UNITED SOUTH AND EASTERN TRIBES, INC.
711 Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214
Telephone: (615) 872-7900 • Fax: (615) 872-7417

TESTIMONY OF KELLER GEORGE, PRESIDENT

UNITED SOUTH AND EASTERN TRIBES, INC. (USET)

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS
AND
THE HOUSE RESOURCES COMMITTEE

On the Settlement of *Cobell v. Norton*

MARCH 1, 2006

Chairmen McCain and Pombo, Vice-Chairman Dorgan, Ranking Member Rahall and distinguished members of the Senate Committee on Indian Affairs and House Resources Committee:

My name is Keller George. I am President of the United South and Eastern Tribes, Inc. (USET) and USET representative from the Oneida Indian Nation. On behalf of its 24 member tribes, USET has closely followed the *Cobell* case over the past ten years and the Department of Interior's (DOI) subsequent reorganizationS. Along with USET Executive Director James T. (Tim) Martin, I represented the tribes of the Bureau of Indian Affairs (BIA) Eastern Region on the DOI/Tribal Trust Reform Task Force (Task Force). USET has testified on trust reform matters several times, most recently in July 2005 to provide preliminary comments on S. 1439.

I thank your Committees for the opportunity to testify on this topic again. USET member tribes believe strongly that Congress must resolve the *Cobell* Indian trust litigation. Congress must do so fairly and it must do so now – not only for the individual beneficiaries but also for the sake of tribes and the protection of the trust relationship.

After ten years of litigation, the *Cobell* class action litigation has exposed an extensive history of federal government mismanagement of the Indian trust. For over a hundred years, the federal government failed to properly account for individual Indians' trust funds. The loss and destruction of trust records has made an historical accounting with any prospect of accuracy impossible. It is clear, however, that the amount owed to the class of individual Indians runs into the billions of dollars.

Without Congressional involvement the *Cobell* case could go on for many more years - leaving many beneficiaries to pass on without seeing any of the funds that are rightfully theirs and tending to enrich attorneys rather than claimants – this alone is cause enough for immediate

Congressional action. But it is also the destructiveness of the DOI's response to the *Cobell* lawsuit that has demanded USET's active engagement in trust reform and that compels our testimony here today. USET calls upon your Committees to mobilize this Congress to act now to protect the rights of tribes, beneficiaries, and most of all, the trust relationship.

Blaming the *Cobell* lawsuit for the need for reform, the DOI has for years been involved in costly and numerous reorganizations that have gutted the BIA and reconfigured the Office of the Special Trustee (OST) into a trust-focused organization that does not listen or answer to tribes. Any new funding for the trust relationship has served only to expand the Office of the Special Trustee's (OST) bureaucracy. The DOI has stripped away scarce BIA resources from programs for essential governmental and life-sustaining services that are relied upon by the tribes and individuals. DOI has redirected those funds to pay for the mismanagement of the trust and costs associated with the *Cobell* case. DOI continues to carry out these activities without meaningful tribal consultation or involvement.

The DOI's willingness to use program funds to pay for trust related issues was illustrated in the worst way in late January when the DOI took $3 million from BIA programs to pay a portion of a $7 million dollars attorney fee award that the *Cobell* Plaintiffs' received from the court. This latest shift of resources away from BIA programs is alarming to USET member tribes and represents a new low for the DOI in the case. USET passed a resolution at our annual "Impact Week" meeting last month urging DOI to seek a supplemental appropriation to restore funding to programs affected by the attorney fee payment. I have attached a copy of that resolution for the record.

But the problem is not just about the DOI's pilfering of program funds to pay for attorney fees and the infrastructure to better manage the trust, it is also about the DOI's systematic efforts to further limit the United States' trust responsibility administratively and legislatively. Over the past few years the DOI has fought hard to limit to the greatest extent possible the United States' liability on all fronts. For instance, the DOI has been directly involved in this Administration's efforts not to support Indian legislation that does not specifically limit the trust relationship and the United Sates' liability. The Administration's inaction on the tribally-proposed amendments to Title IV of the

Indian Self-Determination Act is but one example. Most recently, the DOI announced a Regulatory Initiative in which the agency proposes to revise over 200 pages of regulations that impact Indian lands. It is no surprise to USET or others who have been following these issues that many of the proposals seek to significantly limit or even eliminate the United States' liability.

