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INDIAN TRUST REFORM

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

VIEWS OF THE ADMINISTRATION AND INDIAN COUNTRY OF HOW THE SYSTEM OF INDIAN TRUST MANAGEMENT, MANAGEMENT OF FUNDS AND NATURAL RESOURCES, MIGHT BE REFORMED

MARCH 9, 2005
WASHINGTON, DC

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INDIAN TRUST REFORM

WEDNESDAY, MARCH 9, 2005

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 11 a.m. in room 485, Senate Russell Building, Hon. John McCain (chairman of the committee) presiding.

Present: Senators McCain, Akaka, Cantwell, Dorgan, Inouye, Johnson, Murkowski, Smith, and Thomas.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. We will now begin our hearing on trust reform.

Our first witness is Jim Cason, who is the acting assistant secretary for Indian affairs. He is accompanied by Ross Swimmer, special trustee for American Indians, Department of the Interior.

The subject of Indian trust management reform has been an issue of considerable issue to Congress and to this committee for over a decade. In 1994, Congress enacted the American Indian Trust Fund Management Reform Act with the expectation of bringing order to at least one aspect of the Federal Government's trust responsibility to Indian people, the management of tribal and individual Indian moneys held in trust accounts.

About 2 years later, the *Cobell* case class action lawsuit was filed. In the years since then, we have all learned just what a sorry state the trust fund management system was in. The reasons for this are manifold, I am sure, but most people would agree that for many decades the Federal Government has not been held accountable for its management practices.

This hearing is not directly about the *Cobell* lawsuit, although trust reform should be a component of any legislation to resolve the case and problems that led to it. The purpose of today's hearing is to listen to the views of the Administration and Indian country of how the system of Indian trust management, management of funds and natural resources, might be reformed. I am interested in hearing from the Administration on what it has done to improve trust management and what additional steps it intends to take, because it is no secret that many in Indian country are not satisfied in whole or in part with the Administration's approach and have different views about the direction we should be going in reforming the system.

I also look forward to hearing what the tribal leaders and Ms. Cobell on the second panel have to say about reforming the system.

One more point before proceeding. Several times in recent months I have promised to make trust reform, including the settlement of the *Cobell* case and related issues, a high priority during my tenure as chairman of the Committee on Indian Affairs, but I will also repeat here that I intend to give it only one good shot. If it looks like we are not getting anywhere, if the tribes, the Government, or other interested parties cannot come to terms on a settlement of the lawsuit and on what trust reform should be, then I will leave that task to a future Congress and the courts and concentrate my efforts on other important issues in Indian country.

I am hoping that the Administration and Indian country will begin working with committee staff immediately to see whether something close to a consensus can be reached on the key components of trust reform. This will probably require an efficient, but representative working group within Indian Country to begin helping us shape a bill that can be introduced for review and comment by all stakeholders.

Vice Chairman Dorgan, do you have a statement at this time?

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator DORGAN. Mr. Chairman, let me say that I share your sentiments. It is the case that we cannot solve this issue. Chairman McCain and I and other members of this committee cannot resolve this issue. The parties to this issue must find a way to develop consensus to resolve this issue.

I do not think there is any question but that what is happening now is having a detrimental impact on Indian country. We see sharp cuts in some of the tribal programs that are critically important to Indian tribes for the welfare of the Indian people in this country. We see those sharp cuts in part as a result of the litigation. In my judgment, more and more funds are going to both sides of the litigation. In some ways, I guess in many ways, the Indian people are bearing the burden of the costs for both sides of the litigation.

I think that the settlement of these claims, the settlement of this issue is imperative. My hope is that through the process of this hearing and through the development of other approaches, that we can find a way for us to get all the parties together to reach a consensus and put this behind us.

If we do not, it will have an impact on virtually everything this committee does, all the appropriations that we are involved in with respect to Indian tribes for years to come. I don't think any of us want that. What we want is a fair, thoughtful, equitable settlement that all parties can agree to, and then we move on.

So Mr. Chairman, thank you very much for your leadership.

The CHAIRMAN. Thank you very much.

Welcome, Mr. Cason. Welcome back, Mr. Swimmer. Please proceed.

STATEMENT OF JIM CASON, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS

Mr. CASON. Thank you, Mr. Chairman.

My name is Jim Cason. I am the associate deputy secretary of the Department, and currently I have delegated authorities of the assistant secretary of Indian affairs while we are searching for a new assistant secretary. I am accompanied by Ross Swimmer, who is the special trustee for American Indians. We intend to give a very short opening statement and then go ahead and get on with questions.

We would like to have our written testimony entered into the record, if that would be satisfactory.

The CHAIRMAN. Without objection.

Mr. CASON. We would commend the written testimony for reading. We think it gives a pretty detailed explanation of some of the problems that we think are inherent to the trust.

The Indian trusts had origins with the formation with the formation and expansion of our country. It first began with tribes and in 1887 the United States began a trust relationship with individual Indians. The trust relationship is complicated. It has many opportunities, problems and challenges. Many of the problems stem from conflicting statutory objectives that combine a social agenda with demands of a fiduciary trust, all to be managed in a government program environment.

The challenges and problems have been longstanding and mostly unresolved. For example, the statutory origin of the trust without a trust document is an issue; the long-term nature of the trust, it is in perpetuity, and we are generations away from when the trust started; the lack of a cost-benefit paradigm that marries the interest of the trustee delegate and the Indian beneficiaries together; land fractionation; the choice of skilled personnel; the lack of clear requirements and expectations on all parties that are consistent; the duties and funding are not well coordinated; and organizational structure is a problem.

All of these problems basically came to roost with litigation that we all talk about as *Cobell,* and some associated 22 or 23 lawsuits filed by tribes, where these problems manifest themselves in litigation. One of the problems that was the root of this hearing is to talk about organizational structure, and how we dealt with reorganization of the Department. That effort began about three years ago, and it began with our initial discussions about the underlying roots of the *Cobell* lawsuit.

One of the things that we actually agreed with the plaintiffs on is that we were not clearly focused on managing the trust that we had as a trust. The reorganization efforts that began with the advancement of an idea that was lovingly termed BITAM by Indian country, was to try to separate out the fiduciary trust duties of the Bureau of Indian Affairs [BIA] into a separate organization and place a new assistant secretary in charge of that, so we have a very clear focus on the Department's trust responsibilities.

Needless to say, there was broad opposition in Indian country to that idea for many reasons. That began an almost 2-year process

of initial discussions with Indians, a whole host of meetings, a task force endeavor, lots of written examination of different proposals. At the end of that process, we ended up at impasse. The issues at impasse were basically a request for the United States to waive sovereignty; the interest of Indian country in having an external oversight committee that would oversee the Secretary of Interior and her implementation of the trust; and a request to have delineated trust standards that were in excess of what we already had in the Department.

We reached an impasse and at that point the task force for reorganization broke up and the Department went internal at that point and attempted to implement in good faith the parts of the discussion that we had had in the task force that we thought we ended up agreeing on. There is one exception that comes to mind, and that is we had reached an agreement on pursuing an under secretary for Indian affairs in the Department. We did not pursue that because we believed that it would take both Indian country and the Department supporting that in Congress in order to get that authorization, so we did not pursue that part.

After the reorganization, we are basically complete with our reorganization efforts. There are still some staff people we need to hire. That is part of our normal personnel process, but essentially the reorganization is complete within the Department. We have moved our focus since then from reorganization efforts to a host of other efforts designed to improve the trust. Ross is going to talk a couple of minutes about those efforts.

Mr. SWIMMER. Thank you, Jim.

Thank you, Mr. Chairman and Vice Chairman.

I appreciate the opportunity to present to you today some of the things that are being done in Indian country in regard to the fiduciary trust. As Mr. Cason explained, the trust as we know it today as a fiduciary trust was not a part of the 1887 Allotment Act. The original Allotment Act was for the purpose of holding title to land to prevent alienation or any other form of leasing, mortgaging or using of the land other than by the individual him- or herself.

The attempt would be, then, to move Indian individuals into the economy of the day, which was primarily agrarian, to become farmers and ranchers like their neighbors, and then of course, as we know, the other result was to open the west for homestead.

