

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, Ewiiapaayp 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.
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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.