**Testimony of**
**John E. Echohawk, Executive Director**
**Native American Rights Fund**

**Hearing on Methodologies for Settling the**
***Cobell v. Norton* Class Action Lawsuit**

**Committee on Indian Affairs**
**United States Senate**
**July 30, 2003**

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Good morning, Chairman Campbell, Vice-Chairman Inouye, Members of the Committee – thank you for inviting me here today to begin an earnest discussion with members of Congress, with tribal leaders, and with Administration officials regarding methodologies for settling the *Cobell v. Norton* class action lawsuit.

I am here today on behalf of Dennis M. Gingold, Keith M. Harper and myself, as counsel to the plaintiffs in the *Cobell v. Norton* (96-1285 (RCL) case which is before the United States District Court for the District of Colombia. First and foremost, on behalf of the 500,000 individual Indian trust beneficiaries, we express our deep gratitude for your sincere interest in the *Cobell* litigation and your willingness and desire to see that it is resolved fairly and expeditiously. Be assured that the *Cobell* plaintiffs are now, and always have been, willing to engage in frank and honest discussions for a fair resolution of this case. However the executive branch – with the exception of Treasury – has been steadfast in its unwillingness to negotiate such a resolution. Without your direct and active participation in the settlement process, we have no hope that the Administration will discuss these matters in good faith.

On five previous occasions, we have engaged the executive branch in fruitless settlement discussions. Each time, government officials broke promises they had made to the *Cobell* plaintiffs and rejected settlement of matters that the negotiators had resolved. And, they have never made a good faith offer to resolve the accounting matter. In fact, plaintiffs, in an effort to move settlement forward, took extraordinary action in litigation and provided their expert's financial model to Interior and Justice under a confidentiality agreement, relying on the representations of defense counsel that the government would honor the confidentiality agreement and would honor its commitment to provide to plaintiffs information of equal importance. Unfortunately, Interior and Justice failed to produce the information they had promised and they misappropriated plaintiffs' confidential information, offensively using it in their preparation for Trial 1.5.

Given this disturbing history, plaintiffs are skeptical that Interior and Justice are prepared to

resolve the *Cobell* case in good faith and in a fair manner. Earlier this month, Ms. Elouise Cobell, lead plaintiff in the lawsuit, was invited to testify before the House Committee on Resources regarding *"Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit."* The *Cobell* plaintiffs believe that the answer to this question is self-evident: Of course, such a process can be developed. However, as she testified:

> It is important to note that this case has been in litigation over seven years. It is a matter of record that time and time again the case has been unconscionably delayed as a result of government litigation misconduct. * * * We, the IIM beneficiaries, on the other hand have pursued expedited resolution of this case. We have vigorously contested each and every government-sponsored delay tactic. That is the record of this case. We want resolution (more than anyone) because each and every day trust beneficiaries are dying without receiving justice.

Moreover, she made the plaintiffs' position on one matter unmistakably clear: We are now – as we have been since the commencement of this litigation – prepared to engage in a fair settlement process and resolve these longstanding trust mismanagement issues. The key word is of course, is "fair." With your involvement, with the involvement of other senior Congressional leaders, we hope that this is possible.

Mr. Chairman, many people are under the mistaken notion that the *Cobell* case is just about money. It is not. In fact, the *Cobell* case has always been about three things: (1) fixing the IIM trust system; (2) providing the IIM beneficiaries with an accounting; and (3) correcting the IIM account balances to reflect their true value. In your recent correspondence to Tribal leaders, you outlined a course of action which includes: legal reforms to the Indian probate statute; an intense effort to reconsolidate the Indian land base; exploring creative, equitable and expedient ways to settle the *Cobell* case; and reforming the Federal trust management apparatus. We strongly believe that the objectives of the *Cobell* litigation are consistent with the course of action you have proposed.

## Elements for a Sound Settlement Process

Mr. Chairman, Mr. Vice-Chairman, in your letter dated April 8, 2003 to counsel for the plaintiffs in the *Cobell v. Norton* lawsuit, you stated your strongly held belief that the parties to this case should pursue a mediated resolution rather than a course of continued litigation. You stated your belief that the most effective and equitable way to resolve this matter is to engage in some type of settlement process that includes a mediator or mediation team. Plaintiffs believe that such a process, with certain appropriate elements may very well lead to positive results and resolution of this case.

In consideration to your proposal, we have developed a preliminary, non-exhaustive list of appropriate elements for a sound settlement process. Obviously, this is a very general list and is

intended to commence a dialogue that will aid development of a structure and process for positive discussions and ultimately, perhaps, resolution. In other words, these are issues that are important to consider and hopefully will offer a starting point.

## 1. Inclusion of All Necessary Parties

First and foremost, this process has to include all necessary parties. It is obvious that since this is litigation, representatives from each of the ***Cobell v. Norton*** **parties** must be at the table. Moreover, we believe that it is critical that senior members of the authorizing committees of both houses of **Congress** must be personally involved to ensure that all parties come and discuss resolution in good faith. This may very be the element that makes a difference and set the foundation for a successful settlement process. Finally, tribes have made clear that there are aspects of the *Cobell* case that impact their interests, especially regarding trust reform, and thus, to the extent tribal interests are involved, tribes should participate as well.