The intent was to have that title held for 25 years, and at such time as that ended, that would be the end of that era and fee title would be transferred to all of the allotees. In fact, in 1887, the law specifically prohibited an Indian from leasing their land or getting income from an outside source of their land because the intent was to teach them how to use the land, rather than to have money come into it.

As a result, we have what in law is often referred to as a resulting trust. In this case, I may refer to it as an evolving trust. In about 1910, there was much greater freedom given by Congress to Indian individuals to lease their land. Much of this land was not good for production, for agricultural production. And there were people that wanted to lease it, and we know about the mineral leasing that eventually came about as oil and gas became important in Indian country.

What we have today is what we call a fiduciary trust, but over the years was treated more as a programmatic activity of the BIA. What we created in the Office of the Special Trustee as a result of the work with the tribes, with the BIA and other bureaus within Interior, the Bureau of Land Management, Minerals Management Service, and others, was a trust model that we called the fiduciary trust model. It grew out of 1 year of looking at how the BIA and the Department managed this trust. Then we spent 1 year on how we should manage it. Out of that grew the model that is our basis for managing this trust today.

Obviously, there are still serious issues when we talk about managing the trust. Mr. Cason alluded to a few of those. We have highly fractionated interests in land that make it very difficult to lease that land, to collect the money, and to distribute it to thousands and thousands of people that may own a single parcel. However, some of the things I will mention do help us do that more effectively. Whether we should or not is not a question. At this point, we are obligated by some, it is estimated to be 4,000 statutes and regulations that direct how we should administer this trust.

One of the things that we have done as part of the model is we created another category of people in Indian country. For the first time since 1887 we have fiduciary trust officers deployed to the field located at BIA agencies. These are trained trust officers. They come many from the private sector, several are attorneys, several have been with banks and trust companies. They have been trained in the concepts of fiduciary trusts. They have also been trained in how we transfer the concepts of private sector fiduciary trusts to the Indian trusts, because they do not always mesh, but the concept of a fiduciary, someone that is faithful to the process of managing another's property are basically the same.

The statute has pretty much set out what that responsibility is. We have fiduciary trust administrators that we have selected six of those who manage the fiduciary trust officers at the reservation level. We have created in addition support for the beneficiaries. We have a beneficiary call center that has now been in place for nearly 2 months. In the 2 months, they have received over 10,000 calls from beneficiaries asking for information, everything from when is my lease due, am I going to lease my land, how much do I have in my account, when was my last check given, and this sort of thing; 94 percent of the calls have been resolved at that time when the call center was called. The other calls get referred to the trust officer or to a superintendent or a realty person at the agency for support.

We have also noted in the past that we have had trouble in ensuring that collections were made timely. It was not unusual for a lessee to come into the agency and leave a check, and that check may lay on somebody's desk for a few days. We do not want that to happen. We have moved into a lockbox system so that all moneys that are owed will be collected through a lockbox. We will have a receivable system that will indicate to the lessee how much that money is supposed to be, and we will be able to track it.

In the year 2000, we completed the conversion from about a 30-year-old legacy accounting system to a modern trust accounting system used currently by the largest private trust companies in the

United States. That trust system now allows us to account for collections and to balance to the penny with Treasury on a daily basis.

In addition to the lockbox system, we have advised and continue to stress to individual Indian people that we will disburse their funds faster through the use of direct deposits. We have worked out with Treasury a system where as soon as the money comes in on a person's account, we can send it right out again if it is a nonrestricted account. In those cases where we can do it as a direct deposit, it will go there even quicker. Last year, we sent 435,000 checks out to individual Indian account holders. We would rather do that in a direct deposit, saving both money on checks, as well as getting the money to them faster.

We have and are in the process of replacing legacy IT systems. We have just converted fully from a, again, 30-year-old title system that was very cumbersome to use, to a new title system that should allow us to be able to issue title status reports much quicker than before.

We have provided through professional trust training centers, trust training not only for employees of the Special Trustee, but for the employees of the BIA that may be involved in providing trust services, as well as other employees of the Department of the Interior, BLM, Minerals Management Service and others, in the concepts of fiduciary trusts, and again explaining how those concepts relate to the private sector fiduciary trustee and the Indian trust.

The model calls for a streamlining of the probate process through combining the probate adjudication. It calls for placing of surveyors from the Bureau of Land Management in each of the regional BIA offices to provide faster services on surveying. We have instituted a records center at Lenexa, Kansas that is now a state-of-the-art record center, better than anything in the Federal Government. It is a repository currently for the records of the BIA and for the trustee for the beneficiaries and the tribes. There are millions of records currently being stored there and millions of records that will go there in the future.

These are just a few of the things that we have accomplished as a result of the fiduciary trust model. We are making progress every single day on implementing the model that was adopted this past year.

Mr. CASON. Mr. Chairman, can I just add one other thing? We really appreciate the intent of the committee to take on the *Cobell* issue and trust reform during this session. It is a really complex and difficult issue and we would really appreciate some help with it.

Thank you.

[Prepared statement of Mr. Cason appears in appendix.]

The CHAIRMAN. Mr. Swimmer, what are the major remaining obstacles to resolving this issue, in your view?

Mr. SWIMMER. In terms of the reform, the real remaining work that needs to be done is in the IT sector. We have two other programs coming along that will replace legacy information technology systems. One of those is in what we call the realty, which affects the leasing and managing the land, basically. That is a system that we are currently, in fact it is scheduled for the end of March, to do a user acceptance test. Once that is done and it passes the test,

we will begin the implementation of that. That should replace what you may have heard the acronym before, the IRMS, integrated records management system, as well as about eight other legacy sort of home-grown system RIMS, DADS, GLADS, and various others.

That is going to be a major change. What it does, it allows us then to fully comply with the Reform Act. It allows us to give beneficiary statements with source, type, status of funds. Even though a beneficiary may have a 1/1000's of an interest in a parcel of land or an allotment, we will list that on their statement. We will show whether there is any income received from that. We will show the balance of their account and any other assets that they may own. On average, a beneficiary today has about 10 interests, usually fractionated interests in land scattered in multiple States. The new title system I mentioned gives us access to that information for the individual on a national scale without having to go region by region.

The other basic tracking systems for the appraisal program for the probate program and others that we are replacing legacy systems. The other major component, obviously, is we are currently hamstrung by the lack of Internet access. This is of course a court-ordered issue. We do not have any choice about it. We are kept off of the Internet. We cannot communicate with beneficiaries via the Internet. It does have a serious impact on our ability to perform a lot of these functions in a productive manner. We are having to do a lot of work around to get there.

The CHAIRMAN. What about the resolution of claims?

Mr. SWIMMER. In terms of the accounting claims, we are doing the accounting as we have explained to the committee before. My office oversees the accounting. It is done through the Office of Historical Trust Accounting which was created by this Secretary shortly after she came into office. That office has pursued the accounting. They have an accounting plan. They have an accounting manual. Currently, I think that they have completed accountings or reconciliation of about 36,000 accounts, primarily judgment accounts and per capita accounts. They have ventured into the land-based accounts and are doing some of the work there on the larger transactions.

The plan, as we have described to the committee before, was a plan to do a transaction-by-transaction analysis of accounts from a date-certain forward that would give us a full reconciliation of a person's account and then on transactions below a certain threshold, essentially $5,000, we would do then a statistical sampling, a broad sample across the Nation to give us an indication if in fact there appeared to be any serious issues with the account statements of the individuals.

As you know, that is a process that we started 2 years ago. We have continued to ask Congress to fund that. It is approximately a $335-million effort. We continue to work along those lines on the plan. That was a plan submitted to the court January 6, 2003. Recently, the Federal District Court has reinstated its structural injunction of last year that would require an accounting in the form of a transaction-by-transaction analysis for every account from the time it ever had money in it, which would probably be about 1895.

The CHAIRMAN. What would be the expense involved with that?

Mr. SWIMMER. It has been estimated by our accounting group and other professionals that it would be somewhere between $6 billion and $12 billion.

The CHAIRMAN. Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you.

Mr. Swimmer, that is the course we are now on, correct? The transaction-by-transaction historical accounting ordered by the court? If nothing were to interrupt what is now happening, that is the direction that we are now moving. Is that correct?

Mr. SWIMMER. That is correct.

Senator DORGAN. And the end-point of that is the expenditure of billions and billions of dollars.

