TESTIMONY
OF
DONALD T. GRAY
BEFORE THE
UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING
METHODOLOGIES FOR HISTORIC TRUST RECONSTRUCTION

JULY 30, 2003

Mr. Chairman, Mr. Vice Chairman and distinguished Committee members:

My name is Donald Gray, and I am very pleased that the Chairman has asked me to appear before you today to speak as an expert on methodologies that might be used to reach a settlement of the 120-year old problem of the IIM accounts; a settlement achieved on a comprehensive, as well as a fair and reasonable basis, in which all parties can have confidence. I believe I can be of assistance.

I have described my credentials as a legal expert in the areas of trust administration and historic trust reconstructions in earlier testimony before this Committee and will not repeat them here. If you would like, I can provide a description of the extensive work in this field performed by the Trust and Financial Rehabilitation Group of my firm, which I helped to found more than a decade ago, along with a list of references from some of the nation's largest financial institutions.

INTRODUCTION
The Environment for Meaningful Trust Reform

During the last four years I have, at the invitation of Congressional leaders on both sides of the aisle, testified as a forensic trust expert before this Committee, the House Resources Committee and the Senate Energy Committee. I have also made my views, as an independent, unpaid professional, available to the Tribal Task Force, individual Indian tribes, Congressional staff, and many others interested in this compelling issue. During that time, I have drafted and submitted very detailed testimony describing trust administration and trust fix procedures, both in the public and private sectors, submitted a comprehensive plan for the structure and functions of a truly independent, well-expertised body to tackle both the historic and future asset/trust reform issues, read every major report of the Department of the Interior and the former Court Monitor, and studied hundreds of pleadings, including expert submissions, deposition transcripts, court orders and findings and public statements and communications on these issues.

It would be more than legitimate to question why any busy finance lawyer in his or her right mind would expend so much time, cost and energy without remuneration, no matter how compelling the issue. I trust my testimony, along with hopefully being enlightening as to trust reconstruction methodologies, and their applicability to this issue, will answer that question.

Although various tribes and the DOI have asked to retain me during the past four years, I respectfully declined. I did so because I wanted to maintain my independence, and a neutral stance on these important issues, without being identified with only one approach. Up to this point, the time was not right for a truly independent, neutral program that could best use my services. Hopefully, that time will come soon.

In spite of the vitriolic nature of the *Cobell* class action proceedings, which has employed various negative characterizations of the entire historic process, the most apt of which being "broken trust," I see extraordinary ***PROGRESS*** during the last four years. The progress has not come in the form of asset trust reconstruction or the development of a viable ongoing trust system as I had originally hoped. The progress has been in the hearts and minds of some of the key players in this drama, as they all have come to recognize and embrace the elements necessary for trust reform.

They may vehemently disagree on process, but significant parties – the class plaintiffs, the key members of Congress, the tribal leaders and, I suspect, the Court and its officials – all now agree that often-used private sector trust rehabilitation expertise is essential, and that there must be some kind of independent team, advisors or entity, free from the conflicts-of-interest that so hamper the DOI, to review the feasibility, and to perform many of the tasks, some quite intricate and specialized, of a fair and reasonable historic reconstruction of the IIM accounts. I would refer you especially to the minutes, reports and testimony of the tribal leaders, and DOI officials, concerning the long, hard work of the Task Force on these issues.

Rhetoric and litigation positions aside, anyone who has ever been involved in a true paradigm shift, a real revolution in how participants view the changing standards and procedures required as a result of scandalous revelations of error and wrongdoing in both business and public settings, whether Enron or Indian Trust, cannot but be impressed with the broadening of thought and the expansion of knowledge that takes place when long festering problems come to light, and people of courage attempt to remedy to the problems.

Sometimes such subtle progress is lost in the vitriol of adversary proceedings. It should not be. These subtle but lasting changes in hearts and minds establish the environment and create the platform for true reform.

Four years ago, although I naively wanted to use my more than a quarter century of trust fix experience gained through working with some of the nation's and the world's largest financial institutions and with Alaskan native corporations, by immediately plunging into the data and external information and methods that would reach a real solution, the time was not right. The foundation of knowledge and willingness to look at things in a different way had not been established.

My first testimony, almost exactly four years ago, although not leading as I hoped it might to the immediate work of reconstruction, might have helped to lead to that end. That testimony stressed three things which, until that point, had not been talked about or taken seriously.

One was that this problem required highly specialized ***EXPERTISE*** that had been used successfully countless times in the private commercial sector to solve similar problems, even though such expertise and procedures required modification given the special status of American Indians under law and treaty.

