

**STATEMENT OF
DIRK KEMPTHORNE
SECRETARY OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON
INDIAN TRUST FUND LITIGATION**

MARCH 29, 2007

Thank you, Mr. Chairman, for the opportunity to appear before the Committee today on an issue that is of crucial importance to the Department of the Interior. As our March 1, 2007, letter to you and Vice-Chairman Thomas states, the Administration strongly supports a comprehensive legislative package to resolve the issues facing us today with regard to the Indian land trusts. I have attached to my statement the one page summary of the key facets the Administration believes are necessary for acceptable Indian trust reform and settlement legislation. The testimony of the Department of Justice focuses on the aspects of the legislative package related to the resolution of pending and potential claims by individual Indians and Tribes. I will focus my testimony on the consolidation of Indian lands to make them more manageable and productive and the concepts of owner management of trust lands.

On June 13, 2003, then-Chairman Campbell and Vice Chairman Inouye sent a letter to tribal leaders asking for their help in tackling three major tasks that would improve the management of Indian trust:

- Stop the continuing fractionation of Indian lands and focus on the core problems of Indian probate by swiftly enacting legal reforms to the Indian probate statute.
- Begin an intense effort to reconsolidate the Indian land base by buying small parcels of fractionated land and returning them to tribal ownership.

- Explore "creative, equitable, and expedient ways to settle the *Cobell v. Norton* lawsuit."

We agree that these are priorities for bringing a solution to the issues facing the Indian trust today. We would add settling tribal trust lawsuits as well. The Administration strongly supports a comprehensive legislative package designed to strengthen the partnership between the Federal Government and American Indians. To achieve these goals, the Administration supports providing up to \$7 billion, over a ten year period.

I believe it is time for the Federal Government and the Congress to tackle an issue that has been raised by commission after task force after commission for almost a hundred years. First, the overwhelming finding of almost every task force and commission that has looked at Indian economic issues is that a viable tribal land base is essential. The American Indian Policy Review Commission Report of 1977 pointed out that the economic security and development of tribal economies depend on it. The allotment policy of the 1887 General Allotment Act was intended to break up the Tribes' communal land base and force assimilation of Indian people into non-Indian society. As the Policy Review Commission Report states, the legacy of that policy is "the bizarre land ownership patterns existent on many reservations which make it virtually impossible for those tribes to engage in meaningful economic development."

When lands were allotted under the 1887 Act, a trust period of 25 years was placed on the land with restrictions on state taxation and on the owner's right to sell the land without the U.S. Government's consent. After that time, a fee patent was to be issued to the owner for the land. As a result of issuance of fee patents, 23 million acres of Indian land were sold out of Indian hands by 1934.

The Indian Reorganization Act of 1934 halted further allotments and extended indefinitely the trust status of the allotted lands not yet patented. As a result,

individual Indian allotments still held in trust have passed, through the generations, as increasingly smaller fractionated interests. Since 1934, time and again, witnesses have come before the Congress to detail the problems that have arisen as a result of fractionation of these lands, i.e. as each generation inherits interests in these lands, more and more individuals hold interests in one parcel of land. In 1977, the Review Commission used the example of 360 people owning one allotment on the Standing Rock Reservation. Allotments ranged from forty acres of irrigable land to eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land. Today, we have allotments with more than 1000 ownership interests.

What this means for Interior is that we manage each of these individual interests and, when its owner dies, we oversee the distribution of the owner's interest to his or her heirs through the probate process, at an average cost of about \$5000, even for an interest worth less than \$1. Then-Assistant Secretary for Indian Affairs Kevin Gover, in a radio interview in 2000, mentioned that he is an account holder, having inherited one twenty-seventh of his grandfather's share of land. He had seven cents in his account when it opened. It had eight cents in 2000. He told the interviewer he gets quarterly statements and that it cost the government at that time \$35 a year to maintain his account. This is not a rare occurrence. We have tens of thousands of accounts that are similar, wherein the cost of maintaining the account exceeds the value of the trust assets being managed.

Think about what else we could be spending that money on, like Indian education or fighting methamphetamine use in Indian Country. I think Mr. Gover would understand if we decide to pay him for his interest his quarterly statements stop, and the money that otherwise would have been used to generate those accounts -- and thousands like them -- is instead used to improve economic and social conditions in Indian Country.

