

**INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds**  
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**STATEMENT  
of the  
INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS**

**Presented by  
The Honorable Chief Jim Gray, Chairman, ITMA**

**On  
[S. 1439 "The Indian Trust Reform Act of 2005"](#)**

**Before the  
United States Senate - Committee on Indian Affairs**

**March 28, 2006**

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The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following 63 federally recognized tribes: **Absentee Shawnee Tribe, Alabama Quassarte Tribe, Blackfeet Tribe, Central Council of Tlingit & Haida Indian Tribes of Alaska, Chehalis Tribe, Cherokee Nation of Oklahoma, Cheyenne River Sioux Tribe, Chippewa Cree Tribe of Rocky Boy Reservation, Coeur D'Alene Tribe, Confederated Salish & Kootenai Tribes, Confederated Tribes of Colville, Confederated Tribes of Warm Springs, Confederated Tribes of Umatilla, Crow Tribe, Eastern Shoshone Tribe, Ewiiapaayp Band of Kumeyaay Indians, Fallon Paiute-Shoshone Tribe, Forest County Potawatomi Tribe, Fort Belknap Tribes, Fort Bidwell Indian Community, Fort Peck Tribes, Grand Portage Tribe, Hoopa Valley Tribe, Hopi Nation, Iowa Tribe, Jicarilla Apache Nation, Kaw Nation, Kiowa Tribe, Kenaitze Indian Tribe, Lac Vieux Desert Tribe, Leech Lake Band, Mescalero Apache Tribe, Metlakatla Tribe, Muscogee Creek Nation, Nez Perce Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Ojibwe Indian Tribe, Oneida Tribe of Wisconsin, Osage Tribe, Paiute Tribe of Nevada, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Picuris, Pueblo of Sandia, Quapaw Tribe, Quinault Indian Tribe, Red Lake Band of Chippewa Indians, Salt River Pima-Maricopa Indian Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Shoshone-Bannock Tribes, Sisseton-Wahpeton Oyate Tribes, Soboba Band of Luiseno Indians, Southern Ute Tribe, Thlopthlocco Tribal Town, Three Affiliated Tribes of Fort Berthold, Tohono O'odham Nation, Turtle Mountain Band of Chippewa, Walker River Paiute Tribe, Winnebago Tribe of Wisconsin, and the Yurok Tribe.**

## **I. INTRODUCTION**

This statement is submitted by the Intertribal Monitoring Association ("ITMA") to apprise the Committee of ITMA's position on Titles II through IV of S. 1439, the Indian Trust Reform Act of 2005, and to make recommendations on this important legislation. ITMA was organized in 1990 by tribes determined to actively monitor and have a voice in the activities of the Federal government to ensure fair compensation to tribes for the historical trust funds mismanagement. Today, ITMA is a representative organization of 64 federally recognized tribes that are interested in continuing efforts to reform the administration of the Indian trust estate by the federal government.

In July 2005, ITMA previously testified before the Committee on S. 1439, and appreciates the Committee's willingness to continue an open dialogue with tribes on the topic of trust reform. Throughout 2005, ITMA worked closely with the National Congress of American Indians ("NCAI") and the *Cobell* Plaintiff Attorneys in a National Trust Reform and *Cobell* Settlement Workgroup. The workgroup met on numerous occasions to discuss the specifics of the legislation and develop substantive recommendations for achieving meaningful trust reform legislation. In January 2006, ITMA held a general membership meeting in Albuquerque, New Mexico to obtain additional input from our member Tribes.

The following is a summary of our position on each of Titles II through IV in S. 1439 and provides our recommended changes to the bill.

## **II. TITLE II - INDIAN TRUST ASSET MANAGEMENT POLICY REVIEW COMMISSION**

Title II would establish an Indian Trust Asset Management Policy Review Commission ("Commission") whose purpose, composition, powers and directives would include the following:

- Review all federal laws and regulations and practices of the Department of Interior ("DOI") relating to the administration of Indian trust assets.
- Consists of twelve persons, four appointed by the President and eight appointed by the majority and minority leadership of the House and Senate, respectively.
- Have the power to hold hearings and gather information on improving the management and administration of Indian trust assets and be required to consult with Indian tribes, the Secretary of Interior, and organizations representing individual Indian owners of trust assets.
- Required to submit a report and recommended changes to Congress for improving existing laws and practices, including proposing Indian trust asset management standards.

