had seen the need for adequate law enforcement services. In the early 1970's a Buy Indian Act contract was entered into to provide law enforcement services. The results from having greater involvement in the management of our assets have been transformative. Our economic development of our trust lands and competent management of our trust funds are significantly responsible for the economic and affirmative social advancement of our Community.

But we still need answers from our trustee. We still lack information about those assets that was lost or mismanaged by our trustee in contravention of law. Unfortunately, we still have to deal with a recalcitrant trustee when seeking approvals and other actions by the Department of Interior in commercial dealings. In short, we have been forced into a position of having to seek

recompense in the courts.

To redress the government's massive malfeasance in the management of the SRPMIC's assets and to address these other matters, we brought two lawsuits in December 2006 - *SRPMIC v. Kempthorne* in the Federal District Court for the District of Columbia and *SRPMIC v. United States* in the Court of Federal Claims. The District Court suit seeks a thorough and meaningful accounting of the SRPMIC's trust assets and other equitable relief. In the Court of Claims, we seek money damages for losses sustained as a result of the breaches of trust. The SRPMIC will pursue these cases vigorously to obtain judicial remedies as soon as possible. At the same time, we are willing to participate in a proper resolution process conducted in good faith that is reasonably calculated to lead to resolution of these matters in an expeditious and fair manner – whether that be working with Congress or otherwise. We are prepared to do whatever we must to protect the interest of our Community.

As you know, the government's recent March 1 offer seeks to resolve not only the *Cobell* litigation, but also all tribal trust cases and much more. Since that would include our own tribal breach of trust cases, the SRPMIC's interest are directly impacted as are our interest in ensuring that SRPMIC's landowners are fairly treated in the *Cobell* case.

Below, accordingly, is our view of the March 1 Offer.

SRPMIC REJECTS THE MARCH 1 OFFER

Interior Secretary Dirk Kempthorne and Attorney General Alberto Gonzales sent a letter to this Committee on March 1, 2007 proposing that Congress spend $7 billion over 10 years to extinguish all Indian individual and tribal trust claims past, present and future as well as pay for trust reform, information technology improvements, fractionation of land and other self-serving

unidentified improvements to the government's dilapidated trust management systems. The government's offer does not discuss how much money is to be allocated for each of these purposes. It is clear, though, that however it is divided, $7 billion is pathetically insufficient.

First, let us start with those matters impacting individual Indian trust beneficiaries. I will let the *Cobell* plaintiffs speak for themselves, but it is clear that $7 billion paid over 10 years would not be sufficient (especially given the time value of money) to settle the *Cobell* case standing alone. The government's own expert, SRA International, has estimated the government's liability in the *Cobell* case (excluding all other claims) to be between $10-$40 billion. Also, by the government's own prior admissions, even if the entire $7 billion were offered to resolve tribal trust claims alone, it would be similarly inadequate. Indeed, when Attorney General Gonzales testified before the House Committee on Appropriations on March 1, 2005, he stated in no uncertain terms that with respect to tribal trust claims, the potential government liability was in excess of $200 billion. The *Cobell* mediators say a fair settlement for *Cobell* alone is at least in the $7-$9 billion range. So, by the government's own stated valuation and those of an independent mediator, the government's offer is clearly inadequate for *Cobell* settlement much less with the incorporation of the other areas the government has included in the offer. These are not the proper and legal actions of a trustee. Given the history and the circumstances, such an offer itself constitutes a breach of fiduciary duty just as it would if a private trustee accepted such an offer on behalf of its beneficiaries.

We must keep in mind that the government does not intend to use this pool to only settle *Cobell*. Instead, the offer contemplates utilizing this same pool to address "all existing and potential individual *and tribal claims* for trust accounting, cash and land mismanagement, and other related claims, along with the resolution of other related matters . . . that permit recurrence

of . . . litigation." March 1 offer at 1 (emphasis added). The scope of this claim extinguishment is both mind-boggling and unconscionable.

As with any defendant, the government would like to buy as much settlement as possible for the money it expends. That is not astonishing. But the offer – given the admitted scope of liability and the fact that it is the trustee itself making the offer– is remarkable in its audacity.

With that same pool, the March 1 offer would extinguish *all* other individual claims such as failure to obtain fair market value for leasing. These claims in the aggregate represent a multi-billion liability in addition to *Cobell*.

The offer would also use the same pool to address land fractionation. To address fractionation effectively would cost hundreds of millions, if not billions of dollars. There is still more. Part of the same pool would be used to pay for trust reform, and information technology security as well as other reforms. How much has already been spent on trust reform, and to what effect? Given the Office of Special Trustee's continued practice of wasting money through hiring its cronies – as identified by the Interior's own Inspector General – this will cost added billions too. Indeed, Interior since enactment of the American Indian Trust Fund Management Reform Act of 1994 (Trust Reform Act) has spent more than $1 billion on trust reform efforts and has very little to show for it.

Compounding the offensiveness, the government would like to use part of this same $7 billion pool to resolve all tribal trust cases. But, setting up a single pool of money to pay both tribal and individual claims is a continuation of a practice to divide and conquer tribes and provoke discontent with our membership over how to divide this plainly inadequate sum. This scorched earth approach to settlement goes beyond the pale.

During the March 29th hearing, Acting Associate Attorney General William Mercer

contended that Attorney General Gonzales was "misunderstood" by those suggesting he conceded potential liability of $200 billion. However the actual words of Mr. Gonzales could not have been more clear and leave no room whatsoever for interpretation. The statement regarding tribal trust cases reads in its entirety: "**The United States' potential exposure in these cases is more than $200 Billion**."[1] (Emphasis added). This is the Attorney General's written testimony, testimony that would have gone through the rigorous vetting process of the U.S. Department of Justice.

. Attorney General Gonzales' written testimony is an important admission and a starting point for this Congress and this Committee to use to determine what the tribal trust claims are worth. In light of this valuation, $7 Billion – even if just to resolve tribal trust claims alone would be drastically insufficient. Again, this does not include settlement of *Cobell*, or trust reform.

Finally, as part of this offer, the government seeks to essentially end the federal trust responsibility to Indian people that has been acknowledged for centuries. It is clear that the trust management system as well as the trust relationship is broken. As a solution, our trustee wants Congress to thrust this broken trust management system onto tribal governments and individual Indians.

As a self-governance tribe, the SRPMIC spends a great deal of our resources to supplement what the Interior Department provides through our compact so that we can properly carry out the compacted functions and the trust responsibility. The SRPMIC is fortunate to be in

[1] *Statement of Alberto R. Gonzales, Attorney General of the United States*, before the United States House of Representatives, Committee on Appropriations, Subcommittee on Science, the Department of State, Justice and Commerce, and Related Agencies (109th Congress) on) regarding President's FY 2006 budget for the Department of Justice March 1, 2005 at page 5 available at:
http://www.usdoj.gov/ag/testimony/2005/022805fv06aghousetestimonyfinal.htm.

a position to be able do so, and feels the need to do so as a trustee to our own members. But not all tribes are in this same position, oftentimes as a result of prior government malfeasance. To force tribes to take on these functions with inadequate funding is a replication of the practices of the Termination Era of the Federal-Tribal relationship and a breach of a long standing and long ago accepted responsibility to the original population of this country. This type of one-size-fits all proposition has failed before and is doomed to fail again.

In addition, the March 1 Offer would end all future government liability for breaches of trust. That means irrespective of how blatant and how significant future breaches may be, the government could not be held accountable in court for their misdeeds and dereliction. This is in no uncertain terms a license to our trustee to commit misfeasance, malfeasance and nonfeasance with impunity. Aside from the obvious constitutional infirmity of this provision, it is unconscionable. Elimination of liability means a beneficiary cannot utilize litigation to obtain accountability. Asking Indian Country to release the government with respect to future mismanagement is absurd on its face. One cannot have an effective trustee without accountability enforceable in a court of law.[2] What remedy would tribes have? None. Where would accountability lie? Nowhere. Is this the proper course of action of a trustee? No. The premise of the legal system is to seek to right a wrong or injustice. Why should Native Americans, either individually or communally, be denied such access?

In their March 1 Letter, Secretary Kempthorne and Attorney General Gonzales contend that ending liability is a way to move away from a "litigation-oriented relationship" with tribes

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[2]*Bogert, The Law of Trusts & Trustees (rev 2d ed),* § 973, pp 462-464, 467 ("A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself."). *See also, e.g., Wood v. Honeyman*, 178 Or. 484, 566, 169 P.2d 131, 166 (1946) ("We are completely satisfied that no trust instrument can relieve a trustee from his duty to account in a court of

and individual Indians. If, however, the government truly wanted to move away from a litigation-oriented relationship, then why do they not want to negotiate in good faith?

In short, the government's actions belie their words. They want to avoid accountability, not litigation. This explains the rationale behind their March 1 offer. This offer is only about diminishing litigation in the sense of eliminating any accountability. The problem with the trust relationship has never been, and is not now, too much accountability of our trustee. Quite the contrary: the well-documented malfeasance, negligence and corruption in the management of Indian trust assets is the consequence of there being no accountability of our trustee whatsoever. Litigation, unfortunately, is often the only – albeit sometimes inadequate – process to ensure the protection of the tribal community and individual rights. The SRPMIC does not enter into litigation lightly. We view litigation as a method of last resort.

Mr. Chairman, for the reasons set forth above, the SRPMIC has no choice but to reject the March 1 offer. We do not believe it is a helpful starting point or offered in good faith. And we do not believe it worthy of serious consideration. We are prepared to sit down with this Committee to determine fair ways to resolve our trust cases but not on the wholly unreasonable terms the government proposes.

FUTURE PROCEEDINGS

The SRPMIC stands poised to work with this Committee to forge a solution. We believe these following observations and principles are helpful guidance as to how best to proceed:

- Any settlement of the tribal claims should be independent of resolving the *Cobell* case. The SRPMIC does not support the establishment of a single pool of money to resolve all individual and tribal claims. This would be a manifest injustice.

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equity.").

- Any settlement of tribal claims must consider the government's clear admission that its potential exposure exceeds $200 billion. We understand that resolutions mean compromise, but the government should remain consistent with its previous and more candid admissions. Going from acknowledging a wrong potentially amounting to $200 billion down to $7 billion, including settling individual cases, reforming a system that has received vast amounts of federal funds, preventing future matters from seeking redress in the judicial system and basically terminating the federal-trust relationship does not begin to approach the concept and intent of good faith negotiations.

- Settlement of either individual or tribal trust claims must be separate from the funding necessary to reform the trust management system.

- Any transformation of the management system or consideration of modifying trust duties vis-à-vis tribal trust assets must be determined with direct and consistent consultation with tribes.

- If this Committee takes the posture that it will not act without the tacit or express support of the Administration, there is little hope for a fair process through Congressional action. Past failures to timely respond to attempts to negotiate or offer an amount for settlement and the Kempthorne-Gonzales Letter of March 1 serve as powerful reminders that this Administration is not poised to come to the table in good faith and act reasonably to forge a resolution.

- Litigation of tribal trust cases has just recently commenced. The Congress should take no action in delaying in any way these proceedings. The SRPMIC, like all others, should not be denied equal access to justice. Any resolution of a tribe's trust case must be just and reasonable.

Once again, the Salt River Pima-Maricopa Indian Community commends the Committee for their continued effort to resolve this long-standing issue in a fair and reasonable manner. We thank the Committee for giving us this opportunity to comment on the issue and allow our voice to be heard.

TESTIMONY OF
VIVIAN JUAN-SAUNDERS, CHAIRWOMAN
TOHONO O'ODHAM NATION

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARING ON TRUST FUND LITIGATION AND THE PROPOSED SETTLEMENT OFFER OF INTERIOR SECRETARY DIRK KEMPTHORNE AND ATTORNEY GENERAL ALBERTO GONZALES

MARCH 29, 2007

INTRODUCTION

Chairman Dorgan, Vice-Chairman Thomas and Members of the Committee, I am the Chairwoman of the Tohono O'odham Nation (the "Nation") and I submit this Testimony on behalf of the Nation for the record of the March 29, 2007 oversight hearing on the recent proposed settlement "offer" from Interior Secretary Dirk Kempthorne and Attorney General Alberto Gonzales submitted to the Committee by letter dated March 1, 2007 ("March 1 Offer").

I'd like to start by commending you on holding this hearing to properly and fairly address the United States' historical and continuing failure to properly manage Indian trust assets belonging to Indian trust beneficiaries, both tribes and individual Indians. This is a most critical issue facing Indian Country. We have an opportunity to work together – this Committee, tribal leadership and individual Indians – to forge an equitable solution to a century of persistent and pervasive breach of trust.

After failing to live up to their trust responsibilities for decade after decade, the Departments of Interior and Justice have now put forward a proposal purportedly to "resolve" Indian trust issues through their March 1 Offer. Even a cursory review, however, demonstrates

that this "offer" is not close to reasonable and that it seeks to fundamentally and irrevocably degrade the trust relationship with Indian tribal and individual beneficiaries. Moreover, the amount set aside for the settlement of both individual and tribal claims relating to trust mismanagement is absurdly low – especially in light of this Administration's previous admissions regarding their liability.

Mr. Chairman, the Tohono O'odham Nation is one of the Indian beneficiaries deeply aggrieved by the mismanagement of our trust assets. The Nation has 30,000 members and is located in southern Arizona and shares a 70 mile border with Mexico. The government holds 3,000,000 acres of land and millions of dollars in trust for the Nation. As with other tribes and individual Indians, our trustee has failed to discharge its most basic and central fiduciary duties; our Nation has suffered grievously as a result. And we are not talking about a small sum of money. The government itself concedes through its Arthur Andersen so-called "Reconciliation Report" that they handled at least $2.2 Billion in total transactions for the Tohono O'odham Nation between 1972 and 1992 alone. They have never provided an accounting for these funds or any other funds belonging to the Nation.

To redress the government's massive malfeasance in the management of the Nation's assets, we brought two lawsuits in December 2006, *Tohono O'odham Nation v. United States* in the Court of Federal Claims and *Tohono O'odham Nation v. Kempthorne* in the Federal District Court for the District of Columbia. The suits in combination seek a complete and accurate accounting of the Nation's trust assets and other equitable relief as well as money damages for losses sustained as a result of the breaches of trust suffered. The Nation intends to prosecute these cases vigorously to obtain judicial remedies as soon as possible. At the same time, we are willing to participate in a resolution process conducted in good faith that is reasonably calculated

to lead to resolution of these matters in an expeditious and fair manner – whether that be working with Congress for acceptable legislation, mediation, arbitration or continuing litigation. We are prepared to do whatever is necessary to protect the interest of the Tohono O'odham Nation.

Mr. Chairman, through this hearing, you have sought, *inter alia*, comments from principal stakeholders regarding the March 1 Offer. The Tohono O'odham Nation is such a stakeholder and, for the reasons set forth in greater specificity below, we reject the March 1 Offer by the government.

AN "OFFER" UNWORTHY OF CONSIDERATION

Interior Secretary Dirk Kempthorne and Attorney General Alberto Gonzales sent a letter to this Committee on March 1, 2007 proposing that Congress spend $7 billion over 10 years to extinguish all Indian trust claims past, present and future as well as pay for trust reform, information technology improvements, fractionation and other unidentified improvements. First, utilizing trust litigation settlement funds to pay for functions that the Interior Department already has trust responsibilities to provide is not acceptable. While in the abstract $7 billion is certainly not a small amount of money, it is pennies on the dollar when considered relative to the liability of the United States to tribes and individual Indian trust beneficiaries. Furthermore, other aspects of the proposed "offer" render it not worthy of any consideration.

It is important to identify what this "offer" is and what it is not. Secretary Kemphthorne and Attorney General Gonzales contend that their offer is intended to move away from a "litigation-oriented relationship" with tribes and individual Indians. But their actions belie their words. As this Committee knows full well, late last year, tribes unanimously sought an extension of the period to bring tribal trust lawsuits. While it is far from clear, an argument could have been made that any tribal trust suit had to be brought by December 31, 2006. To

prevent forcing the mass filings by tribes to protect their interest – an event that would inevitably engender a more litigation-oriented relationship with the Departments of Interior and Justice – tribal leadership across Indian country sought a one or two year enlargement. Secretary Kemphthorne and Attorney General Gonzales vigorously opposed such an enlargement. Accordingly, by their own actions, they promoted and indeed forced a more "litigation-oriented relationship" – precisely what they now claim they seek to move away from.

We believe actions speak louder than words – especially words of government officials. This "offer" is only about diminishing litigation in the sense of eliminating any accountability. Otherwise, the government would have agreed to an enlargement of time; they didn't.

What is more, too much accountability of our trustee has never been and is not now the problem. The converse is true: the malfeasance, fraud and corruption in the management of Indian trust assets is the consequence of absolutely no accountability of our trustee whatsoever. Litigation is seemingly the only way to force a change and stop the continuing breaches of trust. If we are to agree to resolve the litigation, we can only do so with a settlement offer that is fair and reasonable. And $7 Billion does not come close to sufficient given the extent of mismanagement and the potential liability counted in the hundreds of billions involved here.

From the Nation's perspective, $7 Billion paid over 10 years is insufficient to settle the *Cobell* case standing alone. Consider that the Interior Department's own experts, SRA International, have estimated that the government's liability in the *Cobell* case (excluding all other claims) to be at least $10 billion, and that it could exceed $40 billion. Furthermore, the proposal is not to settle *Cobell* for $7 billion. Interior would expect to use that same pool to address "all existing and potential individual *and tribal claims* for trust accounting, cash and land mismanagement, and other related claims, along with the resolution of other related matters . . .

that permit recurrence of . . . litigation." March 1 Offer at 1 (emphasis added). The scope of this claim extinguishment is astonishing.

Not only do they want to settle *Cobell*, but also other individual claims, all tribal claims – past present and future – as well as all reforms of the system with the same $7 Billion pool. There are numerous problems with this scheme. First, setting up a single pool of money to pay both tribal and individual claims is a recipe to divide and conquer tribes and provoke discontent with our membership over how to divide this plainly inadequate sum. Second, by the government's own prior admissions, even if the entire $7 billion were to just resolve tribal trust claims, it would be woefully insufficient. Indeed, when Attorney General Gonzales testified before the House Committee on Appropriations on March 1, 2005, he stated in no uncertain terms that with respect to tribal trust claims, the potential government liability was in excess of $200 Billion. Yet, somehow he now thinks Indian Country should accept pennies for these same claims.

Parenthetically, Mr. Chairman, I am deeply disturbed by the testimony at this hearing of Acting Associate Attorney General William Mercer on this issue. He stated that the March 1, 2005 Testimony of the Attorney General which conceded potential liability of $200 Billion has been "misunderstood," and indeed the $200 billion was the amount tribes "alleged" were owed. But that is not what the Attorney General actually said; here is the complete sentence of his *written* testimony on tribal trust cases:

"**The United States' potential exposure in these cases is more than $200 Billion**." (Emphasis added). He could not have been more clear. Had this been merely about what tribes allege is owed, the Attorney General and the Justice Department – all lawyers – would have presumably said simply in his *written* testimony: "Tribes allege they are owed $200 Billion in

these cases." – a shorter sentence that would convey what Mr. Mercer says the Attorney General meant.

Why is this so important? Because the government now contends that they owe tribes so little – in the hundreds of millions – based on their estimates, none of which have been independently verified or validated. How does this Committee know to believe them? By discerning whether they are credible. And what this example conclusively demonstrates is that our trustee is neither candid nor credible.

In short, it is self-evident that a couple of billion dollars cannot satisfy potential exposure exceeding $200 Billion. If that is the government's starting point, then it is far from reasonable and cannot be taken seriously.

In addition to paying pennies on a dollar for resolving *Cobell*, other individual claims not yet litigated or valuated, and the tribal trust cases, the government would like to use the same $7 billion pool to pay the extraordinary cost of addressing fractionation, their dilapidated and unsafe trust management systems, information technology security and all other aspects of trust reform. By any estimation, to properly address fractionation alone would cost hundreds of millions, if not billions. It is a problem of the government's own creation by forcing this broken trust on Indian people so non-Indians could exploit our lands without our consent. Trust reform and IT security will cost billions more – especially with the run-away spending style of the present Special Trustee.

Finally, as part of this package, the government proposes to essentially end the trust responsibility. It is clear that the trust management system is broken; now our trustee wants Congress as part of this settlement package to thrust this broken trust management system onto tribal governments and individual Indians. And if that were not enough, the government

proposes to end all future liability. That means irrespective of how blatant and how significant future breaches are, the government cannot be held accountable in court for their misdeeds and dereliction of duties. This is in no uncertain terms license to our trustee who is in possession of our trust assets to steal with impunity. Aside from the obvious constitutional infirmity of this provision, it is unconscionable. What is needed for the sound and safe management of the Tohono O'odham Nation's trust assets by our trustee is more accountability, not less. But the government's proposal would eliminate accountability altogether. One cannot have an effective trustee without accountability enforceable in a court of law.[1]

The Tohono O'odham Nation is prepared to litigate our claims to conclusion. We are also prepared to participate in a legitimate alternative process to resolve these matters outside of litigation. What our Nation is not prepared to do is let year after year go by without fundamental change and adequate redress. The time for further delay has passed.

HOW SHOULD THIS COMMITTEE PROCEED?

Mr. Chairman, as I said in the commencement of my testimony, we stand poised to work with this Committee to forge a solution. Unfortunately, the government's proposed offer gives us nothing to work with. But that does not discourage us and I think it important that this Committee continue the consultation and dialogue with tribes and individual Indians to find reasonable resolutions to the trust mismanagement debacle. Solutions and fair ways to resolve these matters are far more likely to come from Indian Country than anywhere else.

In considering how to move forward, there are certain observations worthy of our mutual

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[1]BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 973, pp. 462-64, 467 *(2d ed. 1978)* ("A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself."). *See also, e.g., Wood v. Honeyman*, 178 Or. 484, 566, 169 P.2d 131, 166 (1946) ("We are completely satisfied that no trust instrument can relieve a trustee from his duty to account in a court of equity.").

consideration:

- Any settlement of the tribal claims should be independent of resolving the *Cobell* case. The Nation does not support the establishment of a single pool of money to resolve all individual and tribal claims. This is merely a way to cause division among Indian people.
- Any settlement of tribal claims must consider the government's clear admission that its potential exposure exceeds $200 billion. That is a natural starting point. We understand that resolutions mean compromise, but the government should remain consistent with its previous and more candid admissions.
- Any transformation of the management system or consideration of modifying trust duties vis-à-vis tribal trust assets must be determined with direct and consistent consultation with tribes. We note that this recent March 1 Offer, which includes provisions that directly impact tribal assets was put forward without any consultation with the Nation.
- If this Committee takes the posture that it will not act without the tacit or express support of the Administration, then resolution may never occur. The Kempthorne-Gonzales Letter of March 1 is so unreasonable that it serves as a powerful reminder that the Congress does not have a partner in this Administration to move forward in a positive way.
- Litigation of tribal trust cases has just commenced. We plan to pursue the Nation's claims vigorously. The Congress should take no action in delaying in any way these proceedings.

CONCLUSION

The Tohono O'odam Nation is committed to working with this Committee to structure an alternative manner to resolve our Nation's claims. In the meantime we will continue to litigate. We commend you for your efforts and look forward to working together on this most critical of issues.

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Telephone: (615) 872-7900 • Fax: (615) 872-7417

April 12, 2007

Senator Byron Dorgan
Chairman
Senate Committee on Indian Affairs
836 Hart Senate Office Building
Washington, D.C. 20510

Senator Craig Thomas
Vice Chairman
Senate Committee on Indian Affairs
836 Hart Senate Office Building
Washington, D.C. 20510

Re: March 29 Hearing on Trust Reform and *Cobell* Settlement

Dear Senators Dorgan and Thomas:

The United South & Eastern Tribes, Inc. (USET) applauds your efforts to advance legislation that would settle the *Cobell* lawsuit and reform the Department of Interior's administration of the Indian trust. Congressional leadership is vitally needed now to refocus discussion on the core issue underlying the *Cobell* case, the tribal accounting cases, and Indian Country's repeated petitions for trust reform: the need for accountability in the federal management of the Indian trust.

From the testimony submitted and discussion at the March 29 hearing before the Senate Committee on Indian Affairs (the Committee), the Department seeks policies to reduce or eliminate accountability with respect to its administration of the trust responsibility. Congress must demand accountability of the Department in any legislation enacted to settle the *Cobell* litigation and/or to reform the administration of the trust.

As USET has testified to the Committee numerous times over the past six years, the settlement of the *Cobell* lawsuit must be done in a manner that is fair and equitable and be accompanied by reforms that provide for quality assurance and accountability of the federal trustee to individual Indian accountholders and to tribes. With respect to S. 1439, introduced in the 109th Congress, USET urged the Committee to include terms providing for an Assistant Inspector General for the Indian Trust. Its purpose: to provide an independent, but internal agency accountability mechanism to audit and investigate Department practices brought to its attention by tribes and individual Indian accountholders.

USET has also consistently urged that legislation place tribes in an active and decisive role in the institutional reform of the Department. Such placement of the tribes would assure the development of a beneficiary-driven trust in a manner consistent with the Indian Self-Determination Policy.

The Administration's new proposal fails on these counts. For the reasons discussed below, we believe the Administration's proposal should be rejected and new legislation proposed that builds upon the principles and legislative language developed in Indian Country and vetted in consultation with Committee staff during the last session. Further consultation with Indian tribes and affected parties should be reinvigorated to refine legislation based on fairness, accountability and the trust responsibility.

First, the Administration's proposal of $7 billion dollars is inadequate. Just to address the government's liability for the *Cobell* accounting mismanagement, Mr. Bickerman and Judge Renfrew call for a settlement of $7-9 billion. USET urges the Committee to seriously consider this amount to resolve the *Cobell* accounting claims.

USET balks at the suggestion that the Administration's proposal would represent a significant investment in Indian Country as Secretary Kempthorne claims. The proposal amounts to less than $1 billion annually for past, present and future individual and tribal claims for trust funds mismanagement and trust asset mismanagement. Additionally, these funds are to cover costs for land consolidation and technical assistance to provide for individual and tribal self-management of funds and assets. Moreover, as discussed below, considerable resources will be required to restore and make viable lands depleted due to BIA mismanagement.

Second, the Administration's proposal offers a ten-year time frame for a voluntary conversion to Indian-owner managed trusts and implies mandatory participation after ten years. Imposing federal land management responsibilities on tribes and individuals runs counter to the trust responsibility and the policy of Indian Self Determination. Owners of allotted lands in the Great Plains, for example, will have no way to manage those lands without BIA supervision and control. Numerous tribal leaders testified on this point during the Committee's November 2006 hearing, particularly with respect to the negotiation of leases on allotted lands. The problem is compounded by the fact that in certain regions these lands are in terrible condition, in part due to the drought, but mostly as a result of BIA mismanagement.

The Secretary espouses tribal self-determination in his testimony, yet the Department's proposal excludes key benefits of the Indian Self-Determination Act from tribal trust land management activities. In order to provide tribes with meaningful flexibility to reallocate and reprogram federal funding to meet tribal objectives, self-governance compacts provide tribes with advance lump sum payments. The Administration's proposal bars the availability of lump sum payments which would severely curtail a tribe's ability to perform land management tasks in accordance with tribal priorities.

Third, the Administration proposes to restrict liability for any trust-related claims for ten years. Under this concept, tribes are being asked to absolve the federal government for past mismanagement while assuming responsibility for a basic fiduciary responsibility of the federal government. Rather than seeking to make the Department's trust system more accountable, the federal government is turning to the tribes for a bailout that passes all risk to the tribes. Given the likelihood of existing latent errors and future errors of the Department, as well as the prospect of insufficient appropriations for the task, the proposed alleviation of liability is a pill too bitter to swallow.

Fourth, while USET agrees that consolidation of fractional interests will be an integral element of trust reform, absent appropriate parameters for land sales, clarification of ownership, and the allocation of significant sums of money for the purchase of those interests, the proposal may introduce more problems than it solves.

Finally, the Committee's questioning of Secretary Kempthorne during the March 29 hearing made clear that the Administration did not seek nor did it incorporate any input from tribes or tribal leaders. During the Committee's trust reform hearing last November, the Secretary summarized his proposal and then departed. Over the two hours that followed, tribal leaders voiced opposition to the concepts contained in that proposal in the strongest possible terms. In his March 29 testimony, the Secretary framed the proposal as ending paternalism and promoting self-determination, yet, he failed to offer any additional details to alleviate concerns voiced by tribes. In this respect, the Department brings paternalism back to the forefront by suggesting the federal government will determine these vital concerns of Indian Country without tribal participation in its formulation.

For these reasons, we urge you to exercise strong leadership to refocus the trust reform debate. USET has seen the debate on trust reform deteriorate significantly since the release of the Administration's "concept paper" last October. Those concepts, unequivocally rejected by tribes and the *Cobell* Plaintiffs, were formalized in the disconcerting March 1, 2007, letter from Attorney General Gonzalez and Secretary Kempthorne to Chairman Dorgan. A debate on the future of the Indian trust and trust reform legislation cannot be responsibly conducted where the underlying premise is to get DOI "out of the Indian land management business." Will the Administration next be suggesting that the Indian Health Service get out of the Indian health care business? That the Bureau of Indian Education get out of the education business?

