

**United States Senate Committee on Indian Affairs
Oversight Hearing on Backlogs at the Department of the Interior**

**Testimony of Robert Chicks
NCAI Vice President for the Midwest Region and
President of the Stockbridge Munsee Band of Mohican Indians**

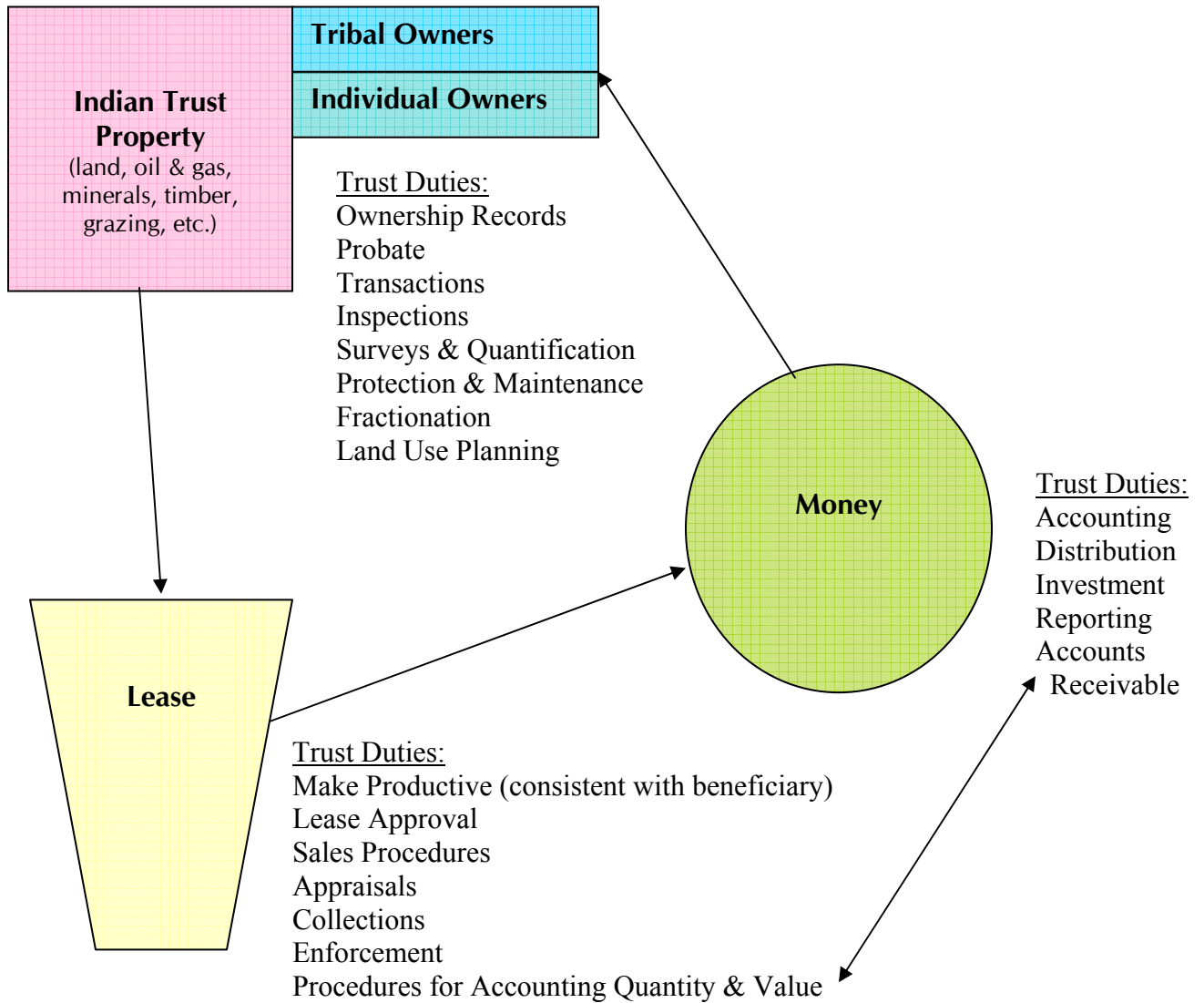
October 4, 2007

Honorable Chairman and members of the Committee, thank you for the opportunity to testify today. This is a very timely and important topic. The National Congress of American Indians and its member tribes have grown increasingly concerned about the backlog of realty functions at the Bureau of Indian Affairs, and the negative impacts on our efforts to develop economic activity on the reservations. In our testimony, we hope to shed light on the context of these various backlogs, and offer constructive suggestions on how Congress and the Department of Interior can make improvements.

First, I believe it is important for Congress to recognize that the Bureau of Indian Affairs is primarily a land management agency. It is a specialized type of land management, with the responsibility of holding 56 million acres of Indian lands in trust and managing them as a permanent homeland where Indian tribal communities live and govern their own affairs. Of course the BIA has other functions such as law enforcement and education, but these activities are a part of the primary responsibility of protecting and managing tribal homelands. Land management should be the BIA's core mission and priority.

