

Testimony of Jim Gray
Principal Chief of the Osage Nation,
President of the Inter Tribal Monitoring Association,
and
Co-Chairman of the Trust Reform and *Cobell* Settlement Workgroup

Oversight Hearing on S. 1439,
the Indian Trust Reform Act of 2005
before the Senate Committee on Indian Affairs

July 26, 2005

Mr. Chairman and Vice-Chairman and Members of the Committee, I am here in my capacity as the President of the Inter-Tribal Monitoring Association (“ITMA”) and as a Co-Chair of the Trust Reform and *Cobell* Settlement Workgroup. I also serve as the Principal Chief of the Osage Nation. The Nation will provide its own separate written testimony about S. 1439 in light of our unique “hybrid” situation where the proceeds of the Osage Reservation subsurface estate are distributed to individuals, including individual Indian money account holders.

Those of us who worked to establish the Principles for resolving *Cobell* and reforming the broken federal trust systems have strongly held convictions about solutions to this decades-old problem. We may come from different regions of the country, have varying trust resources, and have different stories to tell about the harm we have suffered. But, we all share the same critical and overriding objective – a meaningful settlement of the *Cobell* litigation that helps to both undo the damage done and ensure that it doesn’t happen again. There is no doubt in my mind that the Chairman and Vice-Chairman share the objective of justice for the past and certainty for the future.

There can be no question that this bill represents the first and perhaps the only opportunity we will have to settle this case through discussions with the United States Congress, the entity that established the trust and which has plenary, but not unlimited authority to establish the terms of the trust. As tribal leaders, we have the responsibility to make the most of this extraordinary opportunity. This bill represents this Committee’s

commitment to this objective as well. We must be successful in this effort, for if we are not, the growing rift between Indian tribes and the United States will become an entrenched gulf.

Consequently, I would like to note at the outset that one of the most positive aspects of this significant legislation is the simple fact that it has been introduced and by whom. I, for one, view the Chairman's and Vice-chairman's commitment to this effort, as evidenced by the introduction of S. 1439, to be a very positive step and pledge to work with you in a frank, pragmatic and reasonable manner to make this the very best legislation it can be. You have both demonstrated true political courage and leadership in crafting a bill to address this bitterly controversial issue and you deserve the thanks and appreciation of all of us for this bold step.

As to the bill you have introduced, I want to underscore in my testimony today the key elements that we believe you got right, and then close with a few thoughts on where we go from here to improve the bill.

Let me begin with the things we believe you got right in S. 1439. First, in your bill the funds for settlement do not come from the programmatic funding of other federal activities. This is one very important element of the bill that is absolutely correct. Unquestionably, funds to settle the injustice against individual Indian money account holders cannot come from Indian programs. We believe the explicit reference in S. 1439 to the Judgment Fund sends a clear message that there is no legitimate argument that the cost of this settlement should be charged or borne by any distinct part of the federal government or federal beneficiary.

Second, S. 1439 takes clear and affirmative steps towards reducing and eliminating several of the primary causes of the mismanagement mess. In particular the bill addresses two causes: the fractionated ownership of allotted lands, and the absence of clear executive responsibility for federal trust activities. The fractionation component of the bill demonstrates your commitment to a comprehensive effort to put the sad history of the allotment policy and its nefarious consequences behind us. The creation of an Under Secretary position should result in the coordination of federal policies throughout the Department of Interior through the focus of the federal government's trust obligation. The recognition of this trust responsibility underscores the legitimacy of every interaction between the federal government and Indian tribes and their members. These and other

provisions demonstrate that this bill is concerned with both settling the past and taking steps to fix the future.

Third, the bill recognizes that a fair settlement for hundreds of thousands of individuals who have suffered for years or decades will need to be resolved with a payment involving billions of dollars. With a class of claimants that includes hundreds of thousands of individuals, a settlement of even hundreds of millions of dollars would amount nothing more than a token payment for each individual. Your bill recognizes that such a token payment would be a constitutionally questionable act of confiscation, not the legitimate act of a trustee. Even if such a patently inadequate payment might be permissible, it would neither be fair or adequate to bring this crisis to the immediate resolution we must strive to achieve.

There are a number of tribal leaders, like myself, who look forward to developing a legislative proposal that we can recommend to Indian Country. As you have heard from others today, we are not yet at that point. But, both of the sponsor's statements upon introduction clearly demonstrate that neither the Chairman nor Vice-Chairman assumed that this bill was intended to be anything more than a starting point.

I look forward to our dialogue. In this dialogue we must face each tough issue together, and there will likely be many, and resolve them – pragmatically, yes but also in a manner mindful of the terrible injustice we are all committed to rectifying. Ultimately, we **must** succeed. No amount of effort or accomplishment in any other area in this Committee's jurisdiction will make up for the cost of not achieving a settlement.

Where do we go from here? First, we must begin a dialogue with the sponsors and their staffs to develop an understanding of whether certain provisions in S. 1439 constitute mere placeholders, necessary components of settlement legislation, or concessions to the legislative environment. For example, there is a great deal of mistrust of both the Departments of Interior and Treasury within Indian Country. Allowing either Department to exercise the scope of discretion that would be permitted under the current version of the bill could allow the very individuals who are most antagonistic to the objectives of this process to control most or nearly all of the elements of the distribution of a settlement fund. There may come a day when there is enough trust in Indian Country to structure the settlement in this fashion, but we are not at that point today. In fact, we are far from it. If there are reasons

why a judicially-managed distribution is presently perceived as either unworkable or unacceptable, we need an open dialogue to analyze and address those concerns.

Similarly, we must develop together a model to determine how much to compensate the victims of this injustice. We greatly appreciate the sponsors' recognition that a settlement must be measured in the billions. We must now work on how to develop a rationale for a more specific number. In this process, we must bear in mind that the insurmountable burden of accurately measuring the precise amount of compensation is due completely to the federal government's mismanagement of its own records. In light of this, we believe that it may be worthwhile to work with Committee staff to develop some **models** for calculating a fair and equitable settlement figure. One proposed model would calculate a compensation amount using an imputed error rate times account activity, adjusted for interest and inflation. This idea has some genuine merit, and together we should explore its viability.

There are a number of other issues that concern ITMA's members. We will provide you with more detailed comments as to these in the near future.

There is a great deal more to say and to discuss. Some of these discussions will probably be somewhat heated, but we must all remember that we are all working in good faith for a common end. We represent a lot of people who have a lot at stake in this issue, but when tribal leaders get home, no one wants to know whether we won any arguments. They want to know if they will be compensated in their lifetimes for acknowledged injustices or whether their parents will get justice before they die. To the Chairman and Vice-Chairman I thank you for giving them some hope that this will be the case.

Thank you for giving me this time and I would be very pleased to answer any questions.