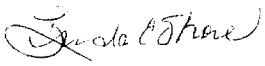
The Administration's current proposal reflects precisely the approach that underscores USET's steadfast commitment to trust reform legislation: a continuation of costly reorganizations that have gutted the Bureau of Indian Affairs (BIA) and reconfigured the Office of the Special Trustee (OST) into a trust-focused organization that does not listen or answer to tribes. Indeed, the Administration's current proposal explicitly calls on the Congress to insulate the Department from past, present and future liability related to its management of the Indian trust. Rather than promoting greater accountability, the Department wants Congress to exempt the agency from its

legal obligations as a fiduciary and to sanction its abandonment of core responsibilities regarding the management of Indian trust lands.

The new Administration proposal suggests a cure as bad as the disease. Even if individual or tribal class members were to benefit from a financial settlement, USET believes such a victory will be empty if at the same time the trust relationship is eroded legislatively and administratively to such an extent that it becomes meaningless. Tribal sovereignty and the maintenance of the trust relationship with the United States are of the utmost importance to all USET member tribes.

USET believes this Committee can work with tribes to develop legislation that restores integrity to the trust relationship. USET and its member tribes would be honored to participate with you in such an effort.

Sincerely,



Brenda E. Shore
Interim Executive Director

STATEMENT OF
DIRK KEMPTHORNE
SECRETARY OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON
INDIAN TRUST FUND LITIGATION

MARCH 29, 2007

Thank you, Mr. Chairman, for the opportunity to appear before the Committee today on an issue that is of crucial importance to the Department of the Interior. As our March 1, 2007, letter to you and Vice-Chairman Thomas states, the Administration strongly supports a comprehensive legislative package to resolve the issues facing us today with regard to the Indian land trusts. I have attached to my statement the one page summary of the key facets the Administration believes are necessary for acceptable Indian trust reform and settlement legislation. The testimony of the Department of Justice focuses on the aspects of the legislative package related to the resolution of pending and potential claims by individual Indians and Tribes. I will focus my testimony on the consolidation of Indian lands to make them more manageable and productive and the concepts of owner management of trust lands.

On June 13, 2003, then-Chairman Campbell and Vice Chairman Inouye sent a letter to tribal leaders asking for their help in tackling three major tasks that would improve the management of Indian trust:

- Stop the continuing fractionation of Indian lands and focus on the core problems of Indian probate by swiftly enacting legal reforms to the Indian probate statute.
- Begin an intense effort to reconsolidate the Indian land base by buying small parcels of fractionated land and returning them to tribal ownership.

- Explore "creative, equitable, and expedient ways to settle the *Cobell v. Norton* lawsuit."

We agree that these are priorities for bringing a solution to the issues facing the Indian trust today. We would add settling tribal trust lawsuits as well. The Administration strongly supports a comprehensive legislative package designed to strengthen the partnership between the Federal Government and American Indians. To achieve these goals, the Administration supports providing up to $7 billion, over a ten year period.

I believe it is time for the Federal Government and the Congress to tackle an issue that has been raised by commission after task force after commission for almost a hundred years. First, the overwhelming finding of almost every task force and commission that has looked at Indian economic issues is that a viable tribal land base is essential. The American Indian Policy Review Commission Report of 1977 pointed out that the economic security and development of tribal economies depend on it. The allotment policy of the 1887 General Allotment Act was intended to break up the Tribes' communal land base and force assimilation of Indian people into non-Indian society. As the Policy Review Commission Report states, the legacy of that policy is "the bizarre land ownership patterns existent on many reservations which make it virtually impossible for those tribes to engage in meaningful economic development."

When lands were allotted under the 1887 Act, a trust period of 25 years was placed on the land with restrictions on state taxation and on the owner's right to sell the land without the U.S. Government's consent. After that time, a fee patent was to be issued to the owner for the land. As a result of issuance of fee patents, 23 million acres of Indian land were sold out of Indian hands by 1934.

The Indian Reorganization Act of 1934 halted further allotments and extended indefinitely the trust status of the allotted lands not yet patented. As a result,

individual Indian allotments still held in trust have passed, through the generations, as increasingly smaller fractionated interests. Since 1934, time and again, witnesses have come before the Congress to detail the problems that have arisen as a result of fractionation of these lands, i.e. as each generation inherits interests in these lands, more and more individuals hold interests in one parcel of land. In 1977, the Review Commission used the example of 360 people owning one allotment on the Standing Rock Reservation. Allotments ranged from forty acres of irrigable land to eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land. Today, we have allotments with more than 1000 ownership interests.

What this means for Interior is that we manage each of these individual interests and, when its owner dies, we oversee the distribution of the owner's interest to his or her heirs through the probate process, at an average cost of about $5000, even for an interest worth less than $1. Then-Assistant Secretary for Indian Affairs Kevin Gover, in a radio interview in 2000, mentioned that he is an account holder, having inherited one twenty-seventh of his grandfather's share of land. He had seven cents in his account when it opened. It had eight cents in 2000. He told the interviewer he gets quarterly statements and that it cost the government at that time $35 a year to maintain his account. This is not a rare occurrence. We have tens of thousands of accounts that are similar, wherein the cost of maintaining the account exceeds the value of the trust assets being managed.

Think about what else we could be spending that money on, like Indian education or fighting methamphetamine use in Indian Country. I think Mr. Gover would understand if we decide to pay him for his interest his quarterly statements stop, and the money that otherwise would have been used to generate those accounts -- and thousands like them – is instead used to improve economic and social conditions in Indian Country.

The logical answer to this problem is that we must take a far more aggressive stance on consolidating these interests and then turn over the management of these Indian lands to Indians. These owner-managed lands would still stay in Indian ownership and they would still be exempt from state taxation. They would still be Indian Country for purposes of tribal jurisdiction. When Indian owners become empowered to make the decisions on land use and leasing, the broad paternalistic roles of the Bureau of Indian Affairs and the Office of the Special Trustee can be reduced significantly.

We recognize that many of the parcels of individual Indian land are so highly fractionated that it would be unfair to convert them to an owner managed status at this point. That is why our proposal includes an element that would provide us with the tools to consolidate these interests before they are converted. We propose including in trust reform legislation both voluntary mechanisms and mandatory authority for consolidating highly fractionated parcels. In addition, our proposal includes incentives to enable individual Indian land owners to undertake property management sooner rather than later.

I have heard our proposal described as "termination" of the trust. Clearly it is not. As many of you know, in the 1950s, the government embarked on a policy of "terminating" the Federal Government's relationship with certain tribes. What termination meant was:

- Ownership of Indian land was unrestricted, with the right to transfer it to non-Indians.
- Tribal land was sold and assets distributed to tribal members.
- Tribal members were subject to all state laws.
- Tribal members were no longer be eligible for services provided to Indians because of their status as Indians.
- All property was subject to state and local government taxation.
- Tribal constitutions and tribal sovereignty were abolished.

That policy was squarely repudiated in 1970 and replaced with the policy of self-determination, the policy that guides our relationship with Tribes today. And we have seen great progress in this regard. This is what NCAI President Joe Garcia said in January of this year in the Fifth Annual State of Indian Nations Address:

> As tribes take on more responsibilities, we find that we need to improve the way our tribal governments function. Today tribes are governments with budgets and responsibilities comparable to state governments, and we have become much more self-sufficient than we were in the past. As I traveled the country this past year, I heard from many tribal leaders about their efforts to improve the effectiveness of their governments.
>
> Too often tribes are saddled with federally-imposed models of governance that do not fit our traditions and cultures. It is time to address the barriers caused by these mismatched governments.

He went on to say:

> Many of the federal policies that impact tribal economic development were put into place at a time when tribal governments did not have the capacity that we have today. These policies need to be revisited and tribal governments need to be given the same tools for economic development that exist for other governments.

I couldn't agree with President Garcia more. Not only must we change our mindset about the management of individual Indian land, but we must change it with respect to tribal land as well. Frankly, I am troubled by a statutory and regulatory paradigm that places Interior employees in the position of second-guessing management decisions tribal governments make regarding their lands. A July 1986 Interior Department Task Force on Indian Economic Development

explained in its report how this paradigm stifles economic opportunities for Indians. The report observed that because the Federal Government reviews most important Indian business arrangements, the completion of negotiations with a Tribe or an individual Indian is only the first stage in a business opportunity. It must be followed by a second round of review and possible negotiations with the Federal Government. The report points out that in business, timing is critical, and one often has to act when the other party is ready to agree. The review process makes that impossible.

We have to be able to look honestly at where we stand today with respect to Indian people and Indian tribal governments and make some important decisions. Our policy is to strengthen tribal governments, not to weaken them. Our policy is to recognize the strides that have been made and the talent that exists now on the reservations. We are saying it is time to use the Indian budget more wisely; to make more money available to empower Indian individuals and tribes to manage their assets directly.

As a Governor of a western State, I had the opportunity to work closely with the Indian Tribes in the State of Idaho. As those of you on the Committee with Indian Tribes in your States know, Tribes have made great strides in the last 30 years under the policy of self-determination. Today, Indian Tribes are full-service governments, offering Indians and non-Indians alike a broad range of services.

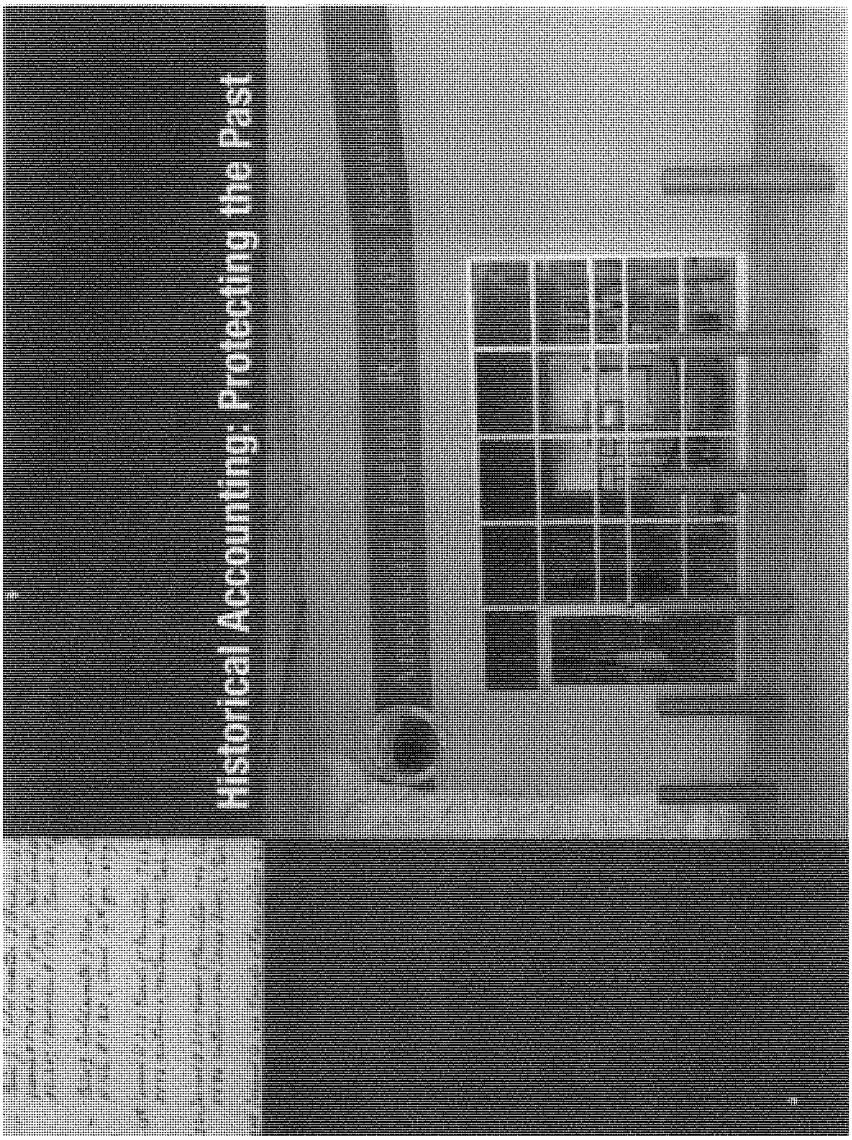
As most of you know, it was President Richard Nixon who ushered in the policy of self-determination for Indian Tribes and Indian people. I'd like to close with excerpts from his famous Special Message on Indian Affairs dated July 8, 1970:

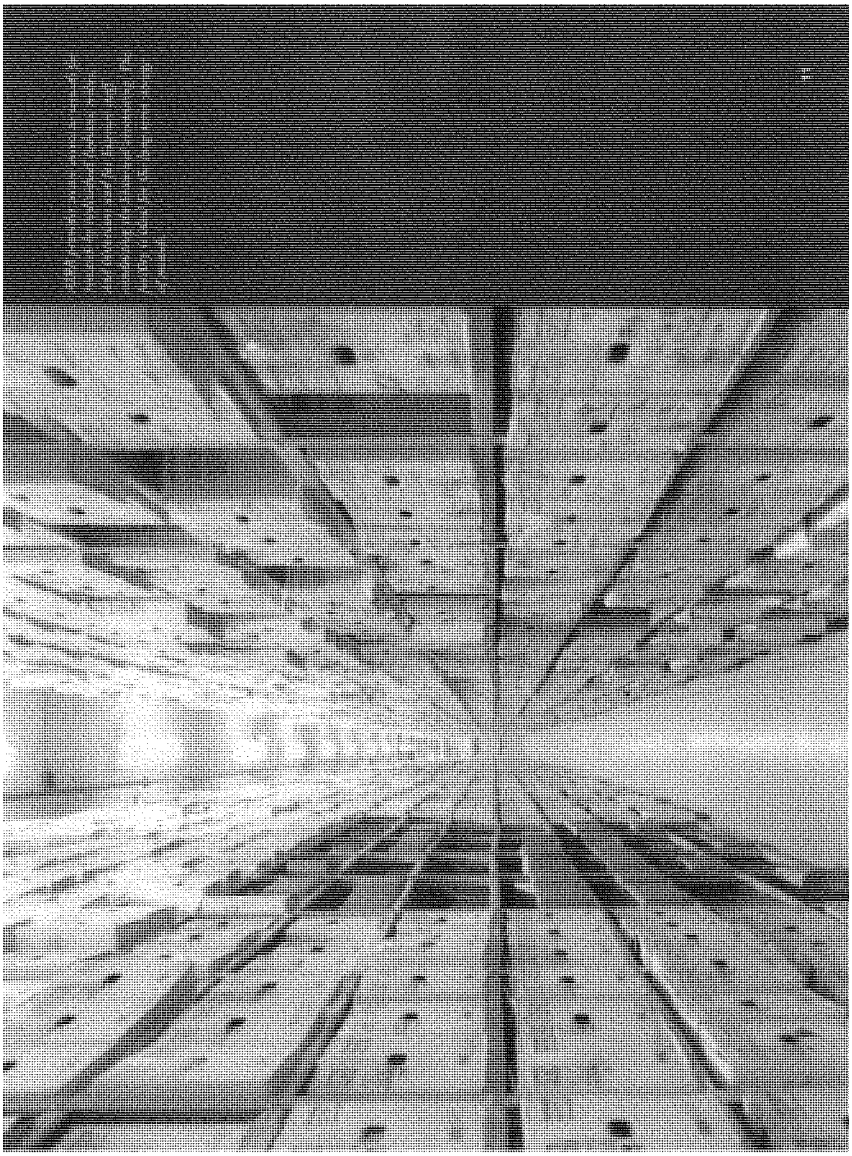
> We must assure the Indian that he can assume control of his own life without being separated involuntary from the tribal group. And we must make it clear that Indians can become independent of

> Federal control without being cut off from Federal concern and Federal support. . .
>
> But most importantly, we have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be furthered. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

Mr. Chairman, we have an opportunity to work together to address several significant issues that are impediments to progress in Indian Country. We need to address the potential for years of litigation. We need to restore the economic value of individual Indian allotments through land consolidation. We need to move beyond a century of well-meaning paternalism to recognize an Indian Country capable of managing its own affairs if only we would let them by moving boldly in that direction. We look forward to working with this Committee, other Members of Congress, others in the Administration, and tribal leaders in our efforts to resolve current conflicts with meaningful initiatives designed to facilitate long term health and prosperity in Indian Country.

Thank you again for the opportunity to appear before you today. We would be happy to answer any questions you might have at this time.


Historical Accounting: Protecting the Past



HISTORICAL ACCOUNTING FOR
INDIVIDUAL INDIAN MONIES
A Progress Report

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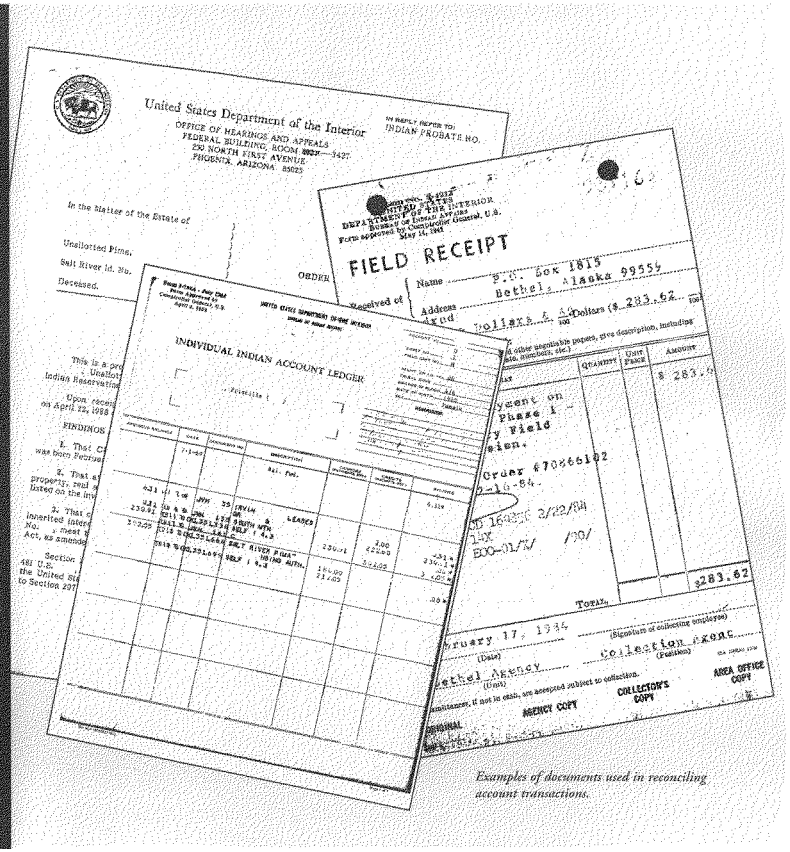
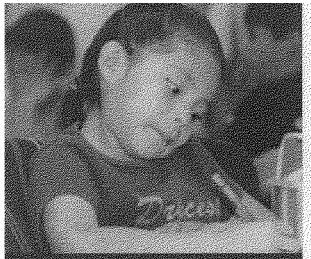


Examples of documents used in reconciling account transactions.



Judgment accounts are often established for Indian minors.

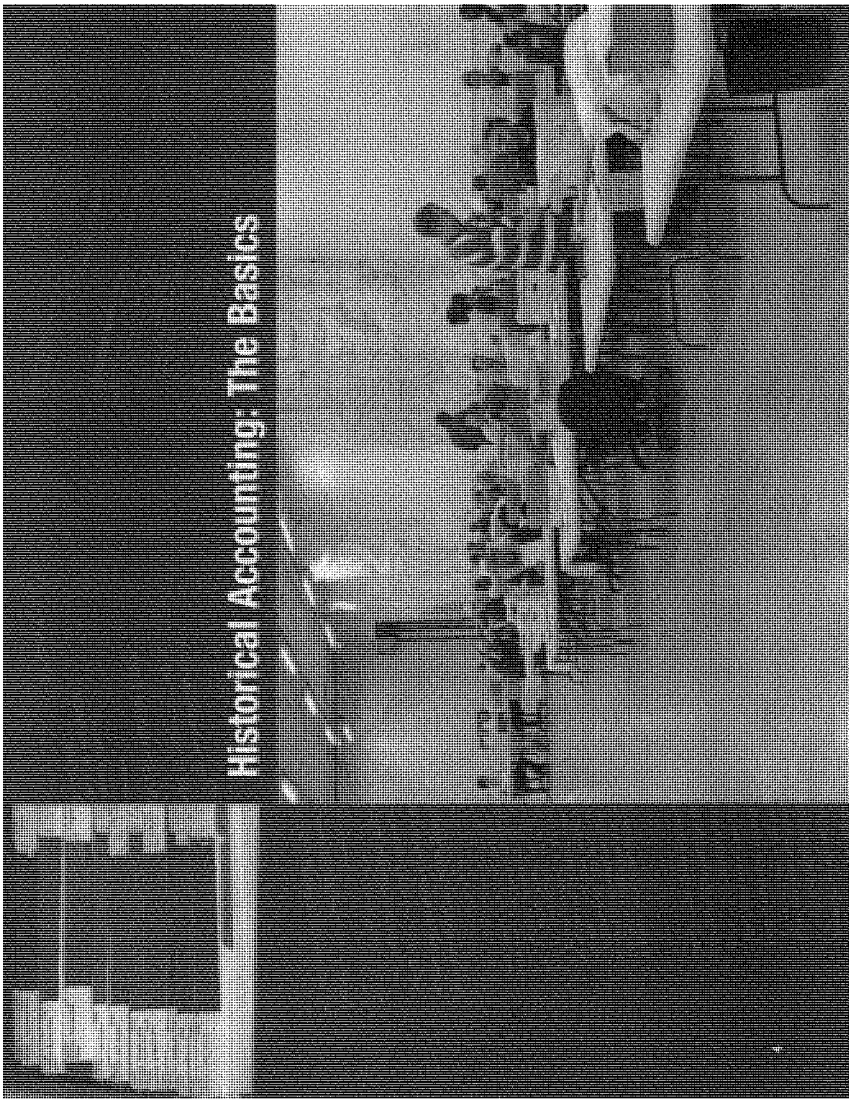
Executive Summary

The historical accounting work on individual Indian monies (IIM) accounts completed to date by the Department of the Interior supports several significant conclusions:

- Supporting contemporaneous records *do* exist and *can* be located for a very high percentage of accounts and transactions.
- Differences between supporting records and recorded transactions *are few in number, small in size, and not widespread or systemic.*
- There is *no evidence* that historical records have been altered or that hackers have tampered with electronic records.
- There is ample evidence that monies collected for individual Indians were distributed to the correct recipients—contrary to the claims of Interior's critics.

Interior has completed a great deal of work to reach these conclusions:

- About a quarter of a billion pages of Indian records have been collected—with over 8 million relevant pages, some dating to the 1910s, digitally imaged and coded for search and retrieval.
- Interior's accounting consultants, using these documents to reconcile (or compare) the *actual* IIM account transactions with the *expected* postings based on an examination of the original financial documents and ownership records:
  - have fully reconciled more than 25,800 out of a total of 42,218 Judgment and Per Capita IIM accounts (accounts based on payments to tribal members) with balances as of December 31, 2000, representing 56 percent of more than $150 million in account balances; and
  - have reconciled nearly 17,000 transactions in Land-Based accounts (accounts that derive their income from the sale or use of land assets and resources), which in aggregate constitute 10 percent of all the dollars in such accounts.


Historical Accounting: The Basics

Individual Indian Monies Trust Accounts

The General Allotment Act of 1887 directed that tribal lands be divided into parcels and given or allotted to individual members of Indian tribes. The initial individual Indian held the sole *ownership interest* in the allotment. As Indians died, often without wills, their heirs each received an *undivided interest* (or share) in the allotment.

Although much of the allotted lands has transferred from Indian ownership since 1887, individual Indians today own approximately 3.2 million undivided interests in approximately 10 million acres of trust lands. Because an individual Indian may inherit interests from several different ancestors, the total number of individuals who own interests is considerably smaller than the number of interests—only about 225,000. The U.S. government is the trustee for the lands and natural resources of individual Indians and for the monetary assets they generate. The Secretaries of the Interior and the Treasury manage those monetary assets through the individual Indian monies (IIM) accounts.

Requirements for Accounting

In passing the American Indian Trust Fund Management Reform Act of 1994 (the 1994 Reform Act), Congress imposed the following duty on the Secretary of the Interior:

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

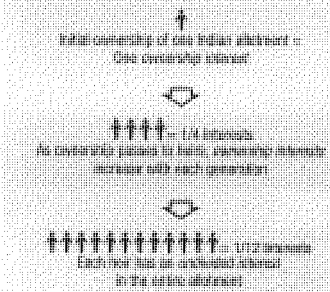
In accordance with this duty, monies received today on behalf of individual Indians are reconciled on a daily basis, transactions are regularly reported to account holders (at least quarterly), and an annual audit of the IIM trust accounts is conducted by an independent auditing firm and reported to the account holders. Interior's current electronic accounting system (the Trust Fund Accounting System) is the same electronic system used by one-third of all U.S. banks.

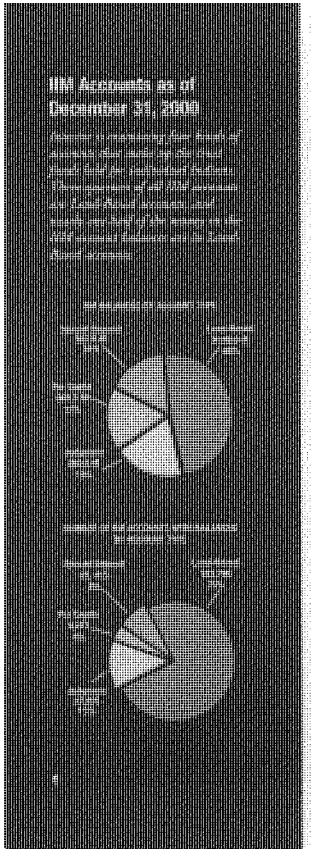
Purpose and Scope of the Historical Accounting

The purpose of the historical accounting for individual Indian monies is to determine and verify the correctness of the opening balance in today's accounts. Ever since Interior began collecting funds for and disbursing these funds to Indians, it has maintained systems—first manual and now electronic— to record those transactions.

What Are Undivided Interests?

Undivided interests are expressed as a fraction of ownership of allotted lands—one-quarter, five-sixteenths, etc. Today approximately 225,000 owners have about 3.2 million interests in over 10 million acres of allotted lands.





Consequently, Interior has divided the historical accounting into two time periods: the electronic accounting era of 1985–2000 and the prior paper accounting era. Interior's Historical Accounting Plan, issued January 6, 2003, includes all IIM accounts open on or after October 25, 1994 (the date of the 1994 Reform Act's passage), through December 31, 2000 (the date by which all IIM account holders were receiving regular quarterly account statements). The Plan calls for Interior to provide each individual Indian a Historical Statement of Account—a history that includes the opening balance, every transaction that ever occurred in that account, and the ending balance, as recorded manually or electronically. Interior also plans to provide each Indian a statement of assurance regarding the accuracy of the Historical Statement of Account.

Types of Individual Indian Money Accounts

Interior has separated its historical accounting activities into four distinct types of IIM accounts: Judgment, Per Capita, Land-Based, and Special Deposit accounts. Each account type had dollar balances in them as of December 31, 2000.

JUDGMENT AND PER CAPITA ACCOUNTS

Individual tribal members received monetary distributions from their tribe from two general sources:

- funds paid to the tribe as a settlement or *judgment* award, and/or
- revenue the tribe earned on its activities (e.g., timber cutting, mineral extraction) and divided among tribal members as a *per capita* payment, similar to a dividend payment.

Most judgment and per capita payments were made directly to the tribal member, but minors and other individuals not eligible for direct payment were paid through IIM accounts. Interior has observed opening balance payments to individual accounts ranging from $43 to $15,370.

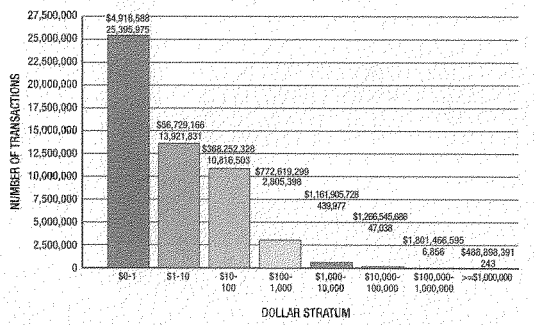
LAND-BASED ACCOUNTS

Some individual Indians received payments based on surface or subsurface leases or other permitted uses of their allotted land and resources. These uses include farming, grazing, rights-of-way, mining, timber, and oil and gas production.