Mr. SWIMMER. Yes.

Senator DORGAN. It appears to me that much of that would come out of otherwise appropriated funds for critically needed programs for Indian tribes and Indian citizens across our country. Would you agree with that?

Mr. SWIMMER. It has to come from someplace. It would come from appropriations. There have been suggestions that it should come from the, quote, "judgment fund" of the Justice Department that is used often to pay off judgments, but that does not protect, if you will, the Department of the Interior's budget. It still is appropriated funds. It still has to come from the appropriations.

Senator DORGAN. Well, if you look at the President's budget this year, what you find is that in that Interior Department, you have a certain amount of money that is allocated for these Indian programs, and that same Department bears the burden, then, of the additional costs here. That looks to me like you have a corresponding decrease in certain Indian programs and a corresponding increase in the trust issues.

Let me just ask, you indicated that you have people in the field now that will be involved in telephone servicing if someone calls and wants some information about their account. I do not quite understand how you do that when there is the fractionated ownership and the absence of the completion of a transactional accounting. How good is the information that you provide to people who call and ask for it?

Mr. SWIMMER. What I would distinguish is the historical accounting, and say answering a question regarding someone's grandfather's account statement in 1930. We would not do that. That is a function of the historical accounting that eventually will come up with that account statement. At that point, we theoretically could do that. What the call center is doing, it is a centralized 800 number and the idea is to, and frankly it is patterned after the Bank of America's trust call center so that when an individual, wherever they might be located, calls for information on their account balance today or yesterday or back to 2000, we would be able to pull up the information right out of the system, out of our trust fund accounting system. Or if they ask for information regarding their fractional interest, or if they had a relative that was in probate and they wanted to know the status of things like that, we could answer those questions for them and are able to do that.

Senator DORGAN. I understand. Mr. Swimmer, what is the practical alternative to going back over a century and recreating on a transactional basis this historical accounting? If doing that is going to cost $6 billion, $8 billion, or $10 billion, what is the practical alternative do doing that in a way that satisfies the interests of all the stakeholders here, in your judgment?

Mr. CASON. I will take the first crack at it. We have another alternative that the Department is actually implementing, which is the plan that we have proffered to the court. That plan depends on the use of statistical accounting to try and resolve the issues and questions about the accuracy of the systems in the past. So that is a plan that takes a lot less time to do. It takes a lot less money to do. If you add the caveat at the end of your question, will everyone be satisfied? Probably not.

If we do the plan proffered by the court, will everybody be satisfied? Probably not. There is not any plan that will satisfy all parties that might be interested in this. But there definitely are alternatives that can be pursued to define the scope of the accounting and define the level of effort required, the level of accuracy of the accounting. All of those will dictate the amount of time and resources it takes to do the work.

We have possibilities for a different approach as well, and that is discussion about settlement. Is there some way that we can cobble together a strategy on settlement that would be acceptable to a majority of the parties? Is there any settlement approach to satisfy everyone? No, but there are ways that we can address most of the problems in a way that is reasonable. We would like to work with the committee to explore the various options that are there and see if we can work with Indian country to bring it to resolution so that in the end, whatever benefits come out of this go to Indian people as opposed to a host of lawyers and accountants.

Senator DORGAN. Mr. Chairman, thank you. I might just observe that obviously I think working with the Indian people takes priority over working with this committee because I think the only way this committee is going to play a constructive role here is to have brought to us the development of a consensus of all the stakeholders. Primary, of course, there are the Native Americans whose accounts we are talking about.

Mr. Chairman, thank you.

The CHAIRMAN. Thank you.

Out of curiosity, Mr. Cason, where would $6 billion to $12 billion come from? What is the BIA's budget?

Mr. CASON. The BIA budget right now, including education, is about $2.2 billion. How much we spend on implementing the trust for both tribes and individuals is somewhere on the order of $500 million a year. So clearly, the Department does not have a funding base that could accommodate this.

The CHAIRMAN. I thank you very much. I am sure we will be seeing more of each other.

Mr. CASON. Thank you, Mr. Chairman.

Mr. SWIMMER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The next panel is Tex Hall, who is the president of the National Congress of American Indians; Chief Jim Gray who is the chair-

man of the Board of Directors, Inter-Tribal Monitoring Association of Albuquerque, NM; Charles Colombe, who is the president of the Rosebud Sioux Tribe; Darrell Hillaire, who is the chairman of the Lummi Nation; and Elouise P. Cobell, Blackfeet Reservation Development Fund, Browning, MT. Welcome.

We will begin with you, President Hall.

STATEMENT OF TEX HALL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. HALL. Thank you, Mr. Chairman. Again for the record, my name is Tex Hall. I am the president of the National Congress of American Indians and chairman of the Mandan, Hidatsa and Arikara Nation in Fort Berthold, ND. I appreciate Chairman McCain and Vice Chairman Dorgan for allowing us to testify on the oversight hearing on trust reform.

Just a brief statement to the response to what was testified earlier. At the end of the day, we still have 50,000 addresses unknown, IIM account holders not known. We still have spent nearly $1 billion for trust reform, and we are not at the point where we need to be. It still takes in some places 3 years to get accurate title for landownership. In many places, including my reservation, lease checks for grazing are not distributed yet in a timely manner and those usually come out much earlier.

So I would like to start my testimony officially by saying I am pleased to be on this panel here with the distinguished tribal leaders that we have before us and the *Cobell* plaintiff Attorney Keith Harper. I am also pleased to be joined by Chief Jim Gray who is the chairman of the Inter-Tribal Monitoring Association. We at NCAI and ITMA are going to lead a coalition of Indian tribes and organizations that will help draft a legislative trust reform and settlement proposal which we would like to submit to the committee later on this spring.

I cannot emphasize how important in Indian country the formulation of this proposal is. To that end, I want to make it clear that my staff and all of us are ready to work with the committee 24–7, whatever it takes to get that task done.

The trust problem, as we know, has dogged the United States for over 100 years, so on behalf of NCAI we want to say that we want legislation that will require the United States to exercise its fiduciary responsibility to Native Americans. We expect that there will be a high standard of accountability and responsibility. There really can be no other way. Fiduciary law is designed to prevent the trustee from abusing its powers. As a fiduciary, the United States cannot treat its relationship with Indian tribes as an arms-length or adversarial relationship. Instead, the United States must safeguard and promote the interests of Indian tribes and individual Indians. It has not, and that is why we need the help of this committee and Congress.

Against this backdrop, the NCAI strongly shares the views of the leadership of this committee that it is time for Congress to establish a fair and equitable process for settling the *Cobell* and doing a trust fix. Tribal leaders have consistently supported the goals of the *Cobell* plaintiffs in seeking to correct the trust fund's accounting and overhaul the system at the Interior.

Just a little backdrop, in 2002 in response to the BITAM that Jim Cason mentioned that was presented by the Secretary in the fall of 2001, it was agreed upon by the tribes through NCAI and the Secretary for creation of a task force that met pretty much for all of 2002. We did not want a bureaucracy that separates the management of our lands from all of the activities that take place on our lands. What has instead evolved is a two-headed bureaucracy that would never make any decisions and would take resources from other important programs of the BIA and really limit services to Indian recipients.

Despite our rejection of this BITAM, it seems like our worst fears are coming true as trust functions and resources are being shifted from the BIA to the Office of the Special Trustee. The President's budget for 2006 would cut $139 million from BIA, mostly from school construction, and add $76 million to OST. On top of this, OST has created trust officers without tribal consultation, with basically no job description and basically no coordination with tribal governments.

So after the meeting in Spokane, we reached an agreement to create this task force in 2002. After 10 months, the Department walked away from the table. However, some of the key recommendations that were part of this proposed legislation that the Indian tribes will be drafting in the next few months, are based on the recommendations and discussions that came out of the 2002 task force.

We had unanimous consent on three key issues. One is the creation of an independent entity with oversight responsibility for trust reform. The Office of Special Trustee was originally envisioned as an independent office that could provide expert trust management advice and oversight. Instead, it was placed under the Secretary of the Interior and now completely lacks independence. It has evolved into a trust management agency that was never intended by Congress or the tribes. Tribal leadership on the task force are working on a proposal to phase out the Office of Special Trustee, and instead replace it with an independent commission capable of oversight on the Indian trust.

