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Testimony before the United States Senate Committee on Indian Affairs

Hearing on S. 1770

The Indian Money Account Claims Satisfaction Act of 2003

October 29, 2003

Introduction

Chairman Campbell, Vice-Chairman Inouye, and members of the Committee, good morning and thank you for your invitation to testify today. On behalf of the member tribes and individuals of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people.

We have been asked to provide our views on S. 1770, the Indian Money Account Claims Satisfaction Act of 2003. There are two ways in which this legislation can be viewed. If this is considered as an immediate legislative proposal that would be quickly passed by Congress, then we have a great deal of concern. This bill would give the federal government the ability to pick the panel of experts who would decide how much money the federal government owes while stripping the beneficiaries of protections they now enjoy as part of the class action litigation. Indian people simply could not trust such a proposal. However, the bill can also be viewed as an effort to put forward some key concepts for settlement and to create discussion that will push settlement forward. In that light, we welcome the bill because it could serve as a vehicle for Congress to establish a fair and equitable process for settling the *Cobell v. Norton* litigation.

As you know, tribal leaders have supported the goals of the *Cobell* plaintiffs in seeking to correct deficiencies in trust funds accounting. At the same time, tribes are concerned about the impacts of the litigation on the capacity of the United States to deliver services to tribal communities and to support the government-to-government relationship. We believe 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 an effective system for management of trust assets.

In July, I testified before this committee on *Cobell v. Norton* settlement options. At that time, NCAI set forth a set of principles for how a settlement process should be structured. Our testimony today will respond to S. 1770 in light of the principles set forth in our earlier testimony.

At the outset, I would like to make three points. First, tribal leaders urge Congress to put forward a serious settlement proposal that signals its willingness to shoulder the costs of settling the lawsuit without diminishing funding to support other Indian programs. Second, tribal leaders are concerned that S. 1770 in its current form feels like another quick fix. A real solution will require the parties to the litigation come to an agreement, and involve both Congress and tribal leadership. S. 1770 appears to set a settlement process in place without taking the time and effort to get "buy in" by affected interests. Third, the proposed settlement is limited to claims relating to historic accounting for individuals who either have current Individual Indian Money (IIM) accounts or who had such accounts open when the 1994 American Indian Trust Reform Act was passed. Congress should also address settlement of accounts for deceased account holders, support land consolidation as a part of the settlement to prevent the problems of trust administration from escalating due to fractionation, and support the funding necessary to implement a state-of-the-art trust management system and standards, so that these problems do not recur in the future.

Principles for *Cobell* Settlement

1) Involve all necessary parties in a conflict assessment to scope and frame the settlement process. The parties, the tribes, and the Congress all have a significant interest in a settlement that will address claims for monetary damages and correct deficiencies in trust administration. We strongly urge Congress to make appropriations for a contract with a

professional mediator to perform a conflict assessment among interested parties to the litigation. Our suggestion for appropriations language is attached. A conflict assessment is a well-established mechanism to assist parties in identifying goals and expectations for settlement and designing a structure for settlement discussions. The assessment should result in a report to Congress with recommendations on how to proceed with a settlement process. A conflict assessment would serve as a mechanism for all parties' interests in developing a settlement process, and allow for formal acceptance of a settlement process.

We recognize that some Members of Congress are impatient to resolve the lawsuit, but we truly believe that adequate preparation will ultimately expedite settlement. NCAI has witnessed trust reform efforts since the 1980's as one quick fix after another has been proposed, implemented, and eventually fallen to the wayside. We have wasted over 20 years and millions of dollars looking for a quick fix. The conflict assessment should take place as soon as possible, but we should allow the affected parties to define the settlement process together rather than quickly imposing a process that may not be well received and will ultimately result in failure.

2) An independent body should play a significant role in the settlement process. NCAI feels strongly that an independent body should play a key role in the settlement process so that all parties can work from a common basis. Certainly an independent body of experts is the key feature of S. 1770. We urge that the parties have a say in selection of the panel of experts contemplated by S. 1770 so as to minimize potential for out of hand rejection of the experts' conclusions. Selecting a group of experts acceptable to the parties would minimize potential for controversy and facilitate full and careful consideration of recommendations. By doing so, this group could be set up as a legitimate, fact-finding body in support of settlement.

3) Account holders should have the opportunity to negotiate and make a choice. Choice is also an important and commendable feature of S. 1770, which would allow individual account holders to accept a settlement offer, choose arbitration, or choose to continue as a part of the class action. A fair resolution will allow account holders the ability to negotiate an agreement based on knowledge and understanding of the underlying facts regarding their trust assets.

We are concerned about the fairness of several aspects of S.1770. First, by using terms like "to the maximum extent practicable" and "demonstration of the probable balances" in the definition of "accounting", the burden of proof could be shifted onto the beneficiary to demonstrate that the amounts determined by the IMACS Task Force are indeed incorrect. Beneficiaries should be entitled to presumptions in their favor while the trustee should have the burden to prove that those presumptions are erroneous.

Second, S. 1770 should clearly state that beneficiaries are entitled to accrued interest on the amounts that should have been deposited into their accounts. Third, fairness to account holders will require that they have advice of adequate counsel. While eligible individuals may retain legal counsel for the arbitration process at their own expense, no provision for legal counsel or court oversight is provided under paragraph (g) of Section 4 when a decision must be made as to whether or not to accept the amount determined by the IMACS Task Force. Fourth, paragraph (f)(3) of Section 5 on arbitration would close the Individual Indian Money (IIM) Account for individuals pursuing this route. While damage claims for historical accounting claims prior to the arbitration settlement date should be foreclosed, we don't

understand why the IIM Accounts should be closed since future payments would still be made to those accounts.

