

Intertribal Monitoring Association on Indian Trust funds

TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

ON

TRUST REFORM

MARCH 9, 2005

SUBMITTED BY THE INTERTRIBAL MONITORING ASSOCIATION

Good morning, my name is Jim Gray, I serve as both the Principal Chief of the Osage Nation and the President of the Intertribal Monitoring Association (“ITMA”). I appear today to provide testimony in my role as ITMA President, but I would be pleased to answer any questions the Committee may have about the unique trust systems that apply to Osage Nation trust resources.

The ITMA would like to thank Chairman McCain and Vice-Chairman Dorgan for holding this hearing and for inviting ITMA to participate. It is ITMA’s understanding that Chairman McCain has made settlement of *Cobell v. Norton* and trust reform one of his highest priorities during his tenure as the Chairman of this Committee. ITMA applauds and thanks the Chairman for his commitment to seek solutions to this difficult subject. ITMA appreciates the opportunity to play a role in this process and support this worthy effort.

There is a widespread view that Congress and both sides of the *Cobell* lawsuit are sufficiently fatigued by this litigation and there is some basis for hoping that a settlement can be reached and approved by Congress. Based on that belief, there is also hope that the time may be ripe to enact comprehensive trust reform legislation during the 109th Congress.

If Congress does not enact trust reform legislation, the Department may interpret this as a tacit endorsement of its “To-Be” trust reform effort and the Department’s decision to continue to expand the Office of Special Trustee (“OST”). ITMA can assist the Committee with its effort to decide whether it wishes to proceed with trust reform legislation or allow the field to be occupied by the Department’s ongoing efforts.

ITMA can provide this assistance to Congress because it can draw from the collective knowledge of at least 60 individual tribal governments that represent the breadth and width of the trust reform issues and experience. In addition, ITMA has been a direct participant in both inter-tribal efforts to develop trust reform proposals as well as recent Federal-Tribal efforts to reach a consensus on these matters. Finally, and we believe most importantly, ITMA as an organization has undertaken an exhaustive effort to go out into Indian Country to meet with the beneficiaries of the Federal trust obligation. We have and continue to gather and analyze this important testimony to guide both ITMA’s consideration of trust reform and to make this information available to Congress.

Based on this knowledge and experience ITMA would like to make the following general observations concerning trust reform. Based on these observations this testimony will address the alternatives available to Congress.

I. General Observations

First, ITMA believes that Congress should determine the manner and direction of trust reform. Only in the absence of Congressional action should by the Executive branch lead the way. It is very likely that Federal courts will only address discrete issues related to the Federal government’s trust obligation but not the direction or the overall character of trust reform. In fact, the recent Court of Appeals decision in *Cobell* recognizes this. Indian tribes certainly prefer

a future where they work directly with this Committee and the House Resources Committee to structure meaningful trust reform.

Second, in light of its trust responsibility to Indians and its trust relationship and responsibility to Indian Tribes, Congress should make every effort to enact trust reform legislation that seeks to hold the Federal government to the highest fiduciary standards applicable to a trustee. Any legislation should also be mindful of the Federal government's enlightened policy of Tribal self-determination.

Finally, at least until Congress has successfully enacted effective trust reform legislation, Congress should take steps to ensure that IIM account holders and Tribal governments have a strong voice and some affirmative means for monitoring and participating in the Department's ongoing reorganization.

II. Enacting Legislation During the 109th Congress

The first question this Committee must address is whether it wishes to enact trust reform legislation. The ITMA strongly encourages the Committee to do so. While the 1994 American Indian Trust Reform Act ("Act") provides some direction, the passage of time has rendered some of the Act's provisions obsolete. For example, the Special Trustee was originally intended to be a temporary position. There is no indication that either that position or the OST bureaucracy is in any way temporary. Quite the contrary is true. Tribal leaders fear the BIA's demise while the OST flourishes in terms of budget and growth. In our listening conferences, we have heard repeated concerns that the OST is distant and unresponsive to individual Indian and Tribal concerns. The question of whether, and if so how, the OST should occupy this large a role should be the subject of an informed Congressional decision rather than simply the absence of action.

The growth of the OST and the permanence of the position of Special Trustee is only one of the issues that can only Congress can decide.

III. Elements of Trust Reform Legislation

ITMA notes that this hearing is by no means Chairman McCain's first effort to contribute to the dialogue on this topic or the effort to achieve meaningful reform of the trust management system. In recent years, Senator McCain has introduced several legislative proposals to raise issues and to ensure that Congress seriously considered any compromise proposals that emerged from the Trust Reform Task Force ("TRTF") that was formed in 2002. ITMA also notes that each of these legislative proposals was a bi-partisan effort to bring about trust reform.

ITMA believes that most or all of the essential elements of an effective trust reform framework can be gleaned from the following sources:

1. The work of the TRTF;
2. The bi-partisan legislation I referred to previously; and
3. By an honest effort, led by this Committee and its House counterpart, to engage with tribal governments and IIM account holders.

I would like to briefly address each of these sources.