In the last Congress, you, Chairman McCain, helped introduce S. 1459, a bill which would create an independent commission that would review Federal trust laws and policies for the management of the Indian trust funds and make recommendations. NCAI strongly supports an independent agency and independence, and that would be of course a great backbone of our legislative proposal.

The second commonality that tribes reached was a high-level responsibility for Indian affairs. The Department agreed with tribal leaders on the task force about the creation of an under secretary for Indian affairs that would have direct line authority over all aspects of Indian affairs within the Department, including the coordination of trust reform efforts across all the relevant agencies within the Department of the Interior outside of BIA. Indian country supports the creation of an under or deputy secretary in new trust reform legislation.

And number three, the reorganization of the BIA. The principal goal of the tribal task force members was to have the resources and

decision making at the local level of the BIA, coupled with an internal oversight mechanism. The Department instead has preferred splitting the authority at the local level, which is what we are seeing today, the development of trust officers. Like BITAM, this is unacceptable to Indian country and we ask Congress to put an end to this in proposed legislation.

Tribal leaders also wanted clear trust standards and legal obligation. If DOI violates its trust responsibility to Indian tribes because DOI is a fiduciary and acts as the bank for Indian tribes, Congress must make DOI to commonly accept legal standards and accountability as other trustees.

On adequate resources, we must have adequate resources, financial and human resources necessary to perform the trust duties. In 1994, the Trust Reform Act called for the Special Trustee to review the Federal budget for trust reform and certify that it is adequate to meet the needs of trust management. In practice, the Special Trustee has no independence and certifies whatever is submitted by the President. Tribal leaders strongly believe that an independent entity should review the Federal budget for trust management and provide its views to Congress.

On core business systems, NCAI believes that Congress should also focus oversight efforts on title, leases and sales and accounting to ensure that reform efforts meet the requirements of the fiduciary trust.

On fractionation, we at the tribal level, at the Administration level and Congress, have great success in the Indian Land Consolidation Act. However, we need more funding.

Finally, last week at the NCAI meeting, Indian country and NCAI leaders met and agreed that we must ask Congress to consult with Indian country first on any trust reform legislation. NCAI strongly believes that any legislative proposal on trust reform should be developed with Indian tribes prior to being introduced in Congress. So as president, I directed a special committee to work on this reform and settlement legislation. I will serve as cochair of this committee on trust, along with Chief Jim Gray. We will reach out to all tribes and tribal organizations, and will welcome and encourage participation at these meetings by all.

We look forward to working closely with the members of this committee, the House Resources Committee, and your staffs on the development of a lasting solution that will settle the litigation and create a lasting trust reform.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Hall appears in appendix.]

The CHAIRMAN. Thank you.

Chief Gray.

STATEMENT OF JIM GRAY, CHAIRMAN, BOARD OF DIRECTORS, INTER-TRIBAL MONITORING ASSOCIATION

Mr. GRAY. Thank you, Senators. My name is Jim Gray. I am the principal chief of the Osage Nation. I am also chairman of the Inter-Tribal Monitoring Association, known as ITMA.

This organization of 60 tribes across the country that have vast trust resources that are managed by the Department of the Interior, BIA through the OST. Over the course of these past 15 years

of this organization's existence, we have worked diligently with both the House and Senate committees that have jurisdiction on Indian affairs. We also have worked diligently with the Administration over the years in a variety of ways on how the administration of the trust resources of Indian country is being managed and how it is being appropriated.

Part of the concerns that ITMA wants to bring before the committee today is primarily detailed in our written testimony which is being submitted to the committee.

The CHAIRMAN. All written statements will be made part of the record.

Mr. GRAY. Okay, thank you.

So today what I would just like to do is just make brief observations about where we are today from ITMA's standpoint, and how we can be helpful in contributing to an overall effort to achieve real trust reform in Indian country.

Part of the biggest concerns that our organization has had is following the process of the 2–B model and its fiduciary trust model, as it is being called today as it is being rolled out across Indian country. One of the biggest concerns that our organization has had is the lack of adequate tribal input and discussion as these policies have been carried out by the Administration.

One of the concerns that I have had just personally is the internal workings of this entity before it was rolled out into Indian country. What I would like to have been able to have been a part of, and of course Chairman Hall had mentioned this earlier, that the task force had worked for almost two years on this effort to try to find some consensus. But the only thing that I think Indian country came out of that was finding the areas where there was disagreement. Unfortunately, that disagreement has not been, I don't know, sufficiently communicated to Congress or to the Administration as these proposals have been fully implemented.

Another concern that we have had is that the process of getting input from the people who are most affected by these policies, the beneficiaries, the individual account holders, as well as the tribes themselves, has been something that ITMA has worked very hard to try to find a resolution to. Last year, at the very beginning of last year, we started out what I thought was a very ambitious and hopeful effort by ITMA to reach out to Indian country. We held seven listening conferences in six States around the country last year. We have four scheduled to be going on this year. This work, as important as it is, it is limiting in some respects in that we would like to be able to do more. The problem is that the purpose of this is to try to find out from individuals across Indian country the impacts of the fiduciary trust model is having on Indian country.

We have made some general observations that are in our written testimony, but I would just like to speak to a couple of them right now. One of the concerns is obviously the speed at which the rollout is taking place and its impact, and the fact that many of these people who are beneficiaries are not receiving a full understanding of the changes that are going on within the Administration from the OST to the BIA. Most of the individual Indians just do not un-

derstand what the implications of moving these policies and administrative positions around.

From the tribal leader's standpoint, I am somewhat familiar with the moving of the boxes all over and the reorganization. As Chairman Hall mentioned earlier, we have concerns that we feel like there has been some consolidation at the central office of very important functions that normally used to be taken care of at the ground.

Part of what I am most proud of with these listening conferences that the ITMA has hosted had to do with being able to get top-level presidential-appointed Administration officials to come before these hearings. Mr. Swimmer and the Deputy Director Donna Erwin attended many of these meetings. We tried our best to try to get their counterparts at the Bureau to attend these meetings as well. One of the problems that we encountered was just scheduling problems, but for the most part these two individuals from the OST made themselves available to listen to the concerns from both tribes and individuals time and time again on their concerns.

Many of the concerns could be explained with just good communication. Some of the concerns were fundamental, and are part of our written testimony, that we think need to be addressed by this committee.

So ultimately, and I will just sum up real quick at this point, is that we have what I think is probably a good system in place right now from ITMA's standpoint to continue this effort to get input into Indian country, and to specifically be able to address and document some of the concerns that are happening in the roll-out of the Department's new fiduciary trust model.

I think what I would like to be able to continue to bring before this committee on behalf of this organization over time is basically a presence in Indian country that is maintaining what the Administration believes is the best trust model that they can put together, and just to see its impact on Indian country, and be able to come before this committee as needed to be able to present to you the views from Indian country as to how that is working.

If Congress does not act on trust reform in the form of any legislation, I would hope that you would see that our role would be a helpful one. But beyond that, if there is a real interest in doing a full-blown legislative solution on trust reform, that you will also see that ITMA can be helpful in that capacity as well. I do pledge to work with the organizations that we have developed relationships with, like the Council of Energy Resource Tribes, the Inter–Tribal Timber Council, and many other intertribal organizations that are devoted to trust resource management as a narrow focus, as well as working with Chairman Tex Hall here, who has demonstrated great leadership in this area on behalf of NCAI.

So at this point, I would like to make myself available for any questions you may have.

[Prepared statement of Mr. Gray appears in appendix.]

The CHAIRMAN. Thank you very much.

President Colombe.

STATEMENT OF CHARLES COLOMBE, PRESIDENT, ROSEBUD SIOUX TRIBE

Mr. COLOMBE. Chairman McCain, Vice Chairman Dorgan, members of the committee, my name is Charles Colombe. As tribal president, I am honored to testify today on behalf of the Rosebud Sioux Tribe of South Dakota.

I have also submitted written testimony that you have, but I am going to shorten that up. I want to thank the committee for their ongoing efforts in holding this hearing and in attempting to deal with the issue before us.

At Rosebud, we have approximately 900,000 acres of trust land, about 25,000 tribal members, with 21,000 of them living on the reservation. We have the second-poorest county in the United States there. We are land-poor in a lot of ways. Only one out of five of our adults have a job.

