STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, AND ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS ON THE COBELL LAWSUIT.

July 26, 2005

Thank you for the opportunity to come before this Committee again and discuss the Cobell v. Norton lawsuit. As we have discussed on several prior occasions, the Department of the Interior supports the efforts of Congress, as the Indian trust settlor, to clarify Indian trust duties, responsibilities and expectations.

Allow me to emphasize that the Administration strongly supports protecting the rights of Native Americans under the law and that is an important objective of the Department of the Interior. Everyone involved the Cobell lawsuit -- the Government, the Indian plaintiffs, and the judges in the district court and the appeals court -- shares, we believe, that objective. But the protracted and painful litigation that has occurred does not serve that objective as well as would a settlement reached by agreement of the parties. It may not be easy for the Government and the Indians to reach a settlement, but it is well worth the effort for all concerned to engage in a good faith effort to resolve the matter. It is, of course, important that any settlement have the support of the Congress, as a settlement could not be implemented without appropriation of the necessary funds.

We particularly want to thank the Chairman and the Ranking Minority Member for their efforts in trying to reach a full, fair and final settlement of the issues in this case. This Congress has an opportunity to look at this issue anew, examine the facts, and move forward with a clear and consistent sense of purpose regarding the Federal Government's administration of the Indian trust.

The Cobell litigation has been pending for too long. It is clear that after nine years of litigation, the Courts have not reached a resolution that is broadly supported by Congress. Interior's annual appropriations make it clear that Congress has not and does not support the kind of accounting effort required by the District Court.

While Congress recently took actions to forestall the implementation of the District Court's structural injunction regarding historical accounting, the introduction of S. 1439 is the first serious Congressional effort we have seen to comprehensively resolve the issues involved in the Cobell lawsuit. While many details remain to be negotiated and clarified, the bill represents an important step towards bringing the parties together for a meaningful effort to seek closure on this matter.

INTRODUCTION

Congress is the Indian trust settler, i.e. the creator of the trust and hence the party that defines its terms. Congress provides statutory direction to guide the management of assets held in trust for Indians and Congressional appropriations are provided to fund trust operations.

Congress began its involvement with the passage of the General Allotment Act. That Act authorized the allotment of tribal lands to individual Indians with the hope individual Indians would take up farming and assimilate themselves into the non-Indian society and culture. The Act provided that the Secretary would hold the lands as an allotment in trust for 25 years. After 25 years, Indians would be free to sell or encumber their lands as they saw fit.

In 1934, Congress passed the Indian Reorganization Act and extended the trust for individual Indian allotments in perpetuity. By then, many of these lands had already started to fractionate into many undivided interests and have continued to do so exponentially over the next 71 years. The interests have become so small in many cases that heirs do not bother to claim their inheritances and interest holders in many cases fail to inform the BIA of their whereabouts. Keeping track of family deaths, missing relatives, and moving interest-holders is a full time job for many employees at BIA.

The 1994 Reform Act was intended to further define the Department of the Interior's obligations regarding the management of IIM funds. In particular, the 1994 Reform Act

defined several prospective accounting duties and a requirement to provide Indian beneficiaries with periodic account statements. In reading the legislative history of the 1994 Reform Act, one will recognize that Congress had known for years about the condition of the trust accounts. However, it also seems apparent that Congress did not expect the Act to set the stage for what is now claimed to be a multi-billion dollar historical accounting liability on the part of the United States. The District Court has directed Interior to account for every land and cash transaction since 1887, even with regards to beneficiaries who had died and whose trust account was closed before 1994. The Court of Appeals seems to have identified a historical accounting requirement beginning in 1938.

In 1996, the Cobell plaintiffs filed a lawsuit seeking an accounting of IIM account funds. Although Congress had not directed Interior to prepare periodic accounting statements or consistently funded such a requirement in the past, the Court of Appeals has ruled that a historical accounting for IIM accounts is required, ostensibly to ensure that the current balances of IIM accounts are accurate.