Fifth, the intent of the appropriations limitation set forth in Section 7 is unclear. Is it Congress's intent that the damages be limited to these amounts even if the IMACS Task Force determines that the IIM beneficiaries are entitled to more? Lastly, we note that the definition of "eligible individual" contained in S1770 leaves unanswered settlement of claims on behalf of individuals who had passed away prior to enactment of the American Indian Trust Fund Management Reform Act of 1994.

4) Move quickly to bring relief to elder account holders. S. 1770 contemplates a speedy resolution, and this is also very desirable. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to settle their claims without delay.

5) One size will not fit all. S. 1770 envisions that the accounting might take place under "one or more appropriate methodologies or models." This also seems wise. There is a great deal of diversity among account holders. Some have large stakes in very valuable natural resources, such as oil, gas, or timber. Others have only a small fractionated interest that is worth less than a dollar. Any settlement process must be able to deal with different classes of accounts and interests.

6) Take the time to do it right. See #1 above. A structured conflict assessment should take place as soon as possible, but we should allow the affected parties to define the settlement process rather than quickly imposing a process that may not be well received and could very well spell failure for the process advanced.

7) Provide for judicial review and fairness - S. 1770 does not offer much in the way of protection for the procedural rights of the individual plaintiffs. Settlements should be judicially approved pursuant to the Federal Rules of Civil Procedure. The settlement process must ensure that Indian people are situated in an equitable position to evaluate the fairness of any settlement offer. The settlement process should require full disclosure of all material facts – the government has the burden of providing beneficiaries with all records from government agencies and contractors pertaining to their trust claims. Many individuals do not have access to legal counsel to review settlement documents; therefore review by the courts is necessary to avoid any unfair settlements.

8) Establish a process that will keep the pressure on for settlement. The parties to the litigation have tried several times to resolve the case but have been unsuccessful in reaching agreement. We believe that this has been due in large part to a failure to establish a structured process to support settlement discussions. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement. While settlement deliberations are in process, I believe the imminent threat of the litigation should continue. Further, I urge that members of the Senate Indian Affairs and House Resources Committees work with the Parties to the Cobell litigation and tribal leaders to design a settlement process and monitor its progress. I believe Congressional involvement will be essential to keep pressure on the Administration for settlement.

9) Ensure that the settlement also fixes trust systems for the future. It would be disastrous to create a settlement that would resolve the past liability for trust mismanagement and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and

accounting today and in the future. We believe that an ultimate settlement proposal, such as the one proposed in S. 1770, should not only settle accounts, but should also offer to purchase and consolidate fractionated interests in tribal hands so that the land does not continue to fractionate in the future; and should establish systems and standards for trust management in the future.

Opposition to Current BIA Reorganization Efforts

As you know, NCAI remains strongly opposed to the current trust reform reorganization effort that the DOI is engaged in. In our view, effective organizational change to effectuate trust reform must contain three essential elements:

(1) Systems, Standards and Accountability—a clear definition of core business processes accompanied by meaningful standards for performance and mechanisms to ensure accountability

(2) Locally Responsive Systems—implementation details that fit specific contexts of service delivery at the regional and local levels where tribal governments interact with the Department

(3) Continuing Consultation—an effective and efficient means for on-going tribal involvement in establishing the direction, substance, and form of organizational structures and processes involving trust administration.

These elements are lacking in the current proposal of the Department of Interior (DOI) for reorganizing the BIA.

We are extremely concerned that the lack of definition of the responsibilities and authorities of new OST offices will cause serious conflicts with the functions performed by the BIA Agency Superintendents and/or Indian tribes. The OST was designed by Congress to play an oversight role, but the reorganization would now give the Office both oversight and management responsibilities, a clear conflict. Moreover, we believe that funding and staff need to flow directly to the agency and regional levels—not just to the new Trust Officers—to address long-standing personnel shortages needed to fully carry out the trust responsibility of the United States. We are certain that it was never Congress's intention to establish an entire new management bureaucracy at the Office of Special Trustee.

The Department may be headed in a positive direction with its reengineering efforts, but the reorganization effort is premature. New business processes should be devised through a collaborative process involving both BIA employees and tribal leadership. We must include the input of tribes and BIA employees so that the great numbers of people who must implement changes in trust administration understand and support necessary reforms. Only then, as a final step, can we design an organizational chart to carry out the functions of trust management without creating conflicting lines of authority throughout Indian country. The history of trust reform is filled with failed efforts that did not go to the heart of the problem and do the detailed work necessary to fix a large and often dysfunctional system.

At this time, Congress should prevent the DOI from proceeding with its proposed reorganization plan and focus instead on funding core Indian programs where there are severe and well documented needs, and to programs such as land consolidation, title, and accounting that will in time reduce the cost of trust administration.

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 the trust reform effort. If we maintain a serious level of effort and commitment by Congress, the Administration, and Tribal Governments to work collaboratively to make informed, strategic decisions, we can make serious progress in resolving the litigation. Our strongly held view is that a mediated process will be the quicker path to a conclusion that will, no doubt, contain many of the commendable elements of S. 1770.

Proposed Line Item Appropriation:

> *$300,000 to the U.S. Institute for Environmental Mediation to contract for an independent mediator to conduct a conflict assessment on the pending case of Cobell v. Norton. The assessment shall provide a report to the House Committee on Resources and the Senate Committee on Indian Affairs identifying the entities who are substantively affected by the litigation; identifying a preliminary set of issues relevant to the litigation and potential settlement; evaluating the feasibility of using settlement processes to address these issues; and, in consultation with the parties, the Committees, and the Indian tribes, recommending a proposed structure for a settlement process. The report shall also include any other recommendations deemed relevant by the mediator.*