The Commission appears to be modeled after the 1970's Indian Policy Review Commission that issued a report leading to the enactment of landmark federal legislation such as, for example, the Indian Health Care Improvement Act, Indian Child Welfare Act, Indian Self-Determination and Education Assistance Act amendments. Congress's approach in establishing this Commission over thirty years ago was indeed a significant undertaking that resulted in the fundamental, modern day framework for federal – tribal relations.

In that vein, the Commission established in Title II may be a very useful tool for a long term review of Indian trust administration. To effectuate meaningful trust reform, the formation and work of the Commission should be triggered in relation to the implementation of Title V, Restructuring of the Bureau of Indian Affairs and Office of Special Trustee. This approach will ensure the Commission considers and assesses all trust reform undertakings that may occur as a result of the restructuring

set forth in Title V. Furthermore, the Commission should be appointed by, and be strictly a creation of Congress, to avoid the current policymakers from holding key posts in a deliberative body composed specifically to review DOI's current practices.

As a matter of trust reform priorities, however, ITMA and Indian Country, generally, have long sought trust reform legislation that includes independent oversight of DOI's administration and management of Indian trust assets. ITMA advocates for trust reform legislation that includes: (1) a true oversight commission; (2) explicit trust standards; and (3) a cause of action in federal court for breach of those standards. Title II falls short in this regard by limiting the Commission's authority to reviewing and assessing the current legal framework for the administration of trust assets, and further lacks discrete, enforceable standards governing the trustee's administration and management of Indian trust assets.

Rather, the legislation contemplates establishing a *process for developing standards* through the work and recommendations of the Commission, ostensibly, to be implemented by Congress at some point in the future. This step may be unnecessary in light of the existing body of relevant authority. For example, the Tucker Act [28 U.S.C. 1491 (2005)], the Indian Tucker Act [28 U.S.C. 1505 (2005)] and the Administrative Procedures Act [5 U.S.C. 551 et al. (2005)] provide some standards and a right to sue for breach of those standards. Based on these authorities and others, the Supreme Court recently upheld federal liability for breach of trust standards. *U.S. v. White Mountain Apache*, 537 U.S. 465 (2003). In the interest of justice and fairness, Congress should codify these standards and establish a mechanism for their enforcement. Such mechanism could entail authorizing a cause of action in federal court or establishing alternative dispute resolution processes. Both would work as an incentive for compliance with trust standards, and as a means for resolving trust-related disputes in a manner more efficient than litigation, since litigation consumes time and resources for both parties involved and can take decades to reach a resolution.

### **III. TITLE III – INDIAN TRUST ASSET MANAGEMENT PROJECT**

Title III would create a demonstration project enabling up to thirty (30) Indian tribes to submit an application to the Secretary to develop their own Trust Asset Management Plan ("Plan"), unique to their respective situation and specific trust assets. Each tribal applicant would be required to:

- Identify the tribe's trust assets,
- Establish the tribe's objectives and priorities, and
- Ensure that the tribe appropriately allocates the funding made available to it for trust asset management.

In reviewing and considering a tribe's application, the Secretary would be required to consider whether the respective plan meets specific standards, including:

- Protecting trust assets from loss, waste, and unlawful alienation,
- Promoting the interests of the beneficial owner,
- Conforming to the preferred use of the beneficial owner, to the extent practicable,
- Protecting treaty rights and others relating to use, access or enjoyment, and
- Requiring that any activity be carried out in good faith and with loyalty to the beneficial owner.

A duly approved Plan would enable contracting and compacting tribes to establish their own management systems, practices and procedures that differ from any such systems, practices and

procedures used by the Secretary in managing the trust assets so long as the plan is consistent with all federal laws, treaties and regulations.

In general, ITMA supports the concept and objectives of Title III, and recommends a couple of changes to enhance these provisions for the benefit of our member tribes, as follows:

- The bill should provide for automatic approval of a plan if the Secretary does not disapprove the plan within 120 days, rather than providing for automatic disapproval if the Secretary does not act within that time.
- The bill should require the Secretary to consider all resources and sources of funding before making a decision to disapprove a tribe's plan on this basis.
- The bill should direct the Secretary to propose an adequate budget submission that provides sufficient resources and other technical assistance to participating tribes.
- The bill should require Congressional oversight and evaluation of the implementation and progress of the demonstration project. ITMA is concerned that there is no requirement under the bill to integrate the demonstration project into the budget development or evaluation systems employed by the Office of Management and Budget (OMB) (currently the Performance Assessment Rating Tool, or "PART", under GIPRA). ITMA believes that, because the performance measures have never been applied to the demonstration project and fail to consider many of the project's goals, the current system could potentially work against tribes since funding is typically reduced when performance measures are not satisfied.
- The bill should provide a directive that the government provide funding, support and other resources for tribes seeking to assume regulatory primacy through these plans. Currently, there is no requirement or mechanism that would compel the government to provide such support. One approach would be to more fully harmonize the provisions with the authorities and mandates of the ISDEAA and the American Indian Agriculture Resource Management Act to ensure that the government provides tribes who pursue these plans with sufficient resources and support to ensure that the implementation of the plan is successful.