The plaintiffs' lawyers have said they do not want handouts; they do not want reparations; they do not want welfare. They just want what is rightfully owed to them – in other words, they want money that was collected for them, but which they believe has not been distributed. In Court, the plaintiffs seek a historical accounting but are now working hard to prevent that accounting from occurring. In Congress, they argue against providing funding for that accounting; in Court, they argue that the accounting is impossible. Instead of an accounting, they want a lot of money. The plaintiffs have been quoted by the press as asserting that the Government has failed to pay individual Indians $176 billion. Recently, the plaintiffs and tribal leaders have offered to settle the historical accounting claims of individual Indians for $27.487 billion. In the recently proposed S. 1439, the Senate left blank the amount of the proposed settlement, but with an indicator that the figure should be in the billions.

Before we speak to the provisions of S. 1439, we would briefly like to address the list of 50 principles the Committee has before it from the Trust Reform and Cobell Settlement Workgroup, which included the Cobell plaintiffs. The principles recommend a lump sum payment to the plaintiffs of $27.487 billion.

This $27.487 billion payment will not necessarily resolve the Cobell litigation. In addition, it does not settle any other claims individuals might have against the United States related to funds management or to their lands. The $27.487 billion is intended to cover only the historical accounting claim. Principles 48-50 state clearly that the individuals should be allowed to continue to seek redress for federal mismanagement claims. Federal mismanagement, the principles say, should be treated as a matter of national interest and, under principle #48, Congress is urged to provide a fair offer to individuals to compensate them for mismanagement in addition to the $27.487 billion.

To achieve a full, fair and final settlement to the potential claims being raised by individual Indians (and separately, by Tribes) it is important to consider carefully four key components:

- Any requirement to conduct historical accounting activities should be eliminated. In exchange for a settlement payment, the account holder must relinquish any claim to an accounting and accept as accurate the balance of the account when closed or at the date of settlement. In addition, permitting a significant number of account holders the option of pursuing an accounting will undermine the cost effectiveness of a settlement program.

- Claims regarding funds mismanagement, including but not limited to accounts receivable issues, funds handling and deposit, investment decisions, etc. must be addressed.

- Appropriate mechanisms for the mitigation of fractionated interests must be provided. For example, the authority to conduct "consolidation" sales of highly fractionated lands would be helpful.

- Congress must decide whether separate resource mismanagement claims will be permitted, and if so, what remedies will be made available by Congress. If the legislation does not resolve those claims, Congress should ensure that these claims do not provide an opportunity to seek a sweeping historical accounting similar to that sought in the Cobell litigation.

HISTORICAL ACCOUNTING: WHAT DO WE KNOW TO DATE?

In determining how much money the federal government should provide to settle individual Indian claims, Congress should consider what work Interior has done so far and what we have found.

As part of the Cobell litigation, Interior collected over 165,000 documents for the historical accounting of IIM trust fund activity through December 31, 2000, for the named plaintiffs and agreed-upon predecessors. Of these documents, about 21,000 documents were used to support the transactional histories, which dated back as far as 1914, and which included a total of about 13,000 transactions.

Pursuant to the requirement in Section 131 of the FY 2003 Appropriations Act, on March 25, 2003, the Department of the Interior provided Congress with a summary of the expert opinion of Mr. Joseph Rosenbaum, a partner in Ernst & Young, LLP, regarding the five named plaintiffs in Cobell v. Norton. This report describes the process the contractor went through and also contains a summary of his opinions. These conclusions included:

- The historical IIM ledgers were sufficient to allow DOI to create virtual ledgers that were substantially complete for the selected accounts.

- The documents gathered by DOI supported substantially all of the dollar value of the transactions in the analyzed accounts.

- The documents gathered by the Department of the Interior do not reveal any collection transactions not included in the selected accounts, with a single exception in the amount of $60.94 that was paid to another account holder, due to a transposed account number entered in the recording process.

- An analysis of relevant contracted payments, evidenced primarily by lease agreements, showed that substantially all expected collection amounts were properly recorded and reflected in the IIM accounts.

- There was no indication that the accounts are not substantially accurate, nor that the transactions were not substantially supported by contemporaneous documentation.

This analysis, including the named plaintiffs and the selected predecessors in interest, found both non-interest transaction overpayments to class members (37 instances totaling $3,462) and underpayments (14 instances totaling $244).