Land-Based account balances and transactions ranged in value from less than $1 to more than $1 million. As land-based assets were inherited over time, the number of small payments continued to grow, along with the increasing number of undivided owner interests. This pattern continues today.

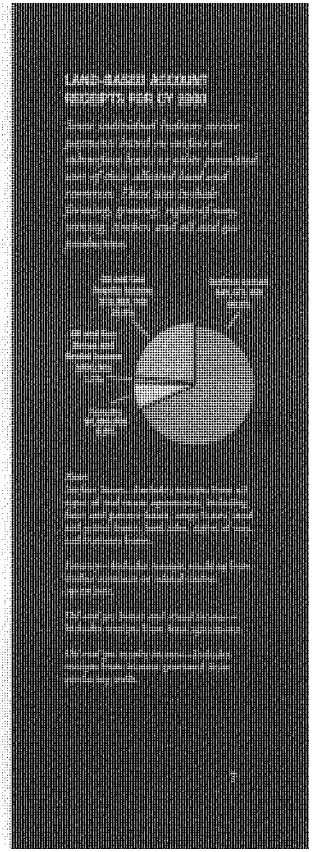
DEPOSIT TRANSACTIONS FOR THE ELECTRONIC ERA: 1985–2000

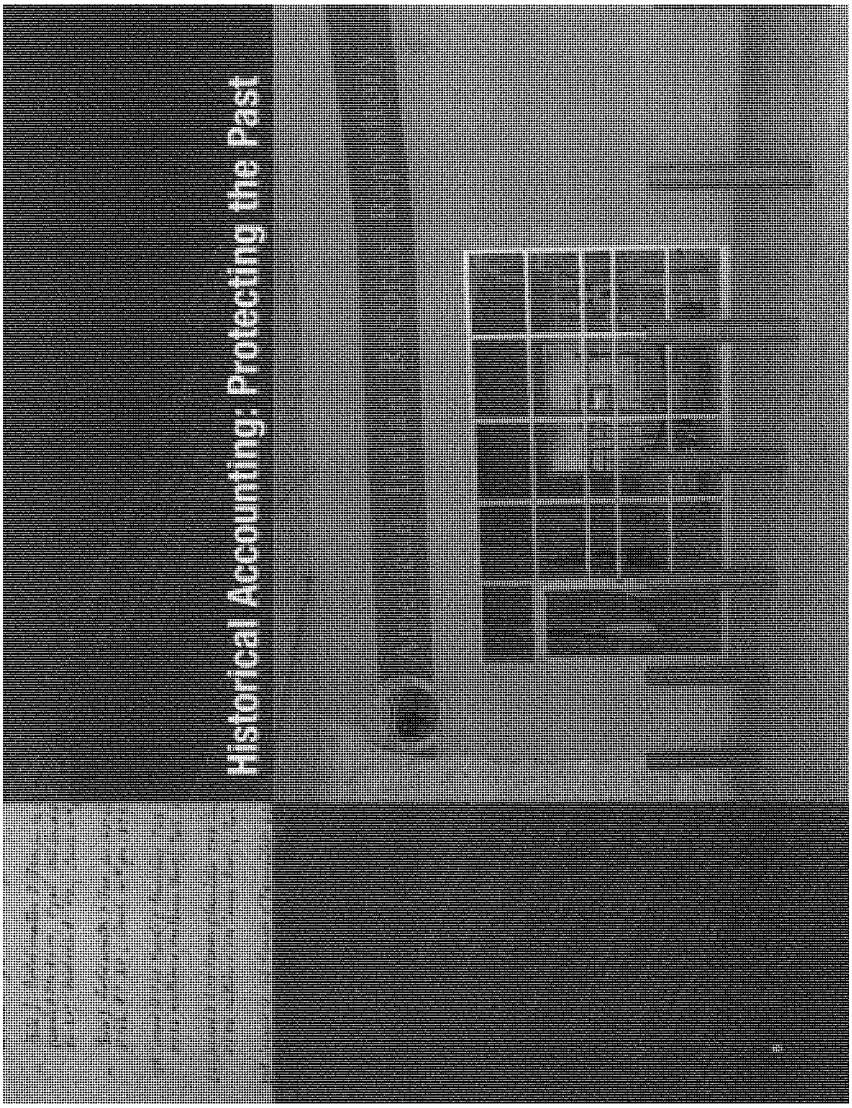
The overwhelming majority of deposit transactions during the electronic records era are small in value and cumulatively represent a small percentage of total deposits. For example, during this period, 93.8 percent of the individual deposits were for less than $100 and represented 7.3 percent of total dollars received, while 0.1 percent of the individual deposits were for more than $10,000 and represented 60.1 percent of total dollars received.



SPECIAL DEPOSIT ACCOUNTS

Interior designed Special Deposit Accounts (SDAs) to be temporary holding accounts for the deposit of funds that could not immediately be credited to their rightful owners. SDAs have been used for a variety of reasons, including instances where ownership could not be readily determined, where time constraints prevented distribution, or where an unresolved issue affected the handling of the funds. Research and analysis of all SDAs must be completed to determine their original source of funds and to properly distribute the funds.



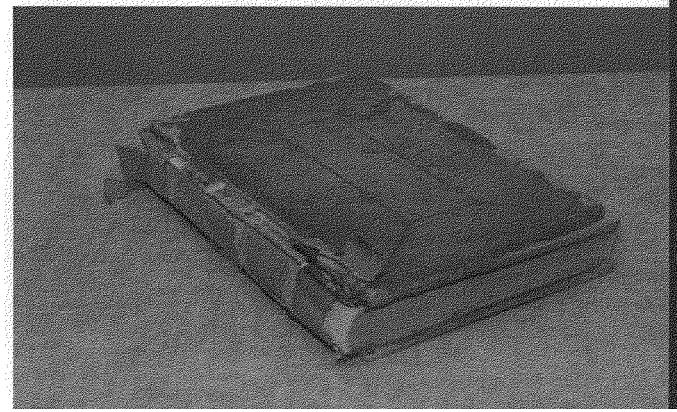

Historical Accounting: Protecting the Past

Preserving and Consolidating Indian Records

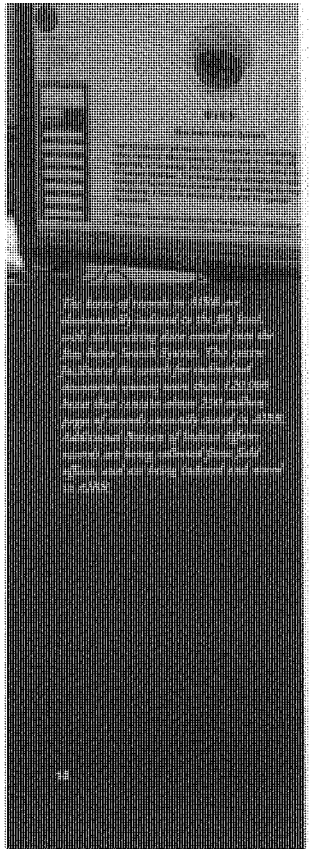
Some have alleged that conducting a historical accounting is impossible because the needed records no longer exist. As a consequence of the work of the Indian Claims Commission of the 1950s, the National Archives and Records Administration (NARA) imposed a "do not destroy" order on all Indian records held at Federal Records Centers—an order that is still in effect today. As a result, the U.S. government has in its possession hundreds of millions of Indian-related documents.

For years, inactive individual Indian and tribal trust records were stored under a variety of conditions at various Federal Records Centers and Bureau of Indian Affairs field offices throughout the country. Following passage of the 1994 Reform Act, the need to protect and have ready access to these records prompted an effort to collect and store them in several warehouses in Albuquerque, New Mexico.

After learning over time that many of these warehouses were not optimal storage spaces, Interior initiated discussions with NARA to build a state-of-the-art document storage facility to consolidate in one location all inactive federal Indian records. As a result, in 2003, Interior and NARA entered into an agreement to



Original leather-bound accounting ledgers from the late 19th century are preserved in the American Indian Records Repository's underground storage center.



establish the American Indian Records Repository (AIRR) in an underground storage center in NARA's Federal Records Center in Lenexa, Kansas. AIRR was completed in 2004, and all records were transferred from Albuquerque by June 2005.

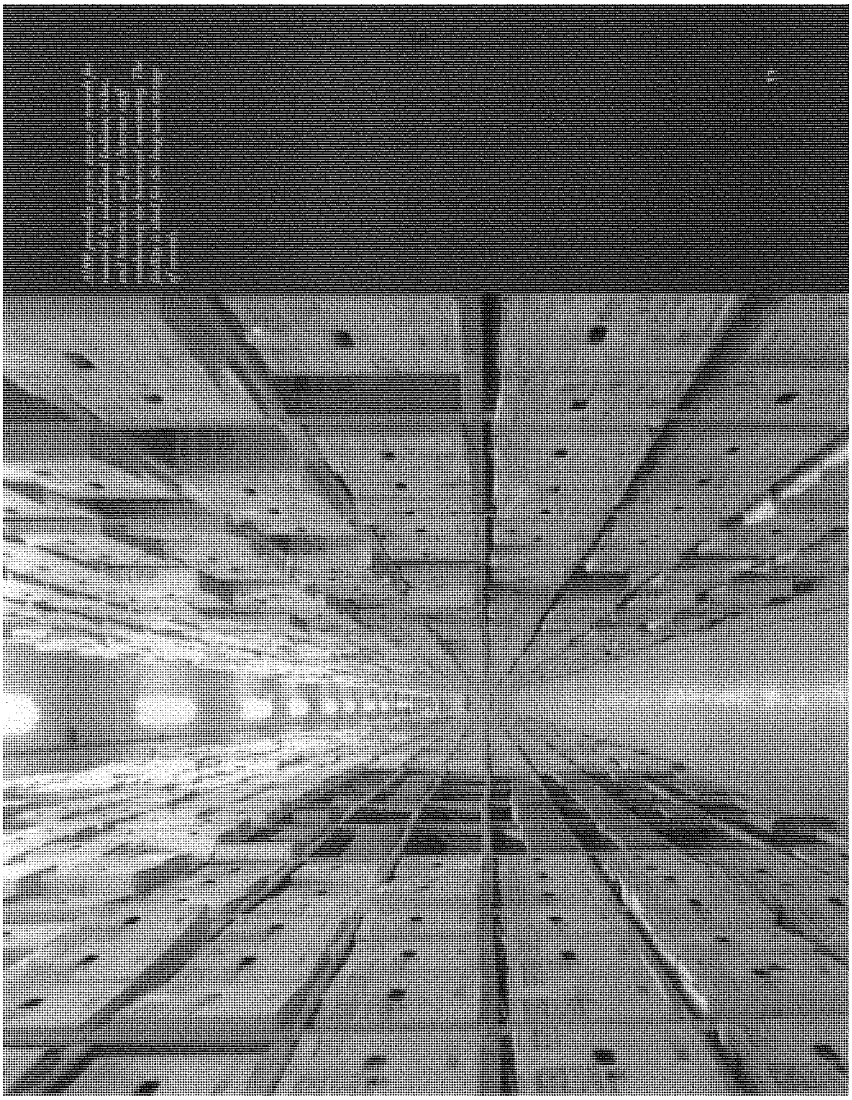
AIRR has been constructed in accordance with higher standards for the preservation of archival records than any other U.S. records storage facility. In addition to lower temperature and humidity controls, AIRR has controls for particulate matter and ultraviolet light. These controls make AIRR the perfect location for the storage of historical records.

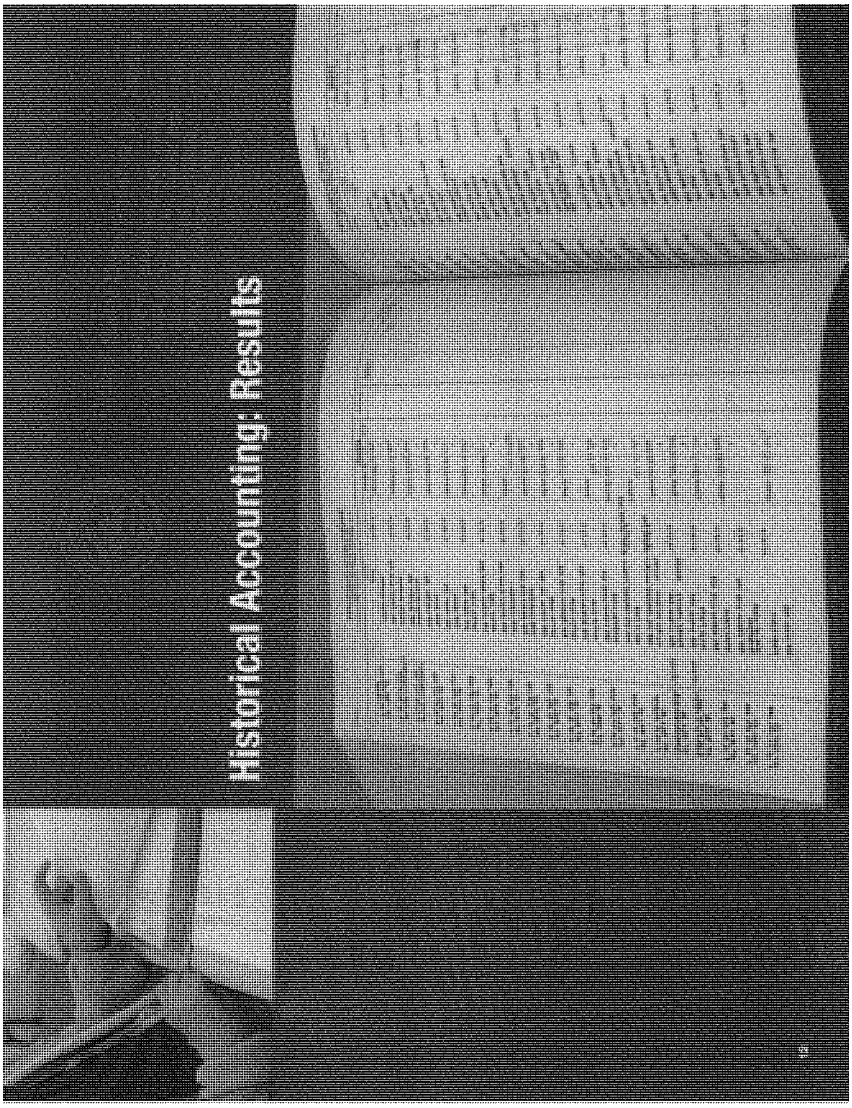
AIRR also has sufficient future capacity to hold all of Interior's American Indian records. Documents will continue to be shipped to AIRR as Bureau of Indian Affairs and Office of the Special Trustee for American Indians headquarters and regional field offices retire records.

Access to Indian Records

AIRR provides secure access to records for research by individual Indians, tribes, and historians, with permission from Interior, and for Interior staff conducting the historical accounting. The boxes of records in AIRR are electronically indexed to the file level, with the resulting data entered into the Box Index Search System. This system facilitates the search for individual paper documents among more than 120,000 boxes that contain about 250 million pages of records currently stored in AIRR. Additional Bureau of Indian Affairs records are being collected from field offices, and are being indexed and stored in AIRR.

Further, Interior estimates that about 70 percent of the accounts that are within the scope of Interior's historical accounting were opened in or after 1985. This period also relates to the time when accounting transaction records were maintained in an electronic system. Interior's initial historical accounting work has primarily covered these accounts, and has demonstrated that supporting records can be (and are being) located. In addition, for some of the accounts that have transactions that pre-date 1985, older paper accounting ledgers and supporting paper records have been located. As part of their reconciliation work, Interior's accounting consultants have reported that they have not observed any evidence that paper records have been altered or that hackers have tampered with electronic records.




Historical Accounting: Results

Judgment and Per Capita IIM Accounts

To provide a statement of assurance to accompany Historical Statements of Account, Interior has decided to reconcile all transactions in each Judgment and Per Capita account. For the most part, these accounts consist of a single opening deposit posting and periodic interest postings. Because numerous accounts are usually associated with each Judgment or Per Capita distribution, by reconciling a payment in one account, Interior can also reconcile all the related accounts. Reconciliation of these types of accounts is straightforward:

- Judgment accounts are reconciled by comparing a posted deposit to (1) the judgment or Act of Congress award, (2) the Tribal Council resolution to distribute the funds in accordance with a use and distribution plan, and (3) the authorized tribal membership roll.
- Per Capita accounts are reconciled by comparing a posted deposit to (1) a Tribal Council resolution, and (2) the authorized tribal membership roll.
- For Judgment and Per Capita IIM accounts, disbursements are reconciled by comparing the posted disbursement to (1) the amount shown on a payment authorization or request for payment document, and (2) proof of clearance or receipt of the disbursement, such as a check register, negotiated check, or electronic fund transfer confirmation.

PRINCIPAL POSTING

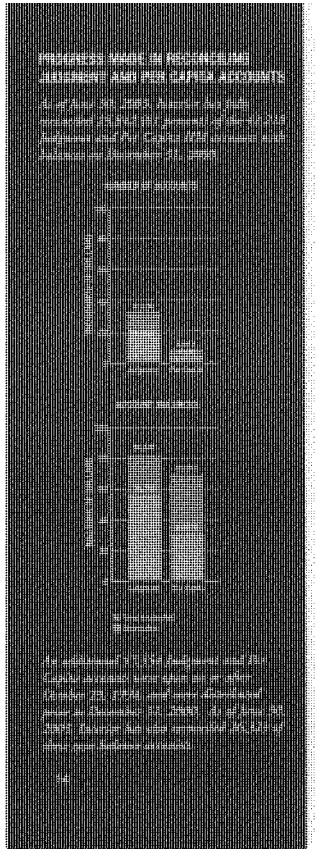
Differences identified during the reconciliation process sometimes favor the Indian beneficiary (overpayments) and sometimes favor the U.S. government (underpayments). The work to date reveals:

- More than 51,300 Judgment and Per Capita accounts were reconciled in which no differences were identified in their principal postings.
- Two Judgment accounts received overpayments totaling $2,205.
- One individual identified on a tribal roll did not receive a Per Capita payment of $100.
- Interior also found two instances where tribes did not distribute the correct amounts to their members:
  - Interest earned—$52—on a refund of legal fees to a tribe was never distributed to 21 tribal members; only the refund itself was distributed.
  - Interest earned—approximately $25,000—by a tribe on Judgment funds was never distributed to 786 accounts; only the principal amounts were distributed.

WHAT ARE DOLLAR AND INTEREST DIFFERENCES?

The accounting term dollar is a comparison of an actual deposit, disbursement, or interest posting to an account with the expected posting based on an examination of the contemporaneous documents that were the basis for the posting. A difference represents an instance where the actual posted transaction amount is not the same as the expected—or, in the case of interest, the recalculated—amount.

As part of Interior's internal accounting procedures, when a difference greater than $1 is found, Interior reports the dollar difference between the actual posting to an account and what should have been posted. Dollar differences may be positive (the actual posting is greater than expected, to the benefit of the account holder) or negative (the actual posting is less than expected, to the detriment of the account holder).



INTEREST POSTING

Because most Judgment and Per Capita IIM accounts have one deposit posting and many interest postings, Interior recalculated the interest posted to each account as part of the reconciliation process. This recalculation has revealed interest differences (defined as greater than 0.5 percent of the posted interest values), due in large part to calculation errors, for:

- 12,533 Judgment IIM accounts—Potential underpayments of less than $225,000 and more than $600,000 in potential overpayments have been identified (out of more than $78 million in posted interest) for a net overpayment to Indian beneficiaries of $375,000. The underpayments represent 0.3 percent of the aggregate interest posted.

- 1,236 Per Capita IIM accounts—Potential underpayments of less than $19,000 and potential overpayments of less than $9,000 were made to IIM accounts (out of more than $14 million in posted interest) for a net underpayment to Indian beneficiaries of $10,000. The underpayments represent 0.14 percent of the aggregate interest posted.

Land-Based IIM Accounts

To assess the accuracy of the Land-Based Historical Statements of Account, Interior has decided to reconcile (1) *all* transactions of $100,000 or more and (2) a statistical sample of transactions less than $100,000. *No statistical sampling is involved in compiling each individual Indian's Historical Statement of Account.* Sampling is only used to *test the accuracy* of the recorded transactions in the account to determine the confidence one should have in the account histories and to provide a statement of assurance. Although Interior considered conducting transaction-by-transaction reconciliation for all transactions in the Land-Based accounts, due to the very large number of transactions (over 23 million deposit and 5 million disbursement transactions), of which the substantial majority have a value of less than $100, Interior determined this course was too time consuming and costly.

Reconciling Land-Based accounts is more complicated than reconciling Judgment or Per Capita accounts because many more supporting documents are required to support Land-Based transactions, and locating those documents involves searching through many boxes of trust records at AIRR and in the field. Also, the ownership interest in allotted lands at the time of the receipt of money must be determined to verify that a posted deposit is the correct amount paid to the right individual interest owner.

What Are the Benefits of Ballot Box?

Everything is a well-equipped museum for training information about an entire population.

Everything is a museum of a new kind, the museum of a population whose consciousness has been transformed by the information about itself that the museum has disseminated. Information about itself has transformed the consciousness of the population, the population of the museum, the population of the museum, the population of the museum

The January 6, 2003, Accounting Plan calls for Interior to provide each individual Indian with a Historical Statement of Account that includes the opening balance, every transaction as recorded in manual and electronic systems, and a statement of the accuracy of the statement. To date, more than 12,000 Historical Statements of Account have been mailed to Judgment account holders.

ILLUSTRATIVE SAMPLE
OFFICE OF HISTORICAL TRUST ACCOUNTING
INDIVIDUAL INDIAN MONIES TRUST FUNDS
HISTORICAL STATEMENT OF ACCOUNT

TO THE PARENTS(S) OR GUARDIAN OF
MINOR CHILD

ACCOUNT OF
ACCOUNT NUMBER

As explained in the attached Historical Statement of Account transmittal letter, the account balance at December 31, 2000 was $1,990.82

This balance was composed of the following:

Judgment award from Dockets 189A and 189B	$1,717.09
Cumulative interest	273.73
Ending balance as of December 31, 2000	$1,990.82

This account activity is detailed below. Interest was calculated based on average daily balance using the interest factor determined for each period by Department of the Interior's Office of the Special Trustee for American Indians. This factor, which may vary by period, is based upon the IIM Trust Funds' investments. Please note, the account balance shown is for December 31, 2000 (the date through which the historical accounting was performed). For account activity and balances after December 31, 2000, please refer to the quarterly Statements of Account.

TRANSACTION ACTIVITY FOR ACCOUNTING PERIOD: 8/27/1998 THROUGH 12/31/2000

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
	$0.00	BEGINNING BALANCE	
8/27/1998	1,717.09	Receipt of judgment award - Dockets 189A and 189B	Collection JUDGMENT PER CAPITA 8B0870142FREDLAKEPSR
9/30/1998	85.23	Monthly Interest	Journal Voucher MONTHLY - AUTO JV08F20623.INT/AUG00
10/29/1998	76.41	Monthly Interest	Journal Voucher MONTHLY - AUTO JV10SF20623.INT/SEP00
11/19/1998	50.26	Monthly Interest	Journal Voucher MONTHLY - AUTO JV10F20623.INT/OCT00
12/05/2000	61.83	Monthly Interest	Cash Receipt INTEREST EARNINGS DOCUMENT # JV11F20623.INT/NOV00
12/31/2000	$1,990.82	BALANCE AT DECEMBER 31, 2000	

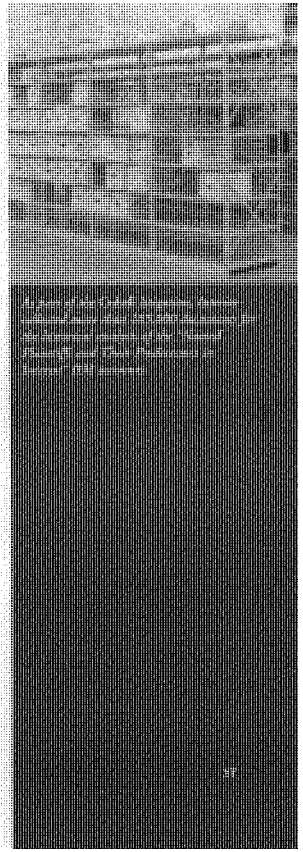
Please note the ending balance is NOT THE CURRENT BALANCE of your IIM account. The account balance shown is for December 31, 2000 (the date through which the historical accounting was performed). If you have questions about this Historical Statement of Account, please call the Office of Historical Trust Accounting, toll free (877) 722-4086. For account activity and balances after December 31, 2000, please refer to the quarterly Statements of Account or your current IIM account balance, please call the Office of the Special Trustee for American Indians toll free (888) 678-6836.

Historical Analysis of the "Named Plaintiffs and Their Predecessors in Interest"

In 1996, five plaintiffs filed a class action lawsuit (*Cobell* v. *Babbitt*, now *Cobell* v. *Norton*), demanding, among other forms of relief, an accounting of IIM funds. The U.S. District Court for the District of Columbia certified "present and former" IIM account holders as a class, and required the Secretary of the Interior to "provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited."

As part of the *Cobell* litigation, Interior collected more than 165,000 documents for the historical analysis of the IIM accounts for the "Named Plaintiffs and Their Predecessors in Interest." These documents went back as far as 1914, with seven of the 37 IIM accounts examined opened prior to 1920. Even in instances where there were gaps in an account's transaction records, it was possible to reconstruct the missing transactions from the original documents that created the transaction. This historical analysis tested the accuracy of the more than 12,500 recorded account transactions by reconciling the source documents to the transactions and the ownership through time. Upon completing this $20 million effort, Interior (and a partner in Ernst & Young LLP) reached the following conclusions:

- The historical IIM ledgers were sufficient to allow Interior to analyze monies collected and disbursed for the 37 accounts, an amount totaling $1.12 million.
- The documents gathered by Interior allowed 86 percent of the transactions to be reconciled and supported more than 93 percent of the dollar values of the transactions analyzed.
- The documents gathered did not reveal any collection transactions that were not included in the selected IIM accounts, with a single exception in the amount of $60.94, which was paid to another account holder due to a transposed account number entered in the recording process.
- There was no indication that IIM accounts are not substantially accurate, that monies were not disbursed, or that the transactions are not substantially supported by contemporaneous documentation.



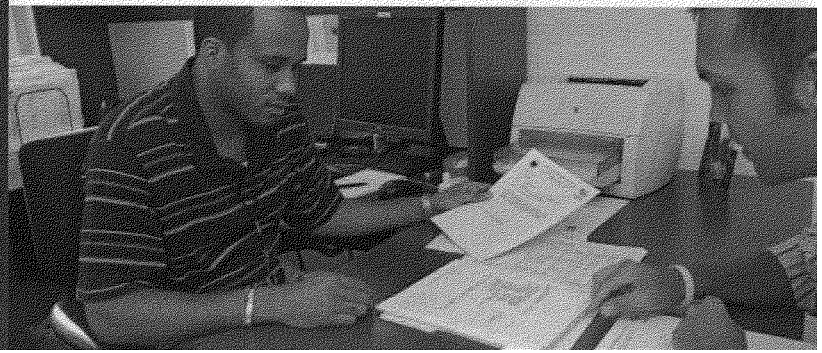
Differences greater than $1 were noted in some of the amounts posted. These differences—totaling nearly $3,500 in overpayments and nearly $250 in underpayments—constitute a combined difference rate of 0.4 percent, and an underpayment dollar difference of less than 0.02 percent of the dollars reconciled.

Interim Results of the Litigation Support Accounting Project

Congress has authorized expenditures for accounting work in support of the ongoing litigation. The Litigation Support Accounting (LSA) project tests the accuracy of Land-Based IIM accounts, and reconciles all high-dollar ($100,000 or greater) transactions, and a statistical sample of smaller-value (less than $100,000) transactions drawn from Land-Based IIM accounts nationwide.

The LSA project is now sufficiently complete to report interim results. Interior has located documents to support over 99 percent of the transactions to be reconciled in this project, further refuting the notion that the records needed for the historical accounting do not exist, are misfiled, or cannot be located. As a consequence:

- Statistical conclusions can be made. These are based on a sample of more than 6,000 transactions out of the approximately 28 million transactions in the 1985–2000 period. It is estimated that more than 40 percent of the monies that have ever flowed through IIM accounts occurred during this time period.



Interior has located documents to support over 99 percent of the transactions to be reconciled in the Litigation Support Accounting project.

- Interior's reconciliation of 1,784 high-dollar transactions to supporting documentation represents more than 10 percent of the aggregate dollars in the 1985–2000 period.

Disbursement Transactions. A key finding of the LSA project is the accuracy of disbursement transactions—payments made to IIM account holders.

- There is no evidence that monies were not disbursed to account holders.