However, we consider ourselves rich in our customs, our traditions, and certainly in our land. Land should be the foundation of our reservation's economy. Since the reservations were created, the United States has had management and control of our land. As I am sure you are aware, the BIA's land management has been a dismal failure. Land management is therefore the heart of trust reform in our region, and I know trust land very well.

I ran our tribe's purchase program during the 1970's when I was on the tribal council. From 1979–94, I contracted title work to the BIA and oil companies. I completed change of title and curative work and computerized all of the land records on all trust titles in the Minneapolis area, the Great Lakes area, Great Plains, Rocky Mountain, and Northwest regions.

I also built the title plant data for the Pacific region and turned the switch on in Sacramento. I provided the same services for 11 of the 19 Pueblos in New Mexico. In that time, I also did a lot of work on title relating to legal claims. For example, law firms asked me to reconstruct ownership files after they had won claims against the United States for timber mismanagement. This sometimes required me to construct records for land that had been probated 20- or 30-year earlier, some of which had passed out of trust.

Also beginning in 1979, I ran the 28 U.S.C. 2415 claims process for South Dakota Legal Services. The United States had filed actions against local governments, utility companies and others on behalf of tribes and allotees for damaging and primarily for using trust lands without first obtaining perfected rights-of-way. The 2415 claims process was an effort to assist tribal members in filing land claims before the statute of limitations expired.

On a personal level, as a rancher, I have leased and permitted thousands of trust acres, bought and used land, and mortgaged it. I understand the way the Bureau manages land, not only on my reservation, but on many others where I have provided contract title services.

Before I get too far into my testimony, I want to acknowledge that almost every tribe has a dog in the fight over the ongoing reorganization of the BIA, because most tribes are impacted by the deep funding cuts to TPA and school construction. The Department of the Interior should collaborate with all tribes to reform the Indian trust. The United States, the Office of Special Trustee, the

BIA and Indian tribes can collaborate. One only has to look at the successful passage of the American Indian Probate Reform Act of 2004 to see how well this can work. I personally believe that this is the most significant piece of legislation enacted to benefit Indian tribes and their members since the 1934 Reorganization Act.

The Great Plains and Rocky Mountain region have the majority of individual Indian money account holders. We want to collaborate with the United States to come up with meaningful trust reform. These regions also recognize that other regions like Oklahoma may very well have higher dollar values in their IIM accounts due to the development of mineral resources on their land.

An example from my reservation demonstrates the land management problems we face with the BIA. It also demonstrates how unresponsive current reorganization is to tribal trust concerns on the Great Plains. In 1943, the BIA created tribal land enterprise for the Rosebud Sioux Tribe under a Federal charter. It is the only one in existence. The BIA wrote TLE's bylaws and still retains supervisory authority over all actions by the board of directors. The board is appointed by the tribal council and the shareholders. As president, I am also a TLE board member.

The BIA today retains signatory authority over all accounts, land transactions, leasing and is responsible to ensure that fair market value is received by the allotee when he sells his property to TLE. TLE seemed like a good idea at the time it was created in 1943. TLE has worked well for the BIA and sometimes, but not always, for tribal government. Here is how it should work.

TLE purchases land from individual tribal members, paying them with a certificate of ownership in the corporation comparable to a stock certificate. These certificates allow individual allotees to retain a financial interest in a corporation that manages the land that would otherwise be of little or no use to them because it was rapidly turned into fractionated undivided interests. Thus, TLE consolidated fractional undivided land interests and returns those interests to tribal ownership.

TLE manages such lands by leasing most of it for agricultural uses. TLE assigned other land to individual tribal members. Profits from leased land have been used to buy even more fractionated land. Regrettably, the bylaws have not been followed for a variety of reasons. TLE board of directors and TLE staff are not trained in land management or other accounting procedures. TLE has simply failed miserably in complying with its own bylaws.

The BIA has stood on the sidelines and allowed shareholders, that is, former allotees, to be defrauded. On paper, TLE has been wildly successful, and has apparently acquired over 570,000 acres of individual land that it now manages for the tribes. It generates approximately $3 million every year in gross lease income. After expenses shows a profit of close to $2 million a year. In reality, however, TLE has become a black hole for the financial interests of individual certificate holders.

Since 1943, TLE has systematically failed to perform the annual land valuation mandated by its bylaws. Due to these failings, individuals selling certificates issued in 1943 could receive less.

The CHAIRMAN. Mr. President, you will have to summarize, if you will please.

Mr. COLOMBE. Thank you.

Individuals receiving less than $42 an acre for land that is worth about $300 an acre.

Frankly, Mr. Chairman, what I need from the committee, the BIA, U.S. Government, are a couple of very simple things. We need to collaborate on how to fix this. This is a case that the accounting is there, the records are there, everything is before us, and it shows that our people have basically lost close to $100 million. It is not one that we have to do a historical accounting on and search for records that are not there. They are all there.

[Prepared statement of Mr. Colombe appears in appendix.]

The CHAIRMAN. Thank you very much, sir.

Mr. COLOMBE. Thank you.

The CHAIRMAN. Chairman Hillaire.

STATEMENT OF DARRELL HILLAIRE, CHAIRMAN, LUMMI NATION

Mr. HILLAIRE. Chairman McCain, Vice Chairman Dorgan, it is an honor to be here. My name is Darrell Hillaire, the chairman for the Lummi Nation.

We have been working in cooperation with the California Tribal Trust Reform Consortium, Big Lagoon, Cabazon, Hoopa, Karuk, Quilliville Rancheria, Redding Rancheria, Yarok. We have also been working with Rocky Boy Reservation of Chippewa Cree, ATNI organization, most notably Colville Nation.

Today, we have drafted and are submitting for consideration proposed legislative language that addresses our concerns regarding the national conflicts associated with trust reform and settlement of the *Cobell* litigation.

Riding on both issues is the Office of Special Trustee and its failure to limit its activities and scope of work within the boundaries set by the 1994 American Indian Trust Fund Management reform. The terminationist and paternalistic insensitivity that the OST has displayed toward the impacted tribes and the damages caused by prior mismanagement of trust funds and assets have polarized Indian tribes and leadership nationwide. The topic of OST consultation with Indian tribes has become a farce that Indian country does not take kindly to.

Our draft language can be divided up into five synoptic topics. The first is the Consortium tribes' concerns that the legislation includes protection of treaty rights and self-determination. The second is the recommendation to create a deputy secretary for Indian affairs that will replace any counterpart duties and functions assigned to an assistant secretary or the Office of Special Trustee, and that the funding and resources that were temporarily placed under the OST will be completely transferred to said deputy secretary.

The third concern is that Indian tribes should be provided every right and opportunity to fully assume the functions of trust fund and asset management, along with the financial resources essential to accomplish the tasks. The fourth concern was the idea of a commission to provide advisory services to the deputy secretary for the purposes of assessing the fiduciary and management responsibilities of the Federal Government with respect to Indian tribes and

individual Indian beneficiaries. Although this recommendation has surfaced before, our Consortium is concerned that it will simply become a commission to circumvent the concerns of the tribes and its beneficiaries.

The fifth issue is associated with the call for mandatory mediation of the *Cobell* litigation. It is sometimes too easy for parties that are not plaintiffs to the litigation to recommend settlement when the impacts are not directly felt by their tribes or their individual membership. However, the Consortium at least believes that the subject could be submitted for consideration during the hearings. It recommends that major plaintiffs and their lawyers are given agenda time during the hearing process.

The most common theme that unites Consortium tribes together is the principles of Indian self-determination and self-governance. The individual Indian money accounts are trust funds that were created as a result of the enactment of the General Allotment Act. The Indian lands were divided. The trust patterns were created, and the BIA assumed control over the estates of all incompetent or non-competent Indians. This even included control of tribal trust funds. The Allotment Act nearly completely destroyed Indian tribal governance. It did destroy tribal reservation economies and impoverished the Indian people.

Since then, the Indian Reorganization Act of 1934 and the Indian Self-Determination and Education Assistance Act of 1975 have been enacted. Then, the latter was amended to provide tribes with the opportunity to become self-governing as a matter of Federal Indian law. Indian tribal leadership was aware that the trust system has been a failure since it began. The tribes have always suffered as the wards and the guardian has always failed to protect the interests of Indians.