As of June 30, 2005, Interior's Office of Historical Trust Accounting (OHTA) had reconciled more than 21,847 Individual Indian Money (IIM) judgment accounts with balances totaling more than $56.3 million and an approximately 15,000 additional accounts with no balance as of December 31, 2000. This accounting effort found non-interest overpayments (2 instances totaling $2,205) and underpayments (21 instances totaling $52).

As of June 30, 2005, OHTA had also reconciled 3,995 IIM per capita accounts with balances of over $28.1 million and an additional approximately 4,000 accounts with no balance as of December 31, 2000. In this accounting effort, no overpayment or underpayment discrepancies were identified.

Interest recalculations identified a particular set of IIM judgment transactions (786 instances totaling $25,000) where principal had been distributed without associated interest amounts (an underpayment) and, more broadly, interest amounts for judgment and per capita accounts that appeared to have been overpaid (a net amount approximating $377,000 on about 25,842 accounts).

The National Opinion Research Center (the Center) at the University of Chicago, a national organization for research, has contracted to assist Interior with interpreting historical accounting data and results. It has recently completed a draft progress report entitled "Reconciliation of the High Dollar and National Sample Transactions from Land-Based IIM Accounts," looking at land-based IIM accounts that were open on or after October 25, 1994. The goal of the project is to assess the accuracy of the land-based IIM account transactions contained in the two IIM Trust electronic systems (Integrated Records Management System and Trust Funds Accounting Systems) for the electronic era 1985-2000. Accuracy is being tested by reconciling all transactions of $100,000 or more and a large statistically representative random sample of non-interest transactions under $100,000. The historical accounting initiative is scheduled to end in August 2005. To date, the Center has found:

- Over 98% of the sampled transactions needed for preliminary estimates have been reconciled for all twelve BIA regions.

- A completion rate of 98% is extremely high in a sample such as this. The draft report states: "This very high completion rate for searching and attendant reconciliations should put to rest most concerns about the impact that the few remaining reconciled transactions might have on results."

- Of land-based IIM account transactions exceeding $100,000, 1,730 of 1,737 were reconciled (99%). The reconciliation identified both overpayments (34 instances totaling $34,053) and underpayments (24 instances totaling $47,168). For the

sampled land-based transactions of less than $100,000, fewer differences were found among the 4,134 out of 4,162 transactions reconciled, with overpayments to beneficiaries (15 instances totaling $506) and underpayments (6 instances totaling $516).

- Reconciliation shows the debit difference rate to be 0.3%.

- Reconciliation results show the credit difference rate to be a little over 1%.

Based upon the historical accounting results so far, Interior suggests that Congress consider exempting Judgment and Per Capita funds from any proposed legislation. Regarding the findings from the IIM land-based accounting thus far, the net difference (underpayments – overpayments) would be about $10,000. Just underpayments, without regard to offsetting overpayments, equal less than $48,000. Notwithstanding the facts, all parties need to be mindful of the cost, risks and uncertainties associated with continued accounting efforts involving the remaining as yet unreconciled accounts.

Through December 31, 2004, OHTA also resolved residual balances in nearly 8,200 special deposit accounts, identifying the proper ownership of more than $38 million belonging to individual Indians, Tribes, and private entities. By the end of 2005, OHTA expects to resolve the proper ownership of approximately $51 million (cumulative) in residual IIM Special Deposit account balances.

Consistent with Interior's historical accounting plan, the Administration proposed funding the historic accounting at $130 million in FY 04, Congress appropriated $45 million. We requested $109 million for FY 2005; only $58 million was appropriated and this includes funding for tribal trust fund accounting as well. The FY 06 budget request for historical accounting is $135 million. This amount would provide $95 million for IIM accounting and $40 million for tribal accounting, however initial indications from House and Senate passed appropriations bills suggest approximately $58 million will be provided. As a result of the lower appropriations amounts provided, the pace of

completing Interior's planned historical accounting effort is slower, and the anticipated completion date will move further into the future. To date, Interior has spent in excess of $100 million to obtain the historical accounting results indicated above.

S. 1439, THE INDIAN TRUST REFORM ACT OF 2005

We are pleased to have an opportunity to review S. 1439, the "Indian Trust Reform Act of 2005." This bill was just introduced late last week so our comments today are preliminary ones. We will provide more detailed comments after an in-depth review of the bill.