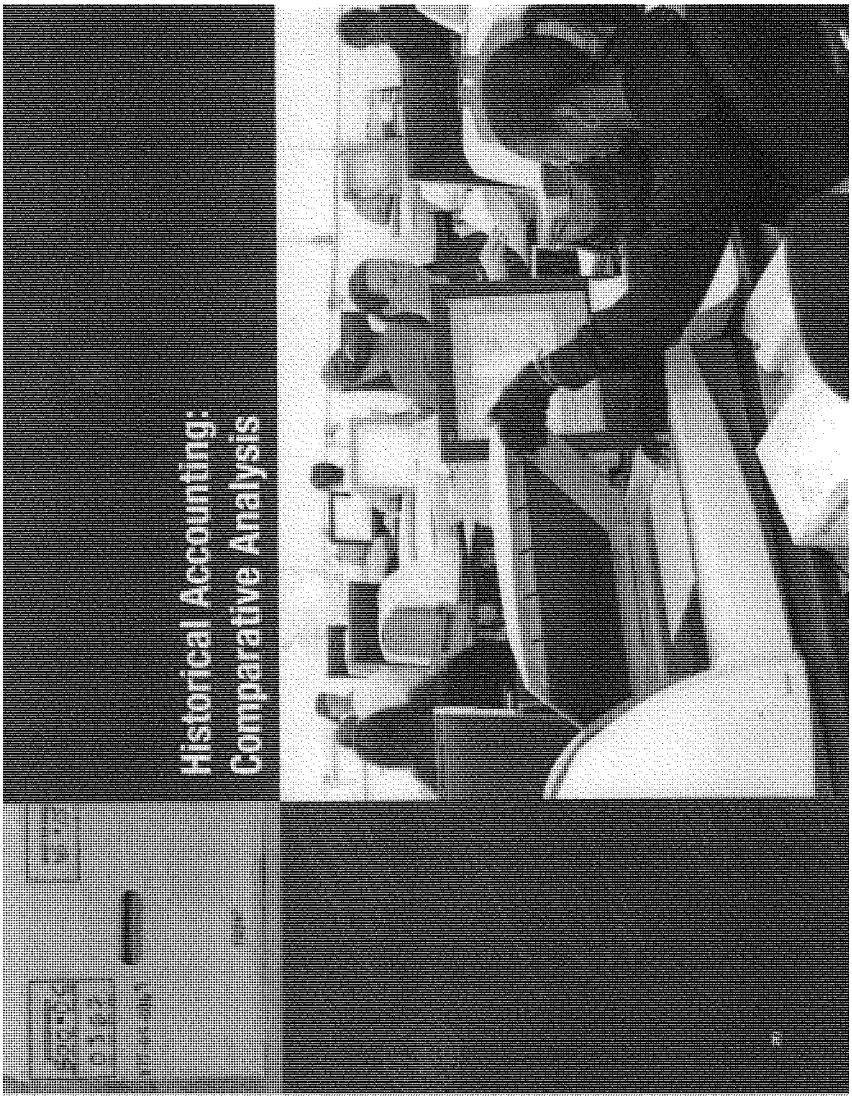
- Only ten differences were found among the 956 high-dollar disbursement transactions reconciled. Three were underpayments totaling more than $1,800, and seven were overpayments totaling more than $19,700 (out of more than $224.8 million reconciled). These underpayment differences represent 0.0008 percent of all the dollars reconciled.

- No differences were found in the sampled disbursement transactions (those that were less than $100,000). The statistical conclusion can be made that, with 95 percent confidence, the underpayment difference rate for disbursements in the entire population in the 1985-2000 period is no more than 0.6 percent.

Deposit Transactions. The 828 high-dollar deposit transactions reconciled resulted in 65 differences: 34 were underpayments totaling just over $60,000, and 31 were overpayments totaling just over $33,000. For the 2,117 smaller-value deposit transactions reconciled, 36 differences were identified: 11 were underpayments totaling $341 and 25 were overpayments totaling $853. For all deposit transactions reconciled, this is a difference rate of 3.4 percent. The statistical conclusion can be made that, at 95 percent confidence, the underpayment difference rate for deposit transactions for the full population in the 1985-2000 period is no more than 3.0 percent.

SPECIAL DEPOSIT ACCOUNTS

The SDA project is an investigation of balances in active and inactive SDAs to determine the nature of the balance and the proper ownership of the account balance. This project is not a reconciliation process in that its primary goal is to determine rightful owners—IIM account holders, tribes, and other parties, such as natural resource companies—of the funds and to distribute their funds to them. Thus far, $36.1 million has been distributed.


Historical Accounting:
Comparative Analysis

Comparison with Other Historical Accountings and Audits

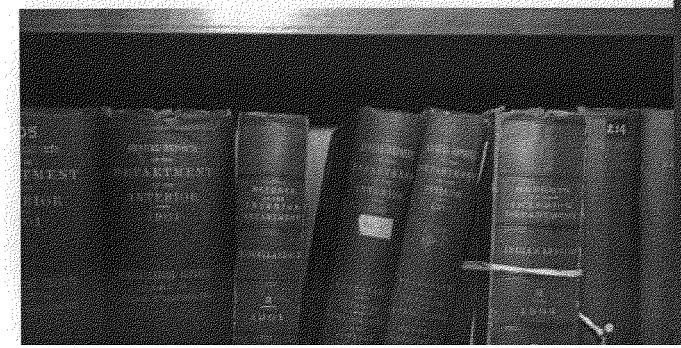
Historical audit and reconciliation studies addressing the soundness of the Indian Trust systems have been conducted by the General Services Administration's Indian Trust Accounting Division, Arthur Andersen LLP (which conducted tribal trust fund reconciliations covering 1972-1992), the Government Accountability Office, and Interior's Office of the Inspector General, among others. The National Opinion Research Center (NORC) at the University of Chicago has reviewed more than 300 of these studies and is conducting a meta-analysis of the studies, reports, and reconciliations of the Trust systems. By integrating and synthesizing these various studies, NORC's meta-analysis will provide valuable evidence on the integrity of the IIM Trust Fund and the systems used in its administration over time.

Thus far, NORC has found no evidence of fraud or major systemic error in the U.S. government's handling of the IIM accounts. Although NORC's meta-analysis is ongoing, Interior's findings, in terms of the number and the size of dollar differences, are consistent with the findings of the previous studies NORC has examined to date. That is, while differences have been noted in transaction records:

- the difference rates are small;
- the dollar differences are a small percentage of the dollars managed in the Trust; and
- the differences appear to be randomly distributed, indicating no systemic issues.

WHAT IS META-ANALYSIS?

Meta-analysis is a recognized statistical technique that allows conclusions to be drawn from a number of similar studies. The statistician combines findings of similar studies to gain precision and certainty, making it possible to assert a more generally applicable conclusion. Meta-analysis is frequently used to compare epidemiological studies and medical clinical trials to integrate the results of different studies in a particular area. For example, it allows conclusions to be drawn from the many different studies of smoking and cancer rates.



The National Opinion Research Center (NORC) at the University of Chicago has reviewed more than 300 known historical audit and reconciliation studies addressing the soundness of the Indian Trust systems.

Historical Accounting: Conclusions

Lessons Learned

Including Fiscal Year 2005, Interior has spent more than $100 million conducting historical accounting. From this effort, Interior has learned the following:

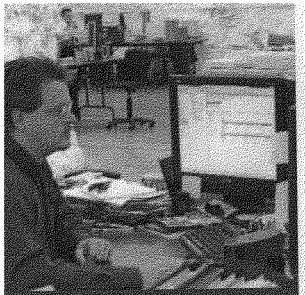
- To a very significant degree, the documents and financial records needed to conduct the historical accounting are available. Locating the necessary records is a lengthy and expensive process due to the sheer volume of records, but the documents are accessible and most can be found.

- Reconciliations completed for Named Plaintiffs, Judgment and Per Capita accounts, Land-Based transactions of $100,000 or more, and a random, nationwide sample of Land-Based transactions less than $100,000 show very low rates of differences. Further, most of the differences tend to be small in value.

- There does not appear to be any bias in the accounting results with respect to differences that favor or disfavor IIM account holders.

- There is no evidence of fraud or major systemic error in the U.S. government's handling of the IIM accounts. Differences found appear to be random computational, posting, or ownership errors.

To date, Interior's accounting work has principally covered the 70 percent of accounts opened in or after 1985 and existing through the 1985–2000 electronic accounting system era. Records prior to 1985 have been examined in the Judgment and Per Capita reconciliations and in the "Named Plaintiffs and Their Predecessors in Interest" reconciliations, which went back as far as 1914. Based on this pre-1985 work and NORC's meta-analysis, there is reason to believe the basic results achieved thus far will extend to the earlier paper accounting era.



Many firms are involved in conducting the historical accounting.

Major Members of the Historical Trust Accounting Consulting Team

Professional Accounting Firms—Five accounting firms are under contract to Interior's Office of Historical Trust Accounting (OHTA): Chavarria, Dunne & Lamey LLC; Deloitte & Touche LLP; Grant Thornton LLP; FTI Consulting, Inc.; and Reznick Group P.C. Formerly KPMG LLP, Arthur Andersen LLP, and Ernst & Young LLP participated in the effort.

Commercial Trust Operations—The Bank of America, which has the largest commercial trust operation in the United States, provides commercial trust expertise.

Statistical Consultant—NORC, the National Opinion Research Center at the University of Chicago, provides statistical analysis.

Historians—Morgan, Angel & Associates LLC, and Historical Research Associates, Inc., provide expertise on leasing, the allotment process, and reservation histories.

Trust Legal Advisor—The Washington-based trust specialist law firm, Hughes & Bentzen, PLLC, provides expert trust law advice.

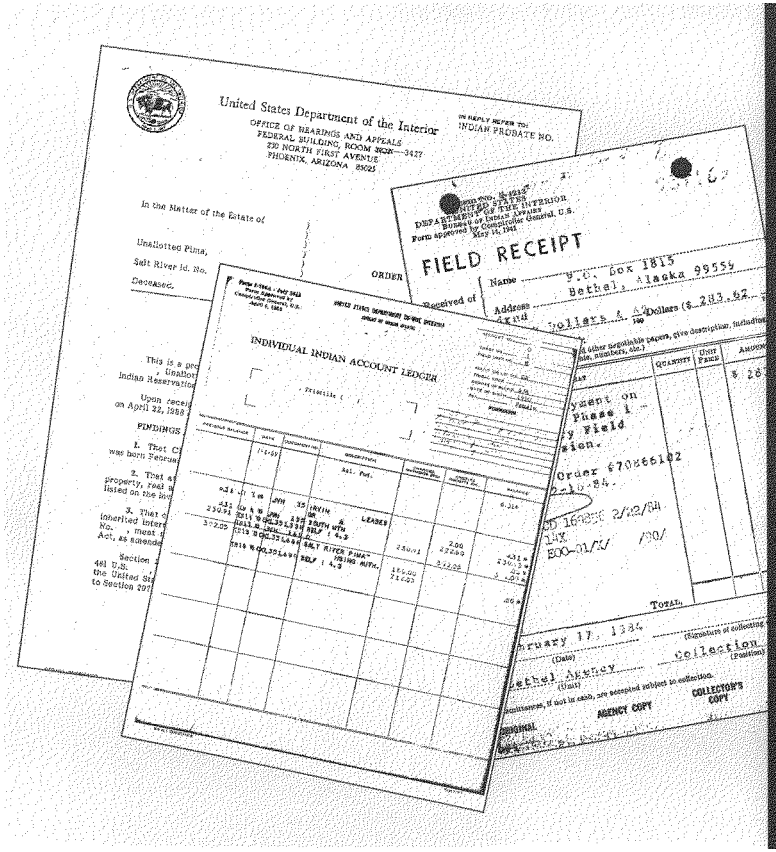
Accounting Reconciliation Tool—Booz/Allen/Hamilton developed the system OHTA's accountants use to compare IIM transactions to trust records that support the transactions and record the findings.

Information Technology Security Advisor—Government & Business Solutions, Inc., provides consulting on the security of trust data and information technology.

Document Imaging and Coding—Ecompex, Inc., has imaged and coded over eight million pages of documents, which are stored in OHTA's Accounting Reconciliation Tool.

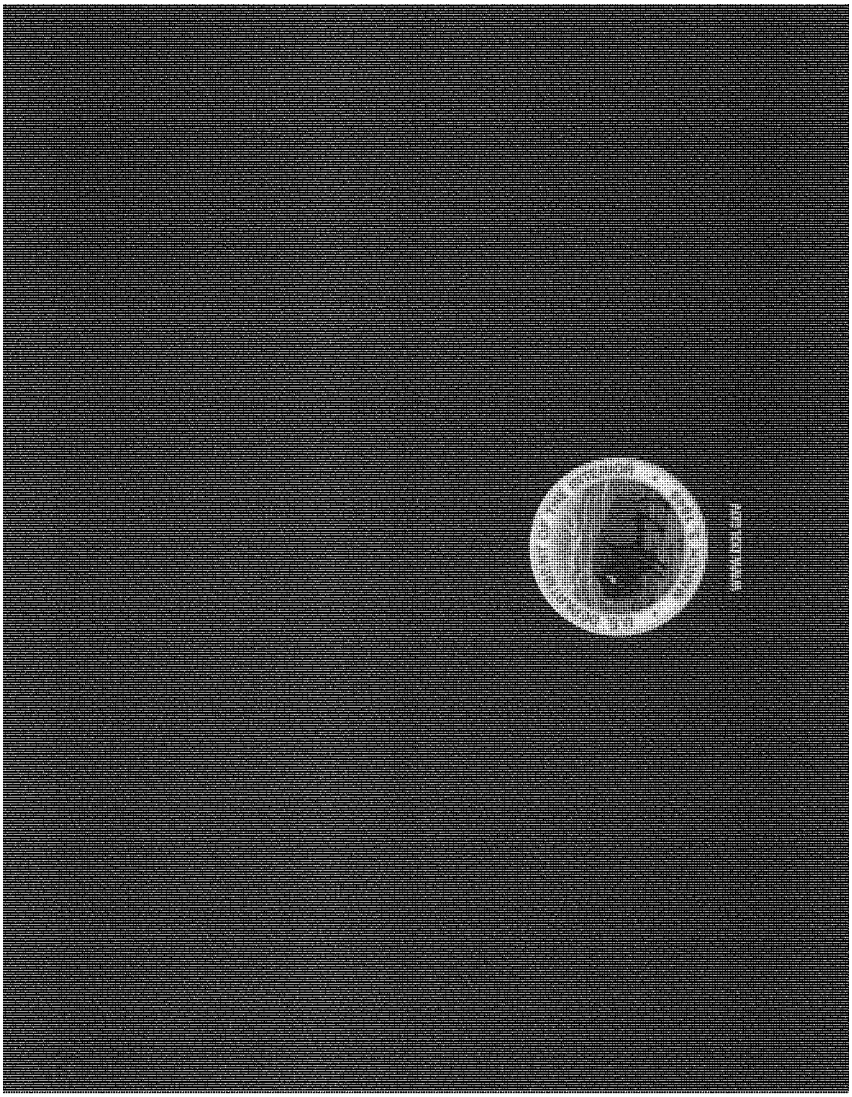
Minerals Records Consultant—Gustavson Associates assists in identifying records relating to oil and gas leases on lands allotted to individual members of Indian tribes.

Records Storage and Indexing—For the Office of Trust Records, Labat-Anderson, Inc., developed the Box Index Search System, and then implemented it, including indexing the boxes of records. Labat-Anderson advises OHTA on records storage and indexing.



"A very high percentage of financial records are available. … Interior's experts have uncovered no evidence of fraud or widespread error in the government's handling of individual Indian monies accounts."

Gale A. Norton
Secretary



INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
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TESTIMONY
of the
INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

"Oversight Hearing on Indian Trust Fund Litigation"
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
Washington, D.C.

March 29, 2007

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following 65 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, Confederated Tribes of Yakama Nation, 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 Nation of Wisconsin, Osage Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Picuris, Pueblo of Sandia, Quapaw Tribe, Quinault Indian Tribe, Red Lake Band of Chippewa Indians, Sac and Fox Tribe, Salt River Pima-Maricopa Indian Tribe, San Pasqual Band of Mission Indians, Sault Ste. Marie Tribe of Chippewa Indians, Shoshone-Bannock Tribes, Sisseton-Wahpeton Oyate Tribe, 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.

Mr. Chairman and members of the Committee, ITMA is pleased to appear and present our views regarding the Administration's recent proposal to settle pending litigation and to recast the nature of the historic trust relationship between the United States and her Indian tribes and their members. The Administration proposes a single initiative to address the *Cobell* litigation, the dozens of pending tribal lawsuits, and the continuing fractionation of Indian land ownership. The proposal would also eliminate government liability for future trust administration. ITMA does not regard this as trust reform, but rather as a proposal for termination or a buy-out of the trust responsibility. In summary, ITMA does not believe the Administration can honorably and reasonably address all the Indian trust-related issues contemplated by this latest proposal in a single package. However, we believe this Committee can and should take certain actions, outlined below, to address these very important issues. Before discussing our recommendations, we first offer a couple of general observations.

GENERAL OBSERVATIONS & COMMENTS

ITMA and our member tribes do welcome a dialogue with this Committee. We believe strongly, however, that a true dialogue can only occur if we are at the table to develop proposals, and not merely to react to them. For today, however, let us start with saying the Administration proposal to "settle" or buy out the trust responsibility for "up to" $7 billion is an illusory offer at best. Mr. Chairman, you have offered us transparency in this process. We do not know how any such amount would be allocated to the vast range of trust-related issues the government proposes to settle.

We do not think tribal claims should compete with a "settlement pot" that includes coerced sales by individuals; pits tribes against their own members; and that threatens human resource programs. If principle matters, any number should result from deliberations, not lead them.

In any principled deliberations, we believe Congress should first break apart the issues into manageable-sized pieces. Starting with the *Cobell* litigation, if Congress chooses to wade into this fray, it should deal with its resolution separately. The recent approach of linking trust reform with settlement of *Cobell* failed, and the Committee should take on a different approach. Congressional intervention, or resolution, or settlement, should not be further complicated by attempting to fold the settlement of a hundred other lawsuits into the mix. After more than ten years of litigation, the membership of the plaintiff class in *Cobell* is still very much in dispute, as is the scope of the lawsuit itself.

Second, with respect to tribal lawsuits, more than one hundred are currently pending against the government. Some of these have been in the courts for almost thirty years. Scores of them were filed as recently as December 2006, however, purely as a defensive measure against the possibility that they would thereafter be barred by the statute of limitations. Some of these cases involve relatively straightforward fiscal accounting issues. Others involve such diverse issues as range management and uranium processing. In other words, these tribal cases are emphatically not all alike.

Third, with regard to land consolidation, reducing the number of Indian-owned interests in trust lands is a centerpiece of the Administration's proposal. However, it

should be noted, at least three previous attempts to accomplish this objective have been declared unconstitutional.[1] ITMA believes another large-scale effort to separate Indian landowners involuntarily from their property is unlikely to fare better than these earlier attempts. ITMA fully appreciates the management issues associated with highly fractionated, undivided land ownership throughout Indian country. The tribes and the government might find some common ground to address this issue, but not if the government insists on driving a wedge between tribes and their members on Constitutionally protected property rights.

ITMA RECOMMENDATIONS

Based on these observations, ITMA offers the following recommendations. With respect to the *Cobell* litigation, just over one year ago this Committee held an important joint hearing with its House counterpart and asked a number of individuals to provide Congress with the benefit of their respective experience establishing settlements in cases where lawsuits succeeded in bringing historic wrongs to the public's attention, but which offer no immediate prospect of redress, relief or restitution for those who were wronged. ITMA suggests that discussion, in which Chairman Dorgan was a very active participant but which was never followed up, might be a helpful starting point for this Committee's consideration of any role it might play in bringing about a resolution of the *Cobell* litigation.

Regarding land consolidation, ITMA suggests the Congress should consider following up on the successes of its voluntary purchase program of recent years.

[1] *See, Hodel v. Irving,* 481 U.S. 704 (1987); *Babbitt v. Youpee,* 519 U.S. 234 (1997); *Dumarce v. Norton,* 277 F. Supp. 2d 1046 (D. S.D. 2003)

This program should be greatly expanded with an eye to eliminating the duplicative bookkeeping, unnecessary red tape, and inadequate funding levels that have hampered its overall effectiveness. ITMA has strongly opposed the idea of converting proposed settlement funds to purchasing fractionated ownership interests through involuntary sales. That would result in settling nothing and would, instead, raise the likelihood of even more claims. The government should look to the tribes themselves for approaches that will work on a tribe-by-tribe basis and will not diminish human service programs in order to ameliorate a bureaucratic problem of the government's own making.

Regarding the pending Tribal litigation and settlement alternatives, we believe Congress should "reset the clock" on any possible Statute of Limitations. Through the efforts of Congressmen Sidney Yates, Ralph Regula, and Mike Synar, Congress first enacted a provision in the annual appropriations legislation to prevent the statute of limitations from even beginning to run on trust claims until each beneficiary receives an accounting. Until the end of last year, Congress also took action to remove the possibility that the receipt of an Arthur Andersen report may have commenced the running of the statute of limitations on any of the 300+ Indian tribes that received such a report.[2] In taking this action, this Committee was fully supported by both reports and testimony provided by the General Accounting Office.

ITMA has long urged a means of resolving tribal trust fund claims without resort to costly and time-consuming litigation. Toward this end, ITMA cooperated with this Committee in developing P.L. 107-153, and later P.L. 109-158. We think it is perfectly clear that those measures had the desired effect of forestalling the

[2] *See*. Public Law 107-153 and P.L. 109-158.

avalanche of litigation that we saw in December of 2006, when tribes felt it necessary to act against the possibility that their claims would expire. ITMA respectfully suggests that many, perhaps dozens of the lawsuits filed in December 2006 might be voluntarily withdrawn if the Congress were again to reset the clock against which the government has argued the statute of limitations will someday run. In fact, we believe that the reports and testimony of the General Accountability Office would fully support a decision simply to declare that the Arthur Andersen reports do not commence the running of the statute of limitations.[3]

As a related and necessary matter, we believe Congress should authorize tribal trust fund settlements outside of litigation and provide authorization to access the U.S. Judgment Fund for payment of such settlements. The government has entered into settlements with many tribes on trust fund-related claims in recent years. To date, however, the government has not reached settlement with a single tribe that was not involved in litigation on the matter. ITMA has urged a means of honorable trust fund settlement for those tribes with neither the means nor the inclination to sue the government. Toward that end, ITMA and the Department of Interior in recent years have been working cooperatively on a Tribal Trust Funds Settlement Project (TTFSP) to develop a methodology by which the government and non-litigating tribes could assess and negotiate resolution of tribes' fiscal claims against the government.

Both parties have expressed hope that, if a resolution of fiscal claims could be reached on the basis of an intellectually rigorous methodology applied to empirical

[3] Of course, this Committee might well reconsider its previous unwillingness to deal with the underlying issue: "The Committee takes no position on whether the receipt of reconciliation reports does in fact commence the running of a statute of limitations on tribal claims against the United States related to the United States' management of tribal trust funds." SEN. RPT. 107-138 (107th Cong., 2d Sess.) at 5.

data, then even broader settlements might well be within reach. The government has indicated that, notwithstanding the spate of lawsuits filed in December 2006, the TTFSP remains an important vehicle for reaching settlement. Even those tribes who have participated in the TTFSP and who also filed suit in December 2006 have expressed their desire to continue to participate in the TTFSP. Both ITMA and the government look forward to continuing to develop the settlement methodology contemplated by the Tribal Trust Fund Settlement Project.

Based on our experience and input from our member Tribes, ITMA urges Congress to pass legislation that specifically authorizes settlement of tribal trust claims outside of litigation, authorizes payment from the Judgment Fund for such settlements, and provides for finality in the absence of traditional re-openers such as fraud, material misrepresentation, etc. In order to avoid setting up a system that results in the raiding of existing tribal programs for payment of these settlements, ITMA strongly believes that Congress must authorize payment of these settlement through the U.S. Judgment Fund, with a directive that any replenishment to the Fund not be charged to or otherwise offset by existing or future appropriated or budgeted funds for Indian programs.

Consistent with the principle of bi-lateral discussions that are based on the recognition of the sovereign status of each individual tribal government, this Committee should begin a dialogue between interested Indian tribes and the Administration to enact a voluntary settlement procedure for those Indian tribes that wish to take advantage of such an opportunity. Such efforts should recognize that every Indian tribe should have the opportunity to bring its claims in the court of courts

of its choice, but that many Indian tribes would probably prefer a more expedient and certain claims settlement process.

Addressing another related tribal settlement issue, ITMA takes this opportunity to reiterate our adamant objection to the proposed Part 112 regulations entitled "Tribal Trust Fund Accounting and Appeals". The draft regulations would greatly diminish the ability of Indian tribes to access the federal courts with regard to federal management and administration of tribal trust funds account and management, and ITMA questions whether DOI possesses the authority to unilaterally, through an administrative rule, undermine the Indian Tucker Act. ITMA has requested that the Department withdraw the draft Part 112 regulations.

ITMA also urges Congress to seek fuller Disclosure of trust fund issues. In the interest of transparency that Senator Dorgan has so recently promised, ITMA suggests that this Committee's deliberations might benefit from a somewhat more complete disclosure than has previously been available to Indian account holders. This Committee has often been told, for instance, that there is no evidence of "widespread" theft or losses from the Indian trust account portfolios. To account holders, that says they have found evidence of theft and losses, but choose not to disclose their findings. ITMA respectfully urges this Committee to demand full disclosure of all such findings. Whether the Executive Branch agencies comply willingly or resist, ITMA suggests the response will be enormously instructive.

ITMA also recommends that Congress eliminate "Administrative Fees" on Indian trust transactions. In recent years, the Department has adopted a policy of imposing "administrative fees" on Indian trust transactions, presumably to "cover the

costs" of processing those transactions. ITMA urges this Committee to withdraw any authority the Department of Interior has to impose such fees until such time as Congress has seen fit to authorize such a fee with some particularity, both with regard to the amount and with regard to the application of any such fees collected. This unilateral authority is tantamount to permitting the Secretary to impose a tax on Indian trust activities; it results in a second set of bookkeeping and accounting obligations when accounting for the underlying transactions is already a source of enormous difficulty and frustration; it permits the development of "operating funds" for the agency quite apart from the Congressional appropriations process; and it generally frustrates the single-minded focus that should be directed at trust reform and not revenue generation for the government.

Finally, ITMA fully supports this Committee's efforts to restore "trust" to the Indian trust. If this Committee can perform this simple miracle, most of the other problems will take care of themselves in due course. The Vice-Chief of the Army has stated recently, in the wake of disclosures about conditions in a facility at the Walter Reed Army Medical Center, that "This is all about trust." In effect, he said the Army should be fighting to determine what a wounded soldier has coming to him or to her, and then to give it him. He shouldn't have to fight us for it. The entire system of rewards and sanctions in Indian trust administration has been turned on its head. The Inspector General reports that a Departmental employee was given a cash bonus for "creativity" in falsifying audit work papers. We cannot remember when last an employee was publicly rewarded for revealing a problem in trust administration.

CONCLUSION

In closing, ITMA is eager to work with this Committee in a new Congress to bring a new sense of trust to the Indian trust; to bring an end to a period of contentious litigation; and to bring honorable resolution to claims too long evaded.

role of the Department of Justice has been and continues to be the handling of those claims. I will largely defer to Secretary Kempthorne as to the other elements of the Administration's proposal.

At the outset, I emphasize that the Administration's proposal is designed to achieve a fair compromise of these claims, without the need for protracted litigation, and does not in any way amount to an admission in any pending or potential case. As judges, lawyers and litigants well know, settlements are not considered admissions, as people and organizations settle lawsuits and claims for a variety of reasons. In any event, we anticipate that, before settling these claims legislatively, Congress will also want to be satisfied that the settlement here is reasonable and in the best interests of the public and of individual Indians and Tribes, and that it neither overvalues nor undervalues the claims that it resolves. As you might expect, there are some limitations on my ability to discuss pending cases. But I would be pleased to discuss with the Committee the Department of Justice's general views about the background and basis of this proposal as best I can.

II. BACKGROUND

As you know, the United States has held in trust and managed land and funds on behalf of Indian Tribes and individuals for over a century. There are currently approximately 55 million acres of land held in trust, some 80% of which is held on behalf of Tribes and 20% on behalf of individual Indians. Over time, ownership of much of the individual Indian land has become divided among numerous parties ("fractionated"), because numerous trust beneficiaries who owned this land have died intestate. This has complicated management of trust resources and

monies, and made determinations of which trustee heir should receive which amounts from the splintered parcels of land more difficult. Fractionation thus impedes effective and efficient use, disposition, and management of these lands, and also complicates the task of managing the trust by increasing the number of individual Indian accounts.

A. The *Cobell* Litigation

The plaintiffs in *Cobell v. Kempthorne* (D.D.C.) are a class encompassing hundreds of thousands of beneficiaries of Individual Indian Money ("IIM") accounts. They seek to enforce trust obligations of the Secretaries of the Interior and Treasury. The ten-year-old class action, the largest filed against the United States, encompasses both systemic trust reform and, more specifically, an historical accounting that is required by a 1994 statute.