The second was that the DOI, and specifically the BIA, no matter how positive one believes their motives, were engaged in hopeless ***CONFLICTS-OF-INTEREST.*** Primarily this was the result of the psychological and legal impossibility of a party responsible for vast errors, deliberate or inadvertent, fixing those errors (the "patient should not be operating on himself" theme). This extreme conflict situation was exacerbated by the DOI's increasing preoccupation with defending itself and its officials in a time consuming and occasionally vicious and increasingly personal lawsuit that would totally sap the energy and creativity of any person or organization.

The third point I made at the time, very much related to the conflict-of-interest issue, was the desperate need for ***INDEPENDENCE***, so that independent fixers, free from conflicts and with no outcome agenda, could work to fix the problem, with proper Indian country, Congressional, DOI and Court input. In doing so, such trust fixers would, as they do in the private sector, help to both immunize those BIA officials who may have made mistakes but are not responsible for any conscious wrongdoing, while consulting with those officials who possess a vast body of knowledge. The entire process may be returned to the doorstep of the BIA in the future, but not until fixed in this way, a way used in the commercial sector for many years.

I honestly do not know if my initial, and subsequent, testimony to the same effect helped this essential change in hearts and minds, or whether it was a change that was inevitable given the terrible years of frustration during the 1990's, the change in the cast of characters in the new administration or the maturation of thinking brought about by the *Cobell* suit, or a combination of all of these. Ultimately, it does not matter. But change there has been. Significant change, strong enough on which to build a real reconstruction effort on. So, as strange as it may sound, I believe a more appropriate, and more helpful, and perhaps even more accurate characterization of the process at this point, rather than "broken trust" (which we all acknowledge there has been) is "a light in the forest." If a hardened financial lawyer can believe this, after significant efforts and disappointment in the last four years, I suggest that some of you might also find this characterization appropriate.

All of this positive change will be wasted, and the situation will remain the same ten years from now, if the only solutions are a few billion more dollars spent on ill-advised procedures by the DOI, or a Court-appointed receiver coming up with a methodology and conclusion for something approaching an accounting or reconstruction that yields an amount owed, but which he or she may not be able to enforce. Meanwhile, more IIM beneficiaries will die without receiving even a modicum of their just due.

There is a third way, and I sincerely recommend it to you. What is needed is a holistic, comprehensive fix effort; employing any and all methodologies that can truly help reconstruct what is owed to the IIM beneficiaries. And Congress should act, in coordination with the *Cobell* Court to do this immediately. We can clean up existing data until we are all old and gray, place

the information in neat but isolated silos, ignore what those extant but imperfect records tell us about the past, ignore independent asset data regarding actual trust assets, or helpful data on similarly situated assets, for which no records exist, and squabble about what an accounting means. Or we can get to the task of reconstructing what is owed to the IIM beneficiaries.

I suggest the latter, and attempt, avoiding unnecessary jargon, to explain a few of the more important methodologies that could get us to the goal post in a fraction of the unconscionable time periods and cost that have been suggested by the DOI.

TERMINOLOGY AND GOALS

Terminology is key here. The *Cobell* Court has ordered an "accounting" of the IIM accounts. Quite frankly, even for a seasoned financial professional, the term "accounting" means different things to different people. What is critical is to look closely at the Court's description of how it construes the Trust Reform Management Act of 1994, and common law trust principles, with respect to what is really required to be done in any historic reconstruction.

The Court has said that the second phase of the trial will involve "defendants' *rendition* of an accounting" (emphasis added), and the government bringing forward "proof of IIM trust balances." The Court has made clear that such balances mean "all funds" relating to those accounts at any time. But the Court was very careful not to "prescribe the precise manner in which the accounting should be performed." Rather, the Court "explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling *or something else*, would be appropriate." (emphasis added). The overriding concern of the Court was that the defendants develop a plan for "bringing themselves into compliance with the fiduciary standards that they owe to the IIM beneficiaries."

I believe it is fair to say that the Court was and is asking for viable proof of any kind that will show the world amounts that, under law, should have accrued to the benefit of these beneficiaries. I do not believe the Court intended to get hung up or split hairs on the meaning of an accounting, temporal limitations on proof or any limitations on methodology, as long as the actual methods used could be verified and found to be fair and reasonable.

The most common meaning of the term "accounting," when applied to a reconciliation of established accounts, is the verification of recorded transactions by supporting data and, if possible, the balancing of inflow and outflow. There are obvious problems with this usage of the term in the IIM context, problems that are evident from the goals of any reasonable reform process. If the "proof" is limited to transaction records and supporting documentation, we now know that very little existed before the early 1970's, that there are huge gaps in the existence of such records even after that time and that the correctness and integrity of at least some of the extant data has been called into serious question. Even during the time when systematic records were maintained, such a narrow approach would only key off actual transactions.

