TESTIMONY OF ELOUISE C. COBELL, LEAD PLAINTIFF IN *COBELL V. NORTON*

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARING ON TRUST REFORM

MARCH 9, 2005

INTRODUCTION

Good morning, Chairman McCain, Vice-Chairman Dorgan and Members of the Committee. Thank you for inviting me here today to provide testimony to the Committee on this most critical of issues – reforming the management and administration of the Individual Indian Trust, finally, after nearly a century of malfeasance and mismanagement by the Department of Interior.

I am here today, once again, on behalf of myself and the other more than 500,000 individual Indian trust beneficiaries represented in the lawsuit we filed nearly nine years ago in the Federal District Court of the District of Columbia, *Cobell v. Norton,* Civ. No. 96-1285 (RCL). First and foremost, as representative of all trust beneficiaries who are the owners of all the assets held in this Trust, we thank you for your continuing leadership on this matter and your sincere interest and effort to both reform the trust and resolve the the *Cobell* litigation. We will do whatever is necessary to aid you in achieving a fair and just resolution of this matter.

In addition, before we discuss the subject of the oversight hearing – namely trust reform – I wanted to make my position, as lead plaintiff, on one critical issue unmistakably clear: **There is nothing that I want more than an immediate and fair resolution of the *Cobell* case**. It is a matter of record that the government has mismanaged this trust for over a century. In November 1989, this Committee explicitly found that fraud and corruption pervades the management and administration of this Trust. In the Fall of 1995, Mr. Chairman, you yourself noted during the confirmation hearing of the First Special Trustee, that the management of this trust has been "criminal." Sadly, nothing has changed. *Cobell v. Norton* has shed further light on the gross mismanagement of this Trust and has raised this serious problem from the deepest and most

secluded shadows of government bureaucracies to the light of day, where everyone can see the extraordinary injustice and abuse. A century of deplorable mismanagement is far, far too long.[1] A century with no accounting of trust assets is unconscionable and unprecedented. A century of harm to hundreds of thousands of this nations poorest citizens in inexcusable. And the harm done to the plaintiff class everyday is unquantifiable. This is often a matter of life and death. A resolution is long past due. I along with other class representatives and our my counsel who have aided us in pursuing our rights will work with whomever is capable of achieving a fair resolution.

Moreover, I want to emphasize that this is not a new position. From inception, we have always sought an expeditious resolution of this case. We continue to do so. We have been and continue to be willing to participate in any resolution process conducted in good faith that is reasonably calculated to lead to resolution of this matter in an expeditious and fair manner – whether that be working with Congress for acceptable legislation, mediation, arbitration or continuing litigation. Simply put, plaintiffs have no interest in prolonging these proceedings.

While we will remain steadfast in our commitment to seek a prompt resolution of this case, we have an unconditional ethical obligation to ensure that any settlement is fair. We and our counsel will, of course, vigorously resist "settlement" that allows pennies on the dollar to the beneficiary class or that fails to address in a meaningful way the on-going and profound mismanagement of their trust assets. It is my obligation as lead plaintiff and my lawyers duty as class counsel to work towards immediate settlement, while at the same time forcefully resisting

[1]*See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.").

any resolution that would further harm the beneficiary-class.

As stated, any acceptable settlement of the *Cobell* litigation must include meaningful trust reform. Below, we will discuss some ideas about the potential ways to achieve such meaningful reform. Prior to doing so, however, I want to raise one preliminary issue – the need to achieve one overall resolution to the *Cobell* case.

As government officials have stated countless times in various fora, the United States would like to achieve a settlement that addresses four related but distinct matters: (1) A historical accounting for individual Indian trust beneficiaries; (2) reform of the management and administration of the individual Indian Trust; (3) Asset mismanagement claims and (4) fractionation of land. While some of these matters may fall outside the scope of the *Cobell* case, plaintiffs agree that an omnibus approach to settlement is best. In particular, we believe that resolution of the historical accounting without addressing trust reform – or vice-versa – is necessarily inadequate and will merely lead to further litigation in the future. Thus, our comments below on what are appropriate considerations for trust reform should not be viewed in isolation. These ideas for appropriate trust reform proposals are merely one aspect of an overall resolution that must include, but perhaps not remain limited to, a resolution of the historical accounting claim central to the *Cobell* case.