The litigation has been the subject of numerous court opinions, including nine from the Court of Appeals. In November 2005, the D.C. Circuit overturned a district court order that had required an exhaustive accounting of IIM revenues that by itself would have cost more than $10 billion to carry out. Since that decision, Interior has continued its historical accounting efforts, including refining its approaches based on the court decisions, results of statistical sampling and available funding. Interior's historical accounting work to date has revealed that substantial documentation does still exist to perform the accounting, and that relatively few differences exist between account transaction ledgers and supporting documents. Interior's accounting work to date suggests possible errors in the range of tens of millions of dollars, not the billions that plaintiffs claim. Moreover, this includes errors of overpayment as well as underpayments.

On July 11, 2006, the D.C. Circuit issued two separate decisions. One vacated the district court's injunction requiring Interior to disconnect nearly all its computer systems from the

Internet. The other vacated an order requiring Interior to declare in all written communications with class members that "any" information provided about trust matters "may be unreliable," and also granted the government's motion to reassign *Cobell* to another district court judge, describing the district court judge's "professed hostility to Interior" as having become "so extreme as to display clear inability to render fair judgments," and noting the unbroken string of eight appeals in which it had reversed or vacated the district court's rulings. On December 6, 2006, after plaintiffs' request to stay the Court of Appeals' decision to reassign the case was denied, the case was remanded and reassigned to District Court Judge James Robertson. On Monday March 26, the Supreme Court denied plaintiffs' request for certiorari as to the D.C. Circuit's two decisions.

Plaintiffs did not seek a stay of the proceedings before Judge Robertson. Consequently, litigation before the district court resumed in December, 2006. Through conferences with the court, the parties and Judge Robertson have begun to explore how litigation of the case should proceed in light of the Court of Appeals' decisions issued since November 2005. In orders issued on January 16 and 29, 2007, Judge Robertson denied, among other motions, all of plaintiffs' pending motions alleging contempt or seeking sanctions against past and present Department of Justice and Department of the Interior employees.

B. The Tribal Trust Litigation

At present, over 80 Tribes have filed a total of 103 lawsuits against the United States seeking an accounting or damages for trust mismanagement. These cases are pending in the United States district courts in the District of Columbia and in Oklahoma, and in the United States Court of Federal Claims; some Tribes have sued in multiple courts. The 37 cases pending

in the United States District Court for the District of Columbia are assigned to Judge Robertson, the same judge who is presiding over the *Cobell* litigation. In two cases, the Tribes assert that they will seek to certify class actions of Tribes seeking accountings of trust funds and assets. If these classes are certified, the number of plaintiff Tribes is likely to exceed 300. Some 78 of the cases were filed in November and December 2006, possibly as the result of the expiration of a statute of limitations on December 31, 2006.

In the cases pending in the federal district courts, the Tribes are seeking a historical accounting, similar to the accounting sought by the *Cobell* plaintiffs. In the Court of Federal Claims cases, the Tribes assert that the United States is liable for money damages for allegedly mismanaging Tribal funds, lands, or resources that it holds in trust. The issues and claims in these cases are legally and factually complex, and the cases will take many years to litigate. Providing a historical accounting or litigating a trust mismanagement claim will require review and analysis of an extremely large volume of documentation and data.

Thus far, the United States has employed several different approaches to the Tribal trust cases. It has engaged a large number of Tribes in constructive settlement discussions or formal alternative dispute resolution (ADR) processes. So far, that cooperative approach has produced partial or complete settlements in some Tribal trust cases. The United States has also addressed other cases through litigation where a settlement or ADR has not been feasible. The United States will continue to address and resolve the Tribal trust issues and claims in a fair, reasonable, and appropriate manner that is in the best interests of the Government and the Tribes.

III. BASIS FOR THE SETTLEMENT PROPOSAL

I will now provide some background on the basis of the Administration's proposal for a legislative program that would involve up to $7 billion over ten years to completely reform the way Indian land trust issues are handled. Although this is a far-reaching legislative proposal, it would include components to settle and resolve the various litigation claims.

Our settlement proposal is consistent in overall scale with past settlements of Indian claims. One important (albeit not strictly analogous) precedent is the Indian Claims Commission. The Commission was a quasi-judicial body that had jurisdiction over Indian claims arising at any time before its creation in 1946, and that considered more than 600 dockets during the 32 years of its existence. If the awards issued by the Commission in those dockets are added and adjusted for inflation, they total approximately $4 billion. The claims before the Commission differ from the present group of cases in some respects: for example, they included numerous large land claims, as well as moral claims not otherwise cognizable at law. Nonetheless, the scale of our proposal is generally comparable with that historical experience. (It is also noteworthy that accounting claims were the second largest class of claims before the Commission, after land claims.)

Tribal claims. As I have explained, the present group of Tribal claims focus on trust accounting and alleged mismanagement of Tribal funds or resources, and seek historical accounting remedies or money damages. The Department of Justice has substantial experience in litigating such Tribal claims. In addition to the accounting claims before the Indian Claims Commission, numerous such claims have also been brought in the Court of Claims or Court of

Federal Claims over the years. The Administration's settlement proposal takes into account this past experience with litigation of these claims.

Past DOJ testimony has been misunderstood as conceding governmental liability for the amount of damages claimed by some Tribes. At one point the Department calculated that Tribes were seeking a total of $200 billion in the then-pending cases. But in the Department's experience, there is often a large gap between the claims in a complaint and what can actually be proved at trial. Should litigation of these cases proceed, the United States will press its defenses diligently, as it would in any other case. Without being able to get into the details of a pending litigation, we still foresee the high likelihood that if litigation proceeds, some Tribes would ultimately receive no recovery, while many others would receive far less than the amount they seek. For example, one Tribe issued a press release claiming that it was entitled to recover $100 billion in its suit against the United States. That Tribe's claims were subsequently dismissed in their entirety, with no monetary recovery to the Tribe. The United States has also been actively involved in seeking to settle the Tribal trust cases through cooperative work with Tribes, and has successfully concluded some settlements. That process likewise involves compromise by Tribes of their claims.

An additional source of information on the value of these claims is the reconciliation project which was completed in 1996. That project analyzed transactions in all Tribal trust accounts between 1972 and 1992. The reconciliation project found that the United States owed the Tribes collectively on the order of ten million dollars for the transactions it reviewed. Because of insufficient time and funding, work on about ten percent of the covered transactions was never completed. But the project represents a substantial effort to analyze the United

States's management of these trust accounts, and underscores that the United States's overall financial exposure to Tribal trust claims is limited.

Individual claims. Turning to the individual claims, there has now been considerable accounting analysis performed on the individual accounts. As that analysis has proceeded, it has increasingly shown that errors were very infrequent. Thus, any settlement payment related to these issues should be in the tens of millions of dollars, at most. However, our settlement proposal would also resolve some claims that have not yet been filed. Those claims involve alleged mismanagement of trust land and money, and would therefore be analogous to the pending Tribal mismanagement claims. The individual claims differ from the Tribal claims in some respects. For example, individuals own less than one-quarter the amount of land owned by Tribes. Therefore, the aggregate payment for these claims would be less than the aggregate amount expended in settling the Tribal claims.

In crafting our settlement proposal, the United States has sought to be as fair as possible to Tribes and to individual Indians. The claims that would be resolved by this legislation are subject to a series of very substantial defenses including, for example, statutes of limitations and restrictions on available damages awards. But Congress does have the ability to pay claims that are barred in the courts, and, as I have described, we are prepared to support a significant settlement payment. The settlement would also avoid the costs, uncertainties, and delays of litigation, both for the trust beneficiaries and for the United States. We therefore believe the substantial settlement amount proposed by the Administration is in the best interests of all concerned, and properly balances the interests of trust beneficiaries with the need to protect the public fisc.

IV. REQUIREMENTS FOR A SETTLEMENT

At this Committee's hearing last year on proposed legislation to settle individual Indian claims, former Deputy Treasury Secretary Stuart Eizenstat discussed his experience during the Clinton Administration with resolving some distinct -- but potentially analogous -- complex historical claims. He explained that such claims are not well-suited to being handled by the courts, as judicial proceedings tend to be slow, cumbersome and very costly for all concerned. Instead, he advocated a legislative resolution, incorporating a formula or some other expeditious administrative process.

The Administration's proposal reflects this approach, and seeks to provide claimants with a timely and fair resolution of their claims with a minimum of litigation and delay. Otherwise, it could take many more years to finally resolve these claims. Again, the closest precedent is the Indian Claims Commission, which was established in 1946 to address a defined group of claims, and did not conclude its work until 1978. The Commission's final report explained that cases involving accounting work were especially burdensome, and that in most of them "a long and complex trial was necessary because . . . the material facts [were] not only embarrassingly abundant but buried in a mass of irrelevant government records." Accounting-related proceedings in *Cobell* and the tribal trust cases are also likely to involve a great deal of costly and time-consuming factual analysis.

We hope to avoid these costs and delays by making settlement payments through a streamlined administrative process. As Mr. Eizenstat's testimony emphasized, such a process will only be effective if it conclusively resolves all of the underlying claims. Our proposal takes

this approach, and also provides for additional safeguards to ensure that litigation does not resume on some new legal theory. Without those safeguards, the benefits of the settlement, and perhaps the settlement money itself, might well be consumed by the cost of unnecessary litigation. Therefore, a full and permanent resolution of these claims is a critical element of the Administration's proposal.

The Administration's proposals to eliminate fractionation of land and to expand opportunities for trust beneficiaries to manage their own lands are motivated largely by the desire to make this land more productive for its owners and to help transform the litigation-oriented relationship between the Federal Government and Indians to one of empowerment and self-reliance for tribes and individual Indians. But it is also true that the present litigation sprang in part from land fractionation, which makes accounting and management tasks substantially more burdensome and expensive, and from the United States's involvement in land that would be more properly managed by its real owners.

Some commentators have said that with these proposals the Administration is seeking to terminate the trust relationship. On the contrary, the Administration remains committed to that relationship and to its government-to-government relationship with Tribes. Instead, our proposals are part of a trend that is occurring throughout Indian country in which land remains in trust status, but government gets out of the way and allows the landowners a primary role in managing their property. And to all of these proposals we are of course bpen to discussions of how best to carry out their underlying purpose.

V. CONCLUSION

In its opinion reassigning the *Cobell* litigation to a different judge, the United States

Court of Appeals for the D.C. Circuit stated that "with no end in sight, the case continues to consume vast amounts of judicial resources," and urged the parties to "help fashion an effective remedy." The United States is accordingly proposing a legislative settlement to resolve these difficult disputes relating to trust resources. As the United States's lawyer in those cases, we are of course also prepared to continue to defend those cases. But if Congress can arrive at an appropriate settlement we would give that approach our strong support.

We look forward to working with the Committee and hope that through our joint efforts the United States can achieve a fair and timely resolution of these issues.

Attachment

MAR 0 1 2007

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter and continued interest in legislation to address Indian land trusts. The Administration strongly supports a comprehensive legislative package designed to strengthen the partnership between the Federal Government and American Indians by moving from a litigation-oriented relationship to one of economic prosperity, empowerment, and self-reliance for tribes and individual Indians.

To achieve these goals, the Administration is willing to invest up to $7 billion, over a ten year period, as explained in the enclosed summary. A legislative package valued at that amount would need to take the next step, over an appropriate term of years, in true self-governance and self-determination, by ensuring trust lands are managed by Indian owners and tribes who have full authority, responsibility, and liability for their decisions. Legislation that embraces an Indian owner-managed trust relationship will permit Indian landowners and tribes to exercise their rights to the full beneficial use and enjoyment of their property interests.

Our commitment to implement a successful Indian owner-managed trust relationship includes legislative mechanisms and priority funding to consolidate the millions of fractionated interests that have severely undermined the economic viability of many Indian allotments. In the short term, this land interest consolidation initiative would result in a substitution of trust assets – Indians will receive cash in place of the mostly unmarketable fractionated land interests held by many minor interest owners. In the long term, we believe that the consolidation of fractionated land interests will significantly increase the value of the trust estate, enable increased opportunity for economic development, and ensure Indian landowners are able to make land use decisions.

As noted in the enclosed summary, settlement legislation requires provisions and funding to settle all existing and potential individual and tribal claims for trust accounting, cash and land mismanagement, and other related claims, along with the resolution of other related matters (e.g., trust reform, IT security, etc.) that otherwise burden the lands at issue and permit recurrence of such highly disruptive litigation. Because it will enhance the value of these lands to their Indian owners, we expect that the package would create benefits greatly exceeding the dollars to be expended.

Over the past few months, we have benefited greatly from the discussions we have had with the majority and minority staff on the Senate Committee on Indian Affairs. We look forward to continuing our work with Congress to help usher in a new era of independence and prosperity for Indian landowners and tribes and a future relationship with Indian Country that reflects our commitments to self-governance and self-determination.

Please let us know how we can assist you, Vice-Chairman Thomas, and Chairman Rahall and Ranking Member Young of the House Natural Resources Committee, with this important legislative initiative. Similar letters have been addressed to them and Senator McCain.

Again, thank you for your continued support on this matter.

The Office of Management and Budget advises that it does not object to enactment of legislation that is consistent with this letter and the enclosed summary entitled "Key Facets of Acceptable Indian Trust Reform and Settlement Legislation."

Sincerely,

DIRK KEMPTHORNE
Secretary of the Interior

ALBERTO R. GONZALES
Attorney General

Enclosure

KEY FACETS OF ACCEPTABLE INDIAN TRUST REFORM AND SETTLEMENT LEGISLATION

The Administration will support Congressional efforts to adopt legislation that would reform and improve major components of Title 25 of the U.S. Code dealing with Indian land trusts. The Administration is prepared to consider a multi-billion dollar expenditure for this purpose if said legislation (as drafted in bill language, not merely outlined in a White Paper) ends all actual and potential litigation disputes associated with those land trusts and is constructed to achieve the following:

[Land Empowerment Reforms]

• Requires conversion of all 128,000 individual Indian allotments, once fractionated interests are reasonably consolidated, into Indian-owner-managed trust status, within no more than 10 years.

• Requires mechanisms and guaranteed priority of all necessary funding (within the overall settlement cap) to consolidate the 3.6 million fractionated interests to the degree necessary to enable individual Indians to gain the beneficial use and enjoyment of their property rights within an owner-managed trust, using both voluntary mechanisms and mandatory authority.

• Includes incentives to enable individual Indian land owners to undertake the duties and responsibilities of property management, and to encourage voluntary conversion to Indian-owner-managed trusts sooner than 10 years.

[Liability Elimination and Positive Future Relationship]

• Relieves the government of all historical accounting obligations, and deems account balances accurate as of the date of enactment of legislation. Settles all cash mismanagement claims that have been or could be brought by individual Indians, and all land-based mismanagement claims that have been or could be brought by individual Indians (also including disputes about right of way, title recording, trespass, or any others related to land).

• Provides relief from all other aspects of the *Cobell* litigation, including limits on attorney fees (no common fund recovery, hourly fees only and with requisite documentation proof, aggregate cap).

• Precludes the government's future liability exposure on any land which is left under government title. Restricts government liability during transition period. Includes provisions to prevent future mismanagement liability claims for any residual responsibilities that the government would continue to provide (close loopholes tightly). Mechanisms can permit the raising and correction of errors, but without assigning liability or damages to the government. Also requires clear statute of limitations, and bar on prejudgment interest.

[Tribes]

[Note: Resolution of Tribal litigation claims could be deferred, but value of the settlement will change substantially with the inclusion or exclusion of Tribal exposures]

• Requires conversion of all Tribal trust lands into Tribal-managed trust status within 10 years.

• Ends all tribal historical accounting claims, cash mismanagement, and land mismanagement issues in similar fashion as for individual claims.

• Includes provisions to prevent future mismanagement liability claims for any residual responsibilities that the government would continue to provide (close loopholes tightly).

[General]

• No lump-sum funding. Land consolidation and then settlement administration payouts to be drawn down as needed from U.S. Treasury (i.e., no interest). Funding established up front may be spread over multiple years.

• Aim for legislation enactment in calendar year 2007, but recognize that a complex settlement cannot be rushed.

Nez Perce
TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

Senate Committee on Indian Affairs

Oversight Hearing on Indian Trust Fund Litigation
March 29, 2007

Written Testimony of Rebecca A. Miles,
Chairman, Nez Perce Tribal Executive Committee
Regarding the Administration's Proposal to Settle
Individual Indian and Tribal Trust Mismanagement Claims

Chairman Dorgan and Members of the Committee:

The Nez Perce Tribe appreciates this opportunity to submit our comments to you regarding the March 1, 2007 letter from Secretary Kempthorne and Attorney General Gonzales to Chairman Dorgan and the attached Key Facets of Acceptable Indian Trust Reform and Settlement Legislation (the "Administration's Key Settlement Facets"). While the Nez Perce Tribe would welcome an opportunity to have meaningful settlement discussions with the Administration, this proposal appears to be designed purely to absolve the United States of its responsibility for mismanaging the Indian accounts that it holds as trustee.

The Administration's proposal suggests that the problems it seeks to resolve were created by Tribes and individual Indians. In other words, the Administration attempts to blame the victims for the sad condition of their trust accounts. The Administration should not be seeking absolution for its trust mismanagement responsibilities from Congress; the Administration should be working with Indian Country to repair or replace the broken records systems in the Bureau of Indian Affairs. Instead of looking to protect itself, the Administration, as trustee, should be concerned about making whole the beneficiaries of the trust.

Background

The Nez Perce Tribe historically owned and occupied approximately 13.2 million acres of land in an area that is now north central Idaho, northeast Oregon, and southeast Washington

which we have utilized since time immemorial for subsistence and commercial purposes. The Tribe entered into several treaties and agreements with the United States, including Nez Perce Treaty of June 11, 1855, 12 Stat. 957 and the Nez Perce Treaty of June 9, 1863, 14 Stat. 647, pursuant to which the Tribe ceded certain land to the United States and reserved for itself a homeland encompassing approximately 750,000 acres, now known as the Nez Perce Reservation which is located in north-central Idaho.

Like other Tribes, the Nez Perce Tribe is the beneficial owner of land and natural resources within our Reservation including land and natural resources that are valuable for timber, minerals, grazing, and agricultural purposes, title to which is held in trust by the United States for the benefit of the Tribe. Over a century ago, Congress authorized the Secretary of the Interior to collect income from tribal trust land and resources and to deposit such income into the United States Treasury and/or other depositories for the benefit of the Tribe. *E.g.*, Act of March 3, 1883, c. 141, §1, 22 Stat. 590. Congress also directed that interest be paid on tribal trust funds and required that such trust funds be invested. *E.g.* Act of February 12, 1929, c. 178, 45 Stat. 1164, *codified as amended*, 25 U.S.C §161b; Act of June 24, 1938, 52 Stat. 1037, *codified as amended*, 25 U.S.C. §162a.

Because the United States holds the property of the Nez Perce Tribe in trust, the United States is charged with the obligations, responsibilities, and duties of a trustee. *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). As trustee, the United States has a fiduciary relationship with the Tribe and "'has charged itself with moral obligations of the highest responsibility and trust' in its conduct with Indians, and its conduct 'should therefore be judged by the most exacting fiduciary standards.'" *Cobell*, 240 F.3d at 1099, *quoting Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

The United States' trust obligations to the Nez Perce Tribe and to other Tribes and individual Indians include the duties to: ensure that the Tribe's trust property is protected, preserved and managed so as to produce the maximum return to the Tribe consistent with the trust character of the property; maintain adequate records with respect to the Tribe's trust property; maintain adequate systems and controls to guard against error or dishonesty; provide regular and accurate accountings to the Tribe as beneficiary of the trust; and refrain from self-dealing or benefitting from the management of the Tribe's trust property. The United States Inspector General for the Department of the Interior, the United States General Accounting Office, and Congress have found that there are massive and long-standing problems with the United States' management and administration of Indian trust funds. After a previous series of oversight hearings on the management of Indian trust funds by the Department of the Interior, Congress issued a report condemning those management practices. *See Misplaced Trust, Bureau of Indian Affairs Mismanagement of the Indian Trust Fund*, H.R. Rept. No. 102-499, 102d Cong. 2d Sess. (1992). Congress found:

> Scores of reports over the years by the Interior Department's Inspector General, the U.S. General Accounting Office, the Office of Management and Budget, have documented significant, habitual problems in the BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities and to prudently manage the trust funds. *Id.* at 2.
>
> The Bureau has repeatedly ignored directives to undertake needed management reform measures. *Id.* at 3
>
> As a result of this dismal history of inaction and incompetence, there is no assurance that the Bureau actually desires to, or will, make any substantial advancement toward rectifying the basic financial management failures brought to their attention. Despite a decade of initiatives, the Bureau's headquarters leadership and accountability continue to be woefully inadequate.
>
> It is apparent that top Interior Department officials have utterly failed to grasp the human impact of its financial management of the Indian trust fund. The Indian trust fund is more than balance sheets and accounting procedures. These moneys are crucial to the daily operations of native American tribes and a source of income to tens of thousands of native Americans. *Id.* at 5.

Congress also found that the United States breached its fiduciary duties to the beneficiaries of the Indian trust fund:

> The [Bureau of Indian Affairs'] management of the Indian trust fund has been grossly inadequate in numerous important respects. The Bureau has failed to accurately account for trust fund moneys. Indeed, it cannot even provide account holders with meaningful periodic statements on their balances. It cannot consistently and prudently invest trust funds and pay interest to account holders. It does not have consistent written policies or procedures that cover all of its trust fund accounting practices. Under the management of the Bureau of Indian Affairs, the Indian trust fund is equivalent to a bank that doesn't know how much money it has. *Id.* at 56.

Congress further found that the United States lost and/or destroyed relevant trust account records, failed or refused to disclose known losses to trust beneficiaries, and failed or refused to reimburse trust beneficiaries for losses to their trust funds. *Id.* at 37-41. Congress required the United States to: audit and reconcile tribal trust funds; provide tribes with an accounting of such funds; and certify, through an independent party, that the results of the reconciliation of tribal trust funds are the most complete reconciliation possible. Act of December 22, 1987, Pub. L.

No. 100-202, 101 Stat. 1329. *See also* Act of October 23, 1989, Pub. L. No. 101-121, 103 Stat. 701; Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; and Act of November 13, 1991, Pub. L. No. 102-154, 105 Stat. 990.

On October 25, 1994, Congress enacted the American Indian Trust Fund Management Reform Act, 25 U.S.C. §4001, *et seq.*, recognizing the United States' pre-existing trust responsibilities and charging the United States with additional responsibilities to ensure proper discharge of the trust responsibilities. These responsibilities include the duty to provide periodic, timely accountings of trust funds to tribal and individual Indian beneficiaries and the duty to cause an annual audit of all trust funds to be conducted. 25 U.S.C. §4011; 25 U.S.C. §162a(d).

In the early 1990's, the Department of the Interior entered into a contract with the accounting firm Arthur Andersen LLP ("Arthur Andersen"), pursuant to which Arthur Andersen was to provide a report on certain tribal trust fund accounts. Arthur Andersen subsequently prepared a report titled "Agreed-upon Procedures and Findings Report for Nez Perce Tribe of Idaho, July 1, 1972 Through September 30, 1992, Summary of Account Balances and Adjustments as of September 30, 1992." Other Tribes received similar reports. The agreed-upon procedures merely required Arthur Andersen to verify that, in those instances where some data were available on tribal trust accounts, those data were correctly recorded. The agreed-upon procedures did not require Arthur Andersen to do an accounting of the Tribe's trust accounts or to reconcile the Tribe's trust accounts. To date, many Tribes, including the Nez Perce Tribe, have not received accurate account reconciliations.

General Comments

In the March 1, 2007 letter, the Administration proposes "to settle all existing and potential individual and tribal claims for trust accounting, cash and land mismanagement, and other related claims, along with the resolution of other related matters (e.g., trust, IT security, etc.) that otherwise burden the lands at issue and permit recurrence of such highly disruptive litigation." Before commenting on the letter and each of the four topics summarized in the Administration's Key Settlement Facets, I must point out that the "highly disruptive litigation" to which the Administration refers was filed by Tribes and individual Indians only as a last resort and only after many decades of mismanagement of trust funds and other trust assets by the United States. Having failed to properly manage these assets, having failed to provide accurate accountings of these assets, and having attempted to cut-off its beneficiaries' remedies for these failures, the Administration now would have Congress eliminate the United States' trust responsibilities and buy-out the valid claims of Tribes and individual Indians for the equivalent of the $24 in beads and cloth the Dutch paid for Manhattan.

As Chief Joseph said long ago during a trip to Washington, D.C.:

> At last I was granted permission to come to Washington and bring my friend Yellow Bull and our interpreter with me. I am glad we came. I have shaken hands with a great many friends, but here are some things I want to know which no one seems able to explain. I cannot understand how the Government sends a man out to fight us, as it did General Miles, and then breaks his word. **Such a government has something wrong about it.** I cannot understand why so many chiefs are allowed to talk so many different ways, and promise so many different things. I have seen the Great Father Chief (the President); the next Great Chief (Secretary of the Interior); the Commissioner Chief . . .; the Law Chief . . .; and many other law chiefs (Congressmen), and they all say they are my friends, and that I shall have justice, but while their mouths all talk right, I do not understand why nothing is done for my people. I have heard talk and talk, but nothing is done. Good words do not last long until they amount to something.

Chief Joseph's Own Story, Ye Galleon Press (1925), p. 29 (emphasis added).

It appears that things have not changed much since Chief Joseph's day. When Senators Dorgan and McCain introduced Senate Bill 1439 on July 20, 2005, in an effort to resolve the claims of individual Indians for an accounting of their trust funds by the United States, both expressed concerns about the United States' failure to live up to its fiduciary trust responsibility to Indian Country. At the time, Senator Dorgan said, "The claims in the *Cobell* litigation [are] examples of broken promises and trust responsibilities to the Native Americans of this country, but it is my hope and desire that this bill will help us keep those promises, fulfill our responsibilities to Native Americans, and restore trust and faith in our government." (http://www.indianz.com/News/2005/009426.asp).

Based on the contents of the March 1, 2007 letter, the Administration appears to hope for just the opposite. Having historically failed to properly manage and account for the funds in individual Indian and Tribal trust accounts, the Administration now proposes not to mend its ways and repair the damage, but to terminate its trust responsibility to Indian Country – to "cut and run" as it were. The proposals in the March 1, 2007 letter purport to provide a means for resolving some significant issues in Indian Country, but they actually exhibit a total disregard by this Administration for the United States' trust responsibility to individual Indians and to Indian Tribes. The Nez Perce Tribe strongly opposes the proposal outlined by the Administration in the Key Settlement Facts.

Land Empowerment Reforms

The first component of the Administration's proposal is captioned "land empowerment reforms." This euphemism refers to the problem of severely fractionated land interests in Indian

Country which the Administration proposes to resolve through consolidation (*i.e.*, forced sales) and conversion of approximately 128,000 individual Indian allotments to "Indian-owner-managed trust status" within 10 years. The ownership of these individual allotments actually is comprised of approximately 3.6 million fractionated interests, and the idea of consolidating them within 10 years is practically unrealistic and naive. This proposal simply ignores the fact that the Bureau of Indian Affairs does not have adequate staff or funding to accomplish such a huge undertaking within 10 years especially in light of the current backlog of probate proceedings and cadastral surveys.

What the Administration actually proposes, in contrast to empowerment, is to relieve itself of its responsibility to manage trust property by forcing that responsibility onto the trust beneficiaries. The Administration also has referred to this provision as "beneficiary-managed trust" – a concept that is simply unacceptable if it is intended to apply to all individual Indian land owners even without their agreement. Some beneficiaries may embrace this concept, but others may not, and those who do not should not be forced to accept it.

The fractionation problem needs to be resolved, but the Indian Land Consolidation Act and American Indian Probate Reform Act, currently contain provisions that would deal with it. These existing provisions, with proper funding, are adequate to begin resolving the fractionation problem.

Liability Elimination and Positive Future Relationship

The Administration apparently is acknowledging in this component of the proposal that it has not, and cannot, properly account for individual Indian trust assets. This component seeks to limit both the damages resulting from that mismanagement and the attorney fees that were necessarily incurred by individual Indians in seeking to remedy that mismanagement themselves. The Administration seeks to, "prevent future mismanagement liability claims for any residual responsibilities that the government would continue to provide" and to establish a "bar on prejudgment interest" that otherwise would have been due to the beneficiaries of the trust. The proposed "land empowerment reforms" and this proposal to relieve the United States of its past and future responsibility to provide individual Indians with accurate statements of their trust accounts, are simply an unacceptable attempt by the United States (the trustee) to avoid liability for the actual damages incurred from its documented mismanagement of the accounts of the individual Indians (the beneficiaries of the trust).

