Testimony of Charles Renfrew and John Bickerman

Before a Joint Oversight Hearing of the

Senate Committee on Indian Affairs

and the

House Committee on Resources

On the Settlement of *Cobell v. Norton*

March 1, 2006

Chairman McCain, Chairman Pombo, Vice-Chairman Dorgan, Ranking Member Congressman Rahall, members of the Senate Indian Affairs Committee and the House Resources Committee, my name is John Bickerman and I appear here today on behalf of myself and Charles Renfrew. Judge Renfrew regrets that he cannot be here today due to an unavoidable conflict but wants to assure the committee that the comments I am about to deliver are his as well. We have worked on this testimony together and they accurately reflect our joint views.

**Role of the Mediators**

First, I would like to provide some background about our role, for it has not been the traditional role in which mediators normally serve. Two years ago this month, the staff of your committees contacted both of us to inquire about our interest in assisting the parties in the *Cobell v. Norton* dispute reach a consensual settlement. We were interviewed separately by the plaintiffs' counsel and senior officials from the Departments of Interior and Justice, but with the strong encouragement by the Committee's staffs that the parties should engage in mediation. Soon thereafter both the plaintiffs and the Administration chose us to help them. Funding for our services was provided by the Department of Justice, but we were assured we would have complete independence in our actions and, indeed, we have enjoyed the traditional independence and neutrality that neutral mediators require. Although we had not met prior to this assignment, Judge Renfrew and I have worked together seamlessly and have been in

complete accord with respect to all aspects of the mediation and the testimony we present today.

Our assignment was to engage the parties in negotiation to seek a resolution of all claims brought by plaintiffs in their class action lawsuit now pending in the United States District Court for the District of Columbia. But our mission was also broader than traditional mediation. From the outset, both the parties and Congressional staff requested that we periodically report back to Congress regarding our efforts and our progress. This request was made for three reasons: first, any resolution we achieved through negotiation would likely require Congressional action; second, Congress wanted to know if either the plaintiffs or the defendants were behaving in a dilatory manner or otherwise negotiating in bad faith; and third, Congress wanted to know if a resolution was impossible, so that it could decide whether to take action. In most mediations, confidentiality of the negotiations is a bedrock principle. In this case, very little of the content of our discussions remained confidential. Indeed, we were expected to periodically disclose our conclusions to Congress.

Although we are both experienced in mediating complex, high conflict public disputes, neither one of us could have predicted the difficult task we were about to face. Never before had we seen the level of acrimony or the inability to agree on even the simplest of logistical or procedural matters. We could not even get the parties to sign a mediation agreement that set out basic ground rules for the parties' conduct. Although we made some small progress, especially in the area of developing a model to resolve the information technology disputes regarding the security of Individual Indian Money

("IIM") Trust data, within six months, we realized that a negotiated resolution was impossible.

In October, 2004, we met with the leaders of the two Congressional authorizing committees to report our conclusions and urge that Congress take the lead in crafting a resolution. We continue to believe that only Congressional action can resolve this dispute for the benefit of the beneficiaries of the IIM Trust and allow the United States to devote its resources to the traditional services it has provided Indian Country. If Congress takes no action at this time, the litigation path will take years if not decades to reach finality. Many deserving beneficiaries will have died in the interim. Those beneficiaries who are alive will not be made whole. We also believe that the Department of Interior's ability to serve Indian Country will be compromised. So much of the policy affecting Indian Country seems now to be made through the prism of the *Cobell* litigation. We are concerned that the historically beneficial trust relationship between the federal government and Indian Country is in jeopardy as a result of this litigation.

**Liability**

There is no dispute that the historical conduct of the United States in managing and accounting for the IIM Trust has been flawed. The federal District Court of the District Columbia has so held and its judgment has been affirmed by the Court of Appeals. Indeed, Congress recognized the problem when it passed the Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. § 162a et seq. & § 4001 et seq.) in 1994. More than 10 years later, the problem persists. Substantial sums have been spent trying to fix a system that, without

legislative changes, may be beyond repair. The pending legislation will go a long way toward addressing the underlying structural problems and compensating IIM beneficiaries for the government's past negligence by restating the account balances for individual beneficiaries. Without legislation to fix the system, the problem will grow exponentially. However, we confine our testimony to Title I and, specifically, how to value the Plaintiffs' Claim.