What if there should have been transactions that never took place – oil and gas leases, timber cutting contracts and other IIM asset sales or leases mandated by law that simply never

occurred? Given such a transactionally narrow approach to an accounting, or even one that is much narrower using statistical sampling of dubious data, a solution might be easier, but it would defeat the real purpose of a meaningful historical accounting – that is – what should these Indians have been paid?

Frankly, if the defendants persist in adhering to narrow definitional arguments to prolong true historic trust reform, I respectfully suggest that Congress help the Court here and amend the 1994 Act to make it clear that what is required is the best feasible historic reconstruction of what monies should have flowed through the IIM accounts, using the most appropriate means of historic reconstruction. Some of the most important of those means and methodologies are discussed below.

HISTORIC RECONSTRUCTION METHODOLOGIES

What follows is a description of the most frequently used private sector trust reconstruction methodologies that could, I believe, be brought to bear on the historic IIM fix effort. But if there is only one thing any reader takes away from my testimony, my hope is that it is the strong belief that there is not one magic bullet among these techniques. Indeed, to obtain a truly holistic, comprehensive and defensible showing of amounts owed to the IIM beneficiaries, ***all*** of these methodologies, plus others discovered along the way will have to be assessed and possibly employed. Just as TAAMS was not the single magic fix to current account processing, there is no single answer here.

Although historic reconstruction from extrinsic records and analogue modeling, where there are no BIA records, is very helpful, an approach just from the asset side is not the entire answer to the question. As criticized as they have been, it is very doubtful that the records that are extant and maintained by the BIA are totally spurious or worthless. There are hundreds of BIA field officials who tried very hard to record transactions correctly. This data needs to be reassessed. To the extent, even with known errors, that such data does accurately reflect transactions and past procedures, the data can be used to project back potentially valid procedures into the pre-electronic record days. Such extrapolations have to be done carefully and always with a mind to verifiability. But in the end, these records are no less a part of a universal reconstruction that has integrity, if not perfection, than any other reconstruction method.

INDEPENDENT GOVERNING PROCEDURES AND ASSET-BASED EVIDENCE

In many long-term trusts which are set up to collect and disburse monies, whether or not those monies are derived from specific revenue producing assets, trust officers will set up transactional recording and separate parallel control procedures at the outset to account for and verify such in/out transactions. These record-keeping procedures are interpretations of the usually rather general requirements of governing documents, like trust indentures or master trust documents, or of statutory law. Sometimes these procedures are a correct reflection of the intent of the governing contract or statute, but sometimes, through human interpretive error, they are not.

In very long-term trusts, the procedures start out as manual records. Over time, and given new technology, these procedures are included in an off-the-shelf or customized computer system. It is not unusual over the course of 30 to 40 years for there to be as many as three to four separate systems. If the original procedures were faulty, the changes from system to system can compound the problem. One reason for this is that financial accounting and trust systems promise the moon, but rarely precisely fit the procedures. Every time there is a systems change, the inabilities of the system to accommodate the procedures and data compound the errors made at the time of procedure set up. Also, regrettably, these systems are touted as self verifying, a nice way of saying that the trust officer need not 'think" any longer about what the processes should be and what the goal of the trust is. Of course, the good trust officers, after many years of experience with trusts that are highly complex as to the financial assets they hold, and the processes of allocation, interest attribution and the like that occur between the in and out events, usually mimic the new systems for a time manually or on simple Lotus spreadsheets because they have learned to be wary of "don't think, do it all" systems.

A real world example here may be more helpful that general description. A $400,000,000 "pooled" municipal bond transaction was set up on the basis of a trust indenture. There were over 20 municipal borrowers who the trustee billed on a monthly basis for their respective shares of debt service on the muni-bonds, and approximately a dozen other charges relating to such things as appraisal costs for the municipal properties and costs of credit enhancements like letters of credit. Over 30 years, the "billing" procedures and systems used did not, in some critical ways, comport with the governing documents, and there were charge allocations and computation errors in a majority of the monthly bills from the trustee to the participants. In this case, the trust officers built their own billing system that was eventually computerized. After several months of identifying errors of real magnitude on a great many of almost 400 invoices, it was realized that correcting these errors, to the satisfaction of the municipal borrower participants would be impossible. It was suspected that some were owed several millions of dollars, and that some had been overpaid (or under-billed) to the same magnitude.

It was concluded that the only way to come to a conclusion as to what was owed and to whom, every dollar of every transaction had to be reconstructed in the transaction, in strict accordance with the governing documents, or in accordance with sound and accepted trust administration procedures where the documents were silent (which was often the case). After constructing a very detailed legal synopsis that laid out hundreds of rules that, if followed, would redirect each dollar to where it "should have gone," some very able forensic accountants reconstructed the movement of every dollar based on this legal analysis. This was a monumental task and took over a year and half. But at the end it was close to a perfect reconstruction, far superior to a retrofitting fix based on correcting thousands of one-off errors. The legal synopsis was 100 pages long and the accountants calculations of reconstructed transactions were over 200 pages long.

