Testimony of Hon. Charles Renfrew and John Bickerman

Hearing of the

Senate Committee on Indian Affairs

On the Settlement of *Cobell v. Norton*

March 29, 2007

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 C*obell*. 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.