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Testimony before
the Senate Committee on Indian Affairs and the House Committee on Resources

Joint Oversight Hearing on the Settlement of *Cobell v. Norton*
March 1, 2006

Chairman McCain, Chairman Pombo, Vice-Chairman Dorgan, and Ranking Member Rahall, I thank you for your invitation to testify today before this extraordinary joint hearing of the Senate Committee on Indian Affairs and the House Resources Committee. I would like to express my appreciation to the leadership and the members of both Committees for their commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The National Congress of American Indians strongly believes that it is time for Congress to move forward with a fair settlement for the *Cobell v. Norton* litigation. Tribal leaders support the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting at the Department of Interior. At the same time, tribes are concerned about the impacts of the litigation upon the capacity of the United States to deliver services to tribal communities and to support the federal policy of tribal self-determination. Significant financial and human resources have been diverted by DOI in response to the litigation. The contentiousness of the litigation is also creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Continued historical accounting activities by the Department may cost billions and are very unlikely to achieve a satisfactory result. Because of this, three years ago NCAI passed a resolution stating that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX-03-040. My predecessor, NCAI President Tex Hall, worked very hard over the last three years to push for a settlement and I plan to continue that effort.

Earlier this week the NCAI Executive Committee considered a resolution from our Annual Session. I am attaching to my testimony our new resolution where NCAI takes three positions. First, NCAI supports S. 1439 and H.R. 4322 and the efforts of Senators McCain and Dorgan and Congressmen Pombo and Rahall in introducing the legislation. Second, NCAI strongly urges the *Cobell* plaintiffs, the Department of Interior, and the Congress to increase their efforts to develop a viable settlement proposal for the *Cobell* litigation. Specifically we would encourage settlement options that will engage the participation of individual Indian account holders in the discussion -- structured in a way so that the Indian account holder can understand what it will mean. Third, NCAI urges the Senate Committee on Indian Affairs and the House Resources Committee to move forward with a mark up of the legislation based on the comments received from Indian country and to develop a more definitive settlement proposal for the *Cobell* litigation than what is currently found in Title I. We encourage you to continue to consult with Indian Country concerning technical amendments to the legislation, but also to move forward to mark up a new bill.

Tribal leaders recognize that the *Cobell* litigation has had some very positive effects. It has focused attention on the important issue of trust reform whereas previously the Department was able to ignore it or brush it under the rug. However, there are also increasing costs or side effects of the litigation which is now entering its tenth year. DOI and Congress are engaging in "divide and conquer" by imposing the costs of the litigation on the tribes and on the budget for Indian programs. It is unconscionable that Indian people are made to pay for correcting the accounts that were mishandled by the federal government in the first place. We want the Congress to either put a stop to these unreasonable burdens on the tribes or to settle the litigation. The side effects of the litigation include:

1) An enormous impact on the budget for Indian programs over the last six to eight years – at this time we are losing approximately $100 million annually out of Indian programs to pay for the accounting and the reorganization reforms that tribes opposed;
2) The Office of Special Trustee has grown into a very large and expensive bureaucracy that far exceeds its intended mission and impedes routine decision making on trust issues;
3) The federal government now looks at Indian issues through the lens of liability rather than a focus of helping Indian people. They are extremely risk averse and fight anything that even remotely looks like a trust responsibility. This is spilling over to other issues like limitations on land to trust acquisitions and the Indian Health Care Improvement Act;
4) An embattled mindset has developed at the Department of Interior that impedes dialogue with the tribes and Indian people that they are intended to serve. With some justification they are concerned that anything they say in public be used against them in court;
5) The Department has become single minded on trust reform and the litigation in a way that distracts significantly from their efforts in other extremely important areas like law enforcement, education, transportation and economic development;
6) As a result of court orders, the BIA has had no e-mail or ability to use websites and the internet for four years. Like everyone else, Indian tribes and Indian people have become significantly dependent on the exchange of electronic information. This is a major reason that communications and information sharing and collection are suffering at the Department;
7) The growth of tribal self-determination has been hindered as the Interior has shifted to more centralized and defensive decision making. The goal of the federal self-determination policy is for tribal governments to increasingly exercise their sovereignty to make decisions and advance tribal priorities. The role of the federal government should be evolving into a partner that performs the federal functions and provides resources and technical assistance. This partnership is critical to the advancement of Indian tribes, but it is not growing in the way that it should – for all the reasons above.

