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Statement of Harold Frazier, Chairman
Great Plains Tribal Chairman's Association
Before
The Senate Committee on Indian Affairs
And
The House Committee on Resources
on the Settlement of *Cobell v. Norton*

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As Chairman of the Cheyenne River Sioux Tribe and the Great Plains Tribal Chairman's Association, I am pleased to present this testimony on S.1439/H.R. 4322 and the settlement of *Cobell v. Norton*. I commend Senators McCain and Dorgan, as well as Representatives Pombo and Rahall, for introducing S.1439 and its companion bill, H.R. 4322, respectively. This ground-breaking legislation would provide fundamental changes in the federal government's management of Indian trust resources and provide a method for settlement of *Cobell v. Norton*, a case that has embroiled most of Indian Country for close to ten years.

In July of last year, I testified as to the effects of the *Cobell* lawsuit before the Senate Committee of Indian Affairs, specifically on the Department of Interior's reorganization of the Bureau of Indian Affairs (BIA) and the Office of the Special Trustee (OST). I also testified before the House Committee on Resources precisely one year ago today on the same subject. My testimonies reflected the nearly universal view that settlement of *Cobell* is necessary and prudent, as the case has been a fiscal drain on vital resources that would otherwise be dedicated to tribal governments for law enforcement, healthcare and other social programs. However, I noted that, like most Great Plains tribes, the Cheyenne River Sioux Tribe is a tribal account holder and has many members who are Individual Indian Money account holders as well. Consequently, my testimonies stressed that any settlement of the watershed case should balance the interests of both tribal and individual account holder interests and recognize that such a balance is an essential element to a successful out-of-court resolution. I also stressed that, in addition to settlement of the *Cobell* case, there also needed to be fundamental reform of the BIA's management of Indian trust resources. Finally, I emphasized that any reform of trust management needs to reflect the fact that "one size does not fit all," and that the needs of the Great Plains Region were far different from the needs of other Regions.

I thank the Committees for the opportunity to testify on this topic again. It is clear that S.1439/H.R. 4322 reflects many tribal views and concerns, particularly in the provisions dealing with the Indian trust resource management demonstration project, creating a new office of the Under Secretary for Indian Affairs, and restructuring the BIA and the OST. Today, after having studied the bills more closely, considered other tribal viewpoints and positions on the bills, as well as caucused with my Great Plains tribal colleagues on the effects of the bills on our Region, I am pleased to present the Great Plains Tribal Chairman's Association's position on Title I of S.1439/H.R. 4322.

Before I begin my testimony, I would like to commend my colleagues from the United South and Eastern Tribes and the Affiliated Tribes of Northwest Indians for taking a joint position on these bills. I would like to share this new position with my Great Plains tribal colleagues with the intent of achieving common ground. For this reason, I respectfully request that the record for written comments on the remainder of the bill remain open for a reasonable period after the conclusion of this hearing.

Title I would resolve the costly and protracted *Cobell* lawsuit and addresses settlement of claims for an accounting of IIM accounts held by individuals. We endorse and support an equitable and timely settlement of the *Cobell* lawsuit, which we believe Title I endeavors to do. For instance, we applaud the principle underlying **Section 103(a)(2)**, which authorizes the settlement amount from the Claims Judgment Fund (31 U.S.C. §1304) so that such funds would not be unfairly scored against any agency. Indeed, as a result of the *Cobell* lawsuit, the Department of the Interior has been involved in a costly reorganization of its offices that has gutted the BIA and poured those funds into an office that does not listen to or answer to tribes, the OST. To fund this reorganization, the Department stripped aware scarce resources from programs for essential governmental services that are relied upon by tribes for functions like law enforcement, education, welfare assistance and other vital programs, and has redirected those funds to pay for the Department's management of the trust. For years, tribal governments have been forced to make due with inadequate funding as a result of the need for reform due to *Cobell* despite overwhelming need at the local level for critical governmental services. This redirecting of funding strikes at the very heart of our government-to-government relationship with the United States, and often pits tribes against each other in competition for basic services funding. Moreover, the Department's willingness to use program funds to pay for trust-related issues was illustrated in the worst way in late January 2006 when the Department took $3 million from the BIA programs to pay a portion of a $7 million dollars attorney fee award that the *Cobell* Plaintiffs' received from the court. This latest shift of resources away from BIA programs is illustrative of the critical need to settle *Cobell* as expeditiously and as fairly as possible for the greater good of Indian Country.

It should be made clear that in drawing this conclusion we do not take a position on the merits of the *Cobell* lawsuit. To the contrary, we simply stress that the time has come to put an end to the Department's siphoning of Indian program dollars under the auspices of "reform" due to *Cobell*, which is only made possible through an equitable legislative settlement.