LEAVING TRUST REFORM UP TO INTERIOR DEFENDANTS IS NOT A SOLUTION

A discussion of how to reform any system must obviously begin with a discussion of where the reform effort is presently. That is easy. Simply put, ***no*** progress has been made on trust reform, despite the fact that –

- The United States has held these assets in trust for individual Indian since 1887 and the assets "have been mismanaged nearly as long."[2]
- More than a decade ago, in 1994, Congress enacted "remedial" reform legislation requiring fundamental changes in Trust management – changes the Interior Department officials admit have yet to to be instituted.
- Five years ago, the District Court ruled following the Phase One trial that defendants were in breach of their trust duties and remanded the case to the Trustee-Delegates to allow them to rectify identified trust management problems and bring themselves into compliance with trust duties – a decision the Court of Appeals unanimously affirmed on February 23, 2001.
- Pursuant to Court order, the Interior Department reports on a quarterly basis regarding the "progress" of their trust reform efforts. It is a judicially-established fact that Interior's quarterly reports are routinely "false and misleading." Despite their sanitized nature, however, Interior routinely acknowledge the utter failure of Interior to implement even the limited reforms to which they themselves have committed. For example, the report filed February 1, 2005 concedes, in their common watered-down bureaucrat-speak, that the historical accounting "will take longer" than they initially told the Court and that trust reform "will consume several more years of activity."[3]
- This past month, the district court reaffirmed that the accounting duty along with relevant subsidiary duties are the basis of a "live" claim in this case and with it comes a

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[2]*Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

[3]*Department of Interior's Twentieth Quarterly Report*, at 2-3 (February 1, 2005).

requirement that defendants reform the "the processes by which records and other documentation of transactions involving trust assets and the actions of the trustee-delegate are created, stored, preserved and so forth."[4]

- The Interior Department's newest "reorganization" does little but move around boxes within the department. It does not address the fundamental problems of trust mismanagement and is widely opposed in Indian Country.

This record makes plain certain inescapable facts. Specifically, accountability and meaningful trust reform will come only when the government is forced to change. They will not do so voluntarily. If a century of failed reform is not long enough to demonstrate this fact, certainly the experience of the last two-decades of more promises and more rhetoric – but no reform – should be. I, along with many others from Indian Country, attempted to work with Interior defendants for over a decade prior to bringing this lawsuit. We heard many promises and many commitments made to Congress in hearing after hearing, but never reform, never a meaningful movement towards bringing the government into compliance with its trust duties.

The sole source of the limited progress has been this lawsuit – the constant prod requiring the Interior Department to at least look like its interested in managing our property better. But even with the litigation, the government has fought us every step of the way. One of the Court's recent orders referenced defendants' obstructionist tactics throughout this case and the resulting delay and harm to the beneficiary-class:

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[4]*Cobell v. Norton*, slip op. at 15 (D.D.C. February 8, 2005). In the same opinion the Court invited plaintiffs to amend the Complaint to include asset management and other types of trust reform. *Id.* at 23-24. Also, the Court made clear that the processes associated with the APA, such as limited discovery, do not apply in this case. *Id.* at 47-50.