**Valuing the Plaintiffs' Claim**

While there is little serious dispute over the question of liability, the gulf that divides the parties over the magnitude of the liability is enormous. The most vexing problem facing your committees is properly valuing the claims and assigning a number that adequately compensates the IIM beneficiaries for the discrepancies between what is in their trust accounts and what should have been there. This is a hard task for which good, reliable data may not readily exist. But the difficulty and the imprecision of deriving a figure should not deter Congress from making a decision now and advancing the very fine legislation that your committees have drafted.

As mediators we are accustomed to seeing the validity of the arguments of both sides to a dispute. This case is no different. We believe that the arguments of both the Administration and the plaintiffs regarding the amount of adjustment that needs to be made are both partially correct and partially flawed.

Initially, we understood the plaintiffs' position to be that strict common law fiduciary principles ought to apply. Absent the United States showing that funds were collected and paid to beneficiaries, the government was obligated to restate the IIM

individual accounts to the full amount in dispute plus interest. They said, "If you can't show it, you owe it." In public statements in Indian Country plaintiffs' counsel and the lead plaintiff have told beneficiaries that the amount that they are entitled to receive exceeds $100 billion and is in the range of $170 billion. We believe that these statements have created unrealistic expectations that have complicated efforts to resolve this dispute. More recently, the plaintiffs presented a settlement demand of $27.5 billion, assuming for settlement purposes, a 20% rate of funds not paid to beneficiaries as a measure of "rough justice," but without data supporting this rate. Testimony of Elouise C. *Cobell* before the House Committee on Resources Hearing on HR 4322, Indian Trust Reform Act of 2005, December 8, 2005, at 7. As we show later in this testimony the choice of assumptions regarding the distribution of unpaid funds over the course of the trust fund, the "error rate," the rate of interest used, and whether the interest is compounded annually dramatically impact the settlement value. The values chosen by the plaintiffs appear to us to be without foundation.

The position of the United States is also suspect. The Department of Interior has spent considerable funds to trace the record of transactions in the IIM system to determine if the payment made to the accounts of trust fund beneficiaries accurately reflects what should have been paid. The possible outcomes include both underpayments and overpayments. The preliminary results of this investigation are that the observed error rate is very small. Testimony of James Cason, Associate Deputy Secretary and Ross Swimmer, Special Trustee for American Indians on the *Cobell* Lawsuit, before the House Committee on Resources Hearing on HR 4322, Indian Trust Reform Act of 2005, December 8, 2005, at 3-5. Indeed, taken to its logical conclusion, the Interior

Department estimate of a settlement value would be far less than $500 million. This calculation may also be based on arbitrary and false assumptions.

We believe that there are three potential sources of error in the IIM system: 1) money was not collected; 2) money was not properly deposited; and, (3) money was not properly disbursed. With respect to the money that was not collected, funds due IIM beneficiaries either never made it into the system in the first place or may have been collected late. The missing funds or the interest due beneficiaries for late payments could reflect a significant amount of money. This is particularly true in the land-based IIM accounts.

We would designate this type of error as "funds mismanagement." We believe fund mismanagement is sufficiently related to the claims in the pending litigation that it should be resolved under Title I of the proposed legislation. But, *fund mismanagement* should be distinguished from "*land mismanagement*." By contrast, land mismanagement would encompasses claims by individual beneficiaries over the failure of the United States to negotiate a fair compensation for their oil, mineral, grazing, real estate, or other assets that have been held in trust by the United States. We do not believe that these land mismanagement claims should be part of the resolution of the *Cobell* litigation. These claims have never been asserted by plaintiffs and are much more susceptible to individualized proofs and thus capable of being more accurately evaluated.