This failure was why the War Department transferred Indian Affairs to the Department of the Interior in 1848. This continuing failure is why President Grant in 1872 placed church leadership in control of Indian reservations. This is why the U.S. Congress has held hearings in the 1870's as to the extent of the BIA mismanagement that then resulted in modification of the laws that governed legal contracts with Indians. The *Cobell* case is litigation that was simply forming over 100 years ago.

Throughout this, Indian lands and inheritance have been destroyed beyond recovery due to the fractionated ownership problems instituted by the Federal BIA mismanagement of Indian affairs. The Indian Land Consolidation Act must be fully funded by Congress in order to reverse the damages done to Indian land titles. Major appropriations should be earmarked specifically for the use of the tribes to clear land titles. Clear titles are essential to Indian housing development, as well as tribal governance and economic development projects.

This is a concern of self-governance tribes in the Consortium. The Consortium tribes want every opportunity to develop a tribally based trust fund and asset management system that will guarantee the protection of the rights and benefits to both the tribes and individual beneficiaries at the local level. The standard of the DOI BIA thus far has been mismanagement and failure. Indian tribes should not have to confront OST or other similar types of officials that

work to squash tribal efforts to develop honest, fair and equitable trust fund and asset management systems.

In addition, there is inadequate attention paid to the difference between the individual trust and the collective trust owed to Indian people. The individual trust is associated with BIA management of trust assets created by the General Allotment Act. Then, there is the sacred trust of civilization that is tied to the government-to-government relationship the tribes have with the United States. Under the latter, the Indian tribes are concerned about assuring that they are given access to rights, services and benefits provided to other population segments of the United States by the other Federal departments and agencies.

The trust concept has been abused. In history, it was always the BIA and only the BIA that serviced Indian tribes and Indian people. Indian tribes have treaty relationships with the whole United States, and not just the BIA. Trust reform is more than simply undoing the damages caused to individual Indian money accounts beneficiaries. It is more about providing Indian people and Indian tribes the opportunity to really exercise Indian self-determination and self-governance. This will take the cooperation of the whole United States. It will require reestablishment of the government-to-government relationship between the Indian tribes and the United States as founded upon the U.S. Constitution.

[Prepared statement of Mr. Hillaire appears in appendix.]

The CHAIRMAN. Thank you very much, sir.

You are obviously not Ms. Cobell.

Mr. HARPER. I am not, Mr. Chairman. [Laughter.]

My name is Keith Harper from the Native Americans Rights Fund. I am one of Ms. Cobell's attorneys.

The CHAIRMAN. Thank you. For the recorders, repeat one more time.

Mr. HARPER. Okay. Keith Harper.

The CHAIRMAN. Thank you very much. Please proceed.

STATEMENT OF KEITH HARPER, NATIVE AMERICAN RIGHTS FUND

Mr. HARPER. Thank you, Mr. Chairman and good morning to you as well, Vice Chairman Dorgan. Ms. Cobell could not make it here today, but she did provide written remarks that we would like to make part of the record.

[Prepared statement of Ms. Cobell appears in appendix.]

Mr. HARPER. We want to thank you for providing this opportunity to give oral and written testimony. On behalf of Ms. Cobell, I want to express our gratitude for your continuing leadership in ameliorating the continuing mismanagement of Indian trust assets and the commitment to explore a prompt and fair resolution of the *Cobell* case.

Our views are detailed in Ms. Cobell's testimony, but I do want to touch upon a couple of points. Mr. Chairman, you have called the mismanagement of Indian trust assets criminal. And it is, in every sense of the word. It is a national disgrace. If this abuse occurred to any other Americans other than Indians, this situation would have been addressed with finality years ago.

Think of it this way. The Congress is presently considering various ways to address the future of Social Security. What if someone proposed to abandon present management of Social Security and instead have it managed by the Department of the Interior in the manner they manage our assets? Knowing what we know about Interior's management, how many Americans would support that proposal? Not many, I imagine.

If it is unacceptable for other Americans, why is it okay for the first Americans? After all, in a very real sense, these assets are our property and our financial security, and the financial lifeblood of our communities.

We would like to be absolutely clear on one point. We want to resolve this case. We brought the case not for any other purpose but to seek redress for these identifiable abuses that are occurring to many Indians out there as has been documented time and time again in hearing after hearing going back generations.

We have put a quote from a report from 1915 for the Congress of the United States that identified fraud, corruption and institutional incompetence almost beyond the possibility of comprehension, 1915. Those same conditions still exist today.

There has been talk about the advances in trust reform by the Department officials. We still have fundamental problems. Let me raise a couple. Collections are largely done on the honor system. Think about that, for a trust, for a fiduciary, there is inaccurate ownership information that controls who gets paid what moneys still today.

There is no fair market value for leasing. To give you an example developed in our case, the special master did a report. He showed on the Navajo Reservation for allotees for rights-of-way going across their land, they get about $9 to $40 a rod, the standard measurement for a right-of-way. For a non-Indian, living right off the reservation, you get no less than about $140 a rod and you probably get more than $590 a rod. Think about that difference, 20-, 30-, 40-fold difference. Now, that is a pretty serious Indian discount and that kind of stuff is not being addressed. So I am not sure what they are talking about when they are talking about these reform efforts, but the fundamental problems are not being addressed.

There is still no accounts receivable system. Mr. Chairman, we think that trust reform is an integral part to resolution of the *Cobell* case, along with historical accounting. I did not intend to talk about historical accounting, but I know that there were questions asked and there was some testimony from the government officials, so I will just say a couple of things, because I understand the concern about spending a lot of money, $6 billion to $14 billion, any money, to provide something to provide the accounting.

We do not believe that one red cent should be spent on performing this accounting because it simply cannot be done. It is absolutely futile. The government admitted that in 1997, but now because of their litigation positioning, they do not want to admit it today. Why? Because if they admit that it is impossible, they admit it is impossible, then we will have to go with an alternative method that they know will mean high liability for them. But if they cannot do the accounting, then we have to look at alternatives that are

consistent with trust law. So we do not want to spend that money. We say spend that money on building schools and all the other desperate needs out in Indian country, not for futile accounting.

The other point is this, the court did reenter the structural injunction, but based largely on the fact that the government said they could do the accounting. If they cannot do the accounting required by law, then we should move on and they should admit as much.

They also have the alternative of getting out of that accounting by going to the court and asking the court to change its order. They have not done that. They said they have appealed and we will see where that goes.

I do want to mention a couple of points that are described in detail in our written testimony. We take a commonsense approach to trust reform. We ask this question: How is this trust different from all other trusts? There are simple answers. There are three critical components that are missing from this trust. I appreciate the leadership of Tex Hall on this issue, and he said what they are.

One, you do not have clear standards and you do not have standards that are applicable and easily discernible that they apply to this trust. In every other trust in this country, every single one, you have clear standards.

Second, those clear standards are enforceable in a court of law. It is clear that they are enforceable. You do not have to argue about jurisdiction. You do not have to argue that you are in the Court of Federal Claims or the Federal District Court. They are simply enforceable.

If you do not have clear standards. If you do not have enforceability, and third, you do not have an independent oversight with real authority, then you do not have the three components that make sure that every other trust in this country is run properly.

We think that these three elements form an essential foundation for proper trust management. These proposals are detailed in our testimony. All I would like to say is that we appreciate the leadership of Chief Gray, Tex Hall and the other tribal leaders, and we will work closely with them to get a single proposal to resolving the *Cobell* case, addressing these foundational concerns and attempting to ameliorate trust management, because we do not want that fraud, corruption and institutional incompetence that existed in 1915 to 2015, and we want to work with this committee to ensure that it is not so.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

If you do not require an accounting, what is the alternative?

Mr. HARPER. We propose one alternative in our January 6, 2003 plan. What that requires is that the Government and us actually agree on an essential point, that within a certain given time period, approximately, we differ slightly but approximately $13 billion was generated from this trust. That is not counting interest, but the point is this, if you take that $13 billion and you figure out how much of that money actually reached the correct beneficiary, the difference is what is owed.

The CHAIRMAN. How do you figure that out?

Mr. HARPER. Well, you have to look at certain transactions. They can, for example, produce any disbursement records that actually show cancelled checks.

The CHAIRMAN. But they do not have the records.