The DOI's actions have made USET member tribes very concerned about the serious negative impacts that a continuation of the *Cobell* case will have on Indian affairs in the short and long terms. Keep in mind that the relief sought in this case is for an accounting, not money damages. Continuation of this litigation for 10-15 more years may be valuable for accountants and attorneys, but may provide limited or no financial recovery for individual beneficiaries. Moreover, individual beneficiaries will suffer as funding and services for Indian programs are reduced. Even if class members benefit from a financial settlement in the next decade, this victory will be empty indeed if at the same time the trust relationship is eroded legislatively and administratively to such an extent that it becomes practically meaningless.

USET's member tribes urge your Committees to seize the opportunity to settle the *Cobell* case now and reform the DOI's administration of trust related functions by acting on S. 1439 and H.R. 4322 this session.

USET previously testified in July 2005 in support of the legislative framework for resolving these issues offered by Senators McCain and Dorgan in S. 1439. USET also submitted detailed comments on S. 1439 and H.R. 4322 in December 2005. Since then USET has engaged in extensive analysis and consultation with the leadership of the Affiliated Tribes of Northwest Indians (ATNI) regarding our views on the two bills. Those consultations have been fruitful and I'm honored to tell you today that USET and ATNI have reached agreement on a joint proposal. With my written testimony, I have attached USET and ATNI's draft recommendations for modifications to S. 1439 and H.R. 4322. USET and ATNI's joint recommendations draw from our member tribes' commitment to support your efforts to resolve the *Cobell* lawsuit and to refine the bills' proposed institutional reforms so that we can embark on a new era of trust relationships that is driven by and responsive to the beneficiaries of the trust – the Indian tribes.

I will take a few minutes to highlight a few key issues that the USET-ATNI proposal addresses:

Title I.

This Title covers settlement of the *Cobell* case and includes a section that will specifically identify an amount that will be made available to settle the case. Ideally, it would be up to the parties to agree upon a settlement amount. Here, the parties to the case have vastly different views about the amount at stake and mediation efforts have failed to bring them any closer together on this critical question. Therefore, identifying a fair and politically acceptable settlement amount is critical for the success of this legislation. USET and ATNI are not in a position to propose what that amount should be, but the next panel should provide you with a basis to identify an appropriate settlement amount. We believe that the Committees are in the best position to identify a fair and politically acceptable amount to be inserted in this Title and we urge you to do so before the next version of this legislation is produced.

The USET-ATNI proposal also calls for settlement funds to be authorized and appropriated over a number of years to maximize the settlement's impact in Indian Country over time and to make amounts available immediately so that elderly, ill and impoverished beneficiaries can better meet their needs.

Title II.

Trust reform is a complex matter with significant implications for the federal government, Indian tribes and individual Indian beneficiaries. For this reason, USET and ATNI support the Policy Review Commission created by Title II of the bills. Additionally, we believe the bills must further delineate the Commission's duty to review and assess DOI practices related to trust management and administration, particularly with respect to the DOI's bifurcation of responsibility at the local field office level. By "stove-piping" its lines of accountability and decision-making authority between trust and non-trust functions, DOI has created inefficiency and duplication in the

administration of its trust responsibility. I urge your Committees to respond to tribes' call for a single point of decision-making authority and accountability at their BIA field office by expressly designating this issue as one for further review by the Commission.

Title III.

The tribal trust asset management demonstration project contained in Title III is strongly supported by USET and ATNI member tribes. The bottom line is that Indian self-determination works and it can work well in the context of managing trust assets. The tribes' greater authority to determine how best to deliver program services to their members has resulted in better – and more – services being provided. USET is confident that management of trust functions will benefit from this demonstration project. Moreover, we expect it will foster an array of best management practices to be utilized for the wide range of trust resources managed in Indian Country. To fully achieve these objectives, however, USET and ATNI believe several aspects of Title III require reconsideration and revision.