The second potential source of error is that once in the system, the funds were not properly deposited in the beneficiaries' trust accounts. This has been the focus of the efforts of the Department of Interior to value the plaintiffs' claim. While analyzing the administration of funds that have been received by the Department is a good start, it is

not sufficient. Moreover, the government appears not yet to have included in its analysis the land-based accounts where logically many more of the errors should arise. Because the analysis by the Office of Special Trustee only considers the second step of the process and does not analyze land-based accounts, we believe its estimates significantly understate the true exposure of the United States.

The third source of error is whether beneficiaries actually received the disbursements that they were intended to receive. Did the beneficiaries get their checks and cash them? We have been advised by the Department of Treasury that the amount of checks that go un-cashed is relatively small. Nonetheless, there is no way of knowing whether these checks reached the intended payees.

**Potential Solutions**

Frequently, as mediators we are asked to value a settlement in a dispute. In many instances the value of a case may depend on the litigation risk or the probability of a party prevailing at trial. What seems certain to us is that there will not be a quick end to this litigation. If Congress does not act, we believe that there will be many more rounds of appeals. Inevitably, one of the parties will petition the Supreme Court for review. By then, many of the IIM beneficiaries will be dead.

There is no perfect or "right" number. Especially, as in this case, where missing documents may make an accurate assessment impossible, an arbitrary number may be the best path to a settlement. Consequently, we do not favor an extended effort to develop and apply a methodology to arrive at a number. We do not believe that it is worth the time and expense of such an effort because, at best, a methodology will only give the appearance of precision. It is our opinion that there are too many unknown and

unknowable pieces of information that would be needed to support an analysis of a settlement value.

What we do know is this: the parties seem to agree that approximately $13 billion should have been paid to beneficiaries over the time the IIM trust has been in existence. Neither side disagrees that a portion of these funds was indeed paid to the IIM beneficiaries. Where there is disagreement is in calculating the amount still owed trust beneficiaries. Other factors influence greatly the calculation of a settlement. Because of the time-value of money, moneys not paid a long time ago can greatly increase the total liability calculation. However, the Department of Interior reports that the vast bulk of funds that went through the IIM system did so in the last 30 years. This seems like a reasonable conclusion that has been supported by verifiable data.

By way of example and for illustrative purposes only – we want to be clear that we are not recommending a specific settlement value – we calculated the amount that the IIM Trust would need to be restated using various assumptions. According to the Department of Interior figures, $10 billion of the $13 billion in IIM Trust receipts were realized after 1970. We further assumed that only $500 million of Trust Fund assets moved through the IIM Trust prior to World War II. Assuming a 20% error rate, a 3% compound interest rate, the fund would need to be restated by $7.2 billion. If we change our assumptions and consider a 10% error rate and a 4% compound interest rate, the restated balance is $5.6 billion. Raising the compound interest rate to 5%, but holding the error rate at 10% yields a value of $9.8 billion. The point of this exercise is not to recommend a settlement but to show the significant fluctuations in value with small changes in assumptions, especially the compound interest rate. Parenthetically, we note

that the use of a compound interest rate is a hotly contested issue between the parties. If simple interest was used, these values would fall. Indeed, what these calculations show is that a final settlement is extremely arbitrary depending on the assumptions one uses. We do not believe that more time and analysis will yield a result that is more precise or less arbitrary.

An alternative approach would be to look at the avoided costs associated with the Office of Special Trustee. Since 2001, the Office of Special Trustee has received more than $3 billion. If this litigation is not settled, how much more will Congress spend to comply with its legal obligations to perform an accounting? We believe that these funds would be better directed to the IIM beneficiaries.

On behalf of Judge Renfrew and myself, we continue to offer our assistance to both Committees in whatever roles you see fit for us to serve. We believe that the prompt enactment of S. 1439 and H.R. 4322 is an imperative and we encourage the Committees to schedule these bills for markup as soon as possible.

Thank you again for the opportunity to testify today. I will be pleased to answer any questions the Committees may have.