Mr. HARPER. They do not have the records on a lot of things, and to the extent that they do not, then you have to use whatever alternative methods are available.

The CHAIRMAN. I go back to my original question. What is the alternative?

Mr. HARPER. The trust law answer is this. The trust law answer is that if you cannot show it, you owe it. And if the Government cannot show that it paid out to a specific beneficiary, then to that beneficiary it owes the money that it said it paid out but never did.

The CHAIRMAN. And if you went to that alternative, have you got an estimate of how much that would cost?

Mr. HARPER. That alternative would mean the $13 billion plus interest, minus any kind of disbursement that they show. We do not know what the disbursements that they can show are.

The CHAIRMAN. The interest starting to accrue when?

Mr. HARPER. When the moneys were deposited.

The CHAIRMAN. So we would be talking about the late 1800's, early 1900's?

Mr. HARPER. That is correct.

The CHAIRMAN. We must be talking about $100 billion.

Mr. HARPER. Over $100 billion is they cannot show specific transactions. That is what trust law provides. What the Government's alternative is, Mr. Chairman, is to say let's change that. Let's change the normal way we figure out these problems and find that there is a lesser duty.

The CHAIRMAN. I think they are saying that, Mr. Harper, because nobody knows where we are going to come up with $100 billion.

Mr. HARPER. I understand that, and that is why we have been at the mediation table. We are working with this committee and others to find a settlement solution. If they cannot do it, then let's resolve it by agreeing to a sum certain that is fair. We are not saying that no money reached the beneficiaries, but they cannot make hardly any demonstration of that. Their present accounting plan is essentially absurd. We just have to go to something that works, and that does not.

The CHAIRMAN. Thank you.

Chief Gray, a statement has been made that the, quote, "Administration" has not been communicating or has not been listening. Is there anyone more highly regarded than Mr. Swimmer? Mr. Swimmer, have you attended a lot of these meetings? Go ahead.

Mr. GRAY. Well, specifically in my opinion, I believe that what Mr. Swimmer represented the U.S. Government at these meetings. To many of these beneficiaries, and specifically in the North Dakota region where he did attend the meeting in the Three Affiliated Tribes area, that was the first time a presidentially appointed official had ever visited the reservation to listen to the concerns. I think that was a great starting point for actually having the opportunity to look some of these beneficiaries right in the eye and explain to them why your appraisal did not get done, and why it got

moved to OST, and then they have to explain what OST is, and then they have to explain why it has taken so long.

I think one of the big problems is that that needed to happen, Senator. I really do believe that. I think those discussions needed to happen, just for the sheer complexity of the work that has been done up here on this very issue, you still have to distill it to a point where it is deliverable in the sense that people can understand it and have some faith in it.

Part of the problem that I saw was a great disconnect because many of the discussions that you have heard today are in the abstract, but to the folks back home this could not be more real. So what ITMA proposed to do was to continue to hold these listening conferences. We may not get complete satisfaction out of every meeting, but we know that over time, I know Mr. Swimmer can probably attest to this to a degree, that the more exposure he got to Indian country, the more he was able to really address some of their concerns because he was there. I think that was a great starting point.

You know, as far as I am concerned, no matter if the committee decides to take on trust reform legislation or not, there is still going to have to be a very important communication component to all this to the beneficiaries.

The CHAIRMAN. Chairman Hall, in your testimony you state a position that I have many times before: The need for clear trust management standards for the Department's trust management functions. At the same time, I have heard that the imposition of standards without sufficient funding for the Department to live up to those standards is a formula for further litigation and claims against the Federal Government.

I guess my question is, is NCAI willing to work with the committee and staff and with the Administration to see if in the context of comprehensive trust reform, there is some way we can find common ground here?

Mr. HALL. I think so, definitely, Mr. Chairman, because as you are looking at a trust fix, we obviously have to have a standard for those standards. But there needs to be a time period where there can be no litigation as the trust fix is being developed with the standards, and that might be two years down the road. We do not know. We will not know until this thing shakes out.

So obviously, in Indian country we understand that. In establishing that relationship, we do not just want to go back the next day if we do a settlement and sue. Instead, we want to work with the committee on resolving the standards, whatever those standards might be.

The CHAIRMAN. I would just like to mention to the witnesses, the main reason why Senator Dorgan and I sought to try to achieve some resolution on this issue is that if it is left up to the courts, we could be looking at a minimum of 10 to 15 years before we could possibly get something done. A lot of Native Americans are not going to be with us 10 or 15 years from now. That is why we want to give this a very, very high priority and do the best we can to reach some kind of legislative fix or facilitate an agreement without legislation, although I am not sure that that is possible.

We intend to do everything we can to encourage the Administration to be forthcoming. This may be probably the most difficult issue that I have encountered, not only as far as Native American issues are concerned, but in the Congress, and I thank all the witnesses for their involvement.

Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you very much. You are correct that this is enormously complicated. It probably over the many decades involves some criminal activity, substantial incompetence, perhaps corruption. When you hear some of the stories about the mismanagement, it really I think angers all of us. So the question for us now is how do we resolve this and how do we create a structure going forward that has some credibility?

Chairman Hall, the National Congress of American Indians convened a meeting last week, I understand, to discuss strategy for developing a comprehensive resolution of these trust issues. What was the outcome of that meeting, in your judgment?

Mr. HALL. The outcome was we formed a special committee that would move quickly and that NCAI would open meetings for all tribal leaders and national and regional organizations to provide input, because a lot of the answers, we know it is a complex issue, but the answers lie within Indian country. I, for one, am also an IM account holder and the chairman of a tribe, so I have to look out for the tribe's interest and I have to look out as an IM account holder and a rancher.

So a lot of us have those day-to-day activities. We live on those 56 million acres of trust land, but we have to talk to each other. We have to communicate to know what is best at the local level. We just do not see that happening. So the tribes at NCAI last week wanted to make sure that we were at the table, because as we see the current reorganization, again we are not being communicated with and we are spending a lot of money at the Federal level, at the congressional level, for a plan that really does not address local issues.

Senator DORGAN. You described your leadership, along with Chief Gray's leadership on this issue. Can you tell us what that leadership will entail and what activities will be involved going forward to try to address this from the standpoint of the tribes, as well as the Indian citizens?

Mr. HALL. NCAI, as you know, Senator Dorgan, comprises about 250 tribes. We have area vice presidents for all of the 12 regions that the BIA has broken out for the United States. ITMA, as co-chair for Chief Gray, has close to 60 tribes, so that is 310 tribes of the 562 tribes. So those two organizations by joining forces, we think we will get the necessary input from Indian country. Indian country has met already with the 2002 task force, so we do not have to reinvent the wheel, so to speak. We can pick up the white paper that was adopted in 2002. There were many issues we had agreement on, standards, oversight commission and accountability for those standards.

And then the legislation that has been done, as I mentioned to Senator McCain, who introduced S. 1459. Let's look at the trust reform legislation. Let's look at the 2002 task force as starting points

to go forward and let's see what has taken place in reorganization since then, and let's put those together.

Senator DORGAN. Chief Gray.

Mr. GRAY. Yes, Senator; from ITMA's standpoint, we have been working on trust reform for a number of years now, and it is certainly the number one priority of this organization's function. Part of what we have also recognized is that we need to work and have relationships with other intertribal organizations that have a similar goal in mind, especially those Indian organizations that have specific natural resource issues that they are gathered around, like the Council of Energy Resource Tribes or the Inter-Tribal Timber Council.

Certain tribal organizations that have a very narrow focus are an instrumental part of formulating any kind of overall policy that ITMA may present to the committees. Part of what we also believe is most important, I think, is that, and I think Chairman Hall spoke to this a second ago, and that is that we understand that other tribes across the country have specific natural resource issues that are specific to their tribe. Our tribe, for example, the Osage for example, we have a very unique situation among all tribes in Indian country regarding our relationship to the IM account holders and the governing institutions of the Osage Nation, and our status as a federally recognized tribe. Many of the dollar flow through both entities' hands, as a tribal government and as individual allotment distributions. This makes us a hybrid in Indian country. Whether we like it or not, we have one foot squarely in the *Cobell* camp and one foot squarely in the tribal camp.