Second, the various backlogs that the Committee has identified are not independent problems, but are interrelated parts of the same BIA land management system. I have attached to my testimony a simplified diagram of the BIA trust business cycle. This chart shows how most economic transactions work in Indian country – starting with land and ownership, moving to land leasing and sales of natural resources, and then accounting and distribution of trust funds back to the land owners. Backlogs in one area affect the entire system. For example, in order to execute a lease, the BIA must have an accurate title status report and a current appraisal and may need a survey and an environmental review. In order to get a title status report, the BIA may have to update the title with the results of probate decisions. A bottleneck at one step in the process causes multiple delays across the entire system.

Third, over the last ten years, a great deal of attention has been paid to the accounting part of the trust business cycle because of the litigation over Indian trust funds. However, in the big picture the basic BIA land functions of title, leasing, acquisitions and probate are even more critical to Indian communities because these functions drive economic development. Business transactions – from routine home mortgages to timber sales to large commercial deals – require a degree of predictability and timeliness that is lacking from the BIA system. Tribal leaders want to fix the BIA land system and we hope to work closely with the Committee and the Department in developing solutions.



Crosscutting Duties:

- Tribal Self-Determination
- Treaties, Laws, Cases
- Funding
- Training
- Internal Controls
- External Audits and Monitoring
- Errors and Omissions

- Strategic Planning
- Policies and Procedures
- Establishing Account Balances
- Security & Privacy of Information
- Systems Architecture
- Beneficiary Focus
- Performance Measures

Causes and Solutions of BIA Realty Backlogs

Trust problems at the BIA are rooted in our country's history. In a push to acquire tribal land, the federal government imposed reservation allotment programs pursuant to the General Allotment Act of 1887. Under these policies, tribes lost 90 million acres and much of the remaining 56 million acres was opened to non-Indian use through leasing and sales. It is widely documented that the BIA has historically mismanaged tribal lands due to inadequate resources and a lack of oversight and accountability.¹ The historic problems have been compounded in recent years by several factors:

- The FY1996 budget cuts for BIA programs were implemented primarily by laying off realty workers in the field offices. The realty budget has never recovered from these cuts.
- The level of fractionation has increased dramatically, causing backlogs in probate and title that create delays in other parts of the land management system. Fractionation is also creating mounting costs in both management and losses in land productivity.
- In response to the *Cobell* litigation for a trust funds accounting, available resources have been shifted to the Office of Special Trustee, which has grown to a \$150 million annual budget with resources largely taken from BIA realty. The litigation has also cut off e-mail and internet access, which eliminates the efficiency of current communication technologies.
- Indian tribes have increased their economic activities, creating an increase in commercial leasing, land transactions and the need for appraisals.

Potential solutions include:

- 1) All of these factors have combined to create backlogs in BIA realty that will not change until Congress puts more financial resources into those offices at the local level. In addition, BIA realty needs process and system improvements; recruitment and training programs for employees; and leadership to develop and implement a plan for business operations in trust management.
- 2) Congress should also revisit Title III of last year's S. 1439, which would increase tribal control over reservation land management. Indian reservations vary widely in their needs for land management services. Indian tribes would be able to create reservation-specific land management plans to establish objectives and priorities, and allocate the available funding according to the needs of that particular reservation. Both direct service and self-governance tribes are eligible to use the plans. Under these plans, tribes would be authorized to enter certain types of leases for up to 25 year terms without the involvement of the Department.
- 3) Congress should also revisit Title IV of last year's S. 1439, which would amend the Indian Land Consolidation Act to streamline land acquisition procedures and create incentives for sales of fractionated interests.

¹ See *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 499, 102ND Cong., 2ND Sess. 1992, 1992 WL 83494 (Leg.Hist.), and *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results* (Letter Report, 05/03/96, GAO/AIMD-96-63).

Land to Trust Acquisitions

As mentioned above, between the years of 1887 and 1934, the U.S. Government took more than 90 million acres from the tribes, nearly two-thirds of all reservation lands, and sold it to settlers and corporations. The principal goal of the Indian Reorganization Act of 1934 was to halt and reverse the abrupt decline in the economic, cultural, governmental and social well-being of Indian tribes caused by the disastrous federal policy of allotment and sale of reservation lands. The IRA is comprehensive legislation for the benefit of tribes that stops the allotment of tribal lands, continues the federal trust ownership of tribal lands in perpetuity, encourages economic development, and provides a framework for the reestablishment of tribal government institutions on their own lands.

Section 5 of the IRA, 25 U.S.C. 465, provides for the recovery of the tribal land base and authorizes the Secretary of Interior to acquire land in trust status for the benefit of Indian tribes to assist in meeting the broad goals of the Act. As noted by one of the IRA's principal authors, Congressman Howard of Nebraska, "the land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship," and said the purpose of the IRA was "to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it." (78 Cong. Rec. 11727-11728, 1934.)