We are concerned that continued litigation will result in a lose-lose-lose result for the federal government, the Indian account holders, and the tribes. The Department has already started the accounting process and is gearing up to spend hundreds of millions if not billions in an effort that will take at least the next ten years. This will result in nothing more than an accounting statement for Indian account holders and not a penny in compensation – although the accounting procedures will certainly be litigated and the entire effort could be delayed and restarted repeatedly. All of the side effects listed above would continue and likely intensify for the tribes. The only likely winners in continued litigation are the accountants and document scanning companies. This is clearly a case that cries out for a more pragmatic solution and settlement.

I would like to provide you with some of the comments that we have collected on S. 1439 and H.R. 4322 as you proceed to mark up the bill. As you know, NCAI President Tex Hall and Inter Tribal Monitoring Association Chairman Jim Gray facilitated a Workgroup last year to develop recommendations for *Cobell* settlement and related fixes to the trust management system. After S. 1439 was introduced last year, this Workgroup met on several occasions to discuss the specifics of the legislation and the following is a summary of suggested changes. This is only a brief overview of the comments that received significant discussion by the Workgroup and had some degree of consensus among the tribal leaders. I would encourage you to solicit further comments from all tribal leaders and tribal organizations.

Title I – Settlement of Litigation Claims

Based on many hearings, the bill includes findings that an accounting for IIM accounts may be impossible because of missing data and may cost billions of dollars to perform, and as a result it is appropriate for Congress to provide a monetary settlement to IIM account holders. We strongly agree with these findings. The bill does not specify the settlement amount and we would encourage you to develop a specific settlement proposal based on what you learn in this hearing today. We believe that it is important to structure the settlement proposal in a way that will bring the voices of the individual Indian account holders into the discussion and find a practical solution that satisfies their need for a fair settlement.

The plaintiffs have raised objections to distribution methodology outlined in the bill, and would like the district court to be given a lump sum and the authority to distribute as the court sees fit. A related concern was raised that a lump sum with no distribution guidelines could create significant complications and additional litigation. Under the class action rules of the Federal Rules of Civil Procedure, when the class is distributing money damages where the plaintiffs are not identically situated, the individuals must be allowed the opportunity to withdraw and bring their own litigation against the lump sum.

Title II – Indian Trust Asset Management Policy Review Commission

This section would establish a commission to review the laws and regulations and practices of the Department of Interior relating to the administration of Indian trust assets. After conducting the review, the commission would develop recommendations and submit a report to Congress on changes to federal law that would improve the management and administration of Indian trust assets. The Commission appears to be modeled on the 1970's Indian Policy Review Commission that issued a very influential report that led to a number of important laws that benefit tribes, including the Indian Finance Act, the Indian Health Care Improvements Act, the Indian Elementary and Secondary Education Act, the Indian Self-Determination and Education Assistance Act and the Indian Child Welfare Act.

This Title does not meet our goal to establish a true oversight commission and explicit trust standards to govern the administration of our trust assets. Our understanding is that the sponsors believed that a broad expansion of federal liability would create insurmountable opposition to the bill. Instead, it appears that the sponsors want to establish a process for developing standards that could be implemented by Congress at some point in the future. There was some support for having a careful review of trust laws that would facilitate legislative action in the future.

Title III – Indian Trust Asset Management Project

This section would create a demonstration project where an Indian tribe may develop its own trust asset management plan that is unique to the trust assets and situation on a particular reservation. The plan would identify the trust assets, establish objectives and priorities, and allocate the available funding. Contracting and compacting tribes may identify the functions performed by the tribe and establish their own management systems, practices and procedures that the tribe will follow so long as consistent with all federal laws, treaties and regulations.

The bill would establish standards that the Secretary must apply to the management plans before they may be approved -- including that the plan must protect trust assets, promote the interests of the beneficial owner, protect treaty rights, and be carried out in good faith and with loyalty to the beneficial owner. The tribes that are currently under Section 131 are eligible to participate in this demonstration project, plus an additional 30 Indian tribes.