#### **IV. TITLE IV - FRACTIONAL INTEREST PURCHASE AND CONSOLIDATION PROGRAM**

Title IV would amend the Indian Land Consolidation Act to establish incentives for purchasing fractional interests and streamline the process for consolidating fractional interests. The key provisions in Title IV are summarized, as follows:

- Authorizes the Secretary to offer more than fair market value as an incentive to encourage voluntary sales of undivided trust or restricted fractionated interests in any parcel of land owned by not less than 20 separate individuals. If an owner agrees to sell such interests, the Secretary is further authorized to include an additional incentive of up to \$2,000 in the offered purchase price.
- Establishes a specific process for acquiring highly fractionated lands with 200 or more undivided interests, which includes comprehensive notice and offer requirements. Pursuant to these specific procedures, an offer to such lands would be deemed automatically accepted unless it is affirmatively rejected by the owner.
- Establishes a process for the Secretary to make an offer to settle any claim that the owner may have against the United States relating to the specific tract of land, but specifically excludes claims for an accounting described in Title I (settlement of Cobell).

- Provides that any payment a landowner receives under the land repurchase program is not subject to any state or federal income tax and would not affect eligibility for any programs including social security and welfare.
- Provides that 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.

ITMA strongly supports provisions in Title IV which authorize the Secretary to offer greater than fair market value because they provide meaningful incentives for individuals with very small parcels of land that are otherwise not economically viable, for ultimate return back to the Tribe. This process will lead to true consolidation of fractionated interests. Currently, many interests are of such small value that the landowner often does not consider it in his or her best interest to seriously consider such an offer. The provisions in Title IV will dramatically change that dynamic.

ITMA makes several recommendations on Title IV, including the following:

- In order to promote consolidation, all land a Tribe acquires within the boundaries of the reservation should be taken immediately into trust by the United States.
- The provision establishing the "automatic acceptance" of an offer for sale of lands with more than 200 owners should be removed because it raises concerns about unfair treatment of landowners.
- The bill should be amended to remove the application of federal liens on repurchased lands because the cost and administrative burdens of these liens significantly outweigh their value. Rather than creating another cumbersome, bureaucratic system to account for and track the repayment of each interest acquired, the Secretary should be authorized to make land acquisition grants, given the compelling congressional policies and goals of eliminating further Indian land fractionation, and consolidating the land base of tribal governments.
- The bill should do more to provide new programs for individual land owner repurchase and consolidation opportunities in order to encourage the further loss of lands from trust status.

ITMA also takes this opportunity to express support for S. 1501, the Crow Tribe Restoration Act, a tribal specific proposal to reduce fractionated interests and consolidate tribal lands. The Crow Nation is a member of ITMA, and is pursuing this specific approach due to special considerations relating to their land holdings.

## **V. TITLE V – RESTRUCTURING THE BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE**

Title V would restructure the Bureau of Indian Affairs ("BIA") and the Office of Special Trustee ("OST") by creating a new position of "Under Secretary for Indian Affairs." Title V consists of the following key provisions:

- Creates a single line of authority under the Office of Under Secretary for all functions that are now divided between the BIA and the OST by replacing the Assistant Secretary and eliminating the Office of Special Trustee by 2008.
- Authorizes the Under Secretary to be responsible for supervising any and all activities related to Indian affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service.
- Requires that all positions within the office of the Under Secretary be subject to Indian preference.

- Recognizes and directs the need to devote more resources and funding to the reservation level. The bill should clarify that all budgetary savings achieved by eliminating OST would be available for field positions, and utilize the Trust Asset Management Plans set forth under Title III as a tool for devoting those resources to the reservation level.

ITMA strongly supports Title V because it would consolidate all Indian affairs functions under a single line of authority, a fundamental component to trust reform that ITMA has advocated for and championed as a tribal priority for many years. To reflect and incorporate the concerns and views of our member Tribes, ITMA recommends modifying the legislation, as categorized below:

Purposes:

- The bill should include as a purpose: to improve and enhance the delivery of services to Indians.
- The bill should also include as a purpose: to provide a single line of authority and accountability for coordination and policy direction on Indian affairs for all programs and agencies of the Department and for Inter-Departmental activities affecting or involving Indian Affairs.