The Trust Reform Task Force

The TRTF represented a significant commitment of time and resources by tribal leaders. While this process did not result in a consensus between the tribal representatives and the Department, it did define a number of elements of comprehensive trust reform. More importantly, it sharply defined the points of disagreement between Indian Country and the Department over the extent and nature of trust reform. Some of these differences Congress can only resolve. For example, while there was a consensus on the idea of establishing a more consolidated line-of-authority for Indian trust resources, there was no agreement on what steps should be taken to ensure that Interior agencies other than BIA and OST would be included in

this structure. It seems only logical that all Department of Interior employees who are responsible for Indian trust resources should be at least presumptively included.

Previous Legislation

As I indicated previously, Chairman McCain's legislation from the two previous Congresses includes many fundamental and essential elements for trust reform. These elements include a strong recognition and commitment to self-governance and self-determination. These bills also include clear direction to the Department that define the government's obligations as trustee. Many of these directions are the most common-sense responsibilities imaginable, such as the need for accurate, periodic account balances. If there is any resistance to the enactment of these common sense requirements, this only shows how great the need is for this Committee to act.

Listening to IIM Account holders and Tribal Governments

ITMA has already begun the work of engaging Indian Country in a serious and important discussion about the direction that trust reform must take. This Committee has always been the place where such views would receive a receptive and supportive audience. I would like to provide a summary of some of the emerging issues that have been raised in ITMA's seven listening conferences in Oklahoma, North Dakota, Oregon, Montana, Wisconsin, and Arizona. This is not intended to be an exhaustive listing and we would appreciate the opportunity to continue to work with the Committee as we continue to obtain and analyze this important testimony. These observations include the following:

- * IIM account holders and allottees are becoming more sophisticated and more interested in the management of their trust resources, especially land and mineral resources. Yet the BIA still labors under an organizational structure and

policies and procedures that belong in a era where Indian ownership was much more passive. While trust beneficiaries do not reject the idea of a trust relationship, they do demand that the BIA, especially the local offices, have the staff, training and resources to assist them with identifying their interests, providing records, appraisals and other support services in a timely fashion.

* Trust beneficiaries also have the right to demand immediate action to prevent the improper or unauthorized use or exploitation of their trust resources, especially trespass.

* There is a widespread belief in Indian Country that the BIA needs to recognize that it must be accountable to the trust beneficiaries and not to the individuals who lease or develop those resources.

* Finally, as trust beneficiaries become more involved in the management of their on-reservation assets, they recognize that it is wasteful, impractical and inefficient to hold some of these assets in trust status and others in fee. In response, they frequently apply to have some assets returned to trust status. But they frequently encounter strong resistance, delay and sometimes even opposition from the Department.

Because ITMA funding is derived from the general trust reform line item, it is impossible for our organization to make any plans that extend beyond the current fiscal year. As a result, ITMA must scramble to organize meetings once our funding level is determined. We believe that Congress should address this issue by providing a specific line-item to underwrite ITMA

activities. This would also remove the temptation to use ITMA's need for Federal support as a method to retaliate against ITMA for any constructive criticism it makes about trust reform.

With respect to Indian tribes, ITMA is working directly with its member and also non-member Indian tribes that are interested in both trust reform and developing a process for resolving tribal claims for losses to or mismanagement of trust resources. With respect to the resolution of tribal claims, ITMA believes that both federal and tribal interests are served by the creation of a voluntary process for settling claims. ITMA is working diligently to develop such an alternative process, especially for those tribes that do not have the resources to commit to initiate or sustain a lawsuit against the federal government.

ITMA is also committed to act as a facilitator in inter-tribal discussion and through its work with inter-tribal organizations with general mandates, like NCAI, as well as those entities that are organized around specific resources, such as the Council of Energy Resources Tribes and the Intertribal Timber Council. As President Tex Hall indicated, part of this effort includes ITMA's willingness to serve and participate in a Special Committee to work with all interested and engaged Indian tribes to provide this Committee and the House Resources Committee with as much direction as possible directly from Indian Country.

As a starting point for developing a working relationship with Indian Tribes and account holders, ITMA strongly encourages the Department to identify any known thefts and losses of trust resources, proceeds or royalties. There are still instances where one part of the Federal government has prosecuted crimes for such actions, while other parts of the Federal government denies that any theft or losses occurred. It is difficult to form a relationship built on trust in such a situation. Similarly, as long as the Department is, by its own admission, not in compliance with its own trust standards and obligations it is both inappropriate and unseemly for the

Department to collect administrative fees for its activities. At a minimum a fee collection moratorium should be either self-imposed or imposed by appropriate Congressional action.

IV. In the Absence of Trust Reform Legislation

In the absence of trust reform legislation Congress needs to fulfill its trust responsibility to the Tribal and individual holders of the beneficial title of trust resources by ensuring that strong, independent and adequately financed organizations can monitor and participate in the Department's trust reform activities. Without such oversight, Congress risks the repeated cycle of trust mismanagement and reform. ITMA is pleased to be a part of this important effort and with the support of this Committee, would like to continue to play this role.

I would like to thank the Chairman and Vice-Chairman for their dedication to this important, but difficult issue. I would be pleased to answer any of the Committee's questions.