The participants studied the correctness of the legal document directives and general legal principles where the documents gave no guidance. The transaction had been reconstructed on the basis of governing procedures and law completely independent of the original set up procedures. This produced different data input based on independent evidence, in this case a

governing document and universally accepted trust procedures. As suspected, some participants owed millions of dollars, and some were owed similar amounts. The indisputable detail and exactitude employed in using independent guidance/evidence was so compelling that all participants agreed to the findings, and years of extremely expensive litigation were avoided.

The expert reports submitted by plaintiffs in February of this year to flesh out their program of starting with the original assets, and what should have been the IIM income derived from the sale or lease of such assets, is simply another iteration of using independent evidence to derive amounts that should have been credited to the IIM accounts, especially during the earlier years of the trust where there are no transactional or supporting data at all. Using oil and gas as an example, these expert reports cited local, county and state records of production from oil fields, and in some cases specific oil wells that are claimed to be on IIM tracts. I can give no opinion as to the correctness of this alternative evidence because I have not seen the original alternative records. Nor can I verify that the mapping procedures used to coordinate production data with wells on IIM tracts. But these are verifiable. The point here is not to take these independent alternative productions of resource records at face value. The point also is that, once verified, and where needed to be corrected, hopefully by experts engaged by the defendants, and then overseen by an independent neutral panel of experts in a settlement/mediation process (a team consisting of legal and accounting trust fix, trust administration, mineral and resource and complex settlement/mediation experts), numbers of what should have flowed through the IIM accounts can be established with significant reliability.

I believe these expert reports submitted by plaintiffs were perhaps the most helpful aspect of seven long years of litigation. For the first time, additional data collection methodologies were proposed as an alternative, or at last an augmentation of the "as is" records maintained by the DOI. The importance of this, especially where there are no trust transaction records at all, is critical if a fair and reasonable reconstruction is to be forged, rather than an endless debate on the impossibilities of a transaction-by-transaction accounting. Again, these submissions need to be countered and tested. But the methodology is sound, and its introduction to the case releases all the parties from being shackled by incomplete and partially incorrect trust data.

There may be those who do not want these windows of independent, but verifiable evidence open. But they have now been opened. For defendants to ignore such methodologies is essentially an admission of unwillingness to settle on a substantive, quantitative basis, rather than just a numbers game. I have to believe that many in the DOI, and especially account officers in the BIA might welcome this new light. It may mean abandoning easier methods of statistical sampling, or attempting to cut off reconstruction for periods before records exist, but it also signifies an effort, a long, hard, difficult one to be sure, but an effort that can yield numbers in which people, including hard-working officials at the DOI and BIA, can have faith.

MODELING

Modeling, also sometimes called analogue or comparison modeling, is another important methodology used for the rehabilitation and reconstruction of long-term, complex trusts, especially those that are established to capture the income from the exploitation of natural

resources. It has been used successfully to reconstruct the value of assets such as oil and gas in Texas, Oklahoma, Alaska and California, coal and other minerals throughout the United States, and even in determining what fishery extraction should have been.

Modeling is used when there is limited or no direct data regarding resource exploitation, either in the form of transaction-by-transaction records or independent extrinsic evidence. In fact, some of the expert reports submitted by plaintiffs are actually combinations of direct independent evidence reconstruction and modeling. For instance, if, using Geographic Information Systems ("GIS") data overlays, the researcher can actually identify a well situated on Allotted Lands, and there are local, county or state records of the output of that well for relevant time periods, and both the geographic location methodology and the independent records can be adequately verified, that is an example of historical reconstruction by means of direct independent evidence.

But if the geographic location methodologies and official records are able to identify oil and gas fields or reservoirs which may only partially include Allotted Lands, or which do not include such lands (with respect to which, for this example, there is no direct transactional or independent evidence), and the studied lands and resources can be shown with a high degree of confidence to be very much like the Allotted Lands, then legitimate comparisons can be made. Specifically, if non-IIM wells can be shown to have yielded X barrels of oil per well, and were sold or leased at Y price for a given time period, and there is an IIM well situated on the same oil field, or a comparable field in close proximity to the studied field and wells, then using such comparable data to give an estimate of the IIM well production and earnings value may have a high degree of reliability (again, if the methodologies and evidence for the studied fields are shown to be legitimate and verifiable).

This same method of "like kind" modeling can be used as well for grazing land, timber land, other minerals, water rights and conglomerates. I suspect that both direct independent reconstruction evidence, as well as verifiable modeling information may be more difficult to locate in these natural resource categories for several reasons. One is that the relative intrinsic value of the commodity in question may not at the time, or ever, have been as high as oil and gas, so that the extent and detail of independent government or contractor records, as well as such evidence relating to comparable but non-IIM tracts, may not have been as high as in the oil and gas field.

