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Testimony before the United States Senate Committee on Indian Affairs

Oversight Hearing on S. 1439, the Indian Trust Reform Act of 2005

July 26, 2005

Chairman McCain, Vice-Chairman Dorgan, and members of the Committee, thank you for your invitation to testify today. I would like to express my appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The National Congress of American Indians strongly shares the views of the leadership of this Committee that it is time for Congress to establish a fair and equitable process for settling the *Cobell v. Norton* litigation. Tribal leaders have supported the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting at the Department of Interior. At the same time, tribes are concerned about the impacts of the litigation upon the capacity of the United States to deliver services to tribal communities and to support the federal policy of tribal self-determination. Significant financial and human resources have been diverted by DOI in response to the litigation. The BIA has become extraordinarily risk averse and slow to implement the policies, procedures and systems to improve its performance of its trust responsibility. Perhaps most significantly, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Because of this, NCAI believes that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX-03-040.

I want to express my deep appreciation for your leadership in developing S. 1439, the Indian Trust Reform Act of 2005. This bill was introduced last week and we have had a short time to review it. The National Congress of American Indians has not developed an official position on the legislation, and I know that tribal leaders will want to have some time to study the bill and consider it carefully. I can tell you that tribal leaders are extremely interested in continuing to work on this legislation. We may have a ways to go in getting to a bill signed into law, but there is a lot that we like in this bill.

Title I – Settlement of Litigation Claims

The bill makes a good start with its findings that an accounting for individual trust accounts is impossible because of missing data and may cost billions of dollars to perform, and as a result it is appropriate for Congress to provide a monetary settlement in lieu of an accounting to the individual Indian account holders who make up the class action in *Cobell v. Norton*.

The bill would provide a lump sum settlement of "$[___],000,000,000." The bill does not say exactly what the settlement amount would be, but hints that it would be in the billions. Plaintiffs have indicated their view that $27 billion is the appropriate figure for settlement and I support that figure without reservation. The lump sum would come from the Judgment Fund, so it would not come at the expense of any other Indian program or account. We greatly appreciate that feature of the bill.

Personally I have strong concerns that the distribution of the settlement fund would be administered by the Secretary of the Treasury. The Treasury is one of the defendants in this case and there is simply a severe lack of faith among Indian people that the executive branch can be trusted to handle our money. The bill also would also allow the Treasury to take a percentage of the funds in administrative costs. This just seems wrong – they mishandled our money for decades and now we would have to pay them to return our money.

The bill indicates that the lump sum would be divided into two portions. One portion would be distributed per capita to all claimants regardless of the value of their account. The other portion would be distributed by a formula intended to measure the value of the accounts. The legislation directs the Secretary of Treasury to develop this formula taking into consideration the amount of funds that have passed through the IIM accounts in the period from 1980 to 2005. This provision of the legislation is causing considerable concern. We need some clarification that this time period is not intended to limit the time frame for the overall accounting, but to determine a relative distribution formula among claimants.

There is also a limitation in the bill that only account holder who held an account in 1994 or their heirs may make a claim. I understand that current account holders are generally the heirs of the original account holders, but there is some concern about person who may have sold their land prior to 1994. Have these people lost their right to an accounting? This also needs to be clarified.

If any claimant is dissatisfied with the settlement amount, they have the right to appeal but must give up any right to the settlement amount. That seems unfairly punitive. On the other hand we greatly appreciate the provision that any receipt of payments would not be subject to federal or state taxes and would not affect eligibility for any federal program such as Social Security or welfare.

The bill appears to meet some of the Trust Principles that we submitted to the Committee last month, particularly in that there is a lump sum settlement and that it is not taken from other Indian programs. However the legislation does not determine the final amount of the settlement, and we have a lot to do to create confidence that the distribution will be handled fairly.

Title II – Indian Trust Asset Management Policy Review Commission

This section would establish a commission to review all federal laws and regulations and the practices of the Department of Interior relating to the administration of Indian trust assets. After conducting the review, the Commission is to develop recommendations and submit a report to Congress on changes to federal law that would improve the management and administration of Indian trust assets. The Commission is to consult with Indian tribes, the Secretary of Interior, and organizations representing individual Indian owners of trust assets.

This part of the bill does not meet the goals of our Trust Principles to establish an independent body with true oversight authority, explicit trust standards and a cause of action in federal court for breach of those standards. I would definitely like you to take a harder look at this issue. Decades of trust reform efforts have produced little change in DOI's willingness to take corrective actions because the DOI believes its job is to ensure that the U.S. is never held liable for its failure to properly administer trust assets. For this reason, DOI is unwilling to put standards into regulations that would govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new understanding of DOI's role in Indian trust management.

The Commission appears to be modeled on the 1970's Indian Policy Review Commission, and for that reason we cannot dismiss it as an empty gesture. The Indian Policy Review Commission did phenomenal work because of its outreach to Indian Country and the credibility of its analysis. Its report led to some of the most important legislation in Indian affairs in U.S. history, including the Indian Finance Act, the Indian Health Care Improvement Act, the Indian Elementary and Secondary Education Act, the Indian Self-Determination and Education Assistance Act and the Indian Child Welfare Act. If this Commission is even half as successful it will be great for Indian Country.

If this Commission is created, Congress should consider making all of the appointments. The Executive Branch has had plenty of opportunities to develop policy on trust reform, and now it is time for Congress to exercise its oversight role.

Title III – Indian Trust Asset Management Project

This section would create a demonstration project where an Indian tribe may develop its own "trust asset management plan" that is unique to the trust assets and situation on a particular reservation. The plan would identify the trust assets, establish objectives and priorities, and allocate the available funding. Contracting and compacting tribes may identify the functions performed by the tribe and establish management systems, practices and procedures that the tribe will follow.