## 2. The Mediator

We believe that a mediator may serve a number of helpful purposes and would support Congress providing resources for that purpose. It is essential that the mediator be a person of significant political clout that can hold all parties to a high standard of good faith. Moreover, this mediator must be a person known to be able to work in a non-partisan manner. The mediator can have a team of individuals and experts to aid in the process, but their should be one person with the ultimate responsibility.

## 3. Scope of Settlement Discussions

The scope of the settlement discussions should be determined up front. Moreover, it is imperative that the settlement not re-open matters and questions already settled by judicial determinations. The District Court and Court of Appeals have already rendered numerous critical decisions in the *Cobell v. Norton* case. It is appropriate that these prior decisions provide the necessary legal parameters for any settlement discussions. In other words, a settlement process is not the place to "re-litigate" issues already determined by court rulings. In our view to permit re-evaluation of judicially determined matters, would open up a Pandora's Box and ensure no settlement will occur.

## 4. Timing

Plaintiffs believe this is an opportune time to begin the discussion of the settlement process. Trial 1.5 has very recently concluded and next Monday, August 4, 2003, the parties will submit their post-trial briefs (*i.e.* Proposed Findings of Fact and Conclusions of Law). The Court's Trial 1.5 decision, which will likely be rendered in the immediate future will determine many significant issues, including the proper methodology to perform the accounting; the applicability of statute of limitations; and burdens of proof in a trust accounting case. It is axiomatic that when there are fewer legal uncertainties and obstacles, the chances of a successful resolution are enhanced materially. And, the Trial 1.5 decision will remove significant uncertainties and obstacles. Therefore, we believe that this is an opportune time to begin the dialogue in determining the settlement process including its shape, structure and scope, as well as to ensure that resources for a process are in available. If we do these things now, then we will be postured to begin the actual and fruitful settlement process as soon as the Trial 1.5 decision is rendered.

## 5. Two Separate Matters for Resolution

The *Cobell* case is not merely about money – an accounting and determination of accurate account balances. It is also about ensuring that reforms are in place and that the United States brings itself into compliance with its fiduciary duties owed to 500,000 individual Indian trust beneficiaries. Plaintiffs believe that consideration should be given to dividing the settlement process into two distinct discussions, perhaps with a separate mediator:

1. **Accounting** - correction of the individual Indian trust accounts
2. **Fix up issues** - reforming the trust system

The *Cobell* case has been bifurcated in this manner and has worked well because the two aspects of the case raise significantly distinct issues. Both aspects of the case raise consequential and nuanced issues which will require considerable attention.

## 6. Continuation of Legal Proceedings During Settlement Discussions

It is important that the litigation not be stalled during the pendency of resolution discussions. If the litigation were stayed during settlement talks, then a party interested in delaying matters further could simply drag out the settlement discussions – wasting valuable resources – and in the end refuse to agree to a fair resolution. Furthermore, the litigation has been the sole reason the government has taken trust reform seriously, by their own repeated admission. It continues to motivate the government to seek resolution. Without that pressure, there will be no reason for Interior to negotiate in good faith.

## 7. Final Resolution

Plaintiffs believe that a final resolution will be more easily achieved if certain issues are addressed up front; they include:

A. The federal government should ensure that the **claims judgment fund** can be accessed to cover the cost of any settlement. It is not fair nor appropriate to fund a settlement through funds that should rightfully go to Indian Country through the ordinary appropriations process. If this case continued in litigation, plaintiffs believe that any correction of accounts would not have to be separately appropriated. Consequently, if this matter is resolved through a settlement process, these century old problems should not be paid through ordinary budgetary processes. We must avoid the "robbing Peter to pay Paul" scenario.

B. Any settlement must have **judicial approval** pursuant to the Federal Rules of Civil Procedure. We must bear in mind that this is an attempt to resolve a case in litigation. Moreover, this is a class action, and therefore due process must be ensured for **all class members**. In other words, settlement must include, among other things, fairness hearings so that each beneficiary has an opportunity to be heard. These matters should be handled in the ordinary judicial avenues – here, before the Federal District Court for the District of Columbia.

C. Any resolution of this case should first be on a **class wide basis**. Class actions are far more expedient and efficient than individualized litigation and offer significant due process protections for class members. Any attempt to break up the class through "side-settling" of claims will merely ensure more litigation. Moreover, Interior will have less incentive to negotiate in good faith if given such an opportunity.

D. There should be **no limitation** on the right to litigate issues not resolved through a settlement process, a suggestion made by the Intertribal Monitoring Association.

Again, these are plaintiffs initial views. We come to the table with an open-mind in formulating the settlement process.

## Closing Remarks

The mismanagement of the Individual Indian Money Trust is a huge problem that has been around for over one hundred years. Together with the help of the Committee we can finally settle this issue and make history.