The Administration also suggests that some undefined future mechanisms, "can permit the raising and correction of errors, but without assigning liability or damages to the government." The Nez Perce Tribe believes that it is important for the United States to establish procedures for handling and reporting the individual Indian accounts and that it is equally

important for the United States to follow the procedures once they are established. However, the Tribe does not believe that the United States should be allowed to avoid liability for any future trust account mismanagement. If history is any indication, it is entirely possible that the United States will not provide adequate accountings, will lose or destroy account records, and also will fail to adequately address those misdeeds unless it faces the possibility of being sued. Existing legal remedies for the beneficiaries of these mismanaged trusts must be maintained.

Tribes

The Nez Perce Tribe agrees that resolution of the Tribal trust mismanagement claims is a worthy goal for both Tribes and the Administration, but this proposal is not acceptable. As with the individual Indian claims, the United States proposes elimination of its trust responsibilities for management of Tribal trust land within 10 years, limitation on the amount of damages resulting from its historic mismanagement of Tribal trust accounts, and a bar to any future responsibility for similar damages that might result from breaches of "any residual responsibilities that the government would continue to provide."

The Administration last year suggested including resolution of the Tribal trust mismanagement claims with the resolution of the individual Indian claims in Senate Bill 1439, but with no additional funding. The Administration now suggests that resolution of the Tribal trust mismanagement claims, "could be deferred, but value of the settlement will change substantially with the inclusion or exclusion of Tribal exposures." The Nez Perce Tribe would like to remind the Committee that two years ago, well before most of the Tribal trust mismanagement lawsuits were even filed, the Administration's own estimate of its "potential exposure in these cases is more than $200 billion."[1]

Like the Interior Department's Preliminary Draft of the New Part 112 Tribal Trust Fund Accounting and Appeals Regulations, this proposal appears to be designed primarily to limit the United States' exposure to monetary damages resulting from its mismanagement of Tribal trust accounts and to eliminate current statutory remedies available for that mismanagement. In other words, the trustee seeks to bar the courthouse doors to the beneficiaries of the trust accounts it has woefully mismanaged. This unconscionable proposal is not acceptable.

There is an alternative. For the last few years, the Interior Department has funded a Tribal Trust Fund Settlement Project through a cooperative agreement with the Inter-Tribal Monitoring Association. The goal of that project was to develop a methodology that could be

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[1]*Statement of Alberto R. Gonzales Attorney General of the United States Before the United States House of Representatives Committee on Appropriations Subcommittee on Science, the Departments of State, Justice and Commerce, and Related Agencies*, March 1, 2005.

used as an alternative to the Arthur Andersen Reports for resolving Tribal claims against the United States on a voluntary basis. In Phase I of the Project, which is almost complete, seven Tribes, including the Nez Perce Tribe, worked in good faith with Interior to develop a mutually acceptable methodology.

Interior, however, now appears poised to cancel Phase II of the Tribal Trust Fund Settlement Project, in which the alternative methodology developed in Phase I would have been used to resolve the claims of any Tribes which voluntarily chose to participate and settle their claims against the United States. Instead, Interior has suggested that it will force administrative settlements of all Tribal claims, and eliminate Tribes' existing statutory remedies against the United States, through its Preliminary Draft of the New Part 112 Tribal Trust Fund Accounting and Appeals Regulations dated June 29, 2006. The Nez Perce Tribe believes that it would be more consistent with the United States' trust responsibility, and more respectful of Tribal sovereignty, for Interior to fund Phase II of the Tribal Trust Fund Settlement Project and pursue voluntary Tribal settlements with willing Tribes.

General

The Administration proposes no "lump-sum funding" of the settlements of either the individual Indian or the Tribal trust fund mismanagement claims. Instead, the Administration proposes that settlement amounts be established, but not paid until the land consolidation process is complete – a process that the Administration hopes will be completed in only 10 years. Settlement payments will then be, "spread over multiple years" without interest. Besides the fact that the Administration would eliminate all legal remedies currently available to Tribes and individual Indians for the United States' past and future trust account mismanagement, the Administration suggests that Indian Country should trust the United States to pay out some undefined amount of money, at some unspecified time in the future, over some unknown number of years, and without any interest. Tribes and individual Indians already have waited over 100 years for the United States to live-up to its duties as a trustee. The trustee should be more concerned with making these beneficiaries whole than it is with finding ways to further delay paying what is due. This proposal is both unacceptable and unconscionable.

The Administration also suggests that Congress should enact settlement legislation, "in calendar year 2007, but recognize[s] that a complex settlement cannot be rushed." As previously mentioned, the Senate considered a bill last session that might have resolved all of the individual Indian claims (S. 1439), and it might have been successful if the Administration had not insisted on combining the settlement of the individual Indian claims with the Tribal claims.

The Administration could have, and should have, consulted directly with Tribes about their claims. The Administration also could have, and should have, supported legislation last

session that would have extended the date on which Tribes were deemed to have received their Arthur Andersen reports. Instead the Administration opposed the legislation and effectively forced Tribes to file hundreds of protective lawsuits before a December 31, 2006 deadline.

Conclusion

The Nez Perce Tribe appreciates this opportunity to submit written comments regarding the March 1, 2007 letter and the Administration's Key Settlement Facets. We hope that you will seriously consider our comments, and similar comments that have been made by other Tribes and national tribal organizations, and we strongly urge you to reject the Administration's proposals until there has been an opportunity for substantive, good faith discussions of these issues – issues that involve the very foundation of the treaty relationship between Indian Country and the United States.

Samuel N. Penney

Rebecca A. Miles
Chairman

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Office of:
The Governor
The Secretary
The Treasurer

March 14, 2007

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: **Bush Administration Proposal to Repudiate Indian Trust Duties**

Dear Mr. Chairman:

As Governor of the Pueblo of Laguna, I am writing this letter to let you know that the Pueblo categorically objects to the Bush Administration's recent proposal to force settlement of all pending and potential Indian trust mismanagement claims and to repudiate all future federal trust duties to Indians, as stated in a letter to you earlier this month from Secretary Kempthorne and Attorney General Gonzales. This letter outlines our three basic objections to the recent proposal and concludes with suggestions for further consideration of Indian trust reform legislation.

Indian Land Cessions Fully Paid In Advance for Permanent Federal Trust Duties

First, as you and Vice-Chairman Thomas recognized in your own recent letter to the Senate Budget Committee, the federal government's fiduciary obligations to Indian tribes arise in part from cessions of millions of acres of land from Indian tribes to the United States. The federal trust relationship with Indians therefore is not a mere gratuity that may be ended at will. Indian tribes have fully performed their side of the "bargain" that was forced on them and fully paid in advance for a permanent, enforceable trust relationship. The United States cannot now repudiate its willingly undertaken, solemn, and centuries-old trust obligations absent either express tribal consent or full return of the consideration paid by tribes, i.e., all Indian aboriginal lands and the value of ceded natural resources that have been severed. Neither option is viable, so the Bush Administration's proposed unilateral repudiation of its trust duties must be rejected. The Pueblo is very deeply insulted, as all tribes should be, at the audacity of the Bush Administration's proposal that blatantly disregards and misrepresents the essence of the federal-Indian trust relationship.

Indians Must Not be Second-Class Citizens for Disposition of Their Trust Assets

Second, the Bush Administration proposal to force settlement of all pending and potential tribal and individual Indian trust mismanagement claims for only an unspecified

portion of $7 billion that also would be used for IT security and dissolution of Interior's existing trust responsibilities is profoundly inadequate. The Committee's staff last fall proposed a $7 billion settlement for just the *Cobell* plaintiffs' claims against the federal government for Individual Indian Money accounts. Moreover, Jim Cason testified to this Committee in July 2005 that tribal trust cases already filed as of then—including the Pueblo's case which has been pending since 2002—involve "sums of money far greater than those involved in the individual Indian trust." Indeed, in March 2005, Attorney General Gonzales testified to the House Appropriations Committee that the United States' potential exposure in tribal trust mismanagement claims exceeds $200 billion. It must be presumed that the Attorney General would never make such an assertion to Congress to support a budget request to Congress unless the Attorney General had a very solid basis for accurately determining that amount.

Congress would never sanction such a settlement of fractions of a penny on the dollar for mismanagement of trust assets belonging to its own members or any other group of Americans. For example, in the savings and loan bailout, Congress readily appropriated far larger sums than are being discussed here when white peoples' money was at stake, even though the government had no obligation to do so beyond deposit insurance requirements. Given the federal government's thoroughly documented failures to perform well-established and basic trust management duties here, Congress should not sanction this proposal to grossly undercompensate the First Americans, who to this day have given so much to their country. The rosy-sounding platitudes that Secretary Kempthorne and Attorney General Gonzales have offered to justify their proposal—"a new era of independence and prosperity" for tribes—disingenuously mask the true purpose of their proposal to simply minimize and eliminate federal liability and responsibility to Indian tribes.

The Federal Government Can and Should Properly Manage Indian Trust Assets

Third, there is no legitimate reason that the United States cannot properly discharge its trust responsibilities to Indian tribes. The Congressional Research Service reported in June 2006 that the United States government holds 56 million acres of Indian land in trust, plus $3.3 billion in Indian trust funds, $2.9 billion of which is in 1400 tribal trust accounts. Trust assets on a much larger scale have been regularly managed in the private sector for centuries subject to hornbook fiduciary duties such as legal responsibility for the proper administration of the trust and liability for the financial welfare of trust beneficiaries. In addition, the Departments of the Interior and Justice have repeatedly represented publicly and in court filings that the United States properly administers its fiduciary duties concerning Indian trust assets. Given the United States' self-professed proper discharge of trust duties to Indians, there is surely no reason for wholesale repudiation of those duties as stated in the recent proposal. "Beneficiary-managed trust" is surely an oxymoron, and the proposal to establish that reeks of the now wholly discredited termination policy of the 1950s.

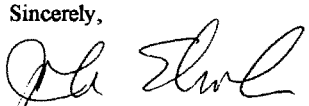
Meaningful and Informed Trust Reform Should Proceed

We know that Congress takes the federal trust responsibility seriously and that there are serious problems with the government's existing Indian trust management activities. Accordingly, the motivating factor for Indian trust reform legislation should be implementation or improvement of the trust responsibility, not abrogation of it. The United States must not repudiate its venerable trust duties to Indians, and the Pueblo of Laguna opposes the Bush Administration's current Indian trust repudiation proposal in the most vehement and unbending manner possible. With this in mind, the Pueblo suggests that meaningful trust reform legislation include the following elements, among others: eliminate the Office of the Special Trustee; preserve existing enforceable trust duties; and increase funding for direct assistance and pass-through Indian programs. Of course, a more comprehensive and detailed consideration of Indian trust reform issues should involve substantial consultation with Indian tribes throughout the country.

I hope that you will keep these considerations in mind when the Committee holds a hearing later this month on the recent Indian trust repudiation proposal. Our counsel of record for our trust mismanagement case, Alan Taradash of the Nordhaus Law Firm, has a great depth and breadth of knowledge concerning these issues. If you think it would be of help to the Committee, Mr. Taradash is prepared to testify on all these matters at that hearing.

Thank you very much for your attention to these concerns and suggestions. Please contact me with any questions regarding these matters.

Sincerely,



John E. Antonio
Governor

Cc: Member, Senate Committee on Indian Affairs
Chairman Rahall & Ranking Member Young,
House Committee on Natural Resources
Members, New Mexico Congressional Delegation
Alan Taradash, Esq.

AK-CHIN INDIAN COMMUNITY COPY
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WRITTEN COMMENTS OF
CHAIRMAN DELIA M. CARLYLE
ON BEHALF OF THE
AK-CHIN INDIAN COMMUNITY

FOR THE
SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING THE UNITED STATES SETTLEMENT OFFER FOR THE
COBELL CASE AND TRIBAL TRUST CASES

April 16, 2007

Dear Mr. Chairman, Mr. Vice-Chairman, and other distinguished members of this Committee:

My name is Delia Carlyle and I am the Chairman of the Ak-Chin Indian Community. On behalf of the Ak-Chin Indian Community ("Community" or "Tribe") I would like to offer these comments regarding the United States' offer to settle the *Cobell* case and the other tribal trust lawsuits. As you know, these cases seek redress for many decades of financial mismanagement by the Bureau of Indian Affairs, Department of the Interior, and other federal government agencies.

The Community is located approximately 35 miles south of Phoenix, Arizona, near the Gila River Indian reservation. We are a small tribe with approximately 700 members. Our Reservation was established by Executive Order on May 28, 1912, and initially consisted of 47,600 acres.[1] Over the ensuing months, however, President Taft twice reduced our Reservation to its present size of 21,840 acres – less than half of its original size.[2]

Like hundreds of tribes throughout the United States, we filed lawsuits against the United States, the Department of the Interior, Secretary Kempthorne, and others to protect our rights and property. The tribal trust lawsuits, and likely *Cobell,* would not have been filed but for the breach of fiduciary duty by the United States for its failure as trustee to properly manage tribal lands, resources, and assets. To be sure, we did not create the problem. The institutional malfeasance and misfeasance at the Department of the Interior has been well-known, widespread, and continuing because no one has forced Interior to fully account for, and correct, its mismanagement of Indian trust funds.

The Community filed its first trust claims against the United States over 50 years ago, as Docket No. 235, before the Indian Claims Commission. It was not until 1981 - 30 years after the cases were initially filed - that they were finally adjudicated. Unfortunately, as

[1] *See* Executive Order No. 1538 dated May 28, 1912.
[2] *See* Executive Orders Nos. 1598 and 1621 dated September 12, 1912 and October 8, 1912, respectively.

was the case for most tribes, the Commission dismissed most of our claims and minimized the small remaining claims. In fact, they stated that my Reservation's reduction by more than half (25,760 acres) in 1912 was a "minor modification" of the Reservation boundary.[3] Moreover, it makes our Community both angry and sad that we must, once again, sue the United States based on the same type of egregious conduct as before.

The Interior's continuing breach of its fiduciary obligations is reprehensible and mind-boggling. Indeed, we agree with Congress that the continuing fraud, corruption, and institutional incompetence are almost beyond the possibility of comprehension. We truly believe that, if the trust property were yours, or that any other non-Indian, these issues would have been addressed and corrected years ago. The fact is that these cases involve Indians, and we are all too familiar with the history of the trust relationship between the United States and Indian people. The facts speak for themselves. Today, as in the past, we are fighting once again for our survival. This time it is against Interior's systematic undermining of tribes by its continuing theft from and waste of tribal resources without accountability.

Furthermore, we have never received a complete and accurate accounting of our Tribal Trust resources, assets, and other income that for many years the Interior has managed for the Community. The words expressed by the Court in 1981 to describe the accounting that Interior produced then still ring true today: "incomplete, inconsistent, and insufficient...and wholly inadequate."[4] The Court also found that Interior's responses to the Community's requests for financial accounting information "have been evasive and manifest an intent to stonewall" the Tribe. It is truly unfortunate that the Court's findings are just as true today as they were decades ago. Please be assured that we are not asking for anything unreasonable, just a full and complete accounting like every other beneficiary is entitled to receive from its trustee.

Because of Interior's mismanagement, malfeasance, and incompetence, my Tribe is forced once again to expend its own money and resources to address the continuing wrongs by Interior. These Tribal funds and resources should be going toward improving our Community and the services available to our members. We presently face serious issues regarding healthcare, safety, education, infrastructure development, and providing for the general welfare of our Tribal members. Instead of addressing these issues and to the expense of our Community, we are again forced to spend our Tribal resources to identify, recover, protect, and preserve our tribal rights and property – ironically, against the entity that is legally obligated to perform these tasks for us.

While $7 billion is a lot of money, it does not come close to settling all the claims that the settlement offer seeks to extinguish. As noted by Attorney General Gonzales, the United States' potential exposure could be more than $200 billion for just the Individual Indian

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[3] *See The American Indians Residing on the Maricopa-Ak-Chin Indian Reservation*, 31 Ind. Cl. Comm. 384, 397 (1973).

[4] *See The American Indians Residing on the Maricopa-Ak-Chin Indian Reservation*, 667 F.2d 980, 1001 (1981).

While $7 billion is a lot of money, it does not come close to settling all the claims that the settlement offer seeks to extinguish. As noted by Attorney General Gonzales, the United States' potential exposure could be more than $200 billion for just the Individual Indian Monies ("IIM") claims. In addition, the offer fails to properly incorporate the tribal trust lawsuits, which are likely to be worth billions of dollars more. Moreover, it cuts off any future liability and accountability, thereby creating an incentive for Interior to continue to violate its trustee obligations. Interior's claims of fires, rats, water, and other excuses for the loss and destruction of documents related to tribal trust funds and property will only become more frequent and prevalent. In terms of damages and equity, the offer eviscerates both, and is insulting to our Tribe. The settlement offer, therefore, is **not** acceptable to my Tribe.

Thank you for your consideration.

Sincerely,

Delia M. Carlyle, Chairman
Ak-Chin Indian Community

Intertribal Timber Council

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Yakama Nation
Yurok Tribe

March 26, 2007

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

The Honorable Craig Thomas
Vice-Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: March 29, 2007 Oversight Hearing on Cobell Litigation

On behalf of the Intertribal Timber Council, I respectfully request that our attached comments be incorporated into the official record of the Oversight Hearing on Indian Trust Fund Litigation scheduled for March 29, 2007 before the Senate Committee on Indian Affairs.

In their letter of March 1, 2007 to Senator Dorgan, Secretary of the Interior Dirk Kempthorne and Attorney General Alberto Gonzales identified a set of proposals that, if implemented, would profoundly affect the manner in which trust assets like Indian forests are administered in the future. We request that the Committee consider our comments and concerns during its deliberations regarding future initiatives to settle issues relating to the Cobell litigation.

Should you require further information or clarification regarding our comments, please contact our Information Specialist, Mark Phillips at (202) 546-1516 or Gary S. Morishima, a member of our Executive Board who has been following developments in trust reform, at (206) 236-1406.

Sincerely,

Nolan C. Colegrove, Sr.

Nolan Colegrove, Sr.
President

Enclosure

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INTERTRIBAL TIMBER COUNCIL
Comments Submitted for the Record
March 29, 2007 Oversight Hearing ON
Indian Trust Fund Litigation
Before the Senate Committee on Indian Affairs

The Intertribal Timber Council (ITC) Executive Board requests the assistance of the Senate Committee on Indian Affairs in clarifying the intent of certain aspects of the Cobell settlement proposals set forth in the March 1, 2007 letter from Secretary of the Interior Dirk Kempthorne and Attorney General Alberto Gonzales: (1) the concept of owner-managed trust; and (2) extinguishment of claims for accounting and trust asset mismanagement.

These and other proposals were revealed in only the sketchiest of conceptual forms on less than a single page attached to the March 1st letter. No specific statutory language was provided and the Administration did not even attempt to engage in consultation with Indian Country. Clearly, the Kempthorne-Gonzales proposals are far-reaching in scope and have the potential to inflict massive and potentially devastating long term consequences. Hopefully, the hearing scheduled by the Senate Committee on Indian Affairs for March 29th will provide insight into the Administration's intentions and motivations as it steps forward to explain and defend its ideas before the tribes, the Congress and the American people. The ITC may elect to provide additional information for the hearing record following that hearing.

Tribes do not shy from an open examination of their relationships with the United States, what it is, where it comes from, and how it might evolve. In just the last thirty years tribes have made tremendous progress in strengthening their economies and managing their affairs. The United States should celebrate, embrace, and build upon the success of a policy founded on support for tribal sovereignty and self-governance. When disagreements arise, they should be addressed through respectful, government-to-government discourse. Instead, we fear that the United States has elected to follow a different path, one leading to disavowal of its historic relationships with, and responsibilities to, tribes.

Neo-Termination?

The Administration's proposals evoke alarming and painful memories of the philosophy of termination during the 1950's which was soundly repudiated and replaced in the 1970s by a new policy based on government-to-government relations and self-determination.

Our member tribes are all too familiar with termination. On August 1, 1953, House Concurrent Resolution 108 was passed under the sponsorship of Utah Senator Arthur Watkins.[1] This resolution called for Congress to end obligations of the United States to Indian tribes by enacting termination bills for dozens of reservations, preparing final rolls of tribal members for distribution of tribal assets, and removing trust protections for Indian resources. Indian tribes that were judged to be best prepared to make it on their own because of resources like timber were targeted for termination. Many of the tribes that were eventually terminated, like the Menominee, Klamath, and many along the Oregon coast, had extensive timber holdings. So blatant were the efforts to end the trust status of timbered reservations that some historians claimed that the true motivation behind termination was to enhance the capacity of timber companies to acquire valuable Indian forests.[2]

Politically, termination was sold as a means to "emancipate the Indian" by forced assimilation through relocation away from reservations, reducing budgets that supported services for tribal communities, ending political and economic support for tribal governments, and encouraging allotment owners to dispose of their property interests through supervised sales. Termination's supporters touted "freedom" and "self-determination", but their real aim was to privatize Indian resources through the wholesale liquidation of the reservation system, the BIA, and the very concept of tribalism itself.[3] Like the policy of allotment a few decades earlier, termination dispossessed Indians of their lands, undercut tribal governments, decimated tribal cultures, languages, and traditions that bound tribal communities together, and had devastating effects on health and economic conditions. And, like the ill-advised policy of allotment, the termination policy was repudiated within a few years of its implementation.[4] But by the time this

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[1] Watkins, Chair of the Senate Subcommittee on Indian Affairs, was strongly influenced by Mormon views regarding Indians. His connections with officials of the Mormon Church and prominent lawyers, coupled with the politics of racism and arguments over who should be considered an Indian for distribution of a $31 million judgment from the Indian Claims Commission, led to termination as a means to divest the Ute Indians of their land and identity. R. Warren Metcalf (2002). *Termination's Legacy: The Discarded Indians of Utah.* Lincoln: University of Nebraska Press.

[2] The Klamath and Menominee are among the most widely known, terminated tribes with large timber holdings. However, of the 109 tribes that were eventually terminated, 62 were located in Oregon at the urging of the Governor who desired access to Indian resources. S.D. Beckham, "Indians of Western Oregon: This Land Was Theirs" Arago Books 1977.

[3] Kenneth R. Philp (1999). *Termination Revisited: American Indians on the Trail to Self-Determination, 1933–1953,* Lincoln: University of Nebraska Press.

[4] In the early 1960's, the policy of termination was beginning to fall into disfavor. The Report of the Commission on the Rights, Liberties, and Responsibilities of the American Indian condemned the

happened in the mid-1970's, the federal government had managed to divest itself of trust obligations to over a hundred tribes and 10,000 individual Indians; over 2.5 million acres of Indian land had been transferred to non-Indian ownership in the process.

Rarely has the purpose behind Indian policy been explicitly revealed, and so it is with the motivations behind the Administration's March 1st letter. It's been left to us to guess if the Administration's proposal for owner managed trusts is just termination, cloaked in new terminology of "land empowerment reforms", but resurrected nonetheless. From ITC's perspective, Secretary Kempthorne's record on Indian affairs leads us to hope that he does not want history to record that he was the Secretary who called for the termination of the trust.

Owner Managed Trust

The Administration's proposal would require all "reasonably consolidated" allotments and tribal lands to be converted into owner-managed trust status within 10 years.

The ITC welcomes the opportunity to advance concepts of self-determination and self-governance within the context of the federal trust responsibility. We have long supported the development of tribal and individual capabilities for assuming greater responsibility and authority for management of trust assets, provided that: (a) there is a means to ensure that beneficiaries are ready to assume greater responsibility for managing trust assets at their own volition rather than through arbitrary, imposed "drop dead" timelines; and (b) technical assistance is available to provide support and specialized expertise.

The ITC requests that the Administration clarify its views regarding the nature of "owner-managed trust status". We believe that the concept should include:

(1) A requirement for individually-owned trust property to be managed in accordance with the exclusive authority of tribal governments to develop and enforce management plans and regulatory controls to use resources, protect environmental and cultural values, and exert taxation authority over all lands and people within reservation boundaries.

(2) Restrictions against alienation, with provisions that clearly give tribes the right of first refusal and access to capital necessary to acquire lands which are proposed to leave trust status.

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termination policy as did the report of the DoI Task Force on Indian Affairs which eventually formed the foundation for Indian policy under the Kennedy Administration. Lastly, the Declaration of Indian Purpose, an outcome of a remarkable convention of Indian leaders in Chicago, called for Congress to revoke its termination policy and reorganization of the BIA to provide more control at the local level. See Lurie, N.L. 1961. The Voice of the American Indian: Report on the American Indian Chicago Conference." Current Anthropology 2:478-500.

(3) Resources and administrative policies, such as expedited fee-to-trust title transfers, and timely, cost-effective appraisals, to support aggressive programs to consolidate forest lands into manageable properties. The ITC understands and supports the need for an assertive program to reverse fractionation and reduce administrative burdens. We encourage the use of voluntary sales and incentive programs to consolidate fractional interests to the maximum extent practicable and minimal use of mandatory authority.

(4) Clear recognition that the remaining involvement of the federal government would not establish a nexus for unfunded mandates or administrative requirements to comply with federal laws and regulations (e.g., NEPA, NAGPRA, NHPA, ESA, CWA, CAA, etc.) which are not applicable to non-federal lands.

(5) Assurances that adequate funding will be provided to properly manage trust assets. We believe that cost-savings from reduced federal administration under owner-managed trusts should be made available to support investment to increase the productivity of trust assets.

(6) For fractionated land ownerships, clarification of responsibilities for collecting, accounting for, investing, and distributing proceeds from land management activities.

(7) A clear statement of the nature and extent of residual federal trust obligations, such as the authority to make and enforce contracts involving trust assets, duties to ensure that fraud, damage, trespass, and waste of trust assets are prevented, and the obligation to make productive use of trust assets, accompanied by enforceable standards for trust administration.

Extinguishment of Claims for Accounting and Trust Asset Mismanagement

The Administration's proposal would settle all cash, and land-based mismanagement claims that have been or could be brought by Individual Indians or Tribes (including disputes about right of way, title recording, trespass, and any others related to land).

The Administration's proposal is all-encompassing, with unclear implications for fiduciary trust responsibilities for management of Indian forests established by statute and case law.[5] Indian forests have been managed by United States government agencies since the 1800's, well before the Branch of Forestry was created nearly a century ago in

[5] The trust responsibility is explicitly affirmed at 25 USC § 3101(2). The early history of Indian forestry is described by Newell, A.S., R.L. Clow, and R.N. Ellis. 1986. *A Forest in Trust: Three Quarters of a Century of Indian Forestry 1910-1986.* Prepared for the U.S. Department of the Interior, Bureau of Indian Affairs, under contract to Litigation Support Services, Washington, DC by Historical Research Associates, Missoula, MT.

1910 to manage Indian forests.[6] Although various laws and regulations have been enacted over time to guide the harvest of Indian timber since 1887, it was not until passage of the 1934 the Indian Reorganization Act (***IRA***) that the Secretary of Interior was authorized "to make rules and regulations for the operation and management of Indian forestry united on the principle of sustained yield management." Enactment of the National Indian Forest Resources Management Act (P.L. 101-630, ***NIFRMA***) on November 28, 1990 established a comprehensive statutory framework for management of Indian forests.

Pervasive BIA Involvement in Indian Forest Management

Under NIFRMA, Indian forests are administered through a set of regulations, BIA manual provisions, handbooks, management plans, and legal instruments. The extent to which the Administration's proposals for owner-managed trust and limitations on liability would require changes in law, regulations, and manual provisions is unclear.

- NIFRMA contains a set of provisions, when taken together, constitute requirements for the manner in which the trust responsibility of the United States is to be administered: (1) a comprehensive set of findings, policy statements, definitions, and management objectives and requirements; (2) provisions regarding forest trespass; (3) clarification of authorities and procedures for forest management deductions; (4) a requirement for periodic, independent assessments of the status of Indian forests and forestry; (5) authority to establish programs for education and internship for Native Americans who are seeking professional careers in natural resources management; (6) a program to provide financial support for tribal forestry programs; (6) authority for the Secretary of Interior to enter into cooperative agreements with Indian tribes for a variety of purposes; (7) authority for Congress to appropriate such funds as may be necessary; and (8) a requirement for Indian tribes to be involved in the development of implementing regulations.

- Regulations transform NIFRMA's statutory language into administrative requirements for the Department of the Interior and BIA. The regulations implementing NIFRMA were developed through a cooperative effort involving tribal-BIA teams and were subjected to public comment through the Federal Register.

- Detailed procedures for trust administration are recorded in the BIA manual and handbooks so they can be more easily revised. These procedures address specific functions, such as timber sales administration, permitting, and handling of proceeds from timber sales, and contain limitations on authorities and responsibilities. Regulations and manuals generally apply to all reservations, unless waivers are granted.