Also, I suspect that the leasing procedures for such resources were not as standardized, in terms of temporality or specificity, as was the case in oil and gas. Where an oil and gas royalty arrangement might call for monthly payments with a high degree of specificity as to volume extracted, a grazing exploitation arrangement might have called for payments at longer intervals, and might have been based on gross use (time) rather than specific quantity extracted.

These critical variances in leasing and accounts receivable histories was, by the way, the reason I pleaded with the Congressional Committees, including Senate Appropriations, not to fund TAAMS as the panacea for all Indian trust assets. TAAMS is basically an OTS oil and gas accounts receivable system that could never accommodate the enormous variety of data included in IIM assets and accounts. But the response I received was that, even though the appropriators pretty much knew they were throwing good money after bad, not to appropriate money for

TAAMS (a clearly politically motivated "quick fix") would have been seen as anti-Indian. I do not believe that would be the case now.

Notwithstanding these potential issues for non-oil and gas resources, I would make an educated guess that if non-Indian private or governmental entities were exploiting adjacent or comparable lands for any of these surface or subsurface assets, there may very well exist in such land owners' records (including records of the U.S. Government for non-Indian supervised land), or exploiting contractor records which would yield significant data that is relevant and verifiable. Indeed it may be essential to a universal reconstruction.

Another reason why independent direct proof, or analogue proof may be more difficult to obtain or interpret for such non-oil and gas resources is the Indians' own attitude towards these resources. I am not an expert in historic Indian land use. But after reading thousand of pages of Indian testimony relating to the various acts of Congress regarding Indian lands and self-determination, dozens of conversations with Indians who work closely on land use issues, and representing an Alaska native corporation relating to trust lands on the Pribilof Islands, it is somewhat clear to me that Indian country has a different view toward subterranean assets than it does toward surface assets. This difference in view will have to be taken into account if any comprehensive reconstruction effort, using all identified methodologies, is to be undertaken.

Indians, I have learned, do not generally think of land in ownership terms. Rather, they view their ancestral lands as gifts bestowed upon them by God, to live off of and maintain for future generations. Where a non-Indian entrepreneur or government might maximize the use of grazing land, perhaps to the point of land exhaustion, or cut timber without regard to replacement techniques for such an otherwise non-replaceable resource, an Indian would take, lease or sell what he or she needs (not just for subsistence, but for profit and economic growth), and conserve the rest so that the assets are reasonable and always available to the Indian inhabitants in a kind of perpetual sacred trust. Further, Indians are very mindful of sacred sites, for which other may have little sympathy, but which Indians would leave untouched or would work around.

All of these variables, some subtle but very important to Indian country, must be taken into account in any meaningful reconstruction.

If I am correct that such important variables do exist between IIM asset classes, such variables must be taken into account in any comprehensive reconstruction.

Again, it would take a considerable, concentrated feasibility study to determine whether modeling, or for that matter, direct independent evidence will yield adequate results as to what should have been deposited in the IIM accounts, but my experience generally, and my extensive reading about the extant records and the nature of the Allotted Lands, leads me to believe that not to give these methodologies a thorough study, and perhaps use them in a universal settlement environment where all valid methodologies are embraced, would itself be a serious abnegation of responsibility by the DOI and the Congress.

EXISTING DATA

I have, of course, not had direct access to the transactional and supporting documentation that is in the possession of the DOI and its Bureaus. However, I have read all publicly available reports of the Agency and EDS regarding the status of that data, the status of the clean-up project for that data, and the rather derogatory description of the status of that data and the programs which support it by plaintiffs and the former Court Monitor.

The defendants' Historical Accounting Plan for Individual Indian Money Accounts, filed in response to Court order, implies, and one of its chief experts who filed a report at plaintiffs' request has said in so many words that "there is no indication that the IIM accounts are not substantially accurate, nor that the transactions recorded are not substantially supported by contemporaneous documentation." That Plan is essentially to reconcile transactions to supporting documents, when support can be found, using a combination of transaction-by-transaction *and statistical sampling methods.* On the other hand the lead attorney for the plaintiffs has stated that the IIM data maintained at the DOI has been corrupted and that information pertaining to such data has been distorted and deleted, that there is no accounts receivable system relating to the IIM accounts and that serious questions have been raised with regard to the integrity of the IIM trust data in the IT system.

As an experienced attorney practicing in the financial field for 29 years, I strongly suspect the truth about the integrity and validity of the DOI data lies somewhere in between these polar statements. But the fact that there are errors, even a great number of them, should not lead plaintiffs to the conclusion that all of these records are worthless, nor should it continue to lead the DOI to the position that they are almost perfectly valid. In fact, my guess is that these records, no matter how many mistakes they contain, also contain a wealth of information that could be used by an independent reconstruction team looking for a comprehensive, very good but not perfect reconstruction of the IIM accounts.