First, we appreciate the fact that legislation has now been introduced to attempt to address the issues in Cobell. We are pleased to see the bill focuses on consolidation of fractionated Indian lands and supports a more aggressive land acquisition program than the one currently under way. We do, however, have some serious concerns with the bill as currently drafted.

Title I. S.1439 would provide a yet undetermined number of billions of dollars to resolve the historical accounting claims of the class members of the Cobell litigation. However, it does not provide for settlement of all of the elements of the Cobell litigation. In addition, in determining what is a reasonable amount, Congress should be aware that the $27.487 billion requested by the plaintiffs does not include money to resolve potential mismanagement of trust fund and asset claims. In deciding upon the amount to provide for a resolution, the Congress should carefully consider all potential liabilities with respect to the individual Indian trust. The legislation should resolve or restrict any claims that might permit the reinstatement of historical accounting litigation comparable to the Cobell case. Congress should also realize that 25 tribal trust cases have been filed involving sums of money far greater than those involved in the individual Indian trust.

Indian Trust Asset Management Demonstration Project Act. S. 1439 includes provisions allowing for a pilot project for 30 tribes to take over management of Indian

trust assets. However, it is critical to transfer the responsibility for results along with authority and funding. Thus, we do not believe the United States should remain liable for any losses resulting from a Tribe's potential mismanagement of an Indian trust asset. This is particularly true because the bill would allow Tribes to develop and carry out trust asset management systems, practices, and procedures that are different and potentially incompatible with those used by Interior in managing trust assets. In a normal trust, this action would be considered a merger of Trustee and beneficiary and thus end the Trust. Of course this would have no impact on the government-to-government relationship.

We look forward to further discussing the following key aspects of this provision. For example, would Interior need to develop expertise in 30 different trust asset management systems sufficient enough to ensure that everything a tribe is doing under that system is in keeping with Interior's trust responsibility? If program reassumption became necessary, how would Interior take back program responsibilities and integrate information back into our trust asset management environment when it has been collected and processed in different systems? What kind of constant monitoring of tribal activities will Interior have to do to ensure the tribe is living up to the standards in the bill? What performance standard would apply: the imminent jeopardy standard associate with PL 93-638 or the "highest and most exacting fiduciary" standard being required of Interior?

Fractional Interest Purchase and Consolidation Program. As we stated above, we are pleased to see that the bill places a priority on developing an aggressive program for the purchase of interests in individual Indian land with the intent of restoring those interests to the Tribes, we are not prepared to take a detailed position on the specific provisions in the bill until we have done further analyses.

The President's FY 2005 budget request included an unprecedented $75 million request for Indian land consolidation. Congress chose to appropriate $34.5 million for the program in FY 2005. In light of this, we requested $34.5 million for FY 2006.

As structured, the program in S. 1439 provides incentives where a parcel of land is held by 20 or more individuals and where an individual sells all interests in trust land. In cases where a parcel of land of land is held by over 200 individuals, the bill provides procedures for noticing interest holders and moving ahead with consolidation of the interests. These provisions will greatly help consolidate interests and reduce the costs of management of the individual Indian trust.

Care must be given, however, to ensure that this bill does not work as an incentive to fractionate land so that individuals can become eligible for the bill's incentives. So far, there has been no lack of willing sellers at appraised values. In addition, we would like to work with you further on the thresholds and amounts included in this title. We have some serious concerns as to the cost of the significant premiums provided in the bill. In addition, we would like to explore the possibilities for consolidation sale authority to reduce the associated public financing burden of addressing the fractionation issue. Further, we need Congressional clarification regarding the seemingly apparent public policy of retaining individual Indian land within Indian Country ownership versus the trust responsibility to obtain fair market value for each land interest. We need to analyze the costs of the new incentives, the mechanisms for funding land acquisitions and the impact of the American Indian Probate Reform Act on the rate of fractionation as a part of our implementation plan.

Restructuring the Bureau of Indian Affairs and the Office of the Special Trustee. S. 1439 includes a number of concepts that were discussed by the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform in 2002. This task force was formed during the period when the Department was examining ways to restructure the trust functions of the Department in response to the trust reform elements of the Cobell court. The task force ended in an impasse with regard to implementing legislation on matters that were not related to organizational alignment. In the face of no legislation, the Department implemented a reorganization plan that could be achieved administratively. We will review this new title with respect to the reorganization just completed and provide you with our comments in our comprehensive report on the bill.