This is an area where I am sure we will need a lot more discussion with tribal leadership on the details, but I am very encouraged by the direction you are going. All over the country tribal governments are increasing their capacity to manage their reservations. Tribes are very interested in increasing their ability to make decisions about how the reservation lands will be managed and used for the long term benefit of their people because every reservation is unique and we know that we can do a better job at the local level.

Title IV – Fractional Interest Purchase and Consolidation Program

This section would amend the Indian Land Consolidation Act to expand the program for acquisition of fractionated interests. Fractionation of ownership exponentially increases the complexity and cost of federal administration, deprives Indian beneficiaries of the full benefit of their resources, and jeopardizes tribal jurisdiction over our reservations. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest. Management of this huge number of small ownership interests has created an enormous workload problem at the BIA. We believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system.

I strongly support the new incentives for voluntary sales of fractionated interests by allowing the Secretary to offer more than fair market value. Many interests are so small even if the owner wants to sell it is not worth the time to do the paperwork for a transfer. The bonuses make a lot of sense and they should greatly increase voluntary participation by landowners.

The bill has a provision for highly fractionated lands of more than 200 owners, where if the Secretary follows certain procedures, including notice by certified mail, the offer would be deemed accepted unless it is affirmatively rejected by the owner. I understand the rationale behind this provision, but it seems grossly unfair to landowners. Every one of us knows how easy it is to lose a notice at the bottom of a stack of mail, and for that the bill would take away a person's property. I think we can find a better system to achieve the same goal.

I very much appreciate the provisions that allow for settlement of any natural resource mismanagement claim although we can improve the details. And once again we strongly support that the bill provides that any payments that landowners receive under the land repurchase program would not be subject to state or federal income tax and would not affect eligibility for any programs including social security and welfare.

Title V – Restructuring Bureau of Indian Affairs and Office of Special Trustee

This title would create a new position of "Under Secretary for Indian Affairs" who would replace the Assistant Secretary for Indian Affairs. The Office of Special Trustee for American Indians would sunset on December 31st, 2008 and the functions of the Special Trustee would be transferred to the Under Secretary on the same date. The Office of Under Secretary would create a single line of authority for all functions that are now split between the BIA and the OST, and the Under Secretary would also have the responsibility to supervise any activities related to Indian affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service.

This title of the bill appears to meet many of the goals of our Trust Principles for reorganization, including the tribal priority of eliminating the Office of Special Trustee and creating a single line of authority. The creation of this position would address a major issue that has been raised in every significant study of trust management at Interior: the lack of clear lines of authority and responsibility within the Department to ensure accountability for trust reform efforts by the various

divisions of the Department of Interior. The two major entities currently responsible for trust assets and accounting are the Bureau of Indian Affairs and the Office of Special Trustee. The lines of authority, responsibility and communication between these two entities has been uncertain and has come into direct conflict. In addition, the Minerals Management Service, the Bureau of Land Management, and the U.S. Geological Service all play important roles in trust management, and various responsibilities are spread throughout the Office of Hearings and Appeals, the Office of American Indian Trust, and the Office of Historical Accounting. Finally, nearly every agency in the Department of Interior has some significant trust responsibilities. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies. This absence has particularly hurt the progress of those issues that cut across agencies, such as the development of a system architecture that integrates trust funds accounting with the land and asset management systems of the BIA, BLM and MMS (as required by the 1994 Act).

Once again, I think there is more we can do to improve this provision but it is a great step forward and Indian country greatly appreciates this provision. In particular we would like to visit the issue of making sure that the resources of the Department are not wasted on bureaucracy but are used to deliver services at the reservation level. The BIA has never been provided with an adequate level of financial and human resources to fulfill its trust responsibilities to Indian country. This chronic neglect of staffing and funding has contributed to dysfunctional management and financial systems at all levels of the BIA.

The 1994 Trust Reform Act provides that the Special Trustee is to review the federal budget for trust reform and certify that it is adequate to meet the needs of trust management. In practice, the Special Trustee has no independence, and simply certifies whatever budget is submitted by the Administration. Tribal leaders strongly supported the concept that an independent entity should have the job of reviewing the federal budget for trust management and provide an assessment to Congress of its adequacy. I believe this role may be more important than ever today, as the Administration moves to assess federal budgets under the Program Assessment Rating Tool (PART). We are going to have to show measurable result for trust programs, and we could greatly use an independent assessment of the appropriate ways to measure the effectiveness of trust asset management programs.

Title VI – Audit of Indian Trust Funds

This section would require the Secretary of Interior to prepare financial statements for individual Indian, tribal and other Indian trust accounts and prepare an internal control report. The section would also direct the Comptroller General of the United States to hire an independent auditor to conduct an audit of the Secretary's financial statements and report on the Secretary's internal controls. This title appears to meet the goals of our Trust Principles, and I believe that the details of the audit procedures can be refined and improved after more discussion with tribal leadership.

Conclusion

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into this bill and the trust reform effort. This is a tough issue and it will take strong leadership on all sides to get it resolved. If we maintain a serious level of effort and commitment, work to understand the viewpoints of all parties, and exercise leadership, we can

make informed, strategic decisions on key policies and priorities necessary to bring about settlement and true reform in trust administration.

As you know, I have served as Co-Chair of an Indian Country working group on this issue along with Chief Jim Gray, of the Osage Tribe and the Chairman of the Intertribal Monitoring Association (ITMA). As an attachment to my testimony I am including the Trust Reform and Cobell Settlement Workgroup Principles for Legislation that we developed and sent to you last month. We plan to continue to reach out to all tribes and all national and regional tribal organizations. ITMA is having a meeting later this week in Denver where we will work on the bill some more. We welcome and encourage participation at these meetings by all tribes and individuals who have an interest in the legislation.