Of the 90 million acres of tribal land lost through the allotment process, only about 8 percent has been reacquired in trust status since the IRA – and most of that was the "ceded but unallotted lands" returned immediately after the IRA. Still today, a number of tribes have no land base and many tribes have insufficient lands to support housing and self-government. Most tribal lands will not readily support economic development. A fundamental purpose of the IRA in promoting land acquisition was to address the problem of scattered and fractionated parcels which often rendered the tribal land base essentially unusable from a practical standpoint. And the legacy of the allotment policy, which has deeply fractionated heirship of trust lands, means that for many tribes, far more Indian land passes out of trust than into trust each year. Section 5 clearly imposes a continuing active duty on the Secretary of Interior, as the trustee for Indian tribes, to take land into trust for the benefit of tribes until our needs for self-support and self-determination are met.

Despite this important purpose, land to trust applications often languish at the Department of Interior. It is a chief concern of many tribes with the existing land to trust process. Too often tribes have spent precious time and scarce resources to prepare a trust application only to have it sit for years or even decades without a response. Such inordinate delay on trust applications often amounts to an unfair *de facto* denial of the request. In addition, during inordinate delays tribes risk losing funding and support for the projects that they have planned for the land, and environmental review documents grow stale.

Our perception has been that most often land to trust applications languish because they are discretionary functions in offices that are understaffed and overloaded with mandatory trust

functions. Even though land to trust applications are a very high priority for the tribes and for the fundamental mission of the Bureau of Indian Affairs, they are given a lower priority because they do not come with deadlines attached to them.

Tribal leaders have encouraged the BIA to establish internal timelines and checklists so that tribes will have a clear idea of when a decision on their application will be rendered. Tribes should know if progress is being made at all, and, if not, why not. Although we understand that the BIA is understaffed and that certain requests pose problems that cannot be resolved quickly, allowing applications to remain unresolved for years is unacceptable. The issue evokes much frustration over pending applications and has been raised at nearly every NCAI meeting.

Tribal leaders' frustrations are heightened because the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is also necessary for consolidation of fractionated and allotted Indian lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health care clinics that serve both Indian and non-Indian communities, and land for Indian schools.

NCAI continues to urge the BIA to establish internal timelines for land to trust applications, which would include a provision for unusual and problematic cases. We believe these time frames would balance the need for timely action from the BIA without burdening its staff or creating unrealistic expectations for the tribes. While decision makers must have adequate time, this must be balanced against the reality that all work expands to fill up the amount of time allotted to it. Establishing reasonable timelines is the only way to meet the tribes main goals - - creating accountability in the process, and providing tribes with an estimated timeframe in which their applications will be processed.

Environmental Review

One of the more burdensome requirements for many land transactions such as leases and acquisitions is the requirement that the application undergo an environmental review under the National Environmental Policy Act ("NEPA"). The Bureau of Indian Affairs does not have an adequate budget to perform environmental analysis, so these costs are most often pushed onto the Indian tribes who are seeking to develop a project on their own lands. Even when these are environmentally beneficial projects such as a sewage treatment plant, the BIA, and thus the tribes, must comply with NEPA.

On this issue, we encourage the Congress to increase the resources to the BIA for compliance with NEPA, which can be a particularly difficult burden for tribes with fewer resources and larger land bases. In addition, we believe that it is appropriate for Congress to consider relieving tribes of some of the burdens of NEPA when tribes are developing publicly beneficial projects such as schools and clinics and other important community infrastructure. We do not believe that NEPA was ever intended to be a barrier to needed development of tribal lands by tribal governments where there is no real federal action other than a pro forma land transaction approval.

Finally, we recommend that the Department consider utilizing a categorical exclusion in its Departmental Manual for land transactions that do not involve a change in use. The BIA has a categorical exclusion for “Approvals or other grants of conveyances and other transfers of interests in land where no change in land use is planned.” 516 Departmental Manual 10.5.I. This categorical exclusion can and should be extended to conveyances where no change in land use is planned. Many tribes wish to take undeveloped land into trust for cultural or natural resource protection, and would manage such lands to fulfill those goals. In such cases, no change or environmental detriment to the land would occur. As a result, it makes good policy sense for transfers of such lands to benefit from the same categorical exclusion as other transfers of interests in lands which will have no adverse environmental impacts.

As the Department has recognized, conservation and cultural resources protection are important goals for many tribes seeking to take land into trust. Providing tribes with a categorical exclusion from NEPA review in such cases will remove a burdensome and unnecessary transactional cost, and help many tribes achieve those important goals. Such a mechanism would be of particular assistance to those tribes with fewer resources and larger land bases in need of protection.

Conclusion

NCAI and all tribal leaders strongly support fixing the trust land management system and we want to work constructively with the Department and with Congress to ensure sound management of tribal assets. The backlog of decision making in BIA realty has been a leading concern of tribal leaders throughout the country for many years. NCAI strongly encourages Congress and the Administration to take action on all of the fronts that we have identified above, in close consultation and cooperation with tribal leadership. This effort will bring great benefits to Indian communities and our neighbors in productivity, economic development, and the well-being of our people. We thank you in advance, and look forward to starting our joint efforts immediately.