This title of the bill also extends the Indian preference hiring policy to the new Office of Trust Reform Implementation and Oversight created by the bill and abolishes the Office of the Special Trustee for American Indians. Interior would appreciate the opportunity to discuss these policy choices in some detail.

While Interior is receptive to the concepts of establishing an Undersecretary position and merging Indian programs under new leadership, we would like to discuss the objectives of such a proposal. In Interior's view, such an initiative is unlikely to materially alter Indian trust performance due to the presence of other, more pressing, structural concerns about the trust, such as the lack of a clear trust agreement to guide responsibilities and expectations, appropriations that do not track with all program trust responsibilities, the lack of an operative cost-benefit paradigm to guide decision-making priorities, the challenges of incorporating PL 93-638 compacting and contracting and the requirements associated with Indian preference hiring policies. These issues have frustrated the beneficiaries, the administrators, and a various times Congress throughout the lifespan of this trust. We encourage Congress to speak clearly in whatever legislative direction in chooses to write, and carefully consider the impacts the language will have in allowing us to meet the objectives of your constituents.

It is clear that moving from today's organization into a beneficiary-services-oriented organization of excellence will demand the highest of financial, information technology and managerial skills. American Indians make up less than one percent of the American public. If we unduly restrict hiring to this small fraction of potential employees, instead of reaching out to whoever may be most qualified, we deprive ourselves of 99% of the available talent pool. While the Indian preference hiring policy does permit the hiring of non-Indians, it also may serve as a significant disincentive for non-Indian applicants. We would like the opportunity to serve Indian Country to appeal to a broader range of applicants so as to create an applicant pool large enough to ensure we are hiring well qualified employees.

Let me be clear. Indian people who are the best or equally well-qualified should be given preference. This allows us to ensure our organization understands the unique issues of Indian Country. However, when better qualified individuals are not even considered or given reasonable promotion potential, a reality exists that organizational performance suffers.

Audit of Indian Funds. The last title of S. 1439 requires the Secretary to prepare financial statements for Indian trust accounts in accordance with generally accepted accounting principles of the Federal Government. The Comptroller General of the United States is then required to contract with an independent external auditor to audit the financial statements and provide a public report on the audit. The Secretary is required to transfer funding for this audit to the Comptroller General from "administrative expenses of the Department of the Interior" to be credited to the account established for salaries and expenses of the GAO.

CONCLUSION

Congress created the individual Indian trust. We are hopeful that S. 1439 will resolve many of the issues that we have spent over nine years in court debating.

From the government's standpoint, we believe S. 1439 should --

- provide for a full, fair and final resolution of the entire case;
- provide a clear and realistic statement of the government's historic accounting obligations for the trust funds of individuals;
- resolve the accounting claims of the account holders and any associated funds mismanagement claims;

- eliminate inefficient trust management obligations by consolidating individual Indians' lands through a land purchasing program and address any historic land assets mismanagement claims;

- clarify trust accounting and management responsibilities such that they are limited by available appropriations, so that future claims and litigation do not arise as a result of unfunded obligations; and,

- provide a clear statement of the government's historic accounting obligations for Indian Tribes..

We recognize this is a daunting task. But I can assure you, it is no more daunting than the prospect of facing many more years in the court system trying to find the answers to these issues.

Mr Chairman, I would like to close with a comment in support of our people at the Interior Department. We want to be sure that the public record reflects the fact of their extraordinary service to the country. Many of our employees past and present have faced rough-sledding in the Cobell case and have been unfairly maligned. Interior Department employees working on the issues involved in the Cobell case, like the other employees of the Department, are here to serve the American public. They work hard, in good faith, to implement the laws you enact and protect the legal rights of Native Americans. We ask that our employees be treated with the dignity and respect they have earned and deserve as we all work our way together through the difficult legal issues involved in the Cobell case.

The Department is encouraged by the Senate's leadership on this issue. We look forward to resolving this case so that the Department and beneficiaries can move forward on a positive agenda for Indian Country. Thank you for the opportunity to appear. We would be happy to answer any questions you might have at this time.