While we generally endorse Title I, we bring the Committees' attention to sections of Title I that we believe require further consideration and amendment.

First, the definition of "claimant" under **Section 102** should be amended to reflect those IIM account holders whose interests were created by virtue of the General Allotment Act of 1887. As currently drafted, the legislation does not take into account those individuals whose accounts were lost prior to the American Indian Trust Fund Management Reform Act of 1994. For instance, in 1905 the Burke Act authorized the Indian Commissioner to issue fee patents under the General Allotment Act of 1887 and other allotment Acts; Indian allotment holders were deemed "competent" and were arbitrarily issued fee patents. Some individuals then lost their land through county tax proceedings, some of which was later put back into trust. Another claim that would be cut off by the 1994 date includes claims from the six year period when non- Indians were allowed to run their cattle

for free on land owned by individual Indians. For purposes of recognizing these claims and others, we suggest amending Section 102 to reflect these claims.

Second, **Section 103** requires that a portion of the Settlement Fund be used to pay attorneys' fees and other administrative fees necessary to carry out the settlement. We believe it is reasonable that a small percentage of the Fund be used for administrative fees; however, we feel it would be inequitable if attorneys' fees for actions under Section 104 of the Act are deducted from the Fund as the general source of recovery for all claims. We respectfully request that another federal source of funds be targeted as a source for these fees. In addition, as drafted, the Act specifies that 80% of the amount in the Fund shall be used to make payments to claimants in accordance with Section 104. Every effort should be made to increase this percentage, starting with reducing the percentage (12%) dedicated to paying attorneys' fees for individuals who seek further redress under Sections 106 and 107. Similarly, we strongly encourage the Committees to consider capping the amount of overall attorneys' fees to reflect market trends, bearing in mind that, as drafted, these fees come directly out of account holders' settlement fund.

Third, **Section 104** sets out the terms for general distribution of the Fund to claimants and provides that the heir of a claimant shall receive the entire amount distributed to the claimant. Since the Act does not define “heir” or otherwise provide a scheme for distribution in the event of death of the original claimant, we suggest that a definition be added to reflect that an heir include lineal descendants. In addition, subpart (c) should enable a tribe to assist the Department in locating missing and claimants by providing relevant information on the claimant. We believe this would not only enhance the possibility of locating the missing claimant, but also provide a degree of due process if the information provided by Interior is disputed. Finally, we recommend that all regulations promulgated under the Act be subject to negotiated rulemaking.

Fourth, **Sections 105-107** lay out three different appeal processes in three different courts for appeals based on three different kinds of claims based on share distribution, valuation of claims and Title I constitutionality. In all three types of appeals, there are no provisions for appeal rights for those claimants that are considered to be "whereabouts unknown." Moreover, for claims relating to method of valuation and constitutionality, class actions are prohibited, and the act of filing an appeal prevents the appellant from receiving any payment under Section 104. Thus, unless the individual wins his/her appeal, they receive nothing. We believe that these sections, taken together, strongly discourage any claimant from appealing the settlement amount, how the settlement was arrived at, and the constitutionality of applying Title I to his/her claim. These sections should be rewritten to streamline the appeal process, allow class action appeals, and allow the claimant to appeal in local courts and consolidate the claims that their appeal is based on. Furthermore, if a claimant appeals and loses, in the interest of fairness, he/she should still be able to receive a payment under Section 104.

Finally, the Great Plains Tribal Chairman's Association, which represents tribes that are also IIM account holders, appreciates that tribal trust claims are preserved by **Section 110(d)** and that those claims will be unaffected by settlement of the class action lawsuit. However, it is not undisputedly clear from the language of Section 110 that tribal trust accounts are inclusive of tribal IIM accounts. We suggest that the language that tribal IIM claims "seeking an accounting, money damages or any other relief relating to a tribal trust account or trust asset or resource" be clarified to avoid any misinterpretation that tribes should not be considered claimants for purposes of settlement

under the Act. This section is particularly important as the Tribe has other potential claims that go beyond simple claims for historical accountings of IIM accounts. In addition, we should point out that Section 110 does not contemplate settlement of claims by "whereabouts unknown" claimants and thus does not foreclose all claims as contemplated under the Act. We suggest that this omission be addressed by way of amendment.

Conclusion

The Great Plains Tribal Chairman's Association acknowledges that settlement of *Cobell v. Norton* is in the best interest of tribal and individual IIM accountholders. However, any settlement must recognize the rights of both types of beneficiaries and balance their interests so that a fair and equitable resolution can be accomplished.

In closing, I would like to thank the members of Senate Committee on Indian Affairs and the House Committee on Resources for holding this hearing today and allowing me to express the voices of the Great Plains Tribal Chairman's Association-Tribes on the impact of Title I on our people.