> As this case approaches its ninth year, it is this Court's hope that the defendants' next appeal will be truly expedited, and will lead to the resolution of these legal issues. Elderly class members' hopes of receiving an accounting in their lifetimes are diminishing year by year by year as **the government fights – and re-fights – every legal battle**. For example, the defendants continue to contend today that this is a simple record-review Administrative Procedures Act case – a proposition that has been squarely rejected by this Court on more than one occasion, as well as by three different Court of Appeals panels in *Cobell VI*, *Cobell XII*, and *Cobell XIII*.
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> **In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics**.[5]

It is these insidious litigation tactics by the government that have led to numerous contempt proceedings[6] and our calls in 2001 for a receivership. Let me be clear on this point, the record amply supports the conclusion that the Interior Department does not have the political will or the institutional competence to reform itself. A receiver – temporarily appointed during the pendency of reform – with the requisite competence and charged with, and singularly focused on, instituting reforms that permit the safe and sound management and administration the Individual Indian Trust is, in my view, the sole way to **ensure** reform will occur.

But I also understand that the government is highly resistant to the receivership approach and has called it a "non-starter." So while plaintiffs will continue to pursue this relief, among others, through judicial proceedings, I understand that this is not likely an acceptable avenue to attain the requisite political support for settlement legislation. It is with this baseline

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[5]*Cobell v. Norton*, __ F. Supp. 2d __, 2005 WL 419293 at *7 (D.D.C. February 23, 2005) (emphasis added).

[6]While plaintiffs would prefer not to have to resort to contempt, we have been left with no alternative in light of the government's persistent violation of court orders and other serious misconduct. In addition, we note, that we have offered to drop all contempt charges if the government would agree to stop its obstructionist behavior and consent to a prompt accounting trial date. To date, the government has not accepted this offer.

understanding that we propose certain other alternatives ways that may lead to successful trust reform. These alternatives will not ensure success like a receiver would. But a proposal that contains at least these measures **may** be sufficient for reliable and meaningful reform.

ELEMENTS OF AN APPROPRIATE TRUST REFORM APPROACH

Often times, Interior Department officials come up to Congress and discuss the Individual Indian Trust as if it is not fixable. They complain of the enormity of the problem and they speak of the challenges involved. We hear excuse after excuse as to why they have not brought themselves into compliance with the most rudimentary and basic fiduciary duties.

What belies their contention that reform is impossible or near impossible is that there are millions of trusts managed in the private sector all over this Nation that do not have these problems and do not suffer from malfeasant management. To be sure, this system has not evolved into a gold standard for mismanagement overnight, it is the result of a century of fraud, corruption and institutional incompetence that has enriched many, but left the Indian owners poor. Contrary to the pleas of government officials, however, the cure need not be decades away.

To achieve real and meaningful reform requires certain fundamental changes that must be made immediately. If one compares the mismanaged Individual Indian Trust with any other trust in the United States, certain observations are easily discernable. There are baseline elements that the Individual Indian Trust lacks which are elements of all other trusts. Moreover, the lack of these elements perfectly explains why the Individual Indian Trust is so profoundly mismanaged and wholly lacks accountability.

In all other trusts, there are, among other things: (1) clarity of **trust duties** and standards;

(2) clarity regarding the complete **enforceability** in courts of equity of trust duties and clarity regarding the availability on **meaningful remedies** against a trustee breaching its responsibilities; and (3) **independent** oversight with substantial enforcement authority to ensure that beneficiary rights are protected. The Individual Indian Trust, by contrast, does not have these elements.

These commonplace elements in other trusts ensure accountability and make it impossible for trust to deteriorate to the extent the Individual Indian Trust has. Their absence ensures no accountability and permits the trustee to abuse the beneficiary with impunity. What possible incentive is there for a trustee to manage trust assets safely and soundly and for the best interests of the beneficiary, if it is near impossible to hold them accountable when they mismanage?

Reform must, at a minimum, bring the Individual Indian Trust in line with all other trust by addressing these three missing elements. Duties must be stated expressly in statute. Congress must clarify that Indian beneficiaries, like all non-Indian trust beneficiaries, can bring an action to enforce **all** trust duties in courts of equity. And Congress must provide for effective oversight.

This is the bottom line: **We know that the Congress of the United States is serious about trust reform. To be effective, these three elements must be included in any legislative effort**. Otherwise, Congress too will be part of the problem, not part of the solution, and equally responsible for the continuing victimization of Indian people through the abusive and malfeasant management and criminal taking of our property.

