STATEMENT OF
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BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON
S. 1439, THE INDIAN TRUST REFORM ACT OF 2005,
TITLES II - VI

March 28, 2006

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

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

Title II – Indian Trust Asset Management Policy Review Commission

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

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

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

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

The Department is currently implementing the FTM, and developing regulations to support the new practices. We are uncertain about the benefit of conducting another study that would likely result in the same analysis or point out seemingly intractable issues that have been known long but remain unresolved. Therefore, we believe it is not in the best

interest of taxpayers to finance a Commission to develop another report for future action. I also understand that a Commission like this one, with members appointed by both the Legislative and Executive branches, raises separation of powers concerns.

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

Title III-Indian Trust Asset Management Demonstration Project Act

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

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

We believe the United States should not remain liable for losses resulting from a tribe's mismanagement of an Indian trust asset. The bill would allow tribes to develop and carry out trust asset management systems, practices, and procedures that are different and potentially incompatible with those used by Interior in managing trust assets. In

considering this provision, we ask you to establish performance expectations that are reasonable, consistent with available resources and designed to constrain the need for litigation.

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

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

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

Title IV-Fractional Interest Purchase and Consolidation Program

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

As you know, the problem of fractionation—and its solutions—are not new. In 1938, at a conference on Indian allotted and heirship land problems in Glacier Park, Montana, Commissioner Collier said *"We have simply gone on, wondering from time to time what to do. We have taken occasion before the budget and before appropriations committees to bring up the problem; to show the waste of millions of dollars a year in these unproductive operations, and the effort taken out of positive human services; and that this type of expense was bound to increase every year."* Another attendee of the same meeting said, *"I think we all have in mind three objectives in our discussion of land program: We want to stop the loss of land; We want to put Indian lands into productive use by Indians; We want to cut down unproductive expenses in administering Indian lands."*

That was almost 70 years ago.

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

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

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

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

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

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

Title V would restructure the Bureau of Indian Affairs and the Office of the Special Trustee for American Indians (OST), and create an Under Secretary for Indian Affairs within the Department.

OST was created because Congress believed that Indian trust management reform would not happen under the previous structure. In fact, the past decade has seen effective reforms implemented—under the supervision of OST—including the hiring of much needed fiduciary trust officers, regional trust administrators, and cadastral land surveyors across the nation. We have also seen the opening of a toll-free call center for all beneficiaries, the purchase and integration of new technology to streamline and standardize all title, accounting, and asset management, a records-management program now considered one of the best in the nation, and a Fiduciary Trust Model now being implemented in all BIA regions.

This title includes concepts that have been previously discussed by the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform in 2002. This group was formed when Interior was examining ways to restructure trust functions to provide for greater accountability in response to the trust reform elements of the *Cobell* case. The

task force ended in an impasse, and was unable to support legislation because of matters that were unrelated to organizational alignment. With no legislation enacted, Interior implemented an administrative reorganization plan that accomplished the majority of the task force's goals.

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

If a restructuring is desired, we would also ask Congress to address some other crucial issues including:

- the lack of a clear trust agreement to guide our responsibilities and expectations,
- appropriations that do not align with all program trust responsibilities,
- the lack of an operative cost-benefit paradigm to guide decision-making priorities,
- the challenges of addressing PL 93-638 compacting and contracting goals, and
- the impediments associated with Indian preference hiring policies.

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

Title VI-Audit of Indian Trust Funds

The last title of this legislation requires the Secretary to prepare financial statements for Indian trust accounts in accordance with generally accepted accounting principles of the Federal Government. The Comptroller General of the United States is then required to

contract with an independent external auditor to audit the financial statements and provide a public report on the audit.

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

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

Conclusion

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