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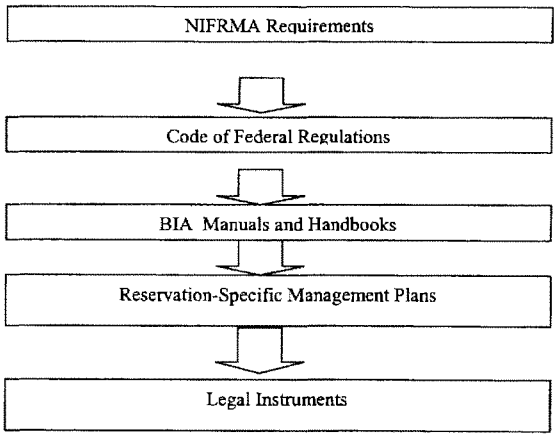
[6] see, for example: Kinney, J.P. "The Office of Indian Affairs: A Career in Forestry," oral history, Forest History Society, 1969.; Kinney, J. P. 1950. *Indian Forest and Range: A History of the Administration and Conservation of the Redman's Heritage.* Washington, D.C.: Forestry Enterprises; Kinney, J.P. 1937. *A Continent Lost—A Civilization Won.* Baltimore: The Johns Hopkins University Press; Kinney, J.P. 1975. *Indian Forest and Range; My First Ninety–Five Years.* Hartwick, N.Y.: self-published; Miller, C. 2000. *Back to the Garden: The Redemptive Promise of Sustainable Forestry, 1989-2000.* Forest History Today, Spring 2000, p16-23.

- Forest or Integrated Resource Management Plans provide reservation-specific management objectives, reflect requirements stemming from treaties, statute, or judicial decree, and provide guidance for trust administration such as land-use designations, allowable cut levels, silvicultural prescriptions, forest transportation systems, and measures to protect fish, wildlife, cultural resources, and environmentally sensitive areas. These management plans must be consistent with statutory requirements set forth in NIFRMA.

- Legal instruments contain requirements and obligations for conducting specific activities under a management plan. A variety of instruments are employed, such as contracts for timber sales, reforestation, site preparation, or thinning, use permits, and road construction. These instruments set forth legally enforceable terms and conditions dealing with such things as performance standards (e.g., log utilization specifications, scaling, bonding requirements, adjustment for stumpage values, etc.)



Liability for Mismanagement of Indian Timber

The set of statutes, regulations, manuals and contracts establishes comprehensive and pervasive federal control over the use and management of Indian forests which defines the contours of a fiduciary responsibility of the United States to manage Indian resources and land for the benefit of Indians. In *United States v. Mitchell ("Mitchell II")*[7], the Supreme Court found that the United States could be held liable for breach of trust.

The liability of the United States for breach of fiduciary obligations for trust asset management has been clearly established for timber. The Department of Interior has had a long, controversial history regarding its capacity to properly discharge its fiduciary responsibilities for managing forest assets on behalf of Indian beneficiaries.[8] Over the

[7] 463 U.S. 206 (1983).
[8] Nafzinger, R. 1976. *A Violation of Trust? Federal Management of Indian Forest Lands.* Americans for Indian Opportunity, June 1976; GAO Report. 1975. *Indian Natural Resources – Opportunities for Improved Management and Increased Productivity, Part I, Forestland, Rangeland, and Cropland.* August 18, 1975; American Indian Policy Review Commission. 1975. *Final Report of Task Force Seven:*

years, tribes and individuals have filed numerous cases before the courts alleging mismanagement and/or malfeasance in trust administration. In a 1979 paper, Angelo Iadarola describes the general obligations of the United States for managing Indian timber and remedies available to Indian beneficiaries of the trust when the government fails to fulfill those responsibilities.[9] The principle of pervasive federal control established in a forestry case, *Mitchell II*, continues to serve as the primary judicial test for determination of liability for breach of trust for asset mismanagement.

Largely as a result of litigation filed by Eloise Cobell in 1996 seeking a full accounting for funds held in Individual Indian Money held by the BIA, the capacity of the United States to fulfill its fiduciary responsibilities as trustee for management of the Indian estate, the natural resources and funds held in trust for tribal and individual beneficiaries, has been subjected to intense scrutiny. Several deficiencies have been identified and many court orders, administrative actions, and legislative initiatives have surfaced which could profoundly impact how Indian forestry is practiced in the future.

Interior's Misleading Assertions Regarding Accounting

Settlement of the Cobell case has been hampered by the unwillingness of the Administration to admit to deficiencies in its accounting systems. Despite numerous Congressional reports, GAO investigations, OIG and external audits, statements of Special Trustees and Special Masters, and judicial decrees to the contrary, the Department takes the position that its own studies have found little evidence of systematic failures of its management systems and that the claims of Cobell plaintiffs that its accounting claims would at most amount to $100 million. That view is a gross misrepresentation of the nature of Interior's studies. Interior's assessments were focused on a review of Judgment and Per Capita IIM accounts, the simplest of the types of IIM accounts maintained by the BIA, during the "electronic era, 1985-2000". Administration of Judgment funds for example involves direct deposits of Congressionally appropriated funds into a single account which is then distributed under a plan developed by the Secretary which identifies specific beneficiaries and amounts (25 USC §§ 1401 et seq.). Per Capita accounts receive distributions of tribal income similar to dividend payments. Judgment and Per Capita accounts are the types of IIM accounts which are least prone to error; the limitation of the time period covered in Interior's study to the electronic era ignores nearly a hundred years of trust administration which lack historical records and were notorious for fraud, errors, and malfeasance.

Income from timber and other trust assets is deposited into Land-Based IIM Accounts. The vast majority of trust transactions involve this type of accounts. Their administration is far more complex and prone to error than the Judgment and Per Capita

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Reservation and Resource Development and Protection. Chapter 3(C)(5); *Quinault Timber Sales Hearings.* Senate Subcommittee on Indian Affairs. 1955-1957.

[9] Iadarola, A. 1979. *Indian Timber: Federal or Self-Management?* In, Final Proceedings of the Third Annual National Indian Timber Symposium, Phoenix, AZ. April 10-12, 1979. Published by the Intertribal Timber Council, Portland, OR, p. 39-141.

accounts, yet Interior has attempted to reconcile[10] only a miniscule portion of land-based account transactions. Over the years, various studies have reported that transactions lack supporting evidence and that the administration of those accounts has been fraught with incompetence and mismanagement. Because historical records cannot be produced to support land-based transactions, a full historical accounting of these accounts is impossible by the Administration's own admission. Accounting difficulties do not address potentially larger claims for trust asset mismanagement which involve the failure to properly administer trust duties, such as collection of fair market fees for the use of trust assets, accounting for the quantity and quality of trust assets removed, failure to properly post interest to their proper accounts[11], and damage or waste of trust assets. Judgments or settlements in some individual asset mismanagement cases have led to awards amounting to millions of dollars for timber (e.g., Mitchell), and could approach billions of dollars for minerals (e.g., Osage Nation); other awards for millions of dollars have been made for under-valuation of lands ceded or taken from Indians by the United States.

The Need for Clarification of the Administration's Proposals for Limitations on Liability

The ITC requests that the Committee press the Administration to clarify its intentions regarding its trust obligations and remaining liabilities. Several questions arise, such as:

(1) What is the intended effect on litigation that has already been filed or resolved? For decades, hundreds of cases have been brought before and resolved by the Court of Claims and other judicial fora to address claims for mismanagement and consequential damages involving trust land-based assets. Does the administration propose to negate past judgments and settlements that have been reached or are pending?

(2) Does the Administration propose to be absolved of responsibility for providing the resources necessary to manage trust assets[12], or for adhering to

[10] The "reconciliation" touted by Interior does not include confirming evidence or documentation supporting the accuracy of trust transactions.

[11] In the 1970's the ITC worked with the BIA to end a long-standing administrative practice of the BIA in which interest earned on advance deposits made for timber sales was placed in "slush fund accounts" maintained by local superintendents. Under ITC's leadership, the practice was modified so that interest now follows the principal; further, other administrative changes reduced time delays in depositing funds into IIM accounts. See proceedings of the Third National Indian Timber Smposium, 1979.

[12] The current fiduciary relationship between the United States and Indian beneficiaries imparts certain fundamental obligations on the trustee. On April 28, 2000, Secretary Babbitt issued Secretarial Order 3215 setting forth certain fundamental trust principles that were later incorporated into Section 303 of Interior's Departmental Manual. The Order: (a) relied upon the definition of trust responsibility as expressed in the American Indian Trust Fund Management Reform Act of 1994 (Reform Act), Pub. L. 103-412, Oct. 25, 1994, 108 Stat. 4239; (b) discussed sources of guidance, such as Solicitor's opinions and judicial opinions, noting that courts, like the Supreme Court in Mitchell II, have looked to statutes and regulations to determine the Department's trust duties. Common-law fiduciary duties require the trustee to ensure that trust assets are protected and productively employed. Congress has routinely appropriated funding to manage Indian forests since the early 1900s and continues to appropriate funds ($133 million in '06 to

statutory requirements, such as those set forth in NIFRMA and Secretarially-approved resource management plans, or abiding by judicial decrees, or adequately performing residual responsibilities under the concept of owner-managed trust? What recourse would tribes and allottees have if the U.S. failure to provide the means to properly manage resources results in catastrophic loss from fire, insects or disease, damage, or waste of trust assets? Such occurrences are far from speculative. For example, the Quapaw Tribe in Oklahoma could easily suffer several billion dollars in environmental damages resulting from heavy metal contamination under the United States' administration of mining operations affecting the Superfund Site known as Tar Creek.

(3) How does the Administration propose to allocate the $7 billion total it proposes for settlement among Individual claims, tribal claims, incentives for owner-managed trust, attorney fees, and land consolidation?

Reconciliation of Limited Liability and Tribal Self-Determination

There has always been a palpable tension between the desire for tribes and individual Indians to assume greater responsibility for management of trust assets and the reluctance of the trustee to allow this to occur because of the potential for liability for any losses that may result. This is a difficult topic that would benefit greatly from a deliberative process involving the trust beneficiaries, the Administration, and the Congress should the participants agree to create and willingly participate in a functional forum and process that involves problem identification and collaborative resolution.

The ITC is not adamantly and irrevocably opposed to the concept of a limited waiver of liability. However, its support for this concept would need to be conditioned on certain principles to ensure accountability in federal administration in a manner consistent with trust responsibilities to tribal governments. Under Self-Determination and Self-Governance, tribes have assumed ever greater roles in management of Indian forests. Today, over 120 tribes operate their own forestry programs with greater efficiency, accountability, and innovation than ever before. Title III in S. 1439 before the last Congress incorporated provisions that can serve as a useful model for progress from Self-determination to self-governance to a form of tribal management with concomitant reduction of federal exposure to liability.

To effectuate such an approach, accountability must be evaluated against objectives and performance criteria specified in tribally-developed plans or agreements. For example, a tribal government could draft a management plan and submit it for review by the Department. If, after reviewing the plan, the Department

(a) concludes that the plan is consistent with the trust responsibility of the United States, then the Department would formally approve the plan, and resources would be managed in accordance with its provisions.

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support state and private forestry in the US Forest Service), even where it has no direct or even indirect fiduciary responsibility.

(b) determines that the trust responsibility of the United States would be at risk under the tribal management plan, the Department would convey to the tribal government the full basis and nature of its concerns and such adjustments to the plan as may be necessary to satisfy the trust responsibility of the United States. In the event that the tribal government does not adjust the plan to satisfy concerns raised by the Department and decides to proceed with implementation, the Department would not be held liable for any actions taken under the plan. A similar approach was embodied in the Tribal Title of the Energy Policy Act (PL 109-58).

Tribal resources would be managed under the plan. For resources held in trust for individuals, potential benefits (income or as otherwise specified by individuals) should be maximized within operational constraints established by tribal-Departmental plans. Beneficial owners receive, at a minimum, fair value for the use or extraction of trust resources (appraisal, sale procedures, legal instruments that are legally enforceable and otherwise protect the interests of the beneficiary) attainable under tribal-departmental plans wherever such plans exist. Where such plans do not exist, principles of common law trust and trustee fiduciary standards of care would apply within constraints of applicable tribal and federal law, such as:

- Use best practices (consideration of state of the art and budgetary constraints) in managing trust resources.
- Ensure that trust resources are adequately protected (trespass, disease, catastrophic loss, etc.)
- Ensure that entities responsible for financial accounting are timely notified of:
  - contractual obligations for the sale or use of trust resources for which compensation is due.
  - quantity of resources involved and removed/used for each beneficial owner
- Ensure full accountability for the quantity and value of trust resources utilized/removed
- Maintain accurate records and inventories (cadastral surveys, title records, probate, etc.)

Concluding Remarks

The ITC is a thirty year old organization whose membership includes seventy forest owning tribes and Alaska Native organizations that collectively possess more than 90% of forestland under BIA trust management. To all our members, responsible stewardship of our resources is our foremost concern. The health and productivity of Indian forests

and woodlands are essential to the physical, cultural, and economic well-being of tribal communities and must be properly managed and conserved for present and future generations. Forests are renewable natural resources which are capable of providing continuing benefits for tribal communities and future generations. But these benefits can be realized only if forests are properly managed. That requires the U.S. to invest in the land and the people.

Nationwide, there are 302 forested reservations (199 contain timberlands and 185 contain woodlands). Out of the 56.3 million acres in federal Indian trust, 18.1 million are forested (7.7 million acres of timberland and 10.2 million acres of woodlands). Indian forests have been actively managed by tribal communities for thousands of years. Several tribes operate enterprises to harvest or process forest products, provide management services such as thinning or tree planting, and maintain highly qualified fire crews. Today, over 120 tribes operate their own resource management programs to provide in-house expertise in forestry, fish, range and wildlife to complement traditional ecological knowledge within their communities.

The Department of Interior is the trustee delegate for the United States with the responsibility to administer trust funds and resources for Indian beneficiaries. The Department maintains over $400 million in 230,000 Individual Indian Money accounts and $2.8 billion in 1,400 tribal accounts. About 56 million acres of land are operated under some 100,000 leases for individual Indians and tribes on trust land. Annually, leases, permits, revenues from resource extraction, and interest generate approximately $226 million for individual Indians and $530 million for tribes. In 2001, Indian forests generated approximately $85 million in stumpage income, provided 2400 jobs in forestry activities, and supported 30,800 full time equivalent positions and $477 million in personal revenues.[13]

The United States has a trust responsibility to assure that our forests are properly managed. Tribes have a covenant of wise stewardship with the generations to follow. Increasingly, tribes are operating their own resource management programs to provide in-house expertise in forestry, fisheries, range, hydrology, and wildlife to compliment traditional ecological knowledge within their communities. Over the 30 years of its existence, the ITC has sought to avoid the temptation to turn to litigation as the primary means to resolve differences in the administration of the trust. Instead, the ITC has worked to build partnerships to build a common understanding of issues and then cooperatively devise solutions to complex and difficult problems. Together, the ITC, tribes, the Administration, and the Congress share a collective responsibility to ensure that the trust is preserved and well deserved.

The ITC is proud to have worked with Congress and the Administration to enact NIFRMA, a landmark law in the federal trust management of Indian forests. All of us can be proud that NIFRMA significantly contributes to making the Bureau of Indian Affairs Forestry program one of the very best in that agency. The independent Indian

[13] Indian Forest Management Assessment Team, December 2003. An Assessment of Indian Forests and Forest Management in the United States, p41.

forest assessments authorized by NIFRMA are documenting our progress, and show Indian forestry programs, despite meager federal support, are vibrant and innovative. More and more tribes are moving toward assuming full management of their forests, and the BIA Forestry program is changing hand-in-glove with the tribes to shape itself into a lean, efficient and engaged partner. This is perhaps one example of a path to the future. It is not perfect, and occasional missteps will occur, but Indian Forestry is moving forward, it is productive, unified and confident. We fail to understand how this instance, at least, merits abandonment of the trust.

A Path To Follow

We ask the Congress and the Administration to repudiate and eliminate the threat of termination and instead affirm policies of Indian self-determination and government-to-government relations between Indian tribes and the United States. This would go far to overcome the suspicions, posturing, and ill-will that presently stand in the way of finding a path to acceptable settlement of the Cobell litigation.

We believe that the best hope for finding a solution to Cobell lies in changing the focus away from the litigation toward the broader challenge of crafting a vision and plan of action to guide the future course of tribal-federal relations. Failure to re-channel the energy and resources that are now being consumed in adversarial futility can only lead to years of prolonged frustration, distrust, and festering outrage. We urge the Committee to press for the establishment of a forum and process that would encourage and empower tribal leadership, the Administration, and Congress to put their collective energies to a more productive purpose. We can appreciate that our recommendation will likely be met with healthy skepticism. Indeed, we realize that the challenges that would need to be overcome are formidable, given the unhappy experiences of mediation and the Tribal-DoI Task Force. But we are convinced that devising the means and mustering the political will to engage in constructive dialogue is the path that holds the best promise of serving the interests of both Indian Country and the United States. Tribes, the Congress, and the Administration should and must work together to develop common vision for the future and walk down a well-marked path to attain it, together.

NATIONAL CONGRESS OF AMERICAN INDIANS

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The National Congress of American Indians
Resolution #ECWS-07-001

TITLE: A Plan for Progress on Trust Reform and Cobell Settlement

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the National Congress of American Indians has supported and continues to support the *Cobell* litigation and tribal litigation to require the Secretary of Interior to properly account for trust funds held by the United States for the benefit of Indian tribes and individual Indians; and

WHEREAS, NCAI Resolution SAC-06-033 supported legislation in the 109th Congress (the August 4 draft of S. 1439) to provide a fair settlement of the *Cobell* litigation and to make certain reforms to the trust system; and

WHEREAS, significant progress was made on the trust reform measures in S. 1439, but agreement could not be reached on terms for settlement of the *Cobell* litigation; and

WHEREAS, the federal government has failed to offer a written proposal for settlement, but has offered only limited settlement concepts that would undermine the trust responsibility and are not acceptable to Indian Country; and

WHEREAS, the ongoing conflict over trust accounting has affected the budget for Indian programs, encouraged the growth of bureaucracy at the Office of Special Trustee, resulted in a narrow focus on trust liability at the Department of Interior to the exclusion of other important issues, an unwillingness to place land into trust, and limitations on communication with the Department of Interior that impede the government-to-government relationship; and

WHEREAS, it is critically important to make improvements to the trust system and improvements in communications and the government-to-government relationship with the Department of Interior in order to foster economic development and tribal self-determination in Indian Country and ensure that the United States fulfills its trust responsibilities in the future; and

WHEREAS, Indian tribes and Indian people have a vision of the United States transitioning to a trust system where there is active engagement by tribal governments on a government-to-government basis and Indian land owners in the management of their lands, while the federal government continues to fulfill its trust responsibilities with accountability in a manner adapted to the unique circumstances of each reservation to meet the intended purpose of providing a homeland and economy for Indian people where trust lands are put to their best use as determined by the Indian owners; and

WHEREAS, it may be possible to enact some of the provisions of S. 1439 that could not be enacted as an omnibus bill and make progress on achieving this vision of the trust system.

NOW THEREFORE BE IT RESOLVED; that NCAI supports and endorses the following as parts of an effort to make progress on trust reform issues at the Department of Interior:

1. Be it further resolved that NCAI urges Congress and the Administration to consult with tribes in considering reintroducing the legislation from S. 1439 in separate bills that will maximize the opportunity for passage; and

2. Be it further resolved that legislation should include provisions of S. 1439 that were in the August 4, 2006 draft of the bill including:
   - Elimination of the Office of Special Trustee
   - Creation of the Office of Deputy Secretary for Indian Affairs
   - Provision for expedited consolidation of fractionated allotments
   - Clear authority for the "Demonstration Project" to provide greater tribal control over trust assets while maintaining trust status
   - Accounting and audit procedures

3. Be it further resolved that NCAI supports a fair legislative settlement of the Cobell litigation and that any settlement should not diminish the funds provided for Indian programs;

4. Be it further resolved that NCAI supports the Inter Tribal Monitoring Association's efforts to develop methodologies for resolving tribal trust accounting claims short of litigation for reference and use by those tribes wishing to do so; and

5. Be it further resolved that NCAI adamantly opposes the newly developed Pt. 112 regulations to resolve tribal trust accounting claims due to the serious and unacceptable contradictions with a tribe's right to access courts in accordance with the Indian Tucker Act; and

6. Be it further resolved that NCAI supports Congressional efforts to prevent the United States from asserting that the Arthur Anderson reports were sufficient to commence the

statute of limitations, preferably by legislation that confirms that the Arthur Anderson reports are not an accounting for purposes of the "claim accrual" provision or any other purpose; and

7. Be it further resolved that NCAI supports dialogue with the Department of Interior on leasing and grazing regulations that will reduce bureaucratic oversight and foster economic development in Indian country; and

8. Be it further resolved that NCAI opposes efforts by the Department of Interior to revise the land to trust regulations because the Administration has not understood the critical role of land to trust in restoring tribal lands, cultures and economies and has indicated that it plans to limit land into trust contingent on a waiver of the trust responsibility and eliminate land into trust for individual Indians; and

9. Be it further resolved that NCAI supports increased communication with the Department of Interior and the removal of court-ordered limitations on access to the internet as soon as the Department has provided sufficient IT security to protect the vital trust data and other information of tribes' and individual Indians; and

10. Be it further resolved that NCAI supports the prioritization of trust and title transactions at the Department that support economic development and home ownership loans in Indian country; and

11. Be it finally resolved that NCAI supports reforms to the Department of Interior budget so that more funds are devoted to reservation-level management of trust lands and less funds are devoted to bureaucracy at the Office of Special Trustee and the Bureau of Indian Affairs.

CERTIFICATION

The foregoing resolution was adopted by the Executive Council at the 2007 Executive Council Winter Session of the National Congress of American Indians, held at the Wyndham Washington and Convention Center on February 26-28, 2007 with a quorum present.

President

ATTEST:

Juana Majel

Recording Secretary

The Jicarilla Apache Nation

EXECUTIVE OFFICES

P.O. Box 507 • Dulce, New Mexico • 87528-0507 • (505) 759-3242

Jicarilla Apache Reservation
February 11, 1887-1987

March 16, 2007

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: **Bush Administration Proposal to Repudiate Indian Trust Duties**

Dear Mr. Chairman:

As President of the Jicarilla Apache Nation, I am writing this letter to let you know that the Nation categorically objects to the Bush Administration's recent proposal to force settlement of all pending and potential Indian trust mismanagement claims and to repudiate all future federal trust duties to Indians, as stated in a letter sent to you earlier this month from Secretary Kempthorne and Attorney General Gonzales. This letter provides brief background on our interest in these issues, explains our four basic objections to the recent proposal, and concludes with suggestions for further consideration of Indian trust reform legislation.

The Nation Has Asserted Substantial Trust Mismanagement Claims

The Jicarilla Apache Nation is particularly interested in these issues because we have very substantial trust assets, including funds, natural gas, and timber, and we filed a breach of trust case against the United States in the Court of Federal Claims in January 2002. In the more than five years since filing that case, we have expended considerable time, money, and effort in developing the necessary factual and legal predicates for our claims and in working with the United States for proper resolution of our claims. Given the magnitude, breadth, and scope of our tribal trust assets, the damages rightfully owed to the Jicarilla Apache Nation by the United States are estimated conservatively to be in the hundreds of millions of dollars. The Nation very much wants to preserve its ability to resolve its claims concerning its trust assets on the Nation's own terms. These circumstances provide necessary context for consideration of our four fundamental objections to the Bush Administration's recent Indian trust repudiation proposal.

Indian Land Cessions Fully Paid In Advance for Permanent Federal Trust Duties

First, as you and Vice-Chairman Thomas recognized in your own recent letter to the Senate Budget Committee, the federal government's fiduciary obligations to Indian tribes arise

in part from cessions of millions of acres of land from Indian tribes to the United States. The federal trust relationship with Indians therefore is not a mere gratuity that may be ended at will. Indian tribes have fully performed their side of the "bargain" that was forced on them and fully paid in advance for a permanent, enforceable trust relationship. The United States cannot now repudiate its willingly undertaken, solemn, and centuries-old trust obligations absent either express tribal consent or full return of the consideration paid by tribes, i.e., all Indian aboriginal lands and the value of ceded natural resources that have been severed. Neither option is viable, so the Bush Administration's proposed unilateral repudiation of its trust duties must be rejected. The Jicarilla Apache Nation is very deeply insulted, as all tribes should be, at the audacity of the Bush Administration's proposal that blatantly disregards and misrepresents the essence of the federal-Indian trust relationship.

Indians Must Not be Second-Class Citizens for Disposition of Their Trust Assets

Second, the Bush Administration proposal to force settlement of all pending and potential tribal trust mismanagement claims for only an unspecified portion of $7 billion that also would be used for settlement of individual Indian trust claims, IT security, and dissolution of Interior's existing trust responsibilities is profoundly inadequate. The Committee's staff last fall proposed a $7 billion settlement for just the *Cobell* plaintiffs' claims against the federal government for Individual Indian Money accounts. Moreover, Jim Cason testified to this Committee in July 2005 that tribal trust cases already filed as of then—including the Nation's case which has been pending since January 2002—involve "sums of money far greater than those involved in the individual Indian trust." Indeed, in March 2005, Attorney General Gonzales testified to the House Appropriations Committee that the United States' potential exposure in tribal trust mismanagement claims exceeds $200 billion. It must be presumed that the Attorney General would never make such an assertion to Congress to support a budget request to Congress unless the Attorney General had a very solid basis for accurately determining that amount.

Congress would never approve such a settlement for fractions of a penny on the dollar for mismanagement of trust assets belonging to its own members or any other group of Americans. For example, in the savings and loan bailout where white people's money was at stake, Congress readily appropriated $50 billion just to initiate resolution before the full extent of problems were known, and the entire bailout ended up costing taxpayers about $124 billion. Congress even appropriated money to pay depositors that had uninsured funds beyond the insurance maximum even though the government had no obligation to do so. Here, by contrast, the mismanagement is by the United States, not third parties, and because the United States is acting as a trustee and not just a depository bank, there is no relevant account insurance limit.

Given the federal government's thoroughly documented failures to perform well-established and basic trust management duties here, Congress should not sanction this proposal which would eviscerate any hope of meaningful indemnification for the First Americans, who to this day have given so much to their country. The rosy-sounding platitudes offered to justify the proposal—"a new era of independence and prosperity" for tribes—disingenuously mask the true purpose of the proposal to simply minimize and eliminate federal liability and responsibility to Indian tribes. And the utter failure to consult with Indian tribes before offering this proposal

belies any notion of a true "partnership" as asserted by the Bush Administration.

Fractionation Is Not a Valid Reason for Abdicating the Federal Trust Responsibility

Third, the assertion in the recent proposal that somehow the "fractionation problem" with allotments is an insoluble problem which justifies repudiating federal trust duties to Indians is both absurd and false. A simple comparison with competent banks and government agencies with many, many more accounts and transactions demonstrates how ludicrous this claim is. It is generally agreed that there are no more than 500,000 Individual Indian Money ("IIM") accounts. Each fractional owner of an interest in an allotment has an account, and the accounts typically have no more than two or three transactions per month. Yet the Departments claim this is an impossible and hugely expensive managerial task that somehow warrants a wholesale abdication of Indian trust duties. Nothing could be further from the truth.

Compare the real—competent—world of banking. For example, JPMorgan Chase, the second largest bank in the United States, which dates back to 1799, states in its 2006 Annual Report that for 2006 its retail financial services division had average deposits of $201 billion, average loans of $204 billion, 10 million active checking accounts, and 5.7 million active online customers. In addition, its credit card services division had 154 million cards in circulation with 18 billion transactions reflecting a total volume of $660 billion. And its asset management division supervised $1.3 trillion in assets including without limitation those for 1.36 million retirement planning services participants. These figures and the banking activities that they represent completely dwarf the Indian trust funds that the Department of Interior has routinely and systematically mismanaged. Fractionation—essentially just more involved accounting—is only a problem because of Interior's incompetence. It is not a problem for a real bank.

But one does not have to look to the private sector to show easily that accounting issues related to fractionation do not warrant repudiation of federal trust responsibilities for Indians. Consider the trust fund management by the Social Security Administration ("SSA"). According testimony provided last month to the Senate Special Aging Committee, in FY 2006, SSA maintained individual payment records for more than 53 million people who received Social Security benefits or Supplemental Security Income ("SSI") each month. During this time, those payments exceeded $586 billion. Moreover, SSA employees processed nearly 3.8 million Retirement and Survivors Insurance benefits claims, 2.5 million disability claims, over 2.5 million SSI claims, and conducted 559,000 hearings. To conduct these and other statutory obligations, SSA served approximately 42 million visitors at its nearly 1,300 field offices across America. The scale of these activities, for which SSA has improved productivity by an average of 2.5% per year since 2001, is far greater than the fractionation issues related to only about 500,000 IIM accounts that Interior claims are prohibitively difficult to manage.

Fraction is not a real problem. Interior's institutional incompetence is the problem. Indeed, this is confirmed because it is well documented that Interior's trust management deficiencies apply to tribal trust activities in addition to individual Indian trust activities for allottees and their heirs. Tribal trust assets are not fractionated. Therefore, even if fractionation issues were a real problem for IIM accounts, that would not provide any justification for wholesale repudiation of trust duties to Indian tribes like the Jicarilla Apache Nation.