Statistical sampling might help "size" the problem somewhat, but it really only tells you, on a statistical percentage basis, that certain aspects of the data, whether relating to transactions, documentation or even the occurrence of errors will likely reoccur in a larger population than the sampled data. That is simply not enough. This data will also demonstrate how account officers in various field offices attempted to account for leases, receivables, trust deposits, and how central authorities dealt with disbursements. This may not sound like exact science, but it is not. If the data is extensive enough, over a long time period, it is definitely possible to extrapolate findings back in time, some good and some bad, to periods when there are no records or when records were missing. To take the largely good faith efforts of hundreds of BIA field officers, attempting to account for assets belonging to family and friends, and either throw it out completely as totally corrupted, or belittled and underutilized by statistical sampling, does not seem very appropriate to an independent trust fixer.

One example of this very much in the defendants favor has to do with disbursements from IIM accounts. Not surprisingly, given the adversarial nature of the *Cobell* case, the submissions by plaintiffs' experts were all about what should have gone in, leaving all methodology and

calculations as to what actually came out to the defendants. Aside from the fairness, or lack thereof, of this approach, it is undeniable that defendants face a much more difficult proof problem with "should have been" outflows than plaintiffs do with "should have been" inflows. While independent asset records and analogue modeling assets appear available as an alternative means of historic reconstruction for plaintiffs, it is likely that not very much independent evidence exists as to payouts. If the transaction or supporting records are not there, one would have to search records of receipts of individual Indians, many of whom are no longer living. At least for the very early years of this trust, such extrinsic evidence is unlikely to be extant. However, the use of the *entire body* of existing records, not just a random or even specialized sample, could be studied to establish trends, possibly very reliable trends, regarding outflows. In fact, one of the things found in some initial testing on the data was that there were errors resulting in over withdrawals. The defendants need this data, the plaintiffs need this data, and most importantly, the IIM beneficiaries need this data to extrapolate therefrom any fair and reasonable, if not perfect, piece of the big puzzle of a comprehensive reconstruction.

SCRUBS, AGREED PROCEDURES AND INDEPENDENT PROCEDURES

There are dozens of historical financial and asset trust reconstruction methodologies that can be employed, depending on time, resources, the major problems encountered along the way and the duration of the trust. Above I have attempted, hopefully in common sense terms, to describe a few such methodologies that might be especially salient given what I have learned about this matter during the past four years. My own feeling is that a meaningful reconstruction may indeed be feasible, but it will be a monumental task, will require the above and other methodologies, and could take at least two years. But if the right independent feasibility and mediation team is assembled, and the parties to the case fully cooperate, I believe there is a good chance that a fair and reasonable settlement figure could be reached based upon verifiable data, although some conclusions will necessarily be reached by intelligent estimations and extrapolations from existing DOI and independent evidence.

Although there may be many methodologies to be employed, there are essentially only two strategic plans that can be employed. One is what accountants call "agreed procedures," the other irreverently called "a scrub." For the record, I am a scrubber. With agreed procedures, accountants and other professionals limit their inquiry to a specific set of data, and employ one or more specific methodologies. The results may yield no more than "test case" data, but in some cases that is sufficient to settle some complex trust and financial matters. This method is also undeniably safer for the professional, because his or her task is data and method limited. The kind of statistical analysis described by plaintiffs' expert, Mr. Lancaster, is a kind of "agreed procedure." These are means to yield expedient, and in some cases largely valid results, especially if the mistakes are of a known and defined type, and there is a great extent of homogeneity as to trust assets.

The other basic strategic approach is a scrub, or more elegantly, a comprehensive data and methodology unlimited reconstruction that may not be perfect, but which is undeniable fair and reasonable. In very long-term trusts, with multiple asset classes, numerous pieces of system and non-system evidence, and a number of revealed mistakes, inadvertent or intentional, full

reconstructions are almost always preferable, simply because they are more exhaustive, more inclusive and generally more accurate. Also, in a hotly charged political environment, the parties simply will not settle for less than such a comprehensive reconstruction effort. If one methodology does not work, try another. The goal is not a pretty statistical package that hangs together well, but may not reflect reality. Rather, the goal is truth, using whatever means are reasonably at one's disposal.

I strongly suggest that Congress, in coordination with the Court, embark upon a feasibility study, with a relatively short time fuse, to assess whether this preferable, but difficult means of total reconstruction is doable.