The requirement for Secretarial approval of Trust Asset Management Plans would give the Secretary a very broad discretionary authority to refuse. This is in contrast to related federal legislation such as the Indian Self-Determination and Education Assistance Act (ISDEAA) which grants narrower authority to the Secretary to disapprove a tribal contract or compact. Tribes have faced a long history of bureaucratic decision making by the Department – highly risk averse, lengthy delays, preservation of federal bureaucracy and occasionally outright conflicts of interest with the tribes. The approval authority of the Secretary should be amended to more closely resemble the type of language that is found in the ISDEAA – the Secretary should be required to approve the plan unless she makes findings that that plan is inconsistent with the trust responsibility, treaties, or is otherwise inconsistent with federal law.

Under Section 304(b)(3), the plan is considered disapproved if the Secretary does not approve or disapprove a proposed plan within 120 days. This seems to be unduly prejudiced against plan approval. Under Section 304(b)(1)(B)(3), the Secretary can disapprove a plan if the cost exceeds available funding. This potentially creates two types of problems (a) since appropriations are made annually, there seems to be an implication that Plans will have to be renegotiated each year; and (b) the capacity of tribes to obtain funding by combining Interior funding with non DOI sources may be diminished.

Section 304(a)(3) seems to provide some flexibility for tribes to develop their own administrative systems, but then may remove flexibility by requiring that the systems adhere to regulations enacted by Interior. The reference to regulations should be deleted, or a provision for waiver of regulations should be included as in the ISDEAA.

The demonstration project still seems to require Secretarial approval for actions taken to implement Trust Asset Management Plans. The demonstration project could include expedited approval or elimination of requirements for approval so long as functions or actions are taken in accordance with Trust Asset Management Plans.

Finally, there may be a need to consider how the demonstration project fits into the budget development or evaluation systems employed by OMB (currently PART under GIPRA) so that the performance measures fit into budget development procedures.

Title IV – Fractional Interest Purchase and Consolidation Program

The heart of the trust problem is the historic fractionation of title to individual lands. Some allotments now have upwards of 1500 owners, and this creates enormous problems in administration and putting land to use. Because the value of each interest can be extremely small, this section would create incentives for voluntary sales of fractionated interests by allowing the Secretary to offer more than fair market value. This is an extremely important program for resolving the trust issues and putting Indian lands back into a manageable form. Any land acquired by the Secretary under this section would be held in trust for the tribal government that exercises jurisdiction over the land involved.

The bill provides that any payments that landowners receive under the land repurchase program would not be subject to state or federal income tax and would not affect eligibility for any programs including social security and welfare. This is an important provision because it removes a disincentive to participation by landowners.

For land with more than 200 undivided interests, if the Secretary follows certain procedures, including notice by certified mail, the offer would be deemed accepted unless it is affirmatively rejected by the owner. The "automatic acceptance" provision for lands with more than 200 owners is new and raises concerns about unfair treatment of land owners. This provision should be removed or deferred to give the newly invigorated voluntary purchase program time to work. The legislation should reconsider the federal liens on repurchased lands. In most cases the costs and headaches of administration of these liens significantly outweighs their value. The bill should do more to provide new programs for individual land owner repurchase and consolidation.

Under the bill, the Secretary would be authorized to offer to any individual owner a settlement of any natural resource mismanagement claim that they may have (as opposed to the accounting claims. This provision does not appear to be funded and should be considered in conjunction with Title I and the *Cobell* settlement.

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

This title of the bill is strongly supported because it includes the tribal priority of eliminating the Office of Special Trustee and creating a single line of authority. This title would create a new position of "Under Secretary for Indian Affairs" who would replace the Assistant Secretary. The Office of Special Trustee for American Indians would be terminated in 2008 and the functions of the Special Trustee would be transferred to the Under Secretary. All positions in the office of the Under Secretary would be subject to Indian preference. The Office of Under Secretary would create a single line of authority for all functions that are now split between the BIA and the OST, and the Under Secretary would also have the responsibility to supervise any activities related to Indian affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service.

The bill only indirectly addresses the need for reorganization at the lower levels and the need to devote more resources to the reservation level. The elimination of OST should free up budget for line positions, and the Trust Asset Management Plans can be a tool for devoting resources to the reservation level.

Although many tribes would prefer that the position be a Deputy Secretary, the primary focus of the Workgroup was placed less on clarifying the necessary authorities and responsibilities of the position. Our suggestions for these authorities and responsibilities are the following.