The Government Can and Should Properly Manage Indian Trust Assets by Using Banks

Fourth, there is no legitimate reason that the United States cannot properly discharge its trust responsibilities to Indian tribes. The Congressional Research Service reported in June 2006 that the United States government holds 56 million acres of Indian land in trust, plus $3.3 billion in Indian trust funds, $2.9 billion of which is in 1400 tribal trust accounts. As noted above for JPMorgan Chase, trust assets on a much larger scale have long been managed in the private sector. These always have been subject to fiduciary duties such as legal responsibility for proper trust administration and liability for the financial welfare of trust beneficiaries. Plainly, there is not a problem with the imposition of proper trust management duties, as surely any Senator would insist for any bank that holds his or her money on deposit. Moreover, the Departments of the Interior and Justice have repeatedly represented publicly and in court filings that the United States properly administers its fiduciary duties concerning Indian trust assets. Given the United States' self-professed proper discharge of Indian trust duties, and the longstanding and broad compliance with enforceable fiduciary duties by banks and other federal agencies, there is surely no reason for wholesale repudiation of those duties here as stated in the recent proposal.

Even if the Department of the Interior finally concedes its institutional incompetence for Indian trust fund management, that would not warrant blanket repudiation of long-established trust duties as Interior has proposed along with its attorneys at Justice. Consider the manner in which a bankruptcy trustee manages a bankrupt estate. The trustee does not try to become a bank, but instead uses the services of a bank for banking functions without any diminishment of the trustee's legal duties. This is hornbook trust law. So too should Interior cease trying to perform banking functions for which it is incompetent and unnecessary. The federal trust responsibility to Indians for fund management would be carried out better, more efficiently, and with greater accountability if Interior were to use real banks to perform banking functions.

By using the private sector, the Departments of the Interior and Justice can avoid their felt need to engage in deceptive language to try to give to Congress the false impression that somehow a repudiation of federal trust duties to Indians would be in Indians' best interests. It would not. "Beneficiary-managed trust" is surely an oxymoron, and the proposal to establish that reeks of the now wholly discredited termination policy of the 1950s. And because Indians tribes already have fully paid in advance for a permanent trust relationship with the United States—from which the United States government has long since reaped handsome benefits—the Bush Administration should not be heard to assert that Indians should be charged for the privilege of having competent trust administration.

Meaningful and Informed Trust Reform Should Proceed

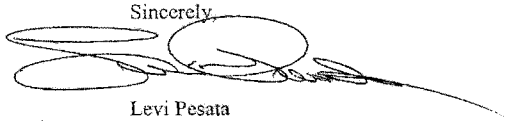
We know that Congress takes the federal trust responsibility seriously and that there are serious problems with the government's existing Indian trust management activities. Accordingly, the motivating factor for Indian trust reform legislation should be implementation or improvement of the trust responsibility, not abrogation of it. The United States must not repudiate its venerable trust duties to Indians, and the Jicarilla Apache Nation opposes the Bush

Administration's current Indian trust repudiation proposal in the most vehement and unbending manner possible. With this in mind, the Nation suggests that meaningful trust reform legislation include the following elements, among others: eliminate the Office of the Special Trustee; preserve existing enforceable trust duties; and increase funding for direct assistance and pass-through Indian programs. Of course, a more comprehensive and detailed consideration of Indian trust reform issues should involve substantial consultation with Indian tribes throughout the country. For that, the Jicarilla Apache Nation agrees with your public statement that input from Indian tribes is required before Indian trust settlement legislation can move forward.

We hope that you will keep these considerations in mind when the Committee holds a hearing later this month on the recent Indian trust repudiation proposal. Our counsel of record for our trust mismanagement case, Alan Taradash of the Nordhaus Law Firm, has a great depth and breadth of knowledge concerning these issues. If you think it would be of help to the Committee, Mr. Taradash is prepared to testify on behalf of the Jicarilla Apache Nation on all these matters at that hearing.

Thank you very much for your attention to these concerns and suggestions. Please contact me with any questions regarding these matters.

Sincerely,



Levi Pesata
President

cc: Members, Senate Committee on Indian Affairs
Chairman Rahall & Ranking Member Young,
House Committee on Natural Resources
Members, New Mexico Congressional Delegation
Secretary of the Interior Kempthorne
Attorney General Gonzales
Alan Taradash, Esq.

Mar-28-07 01:09pm From-Navajo Nation Dept Of Justice 928-871-6177 T-202 P.002/010 F-236

DR. JOE SHIRLEY, JR.
President

BEN SHELLY
Vice President

March 28, 2007

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, D.C. 20510

Re: President of the Navajo Nation's Statement on the Kempthorne/Gonzales Proposal for Legislative Foreclosure of Tribal Trust Mismanagement Claims and Repudiation of the Federal Government's Indian Trust Duties

Dear Chairman Dorgan:

The Navajo Nation is in unreserved opposition to the recent proposal submitted to your office by Secretary Kempthorne and Attorney General Gonzales on March 1, 2007. The clearly intended purpose and effect of their joint proposal is twofold: (1) to foreclose all pending and potential Indian trust mismanagement claims against the United States; and (2) to repudiate all future federal trust duties. The added purpose and effect of barring this country's first inhabitants from access to the great courts of the United States is a particularly odious part of the Kempthorne/Gonzales proposal and is at great odds with the simple principle of decency and honor in government that is fundamental to our democracy.[1]

No other citizens who have suffered such harm directly at the hands of the agents of our government have ever needed access to its courts more than the First Americans. And yet, and in contrast to the full restitution made to all depositors at the failed savings & loan institutions in the 1980s, the proposal made to you by the Secretary of Interior and the Attorney General would place Native American tribes and Native American people on a par with slaves in 1857 when the Supreme Court, in the infamous Dred Scott case, declared slaves to be without rights as human beings to seek redress in this Nation's courts.

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[1] As you review the Kempthorne/Gonzales proposal to foreclose all pending and potential Indian trust mismanagement claims against the United States, it is at least worth pondering the inscription that is literally and proudly carved in stone on the ground floor of the United States Court of Federal Claims (and, ironically, not more than 400 yards from the front door of the White House):

> "It is as much the duty of government to render prompt justice against itself, in favor of its citizens, as it is to administer the same, between private individuals."
>
> Abraham Lincoln

Office of the President and Vice President
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The Secretary and the Attorney General put forth false platitudes with language that speaks of moving tribes and individual Indians to "economic prosperity, empowerment, and self-reliance." Were it not so serious, one would be apt to say that such misleading language borders on being farcical. It is unfathomable how the Secretary and Attorney General is depriving Native American tribes of their right to have their cases heard in impartial courts could be deemed empowering or be equated with economic prosperity. If the Secretary and the Attorney General truly supported a move to economic prosperity, empowerment, and self-reliance for Native American tribes and individual Native Americans, their proposal would have the federal government honestly accept legal and financial responsibility for its thoroughly documented historical failure to honor its trust duties and fiduciary obligations to the First Americans.

On December 29, 2006, the Navajo Nation timely filed a breach of trust case against the United States in the United States Court of Federal Claims asserting significant losses and damage to tribal trust assets due to a variety of breaches of fiduciary trust duties the United States has *vis-à-vis* the Navajo Nation. The Navajo Nation has devoted significant time, money, and effort, in developing the necessary factual and legal predicates for proper and fair resolution of its claims through the legal process. As a sovereign government and as an assertion of self-determination, the Navajo Nation wishes to preserve and retain its ability to resolve claims concerning its trust assets on its own terms, including use of the judicial process, if it so chooses.

For these reasons and the reasons further discussed below, the Navajo Nation categorically objects to the Kempthorne/Gonzales March 1, 2007 proposal to force settlement of all pending and potential Indian trust mismanagement claims and to repudiate all future federal trust duties.

Permanent Federal Trust Duties Have Been Fully Paid for in Advance

The Navajo Nation and its leaders are, quite frankly, aghast at the blatant disregard for and misrepresentation of the essence and substance of the federal government-Indian trust relationship put forth by the Secretary and the Attorney General. The federal government's fiduciary responsibilities to Native Americans are grounded in the United States Constitution, treaties, federal statutes, and Supreme Court case law, as well as in agreements made over the course of 200 years of dealings.

For example, in the Treaty of 1849 between the Navajo Nation and the United States, the Navajo Nation submitted to the "free and safe passage" of non-Indians through Navajo territory and the Government's "sole and exclusive right of regulating trade and intercourse" with the Navajo. In exchange, the United States' promised to give the Treaty a "liberal construction" and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo.

This was not the first or only time the United States willingly assumed trust duties concerning the Navajo Nation. The Treaty of 1848 specifically states that in the Treaty of Guadalupe Hidalgo of 1848 between the United States and Mexico, the United States promised that Navajos and the Navajo territory "are now and will forever remain" under the protection of the United States.

As you and Vice-Chairman Thomas recognized in your March 1, 2007 letter to the Senate Budget Committee, the federal government's permanent fiduciary obligations to Native American tribes arise in part from the cession of millions of acres of lands (as well as the natural resources on such ceded lands valued conservatively in the billions of dollars) to the United States. Native American tribes made these cessions conditioned upon an understanding that in exchange for freeing up vast amounts of territory for settlement by non-Indians, the federal government would forever safeguard the autonomy of the tribes by protecting their retained lands and valued resources.[2]

In the Treaty of 1868, the Navajo Nation acceded to the establishment of the original Navajo reservation. However, the Navajo Nation leaders did not enter the Treaty of 1868 with the United States until after the United States Calvary's scorched-earth campaign ravaged their homeland and 7000-8000 Navajo grandmothers, grandfathers, children, men and women were rounded-up and forced, at gunpoint, to walk 400 miles from their homeland to internment at a concentration camp on a 40 square mile patch of desolate desert. Thousands of Navajos died during captivity and what has come to be known as "The Long Walk." Despite such cruel and inhuman treatment, the Navajo Nation has honored every article of the Treaty of 1868, because their leaders gave their word of honor to abide by it.

The federal trust relationship with Native Americans is not a mere gratuity that may be ended at will or for the convenience of the Secretary and the Attorney General. Native American tribes have fully performed their side of the "bargain" that was forced on them and fully paid in advance for a permanent, enforceable trust relationship. Secretary Kempthorne and Attorney General Gonzales, solely for purposes of bureaucratic and administrative convenience, ought not be permitted to persuade Congress to repudiate the federal government's willingly undertaken, solemn, and centuries-old trust obligations. To do so would bring dishonor to this great Nation and would once again call into question the trustworthiness of the words and commitments of the United States.

It is worth pondering the last sentence of the great dissent of Justice Hugo Black in the Supreme Court's 1960 decision in the Tuscarora case: "Great Nations like great men should keep their word." Absent either express tribal consent or full return of the consideration paid by tribes, e.g., all Indian aboriginal lands and the value of ceded natural resources that have been severed, the trust obligations of the United States must remain intact. The Navajo Nation has not given its consent, nor has the federal government offered the full return of the consideration paid by tribes. Thus, Congress must also reject the proposed repudiation of its trust duties.

[2] In addition, the Treaty of 1849 and the Treaty of 1868 between the Navajo Nation and the United States also contain specific language under which the Navajo Nation and United States pledged "that from and after the signing of this treaty, hostilities between the contracting parties shall cease" and "from this day forward all war between the parties to this agreement shall forever cease."

Indians Must Not be Second-Class Citizens for Disposition of Their Trust Assets

Despite the acknowledgment that the true price tag of mismanagement of tribal trust assets alone could run into the hundreds of billions of dollars, the Kempthorne/Gonzales proposal is to settle all trust mismanagement claims and to pay for trust reform efforts with only some unspecified part of $7 billion. In March 2005, the Attorney General himself testified to the House Appropriations Committee that the United States' potential exposure in tribal trust mismanagement claims exceeded $200 billion.

It must be presumed that the Attorney General would never make such an assertion to Congress to support a budget request, unless the Attorney General had a very solid basis for accurately determining that amount. Yet, his proposal to force settlement of all pending and potential tribal trust mismanagement claims for only an unspecified portion of $7 billion is not only profoundly inadequate, but insulting to Native American tribes and Native American citizens.

Aside from forcing settlement of pending and potential tribal trust mismanagement claims, the proposed $7 billion would also be used for settlement of individual Indian trust claims, IT security, and dissolution of Interior's existing trust responsibilities. Adding insult to injury, the Secretary and Attorney General's $7 billion proposal was put forth knowing that Interior's Jim Cason testified to this Committee in July 2005, that tribal trust cases filed as of then, which did not include the Navajo Nation's claim, as well as many other tribal claims not yet then filed, involved sums of money far greater than those involved in the individual Indian trust. Last fall the Committee's staff proposed a $7 billion settlement for just the Cobell plaintiffs' claims against the federal government for Individual Indian Money ("IIM") accounts.

A settlement for fractions of a penny on the dollar for mismanagement of trust assets belonging to its own members or any other group of Americans would not even be considered by Congress, let alone approved. For example, in the savings and loan bailout where mainly white people's money was at stake, Congress readily appropriated $50 billion just to initiate resolution before the full extent of problems were known. The entire savings and loan bailout ended up costing taxpayers about $124 billion. Congress even appropriated money to pay depositors that had uninsured funds beyond the insurance maximum despite the fact that the government had no obligation to do so. Here, by contrast, the mismanagement is by the federal government, not third parties. In addition, the federal government is acting as a trustee, not just a depository bank, and there is no analogous account insurance or limit.

Given the federal government's thoroughly documented failures to perform well-established and basic Indian trust management duties, Congress should not sanction this proposal which would eviscerate any hope of meaningful indemnification for the First Americans, who are and always have been among the poorest of the poor United States citizen and still to this day have given so much to their country.

Navajo members have and continue to this day to voluntarily and disproportionately serve in the United States' military. When Japan bombed Pearl Harbor on December 7, 1941,

Navajo men flocked to the nearest recruiting stations determined to serve and protect the United States. The Marine Corps welcomed them and in the course of their duty created the only unbroken oral military code in the history of the world. Over four hundred Navajos became certified code talkers and served in every South Pacific campaign form Guadalcanal to Okinawa. The Navajo military code saved thousands of American lives during the course of the war.

While the service of the Navajo Code Talkers has been well documented recently, a much lesser known, but equally as important contribution of this country's most loyal Native American tribes to the United States' World War II war effort remains largely unknown. As the jeeps, trucks, ships, tanks, and airplanes of this great Nation swung into high gear to save Europe, Asia and indeed the free world from the very real threats confronting the world in 1941, the gasoline, oil and diesel fuel that they ran on came largely from the huge oil reserves of the Navajo Nation, the Wind River Reservation, and the Osage Nation. The pumps and valves at these three huge oil fields were opened wide to assure that the fighting forces of our country had the necessary fuel to successfully confront and overcome Nazi and other fascist forces arrayed against the Allied Forces. None of these tribes quibbled or hesitated for a moment to contribute all that they had to aid our Nation at its greatest time of need since the Civil War. The recent Kempthorne/Gonzales proposal appears obscene against the background of this history.

The platitudes offered by Secretary Kempthorne and Attorney General Gonzales in a vain attempt to justify their proposal - "a new era of independence and prosperity" for tribes - disingenuously masks the true purpose of their proposal which is to simply minimize and eliminate federal liability and responsibility to Native American tribes. The complete and utter failure to consult with Indian tribes before offering this proposal belies any notion of a true "partnership," as was asserted by the Secretary and Attorney General.

Fractionation Is Not a Valid Reason for Abdicating the Federal Trust Responsibility

The assertion in this proposal that somehow the "fractionation problem" with allotments is an unsolvable problem, which justifies repudiating federal trust duties to Indians, is simply false. A simple comparison with competent banks and government agencies with many, many more accounts and transactions demonstrates how ludicrous this claim is. It is generally agreed that there are no more than 500,000 IIM accounts. Each fractional owner of an interest in an allotment has an IIM account. These accounts typically have no more than two or three transactions per month. Yet the Department of Interior claims that this is an impossible and hugely expensive managerial task that somehow warrants a wholesale abdication of Indian trust duties. This is simply not true.

Compare the real--competent--world of banking. For example, JPMorgan Chase, the second largest bank in the United States, which dates back to 1799, states in its 2006 Annual Report that its retail financial services division had average deposits of $201 billion, average loans of $204 billion, 10 million active checking accounts, and 5.7 million active online customers. In addition, its credit card services division had 154 million cards in circulation with 18 billion transactions annually reflecting a total volume of $660 billion. Notably, its asset

management division supervised $1.3 trillion in assets including, without limitation, those for 1.36 million retirement planning services participants.

These figures and the banking activities that they represent completely dwarf the Indian trust funds that Interior has routinely and systematically mismanaged. Fractionation - essentially just more detailed accounting - is only a problem because of Interior's incompetence. It is not a problem for a real bank.

One does not have to look solely to the private sector to easily see that accounting issues related to fractionation do not warrant repudiation of federal trust responsibilities for Indians. Consider the trust fund management by the Social Security Administration ("SSA"). According to testimony provided last month to the Senate Special Aging Committee, in FY 2006, SSA maintained individual payment records for more than 53 million people who received Social Security benefits or Supplemental Security Income ("SSI") each month. During this time, those payments exceeded $586 billion. Moreover, SSA employees processed nearly 3.8 million Retirement and Survivors Insurance benefits claims, 2.5 million disability claims, over 2.5 million SSI claims, and conducted 559,000 hearings. To fulfill these and other statutory obligations, SSA served approximately 42 million visitors at its nearly 1,300 field offices across America. The scale of these activities, for which SSA has improved productivity by an average of 2.5% per year since 2001, is far greater than the fractionation issues related to only about 500,000 IIM accounts that Interior claims are prohibitively difficult to manage.

Fractionation is not a real problem, only a disingenuous excuse which Interior uses to justify institutional incompetence. It is well documented that Interior's trust management deficiencies apply to tribal trust activities, not just to individual Indian trust activities for allottees and their heirs. However, tribal trust assets are not fractionated. Thus, even if fractionation issues were a real problem for IIM accounts, fractionation does not provide any justification for wholesale repudiation of trust duties to Native American tribes.

Nor does fractionation provide any justification for foreclosing Native American tribes' rightful access to the court system to resolve their tribal trust asset mismanagement claims. Normal judicial processes are sufficient to process individual tribal claims. It is well-known and accepted that sufficient documentation exists for tribes to support, value, and prove their claims against the federal government. The Secretary and Attorney General's proposal to foreclose Native American tribal governments' access to the courts is simply a plan for their convenience and not reflective of the fact that tribal trust asset mismanagement claims have been and continue to be successfully litigated in the courts.

The Government Can Properly Manage Indian Trust Assets by Turning to the Private Sector

There is no legitimate reason that the United States cannot properly discharge its trust responsibilities to Native American tribes. The Congressional Research Service reported in June 2006 that the United States government held 56 million acres of Indian land in trust, plus $3.3 billion in Indian trust funds, $2.9 billion of which is in 1400 tribal trust accounts. As noted

above for JPMorgan Chase, trust assets on a much larger scale have long been competently managed with unfailing accountability in the private sector. This management has always been subject to judicially enforceable fiduciary duties, such as legal responsibility for proper trust administration and liability for the financial indemnification, where appropriate, of trust beneficiaries.

Plainly, reputable financial institutions do not have a problem with the imposition of proper trust management duties, as certainly any Senator would insist for the bank that holds his or her money on deposit. Moreover, the Departments of the Interior and Justice have repeatedly represented publicly and in court filings that the United States properly administers its fiduciary duties concerning Indian trust assets. Given the United States' self-professed proper discharge of Indian trust duties, and the longstanding and broad compliance with enforceable fiduciary duties by banks and other federal agencies, there is surely no reason for wholesale repudiation of trust duties as recently proposed by the Secretary and the Attorney General.

Even if Interior finally concedes its institutional incompetence for Indian trust fund management, a blanket repudiation of long-established trust duties as proposed by the Secretary and Attorney General would not be warranted. When a bankruptcy trustee manages a bankrupt estate, the trustee does not try to become a bank. Instead, the bankruptcy trustee uses the services of a bank for banking functions without any diminishment of their legal trustee duties. This is hornbook trust law. Likewise, Interior should cease trying to unnecessarily perform banking functions for which it is incompetent. The federal trust responsibility to Indians for fund management would be carried out more effectively, more efficiently, and with greater accountability if Interior were to use real banks to perform banking functions.

The Department of Interior already uses private sector suppliers of goods and services on a regular basis. For example, when the Secretary of Interior wants to make a copy of a document, the Secretary does not use a photocopy machine invented and manufactured by the Department of Interior. Even government's pens, embossed with the words "United States Government," are not manufactured by the government. These items are purchased from the private sector, as is their maintenance and repair. So looking to the private sector is nothing terribly new for the government.

By using the private sector, the Departments of the Interior and Justice can avoid providing Congress with the false impression that somehow a repudiation of federal trust duties to Native Americans would be in Native Americans' best interests. It would not. "Beneficiary-managed trust" is an oxymoron and the Kempthorne/Gonzales proposal to establish such for Native American tribes and Native Americans citizens reeks of the now wholly discredited termination policy of the 1950s. And, because Native American tribes already have fully paid in advance for a permanent trust relationship with the United States - from which the United States government has long since reaped handsome benefits - the Secretary and the Attorney General should not now be heard to assert that Native Americans should be charged for the privilege of having competent trust administration.

Meaningful and Informed Trust Reform Should Proceed

The Navajo Nation knows that Congress takes the federal trust responsibility seriously and that there are serious problems with the government's existing Indian trust management activities. Accordingly, the motivating factor for Indian trust reform legislation should be implementation or improvement of the trust responsibility, not abrogation of it.

The United States must not repudiate its venerable trust duties to Native Americans, and the Navajo Nation vehemently opposes the Kempthorne/Gonzales current Indian trust repudiation proposal in the most unbending manner possible. With this in mind, the Navajo Nation suggests that meaningful trust reform legislation include the following elements, among others: eliminate the Office of the Special Trustee; preserve and enforce existing trust duties; preserve the right of tribal governments to resolve their claims through judicial processes; increase funding for direct assistance and pass-through Indian programs, and create a Cabinet Level Secretariat for Indian Affairs.

Any comprehensive and detailed consideration of Indian trust reform issues should involve substantial consultation with Native American tribes throughout the country, including the Navajo Nation. For that, the Navajo Nation agrees with your public statement that input from Native American tribes is required before Indian trust settlement legislation can move forward.

We hope that you will keep these considerations in mind when the Committee holds a hearing this week on the recent Indian trust repudiation proposal. If you think it would be of help to the Committee, Louis Denetsosie, Attorney General of the Navajo Nation, who is exceptionally well versed in these matters, is prepared to testify on behalf of the Navajo Nation at any appropriate hearing.

Thank you for your attention to these concerns and suggestions. Please contact me with any questions regarding these matters.

Sincerely,

THE NAVAJO NATION

BEN SHELLY, VICE PRESIDENT

xc: The Honorable Craig Thomas
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March 23, 2007

The Honorable Byron Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: Listening Session and Administration Proposal of March 1, 2007 regarding Indian Trust Asset Accounts and Trust Duties

Dear Chairman Dorgan:

On behalf of Taos Pueblo, we thank you for the listening session you held in Albuquerque on February 19, 2007. We appreciated the opportunity to acquaint you with Taos Pueblo and the issues of concern to us. You may already know that Taos Pueblo is the only World Heritage Site in the United States recognized for its living culture. The protection of this unique place and way of life informs our every decision. With the support of members of Congress, we succeeded in the decades-long struggle for the return of our sacred Blue Lake Wilderness through federal legislation, and we are now poised for the introduction of water rights settlement legislation in the current Congressional session. We were pleased to speak with you personally about the water settlement and other pressing concerns for Taos Pueblo, including health facilities and funding for law enforcement and tribal courts.

We also write to bring to your attention Taos Pueblo's views relating to the Administration's March 1, 2007 letter to you proposing a settlement of Indian trust mismanagement claims. The Pueblo and our members have trust fund accounts that we fear have suffered gravely from the neglect and mismanagement that has plagued the Department of Interior's historical management of trust assets. We have a great deal at stake in how this mismanagement is ultimately redressed.

We appreciate the attention that the Administration and Congress are devoting to the issue of trust asset mismanagement. It is important for all of us to recognize that the problems, and the damages, have built up over a long period of time. Each affected Tribe has a unique history and circumstances that must be carefully considered in crafting a resolution. For this reason, there can be no one-size-fits-all quick fix.

The Department of the Interior currently maintains substantial funds in trust for Taos Pueblo. We have disputed the account balances and we have requested that the Department provide an administrative process to provide an accurate reconciliation and to resolve our claims in a constructive and cost-effective manner. We wish to pursue this process, not for it to be prematurely cut off by a blanket settlement and trust reform package that is not tailored to our

situation.

The federal government has, unquestionably, failed the Taos Pueblo and Indian people across the country in managing our trust assets during the course of our long relationship. The solution, however, is not to repudiate the federal trust responsibility to Indian tribes and our members, and we believe that this is not what Secretary Kempthorne intends.

We have been greatly impressed by the sincere and deep engagement of Secretary Kempthorne and his team in moving the Taos Pueblo water rights settlement through the Administration's review process. Our experience to date in the water rights settlement arena gives us confidence that we can productively consult with Secretary Kempthorne to resolve other trust resource and trust duty issues.

We submit to you that a trust reform package must not include any abrogation of the federal trust responsibility. It must, instead, preserve existing trust duties and augment funding for direct assistance and pass-through Indian programs, for example. If the Administration and Congress intend to proceed with a trust reform package, then we expect to be directly consulted by decisionmakers as they formulate the proposed reforms.

We would welcome any opportunity to talk with you about our views on trust reform, and to further acquaint you with Taos Pueblo. On your next trip west, we would be honored to host you at Taos Pueblo.

Sincerely,

Gilbert Suazo, Sr.
Governor

Louis Archuleta
War Chief

cc: Members, Senate Committee on Indian Affairs
Chairman Rahall & Ranking Member Young, House Committee on Natural Resources
Members, New Mexico Congressional Delegation
Secretary of the Interior Dirk Kempthorne
Counselor Michael Bogert
Attorney General Alberto R. Gonzales
Susan G. Jordan, Nordhaus Law Firm
Alan R. Taradash, Nordhaus Law Firm
Carlos W. Fierro, Nordhaus Law Firm

Message from the Secretary

For several years, the Department of the Interior has been involved in an accounting project of unprecedented proportions. Among other things, Interior has been ordered by the district court in *Cobell v. Norton* to document every dollar it has received and disbursed on behalf of individual Indians since 1887—a task that encompasses billions of dollars, hundreds of thousands of accounts, and tens of millions of account transactions. Under the district court's order, Interior must verify the accuracy of every transaction in its individual Indian account ledgers by reference to the supporting documents. No other federal financial system—not the tax collection system, the Social Security system, or the Medicare system—has ever been tasked with an undertaking of this type and scope.

The resources necessary to accomplish this task are staggering—estimated at more than $12 billion. Although the district court's order has been stayed pending appeal, Interior has nonetheless continued its accounting work, consistent with its own 2003 accounting plan and the funding provided by Congress, and has made substantial progress.

Interior's experience in conducting its accounting has revealed that a very high percentage of financial records are available—a quarter of a billion pages of Indian records have been collected and electronically indexed. Interior's accounting experts have uncovered no evidence of fraud or widespread systemic error in the U.S. government's handling of the individual Indian monies accounts, and the few errors that have been found are generally small in monetary value. This picture is significantly different from that offered by Interior's critics.

This brochure reports on the progress Interior has made in its historical accounting effort. I am very proud of the historical accounting work Interior has accomplished thus far, through its dedicated employees and an impressive group of outside contractors. The reported results provide some needed perspective on the allegations that have been made against the Department about its handling of individual Indian monies, and will, I hope, inform Congressional deliberations as well.

Sincerely,

Gale A. Norton

Gale A. Norton
Secretary of the Interior

Statement of William W. Mercer
Acting Associate Attorney General
Department of Justice

Before the Committee on Indian Affairs
United States Senate
Hearing on

"Indian Trust Fund Litigation"

March 29, 2007

I. INTRODUCTION

Chairman Dorgan, Vice-Chairman Thomas, and members of the Committee, I am pleased to appear before you today to discuss proposed legislation to address Indian trust claims and related issues. As you know, earlier this month Attorney General Gonzales and Secretary Kempthorne sent a letter setting forth a proposal for a legislative solution to these difficult and long-standing issues. Among other things, that letter included a list of objectives for the legislation, and said that the Administration would be willing to invest up to $7 billion over ten years in order to secure those objectives.

I am appearing before you today to provide additional details on the nature and goals of the Administration's legislative settlement proposal. The proposal has several elements. First, it would resolve pending and potential claims by individual Indians and Tribes. Second, it would provide those Tribes and individuals with additional authority to manage their own lands and resources. Third, it would consolidate fractionated individual Indian lands in order to make those lands more manageable and productive.

I will focus my testimony today on the first of these three issues, because the principal

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