My suggestion is to engage a relatively small team of neutral professionals, including experts in natural resources, legal trust fixes, forensic accounting, trust administration, systems analysis, complex mediation and settlement and Indian law to perform the feasibility study, and possibly serve as the nucleus of a mediation team. Much has been discussed about the importance of independent experts and oversight in the trust reform process. For the first time I believe it safe to say that some form of neutral body is the consensus of the tribes, although it is my belief that DOI's resistance to anything of this kind was the principle reason why the Task Force's work came to a halt.

But starting with such a modest team of true experts, extremely time limited, to assess feasibility and facilitate settlement seems to me the least offensive or intrusive means of injecting a modicum of independent expertise into this problem. The world of first class trust and financial vehicle fix experts is not a wide one. The same excellent people bump into each other in just about every major fix effort. I can absolutely assure you that these otherwise very busy people would do everything in their power to assist on such a team. I know this because I have asked them. Small bites. No magic bullets. Hard work and independence. And most of all, a high degree of the ephemeral quality so much at stake here – trust. This is the approach I urge on Congress and the *Cobell* Court in establishing such a team and its mandate.

To depart from business as usual, like judicial deference to federal agencies known as the "Chevron defense" (which I certainly do not accuse the *Cobell* Court of), DOI's continuing delaying tactics and emphasis on form rather than reconstruction content, or default to a receiver who will face exactly the same need for independence and expertise with questionable enforcement authority, do not seem like attractive options.

WHAT IS GOING ON AT THE DOI?

I found a recent read of the DOI's Comprehensive Trust Management Plan of March 28, 2003 a bit chilling. For a first time reader, the plan sounds logical enough, chocked full of noble goals and tasks. But to anyone sophisticated in this problem, reading that report is a bit like going back to the empty generalities of former Secretary Babbitt's High Level Implementation Plan, the piece that effectively trumped the valid, even visionary report ordered by Congress from Paul Homan, the first Special Trustee.

The March 2003 plan, just to use the major subheadings of what the DOI thinks its tasks are, reveals a total inadequacy of expertise and, for trust reform, a potentially lethal bureaucratic mindset. The prime elements of the Comprehensive Trust Management Project Schedule include: Expand Project Planning and Management, Change Organizational Structure, Create Vision and Strategic Plan, Organizational Development, Trust Reengineering and Establishing Performance Management Program. Very little time is devoted to the intense training in trust administration and fiduciary management, which must be conducted by outside professionals. Instead of first looking to extremely well trained outside professionals to size the task and identify efficacious methodologies to fashion a meaningful reconstruction that is the heart of the historic task, the DOI, perhaps in good faith and unconsciously, seems content to rearrange the chairs on the Titanic.

The March Plan pays very little attention to ongoing trust administration training, citing such things as one-day intensive seminars. It totally misses the point that for both future trust administration and historic reconstruction, the Agency cannot educate itself, and in the case of historic trust fixes, one of the most complex tasks in all of law and accounting, even outside consultants cannot teach internal personnel the intricacies of the task. And if they could, internal personnel would be put in the completely untenable and inhumane position of attempting to fix errors they, their brothers, sisters, fathers and mothers may have made. These people need to be immunized and safeguarded throughout this process, and engaged as the great repositories of information that they are. They should not be brutalized by being asked to do the undoable, and to expose errors made by them, family members and friends. Again, at the risk of sounding like a broken record, there must be independent expertise applied to both the historic and future problems, or we will be in the exact same position a decade from now and all the hard work of the *Cobell* litigants in the last seven years, Congress in the last decade, and, to my mind, a basically honest and earnest (but very poorly advised) DOI during the past two and one half years, will have been a complete waste.

I personally believe that there are a number of people at the DOI, perhaps a great number, who would like to see a fair and reasonable resolution to the historic problem, and the construction of a sound ongoing system that the BIA, with proper training, can adequately administer in the future. One of my saddest days in the last four years was the day I learned that Neil McCaleb, a man of impeccable honesty and integrity, and a man of Indian blood who forewent lucrative opportunities in the private sector to do something meaningful for American Indians by becoming Assistant Secretary for Indian Affairs, resigned in exhaustion and dismay under the relentless, and extremely personal invective of the plaintiffs. Knowingly or not, the plaintiffs lost a powerful ally, and one, I believe, who would have fought hard for the type of reform program outlined in this testimony.

If I am even near correct, why does the DOI simply appear not "to get it" when it comes to trust reform?

The March Plan is a prime example of an agency creating organizational and managerial solutions, at significant expense, completely "around" the real problem – how do you fix a badly broken trust, and how do you learn from that fix effort to fashion a truly viable system for the

future? I humbly submit that this is a strong message that the DOI, although it does other things, especially with American Indians, quite brilliantly, still does not get it when it comes to trust reform. They still do not understand that they have a problem that will never be solved without the application of truly independent, non-conflicted expertise.