Mr Chairman, we do not state the choice before Congress is such stark terms lightly. Unfortunately we have already experienced in real and profound ways the impact of when

Congress takes action that undermines rather than furthers the goal of a fair resolution. As you are well aware, one example of problematic legislative action occurred in the late Fall of 2003, when Congress enacted the Interior Appropriations Act, P.L. 108-108. That law included a provision, commonly called the "Midnight Rider" that you opposed. The Midnight Rider was so dubbed because it was not vetted through the authorizing committee of jurisdiction – this Committee and the House Resources Committee – rather it was hastily snuck in to a conference committee report directly prior to enactment.

The Midnight Rider is a prime example of why legislating on an appropriations bill is folly. While one of the stated purposes of the Rider by its sponsors was to provide a "time out" so the appellate court could review the trial court's decision requiring a historical accounting be performed, the actual effect was to negate the appellate court's ability to review the historical accounting part of the structural injunction decision altogether. Specifically, the December 10th appellate decision held that the Midnight Rider temporarily "removes the legal basis for the historical accounting elements of the injunction."[7] By Congress' doing so, the appellate court could not review the trial court's historical accounting duty until after the Rider expired on December 31, 2004.

Rather than expedite resolution of this case, the Midnight Rider caused serious and irreparable delays. It is not an overstatement to suggest that the Midnight Rider delayed this case and relief for the plaintiff class for no less than three years. In this instant, Congress was not a force for resolution, but provided justification for delay and recalcitrance.

There are a couple of important lessons that can be gleaned from this experience with the

[7] *Cobell v. Norton*, 392 F.3d 461, 465 (D.C. Cir. Dec 10, 2004).

Midnight Rider. First, when Congress acts it must do so carefully. Hastily drawn riders without proper review through appropriate committees and hearings can have unintended consequences that dramatically impact the lives of people – here, 500,000 individual Indians. Second, while the Court of Appeals clarified that the Midnight Rider was constitutional, that was so only because of the temporary nature of the rider. Had the Rider completely eliminated the duty to account, it would have violated the Fifth Amendment Takings clause.[8] Third, and perhaps most importantly, the appellate court acknowledged that Congress had some authority to address the accounting issue through legislation, but that it was obligated to "assur[e] that each individual [beneficiary] receives his due or more."[9] Put another way, any legislative alteration of the accounting duty that does not provide each beneficiary "his due or more" would necessarily be a taking of that individuals' property and, hence, constitutionally infirm.

The point is, we believe that with your involvement, Congress will play the important role as the primary agent of fair resolution. To do so, we believe certain base level reforms outlined below in greater detail must be part of the trust reform settlement legislation.

1. Restatement Trust Duties

It is axiomatic that one cannot ensure fulfillment of duties unless there is clarity, in the first instance, as to which duties are applicable. Because of the lack of clarity and uncertainty regarding enforeability of trust duties, even when the government plainly breaches its trust duties – as in this case – litigation can drag on for years. The argument – as in *Cobell* – does not center around whether the government's conduct meets ordinary fiduciary standards, but whether they

[8] *Id.* at 468.

[9] *Id.*

must meet those standards, or alternatively, even if they do not meet the standards, can the courts order appropriate redress.

In the *Cobell* case, for example, the government has long admitted that they have never performed an accounting – not for one transaction for one beneficiary, even though it is well-settled that the accounting duty is the most central of trust duties. In fact the leading treatise states in unequivocal terms: "If the settlor attempts to eliminate any accounting duty of the trustee, by providing that it shall not be necessary for his trustee to account to anyone at any time, it would seem that the clause should be invalid and the duty of the trustee unaffected."[10] Simply put, a trust without an accounting duty is considered a contradiction in terms.[11]

