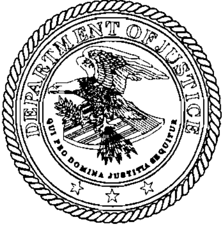


Department of Justice

STATEMENT

OF

WILLIAM W. MERCER
ACTING ASSOCIATE ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

"INDIAN TRUST FUND LITIGATION"

PRESENTED ON

MARCH 29, 2007

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

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 open 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 01 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.

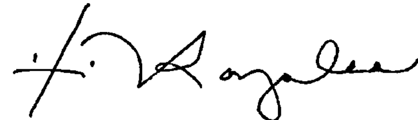
Please let us know how we can assist you, Vice-Chairman Thomas, and Chairman Rahall and Ranking Member Young of the House Natural Resources Committee, with this important legislative initiative. Similar letters have been addressed to them and Senator McCain.

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.