Appointment:

- The bill should require tribal consultation in the appointment of the Under Secretary.
- The bill should be amended to remove 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.

Responsibilities:

- The bill should require the Under Secretary to inform decision makers across the Department as to the implications of their action for the trust obligations of the United States.
- The bill should require the Under Secretary to represent, protect and advocate for Indian interests through all bureaus and agencies of the Department, not just those enumerated in the bill. This responsibility would not be limited to activities pertaining to trust administration, but would also encompass all programs providing services to Indians and the capacity for Indian tribes to exercise federally reserved rights.
- The bill should require the Under Secretary to exercise guidance and provide oversight for the demonstration project to be established under Title III.
- With respect to the restructuring activities, the bill should include language that requires the Under Secretary to foster and promote progress under Self-Determination and Self-Governance programs for all Departmental programs affecting Indians.
- The bill should designate the Office of Under Secretary to 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) and direct the Under Secretary to:
  - i. Advocate for Indian interests;
  - ii. Ensure that Agencies are informed of trust obligations;
  - iii. Review and comment on proposed policies; and
  - iv. Improve coordination and promote integration of federal programs that provide services to Indians.

Authorities:

- The bill should authorize the Under Secretary to retain outside counsel and to establish a position of trust counsel.
- The bill should authorize the Under Secretary to utilize all budgetary savings achieved by eliminating OST for field positions, and to use the Trust Asset Management Plans in Title III as the vehicle for devoting those resources to the reservation level.
- The bill should authorize the Under Secretary to provide policy direction on matters pertaining to Indian Affairs to all entities of the Department and to coordinate activities of such entities to improve the effectiveness and efficiency of service delivery to Indians.
- The bill should authorize the Under Secretary to coordinate with federal entities outside the Department on Indian affairs matters.

Separate operational and oversight functions in the Office of Trust Reform Implementation and Oversight (OTRIO):

- The bill should establish an Office of Trust Reform Implementation (OTRI) as the entity responsible for developing policies, procedures, and programs for trust administration and make them operational in the BIA; transfer programs and functions currently under the supervision of the OST to OTRI; and establish a sunset date for completion of the work.
- The bill should establish an Office of Trust Administration Oversight as the entity responsible for oversight and 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.

Guidelines for organizational restructuring:

- The bill should specify objectives for restructuring, including: (a) consolidation of functions and operational authorities at the BIA field office levels; and (b) clarification of the lines of authority for Departmental personnel responsible for delivering services to Indians and those responsible for providing oversight of trust administration.
- The bill should require tribal involvement in the restructuring of national, regional, and agency operations to provide local flexibility in allocating available resources (including measures to provide oversight for trust administration).
- The bill should specify that tribal contracting and compacting are not to be diminished, but should be enhanced.
- The bill should require that trust administration functions be performed in accordance with tribal law and management of reservation-specific resource management plans, unless otherwise prohibited by federal law.

**VI. TITLE VI: AUDIT OF INDIAN TRUST FUNDS**

Title VI 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.

ITMA has advocated for auditing provisions as an important element of trust reform. ITMA strongly supports Title VI and recommends the following changes:

- The bill should set forth statutory purposes for requiring financial statements: to promote and foster meaningful communication of financial information and transparency in the administration of trust funds and the sources of those funds.
- The bill should empower the Comptroller General with both the authority and the responsibility to ensure broad audit coverage of all categories or stratified trenches of trust funds.
- The bill should require public availability of audit reports, audit findings, and management letters.
- The bill should require negative assurances or third-party assurance statements from auditors regardless of whether they are government employees or contract workers. This requirement is intended to pierce the government's opaque shield of reliance on third-party work that cannot be examined by account holders and to prohibit accounting firms from escaping any accountability to the known end users of their work because "the government, not the account holder, is the client."

## **VII. CONCLUSION**

In closing, the Intertribal Monitoring Association on Indian Trust Funds appreciates the opportunity to present this statement to the Committee. ITMA respectfully requests the Committee's favorable consideration of the recommendations made herein. If you have any questions, please do not hesitate to contact ITMA's Executive Director, Mary Zuni-Chalan at (505) 247-1447 or your staff can contact our legal counsel in Washington D.C., Shenan Atcitty at (202) 457-7128. Thank you.