Despite the clarity of this common sense rule, the government nevertheless argued, for six years, that they did not have to provide us the accounting we sought. In turn, we were forced to spend the first six years in litigation establishing a proposition presumed for any other trust. Not until the appellate court held that indeed defendants must account for all assets in February 2001 was this issue settled.[12] Such costly and time-consuming litigation would not occur in cases involving any other trust, because it is clear that a trustee owes a duty to account, along with all other ordinary fiduciary duties. Such uncertainty and concomitant cost are only suffered by Indian beneficiaries. This is true even though courts have ruled time and time again, as they did in *Cobell* that they "'must infer that Congress intended to impose on trustees **traditional**

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[10]Bogert, The Law of Trusts & Trustees (rev 2d ed), § 973, pp 462-464, 467

[11]*Id.* ("A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself."). *See also, e.g., Wood v. Honeyman*, 178 Or. 484, 566, 169 P.2d 131, 166 (1946) "We are completely satisfied that no trust instrument can relieve a trustee from his duty to account in a court of equity.").

[12]*Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001).

fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.'"[13]

With the uncertainly comes a lack of accountability. The Justice Department is well aware that even where the conduct constitutes patent mismanagement, they can argue that those duties are inapplicable to Indian trusts. Perhaps they will find a court to agree with them and prevent beneficiaries from achieving appropriate redress. At a minimum, Justice Department counsel can drain the resources of Indian litigants by arguing each point of law for years, often decades. The result is plain: unabated abuse and malfeasance without amelioration.

But there is an answer. Any settlement legislation must state in express terms the specific duties that apply to Indian Trust. Uncertainty will be eliminated. Enforceability will be enhanced and Interior officials confusion – feigned or otherwise – as to the applicability of ordinary fiduciary duties will be eradicated. Moreover, such legislation should make clear that those duties normally applicable to trust, apply with equal force to this trust, even though the beneficiaries are Indians. Discriminatory distinctions will become a thing of the past. If the trustee-delegate can demonstrate with specificity the need to depart from the ordinary trust duties, the reasons should be articulated with particularity and departures from ordinary principles should be narrow.

2. Express Cause of Action

Clarified duties alone are insufficient. In addition, Congress must clarify that Indian beneficiaries, like all other beneficiaries of trusts, can hold accountable their trustee in courts of equity. It is worth repeating, it is not an accident that the trustee with the absolutely worst record for mismanagement – our trustee – is a trustee that is difficult to hail into court when it

[13]*Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001)(emphasis added) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981)).

mismanages assets of a beneficiary. It is wholly predictable. All other trustees – even those created statutorily such as ERISA trustees, can be easily sued when they breach responsibilities and court's of equity can grant any appropriate relief.

But consistently in Indian trust cases, the government is able to tie up litigation by raising jurisdictional questions and issues as to whether the courts can grant the type of relief available to any other beneficiary of any other trust. By clarifying a cause of action and stating that normal equitable remedies are available to Indian beneficiaries – like they are to non-Indian ones – Congress will eliminate uncertainty and secure accountability.

Coupled with clarified duties, Indian beneficiaries will finally begin to approach the position that all non-Indian trust beneficiaries take for granted. Conversely, without such basic legal reform, Indian beneficiaries will continue to suffer abuse at the hands of a discriminatory system that permits their trustee – and their trustee alone – to abuse them with impunity.

3. Independent Oversight

As you know, Mr. Chairman, I am a banker by trade. I cannot begin to tell you how much regulation there is for me and other bankers when we hold other peoples' monies in our institutions. You well know the extent of oversight by regulatory bodies such as the Office of the comptroller of the Currency (OCC). Such oversight whether it be the OCC or the Securities & Exchange Commission (SEC) is vital to ensure that when one entity manages or administers a persons' assets – even in the non-trust context – they do so with care and pursuant to well-established rules.

Indeed, whenever any institution manages an American's assets, it is regulated – bar one. There is no entity that regulates or oversights the Department of Interior's management of the

Individual Indian Trust. In that context, is it any surprise that this trust is so poorly managed? Of course not.