The logical answer to this problem is that we must take a far more aggressive stance on consolidating these interests and then turn over the management of these Indian lands to Indians. These owner-managed lands would still stay in Indian ownership and they would still be exempt from state taxation. They would still be Indian Country for purposes of tribal jurisdiction. When Indian owners become empowered to make the decisions on land use and leasing, the broad paternalistic roles of the Bureau of Indian Affairs and the Office of the Special Trustee can be reduced significantly.

We recognize that many of the parcels of individual Indian land are so highly fractionated that it would be unfair to convert them to an owner managed status at this point. That is why our proposal includes an element that would provide us with the tools to consolidate these interests before they are converted. We propose including in trust reform legislation both voluntary mechanisms and mandatory authority for consolidating highly fractionated parcels. In addition, our proposal includes incentives to enable individual Indian land owners to undertake property management sooner rather than later.

I have heard our proposal described as “termination” of the trust. Clearly it is not. As many of you know, in the 1950s, the government embarked on a policy of “terminating” the Federal Government’s relationship with certain tribes. What termination meant was:

- Ownership of Indian land was unrestricted, with the right to transfer it to non-Indians.
- Tribal land was sold and assets distributed to tribal members.
- Tribal members were subject to all state laws.
- Tribal members were no longer be eligible for services provided to Indians because of their status as Indians.
- All property was subject to state and local government taxation.
- Tribal constitutions and tribal sovereignty were abolished.

That policy was squarely repudiated in 1970 and replaced with the policy of self-determination, the policy that guides our relationship with Tribes today. And we have seen great progress in this regard. This is what NCAI President Joe Garcia said in January of this year in the Fifth Annual State of Indian Nations Address:

As tribes take on more responsibilities, we find that we need to improve the way our tribal governments function. Today tribes are governments with budgets and responsibilities comparable to state governments, and we have become much more self-sufficient than we were in the past. As I traveled the country this past year, I heard from many tribal leaders about their efforts to improve the effectiveness of their governments.

Too often tribes are saddled with federally-imposed models of governance that do not fit our traditions and cultures. It is time to address the barriers caused by these mismatched governments.

He went on to say:

Many of the federal policies that impact tribal economic development were put into place at a time when tribal governments did not have the capacity that we have today. These policies need to be revisited and tribal governments need to be given the same tools for economic development that exist for other governments.

I couldn't agree with President Garcia more. Not only must we change our mindset about the management of individual Indian land, but we must change it with respect to tribal land as well. Frankly, I am troubled by a statutory and regulatory paradigm that places Interior employees in the position of second-guessing management decisions tribal governments make regarding their lands. A July 1986 Interior Department Task Force on Indian Economic Development

explained in its report how this paradigm stifles economic opportunities for Indians. The report observed that because the Federal Government reviews most important Indian business arrangements, the completion of negotiations with a Tribe or an individual Indian is only the first stage in a business opportunity. It must be followed by a second round of review and possible negotiations with the Federal Government. The report points out that in business, timing is critical, and one often has to act when the other party is ready to agree. The review process makes that impossible.

We have to be able to look honestly at where we stand today with respect to Indian people and Indian tribal governments and make some important decisions. Our policy is to strengthen tribal governments, not to weaken them. Our policy is to recognize the strides that have been made and the talent that exists now on the reservations. We are saying it is time to use the Indian budget more wisely; to make more money available to empower Indian individuals and tribes to manage their assets directly.

As a Governor of a western State, I had the opportunity to work closely with the Indian Tribes in the State of Idaho. As those of you on the Committee with Indian Tribes in your States know, Tribes have made great strides in the last 30 years under the policy of self-determination. Today, Indian Tribes are full-service governments, offering Indians and non-Indians alike a broad range of services.

As most of you know, it was President Richard Nixon who ushered in the policy of self-determination for Indian Tribes and Indian people. I'd like to close with excerpts from his famous Special Message on Indian Affairs dated July 8, 1970:

We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of

Federal control without being cut off from Federal concern and Federal support. . .

But most importantly, we have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be furthered. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

Mr. Chairman, we have an opportunity to work together to address several significant issues that are impediments to progress in Indian Country. We need to address the potential for years of litigation. We need to restore the economic value of individual Indian allotments through land consolidation. We need to move beyond a century of well-meaning paternalism to recognize an Indian Country capable of managing its own affairs if only we would let them by moving boldly in that direction. We look forward to working with this Committee, other Members of Congress, others in the Administration, and tribal leaders in our efforts to resolve current conflicts with meaningful initiatives designed to facilitate long term health and prosperity in Indian Country.

Thank you again for the opportunity to appear before you today. We would be happy to answer any questions you might have at this time.