First, the procedural terms for the approval, disapproval and appeal of trust asset management plans must be made consistent with the same procedural terms that apply for contracting or compacting under the Indian Self-Determination and Education Assistance Act. For instance, in the bills a management plan is deemed disapproved absent Secretarial approval. By contrast, under the Self-Determination Act, a tribal proposal is deemed approved if the Secretary does not act within the statutory time frame. Additionally, judicial review of the Secretary's disapproval of a plan in these bills requires exhaustion of administrative remedies and Administrative Procedures Act review (which gives deference to the agency). By contrast, the Self-

Determination Act provides for immediate judicial review and places the burden of proof on the Secretary.

Second, the bills should set some targets and/or criteria whereby the demonstration project may be evaluated and through which resource-specific standards will be established. Standards must be developed in a manner that allows for flexibility, reflecting the diversity that exists among tribes as well as the diversity among the resources – both of which the Secretary has a trust responsibility to safeguard. USET and ATNI support the demonstration project for respecting this diversity and allowing tribes to establish best management practices that can be reinforced and replicated. In order to assure that the demonstration project benefits all tribes, however, the legislation must establish mechanisms for disseminating these best practices and codifying resource-specific standards.

Third, as drafted, the demonstration project lacks a mechanism for reporting results to the Congress. The joint USET-ATNI proposal requires the Secretary to present Congress with an annual report on the demonstration project (to be submitted to tribes for their comments) that would serve as a basis for an annual oversight hearing.

Title IV.

USET and ATNI support the manner in which the proposed legislation would expand the voluntary buy back program for highly fractionated shares by permitting the purchase of shares at greater than fair market value. USET and ATNI urge that substantial funding for the program be

made available so that this process can reverse the devastating policy introduced through the Allotment Act by restoring tribal trust lands.

Title V.

By elevating the Assistant Secretary-Indian Affairs to the position of Under-Secretary and eliminating the OST, the legislation should improve coordination of trust activities within the DOI and establish decision-making authority and accountability under one executive authority. Yet, the devastating effect introduced by the DOI's transferring operational functions to the OST will not be resolved simply by eliminating that office. Not only must OST be eliminated, but the legislation must also reverse the costly and duplicative stove-piping that DOI has caused by splitting authorities at the local level between staff that perform Indian trust functions and staff that perform Indian program functions. The legislation should require that the Indian trust and Indian program functions of the BIA be reconsolidated at the field office level.

USET and ATNI also urge the Committees to establish legislative terms for improved accountability and oversight of the DOI's performance of trust duties. The *Cobell* lawsuit has served as the impetus for important DOI reforms and the settlement of the case should not be the end of independent review of DOI performance. Rather, a more systematic monitoring and policing role is needed to assure that reforms identified through this legislation and the recommendations issued by the Policy Review Commission (established in Title II) are given effect by the DOI.

USET and ATNI also believe that the bills should establish a new Assistant Inspector General for Indian Trust to carry out investigation and audit responsibilities associated with the

DOI's implementation of the trust responsibility. This proposal does not require the creation of a new executive agency or charging another agency with policing of the DOI. Rather, the proposal utilizes the DOI's existing accountability mechanism to ensure that the DOI is acting consistent with its fiduciary trust responsibilities.

Before closing, let me stress USET's view that all the reform in the world will not improve trust asset management and administration unless those functions receive adequate funding. DOI vacancies and under-staffing, particularly in BIA offices responsible for the implementation of trust activities, demonstrate why the DOI has failed to meet its trust obligations. USET is committed to working with you to assure that DOI budget requests do not cut funding for programs essential to carry out Indian programs and the trust responsibility.

USET member tribes stand with you in your efforts to seek a resolution of the *Cobell* lawsuit and to implement needed reforms for the DOI's administration of trust functions. The choices that we face today are clear: millions more can be spent on litigation and an accounting that likely will tell us little more than we already know while the trust relationship continues to erode, or legislation can be enacted that settles the lawsuit in a fair and equitable manner and that implements much needed reform on the DOI's management of trust resources. USET member tribes strongly believe that the second choice is by far the better option.

Thank you for the opportunity to share USET member tribes' views on these critical issues. I would be glad to answer any questions that you may have about USET's views on the settlement of the *Cobell* lawsuit or with respect to other titles of these