In order to ensure that the Interior Department abides by ordinary rules and operates pursuant to best practices, there must be oversight. That oversight must be independent of the Department itself – and cannot – like the Office of Special Trustee – be under the control of the Secretary of Interior. That oversight body must also have real authority and, at a minimum, have cease and desist powers – like other oversight bodies do.

Mr. Chairman, these three elements are not a finite list, but they are necessary conditions to reforming this trust. What I have stated hear, moreover, is in outline form, and we look forward to working with you and other members of this Committee to fill out the details. But let me reiterate that without these three elements we will not achieve meaningful reform.

HOW TO PROCEED

Mr. Chairman, I understand that this is the first hearing on these issues and that there are many interested stakeholders in how reform occurs. I want you to know that we and our attorneys are committed to working with you and this Committee as well as tribal leadership to achieve reform in a manner acceptable to all. I am also pleased to note that the reform principles I discussed above are the same ones that have received widespread support by tribal leaders. And indeed, irrespective of those enduring forces that are always attempting to divide and conquer Indian Country, it has been my experience that we in Indian Country share widespread agreement of the vast majority of issues concerning trust reform.

Through the leadership of NCAI President Tex Hall and ITMA Chairman, Chief Jim Gray, we will participate in the working group that will seek to derive a consensus approach to

addressing trust reform and resolution of the *Cobell* case. It is my firm belief that if Indian Country comes together in this manner along with your staff, we will be able to take this opportunity to achieve proper reform and formulate a fair settlement of the *Cobell* case.

We are also pleased that President Hall has recognized our role in evaluating the fairness of any settlement proposal. As he stressed not so long ago in the "Guiding Principles of the Settlement Process," a settlement process must be acceptable to the *Cobell* plaintiffs and must "provide for judicial review and fairness."[14] We agree with this approach.

CONCLUSION

Mr. Chairman, let me conclude by reiterating the plaintiffs commitment to resolving this case. We have vigorously pursued litigation because we want resolution. We do not care if achieving fairness and stopping abuse of individual Indian beneficiaries comes through litigation, mediation or a settlement act, or arbitration for that matter. The means are unimportant. What is important is that we do so quickly and fairly.

I will leave you with the following passage from a report commissioned and prepared for Congress some years ago:

> In the first place the machinery of government has not been adapted to the purpose of administering a trust.
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> On the other side, behind the sham protection which operated largely as a blind to publicity, have been at all times great wealth in the form of Indian funds to be subverted; valuable lands, mines, oil fields, and other natural resources to be despoiled or appropriated to the use of the trader; and large profits to be made by those dealing with trustees who were animated by motives of gain. This has been the situation in which the Indian Service has been for more than a century – the Indian during all this time having his rights and properties to greater or less extend neglected; the guardian, the Government, in many instances, passive to

[14]Testimony of Tex G. Hall, NCAI Testimony on Potential Settlement Mechanism for *Cobell v. Norton*, Senate Committee Indian Affairs July 30, 2003 at 1, 4.

conditions which have contributed to his undoing.

> And still, due to the increasing value of his remaining estate, there is left an inducement to **fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension**.[15]

As you can see from the citation, this is a report from 1915. They knew back then of the "fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension." I can show you similar findings in reports from the 1920s, 30s, 40s 50s, all the way up to present – not least of which is the 1989 Report of this Committee that also found similar fraud and corruption. When and how will this criminal administration of our trust property end?

We have a chance right now to stop this **"**fraud, corruption, and institutional incompetence." With help from this Committee, we can make sure that the abuse present in 1915 is not still present in 2015 and Indian children will not suffer the indignities and abuse of their parents and grandparents.

We look forward to working with you and tribal leaders on this important issue.

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[15]"Business & Accounting Methods, Indian Bureau," Report of the Joint Commission of the Congress of the United States, 63rd Cong. 3d Sess., at 2 (1915) (emphasis added).