To the outside world, now increasingly familiar with this exigent problem, the Agency and their top personnel seem like denizens of an old, ornate building which, although they know nothing about architecture or building, they built themselves over many decades, but which is now literally crumbling around them. Instead of hiring expert building maintenance crisis managers, professional builders and architects, they spend vast amounts of tax dollars studying the problem and coming up with new internal organizational and management structures to eventually devise a totally internal fix by people who do not know anything about badly built, crumbing buildings. This situation might not be so tragic, and I dare say there may be real life examples of stubborn but proud people who actually live in such buildings, were it not for the fact that in this case there are, metaphorically, hundreds of thousands of subsistence-level tenants living in the basement of this deteriorating edifice who were promised by law and treaty that they would be safely housed and protected – the IIM beneficiaries.

Or perhaps they do, in fact, get it. The DOI realizes that it will have to give up at least some jurisdiction over the vast problem, at least for a time, and no agency ever wants to lose jurisdiction. I think we all have some sympathy for this. My own feeling is that the current administration at the DOI are honest people who believe they can fix the problem in a bureaucratic environment, riddled with conflicts, so that jurisdiction is not lost and BIA officials, many of them Indians, do not risk losing their jobs. I do not agree with this position, but I understand it.

In fact, one of the things I have continually harped on is that a trust fix, by real professionals, not only does not signal the end to BIA trust jobs, but in fact presents one of the best on the job training opportunities for Government officials of all time. To date, I have not been persuasive on this.

A COMPLEX BUT COMMON SENSE FIX

What I have suggested is a complex, comprehensive fix effort unrestrained by limitations to particular data or methodology. There will, of course, be realistic limitations of time and money. But within those restraints, the effort is to uncover the truth, by any means, down any avenue, rather than to settle for "agreed procedures" or small set samplings. Make no mistake. It is a monumental effort, and you need the best in the industry to accomplish it, assuming they, in an initial feasibility study, conclude that such a valid reconstruction can be done. Those experts are available.

But as complex and comprehensive as such a fix may be, and as complicated as some of the methodologies may seem (although I have attempted to describe them in understandable terms), my proposal is based on simple common sense.

I was very impressed by the recent testimony in the House by an Indian leader who has become a colleague in the Indian trust reform effort during the past few years, Tex Hall, President of the National Congress of American Indians. His testimony, as an IIM beneficiary, in the form of a hypothetical colloquy between him and Secretary Norton, was nothing other than a common sense, straightforward request for just the kind of multi-methodology, comprehensive historic reconstruction effort described above. In the end, this Committee and the Executive branch should follow the wishes of intelligent stakeholders. In fact, Tex may have put forth the case I espouse more directly and more eloquently than I ever could. Some of his remarks bear repeating here.

First, Tex set forth the guiding principles he believes must govern any settlement effort, an effort that may require multiple methodologies. Those are, in part: (1) take the time to do it right, (2) establish a process that will keep the pressure on for settlement, (3) Congress should be involved in developing a settlement process, (4) ensure that settlement also fixes trust systems for the future, (5) an independent body should play a significant role in the settlement process, (6) one size does not fit all, (7) move quickly to bring relief to elder account holders, (8) do not allow the settlement process to prey on the most vulnerable, and (9) funds for settlement must not deplete funding for other federal Indian programs. I heartily agree with all of the above.

Tex then goes on to have a hypothetical discussion with Secretary Norton regarding settlement of historic IIM accounts, specifically his own, and those of his immediate family. He states that, as an IIM holder he does not know what leases have been let out, or the rate they received, or whether the full amount was correctly collected, invested and distributed. He wants a listing of all the tracts of land in which he has an ownership interest, the lease activity on those lands and copies of all leases.

Along the way, as Tex asks for program documentation, the Secretary cautions that it might not exist. But Tex persists. He states that if the Agency cannot perform a full accounting, "I could see my way clear toward a settlement if I had ***some other kinds of information*** to make an educated estimation." For this he would need access to local BIA officials with years of asset experience, professional and independent opinions on what assets IIM lands "should" have produced, using available extrinsic/independent evidence of production and market rates and comparisons of output and market rates on similar properties for the same time periods. He specifically states that there could be "***any number of valid methods used"*** to calculate the value of assets that should have been leased or sold. He ponders whether the Secretary's rather narrow proposal for a statistical sampling will take into account the fact that continued overgrazing on IIM lands has resulted in only half the value of the resources accruing to the benefit of the grazing land IIM holders. A very good question, and one I doubt a statistical expert, working under agreed procedures, would be adequately able to answer.

Tex is right. These are the guiding principles and goals, and all methodologies must be used, if a comprehensive, historic reconstruction, that can serve as a basis for a fair and reasonable settlement, is to occur. I hope Congress will help this to occur.