1) Responsibilities:
   a. Report directly to the Secretary on matters pertaining to Indian Affairs.
   b. Provide a single line of authority and accountability for coordination and policy direction for all programs and agencies of the Department of Interior, (a) inform decision makers as to the implications of their action for the trust obligations of the United States; and, (b) coordinate with Assistant Secretaries and agency heads to improve service delivery to Indians.
   c. Represent, protect and advocate for Indian interests through all bureaus and agencies of the Department (avoid listing specific agencies). This responsibility is not limited to activities pertaining to trust administration, but rather encompasses all programs providing services to Indians and the capacity for Indian tribes to exercise federally reserved rights.
   d. Provide guidance and oversight for the demonstration project to be established under Title III of S. 1439. Generally ensure progress made under Self-Determination and Self-Governance programs in all efforts to restructure programs of the Department to deliver services to Indians; support and advance tribal self-determination, contracting an compacting for all Departmental programs affecting Indians.
   e. Serve as a liaison with federal agencies outside the Department of Interior on matters pertaining to Indian Affairs (e.g. Departments of Commerce, Treasury, Agriculture, EPA, and FERC). This includes (a) advocating for Indian interests; (b) ensuring that Agencies are informed of trust obligations; (c) reviewing and commenting on proposed policies; and (d) improving coordination and promoting integration of federal programs that provide services to Indians. Should include a provision requiring other federal agencies to coordinate with Under Secretary.

2) Authorities:
   a. Provide policy direction on matters pertaining to Indian Affairs to all entities of the Department of Interior and authority to coordinate activities of such entities to improve the effectiveness and efficiency of service delivery to Indians.
   b. Coordinate with federal entities outside the Department to ensure that decision makers are informed as to the potential implications of their actions on the trust obligations of the United States, minimize potential for conflict, and improve the effectiveness and efficiency of service delivery to Indians.
   c. Retain Trust Counsel.
   d. Provide the Under Secretary with sufficient authority to establish a position of trust counsel and draw upon such agency expertise as may be necessary to fulfill duties and responsibilities. Minimize the need to force agencies outside the BIA & OST to place staff under the Under Secretary – so as to maintain access to staff in other agencies with specific expertise. Emphasis should be placed not on direct supervision, but rather on providing policy guidance to ensure collaboration, coordination, and efficient, effective service delivery by the bureaus and agencies of the Department of Interior.

3) Appointment:
   a. Require tribal consultation
   b. Eliminate the exception (503(b)(2)) which allows the Assistant Secretary of Indian Affairs to become the Under Secretary without the advice and consent of the Senate

4) Office of Trust Reform Implementation and Oversight -- Separate operational responsibilities from oversight functions:
   a. Consider redesignating the current OST or ASIA as an Office of Trust Reform Implementation (OTRI). Define the role of the OTRI as the entity responsible for developing policies, procedures, and programs for trust administration and making them operational within the BIA; require that programs and functions currently under the supervision of the OST be transferred to the BIA once they become operational; establish a sunset date for completion of the work.
   b. Establish a separate entity (Office of Trust Administration Oversight?) responsible for oversight; include an ombudsman position with authority to investigate and report to the Under Secretary on recommended resolution to problems and issues related to trust administration.

5) Provide guidelines for organizational restructuring:
   a. Objectives for restructuring: (a) consolidation of functions and operational authorities at the BIA field office levels; (b) clarify lines of authority for Departmental personnel responsible for delivering services to Indians and those responsible for providing oversight of trust administration.
   b. Require tribal involvement when restructuring national, regional, and agency operations to provide local flexibility in allocating available resources (including measures to provide oversight for trust administration). Develop guidelines for tribal involvement (include a separate section of S. 1439 describing requirements for consultation, including timelines, participants, and agenda control?).
   c. Consider merits of integrating local consultation process with development of agreements with tribal governments containing specific, locally-driven performance standards for trust administration.
   d. Tribal contracting and compacting is not to be diminished, but should rather be enhanced.
   e. Trust administration functions should be performed in accordance with tribal law and management of reservation-specific resource management plans, unless otherwise prohibited by federal law.

Title VI – Audit of Indian Trust Funds

This section would require the Secretary of Interior to prepare financial statements for individual Indian, tribal and other Indian trust accounts and prepare an internal control report. The section would also direct the Comptroller General of the United States to hire an independent auditor to conduct an audit of the Secretary's financial statements and report on the Secretary's internal controls. We strongly support this provision and the importance of an independent source of the audit function that will protect both account holders and the federal government.

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