These individual kind of instances that occur all across Indian country are reflective of these other organizations' efforts to try to gather the broadest consensus that there may possibly be, but respecting the individual interest of every tribe. This is a very difficult line to walk, but this is how we are trying to approach it.

Senator DORGAN. Without substantial leadership from the tribes, I do not think this gets resolved. I agree with the chairman that it may require legislation ultimately, but legislation in my judgment will not successfully occur here without substantial leadership at the tribal level on behalf of the Indian people. I think you have a significant burden, Chairman Hall and Chief Gray. I am pleased that you are accepting that burden to try to see if we can find a way to bring people together to reach a consensus.

Chief Colombe, you raised a point in your testimony about TSE, TLE, I am sorry. I think, Mr. Chairman, I would suggest that we have our staff take a look at the TLE allegations raised by Mr. Colombe. If the allegations are as he is representing them this morning, I believe it would be appropriate to ask the GAO to take a look at that situation. So with your permission, I would hope perhaps we could have our staff take a look at that specific instance.

The CHAIRMAN. May I mention, maybe we ought to have the GAO look at the whole situation and see what their view is of it and what the options are. It is pretty big tasking, but we might want to do that.

Senator DORGAN. Yes; I think we should. I do think that the specific set of issues with respect to the BIA's management of this particular issue, it would probably be instructive for us to understand

a bit more, but I think we also could use those resources to take a broader look as well.

This has been I think an interesting set of testimony that has been offered today. It is a starting point. As I said, in order for this to bear some fruit, it is going to require substantial leadership on the part of all of you in order for us to find a way to develop some consensus.

It is, in my judgment, a failure on everybody's part if nothing happens except we just talk and talk and talk until we are all exhausted and we are back in the same position of having a historical accounting that is required by a transaction-by-transaction analysis, and we spend billions and billions of dollars to do that. That would be a horrible failure, in my judgment, for everybody, for the American taxpayer, and most especially, though, for American Indians and the tribes. We really do need to find a way to see if we can solve this very complicated issue.

Mr. Chairman, I want to thank you, and let me thank those who have presented testimony today.

The CHAIRMAN. I thank the witnesses.

This hearing is adjourned.

[Whereupon, at 11:15 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF JIM GRAY, PRINCIPAL CHIEF, OSAGE NATION AND PRESIDENT, INTERTRIBAL MONITORING ASSOCIATION

Good morning, my name is Jim Gray, I serve as both the principal chief of the Osage Nation and the president of the Intertribal Monitoring Association [ITMA]. I appear today to provide testimony in my role as ITMA president, but I would be pleased to answer any questions the committee may have about the unique trust systems that apply to Osage Nation trust resources.

The ITMA would like to thank Chairman McCain and Vice Chairman Dorgan for holding this hearing and for inviting ITMA to participate. It is ITMA's understanding that Chairman McCain has made settlement of *Cobell* v. *Norton* and trust reform one of his highest priorities during his tenure as the chairman of this committee. ITMA applauds and thanks the chairman for his commitment to seek solutions to this difficult subject. ITMA appreciates the opportunity to play a role in this process and support this worthy effort.

There is a widespread view that Congress and both sides of the *Cobell* lawsuit are sufficiently fatigued by this litigation and there is some basis for hoping that a settlement can be reached and approved by Congress. Based on that belief, there is also hope that the time may be ripe to enact comprehensive trust reform legislation during the 109th Congress.

If Congress does not enact trust reform legislation, the Department may interpret this as a tacit endorsement of its "To-Be" trust reform effort and the Department's decision to continue to expand the Office of Special Trustee [OST]. ITMA can assist the committee with its effort to decide whether it wishes to preceed with trust reform legislation or allow the field to be occupied by the Department's ongoing efforts.

ITMA can provide this assistance to Congress because it can draw from the collective knowledge of at least 60 individual tribal governments that represent the breadth and width of the trust reform issues and experience. In addition, ITMA has been a direct participant in both inter-tribal efforts to develop trust reform proposals as well as recent Federal-tribal efforts to reach a consensus on these matters. Finally, and we believe most importantly, ITMA as an organization has undertaken an exhaustive effort to go out into Indian country to meet with the beneficiaries of the Federal trust obligation. We have and continue to gather and analyze this important testimony to guide both ITMA's consideration of trust reform and to make this information available to Congress.

Based on this knowledge and experience ITMA would like to make the following general observations concerning trust reform. Based on these observations this testimony will address the alternatives available to Congress.

First, ITMA believes that Congress should determine the manner and direction of trust reform. Only in the absence of Congressional action should by the Executive branch lead the way. It is very likely that Federal courts will only address discrete issues related to the Federal Government's trust obligation bit not the direction or the overall character of trust reform. In fact, the recent Court of Appeals decision

in *Cobell* recognizes this. Indian tribes certainly prefer a future where they work directly with this committee and the House Resources Committee to structure meaningful trust reform.

Second, in light of its trust responsibility to Indians and its trust relationship and responsibility to Indian tribes, Congress should make every effort to enact trust reform legislation that seeks to hold the Federal Government to the highest fiduciary standards applicable to a trustee. Any legislation should also be mindful of the Federal Government's enlightened policy of tribal self-determination.

Finally, at least until Congress has successfully enacted effective trust reform legislation, Congress should take steps to ensure that IIM account holders and tribal governments have a strong voice and some affirmative means for monitoring and participating in the Department's ongoing reorganization.

The first question this committee must address is whether it wishes to enact trust reform legislation. The ITMA, strongly encourages the committee to do so. While the 1994 American Indian Trust Reform Act [act] provides some direction, the passage of time has rendered some of the act's provisions obsolete. For example, the special trustee was originally intended to be a temporary position. There is no indication that either that position or the OST bureaucracy is in any way temporary. Quite the contrary is true. Tribal leaders fear the BIA's demise while the OST flourishes in terms of budget and growth. In our listening conferences, we have heard repeated concerns that the OST is distant and unresponsive to individual Indian and tribal concerns. The question of whether, and if so how, the OST should occupy this large a role should be the subject of an informed Congressional decision rather than simply the absence of action.

The growth of the OST and the permanence of the position of special trustee is only one of the issues that only Congress can decide.

ITMA notes that this hearing is by no means Chairman McCain's first effort to contribute to the dialog on this topic or the effort to achieve meaningful reform of the trust management system. In recent years, Senator McCain has introduced several legislative proposals to raise issues and to ensure that Congress seriously considered any compromise proposals that emerged from the Trust Reform Task Force [TRTF] that was formed in 2002. ITMA also notes that each of these legislative proposals was a bipartisan effort to bring about trust reform.

ITMA believes that most or all of the essential elements of an effective trust reform framework can be gleaned from the following sources:

No. 1. The work of the TRTF;

No. 2. The bi-partisan legislation I referred to previously; and

No. 3. By an honest effort, led by this committee and its House counterpart, to engage with tribal governments and IIM account holders.

I would like to briefly address each of these sources.

The TRTF represented a significant commitment of time and resources by tribal leaders. While this process did not result in a consensus between the tribal representatives and the Department, it did define a number of elements of comprehensive trust reform. More importantly, it sharply defined the points of disagreement between Indian country and the Department over the extent and nature of trust reform. Some of these differences Congress can only resolve. For example, while there was a consensus on the idea of establishing a more consolidated line-of-authority for Indian trust resources, there was no agreement on what steps should be taken to ensure that Interior agencies other than BIA and OST would be included in this structure. It seems only logical that all Department of the Interior employees who are responsible for Indian trust resources should be at least presumptively included.

As I indicated previously, Chairman McCain's legislation from the two previous Congresses includes many fundamental and essential elements for trust reform. These elements include a strong recognition and commitment to self-governance and self-determination. These bills also include clear direction to the Department that define the Government's obligations as trustee. Many of these directions are the most commonsense responsibilities imaginable, such as the need for accurate, periodic account balances. If there is any resistance to the enactment of these commonsense requirements, this only shows how great the need is for this committee to act.

ITMA has already begun the work of engaging Indian country in a serious and important discussion about the direction that trust reform must take. This committee has always been the place where such views would receive a receptive and supportive audience. I would like to provide a summary of some of the emerging issues that have been raised in ITMA's seven listening conferences in Oklahoma, North Dakota, Oregon, Montana, Wisconsin, and Arizona.

This is not intended to be an exhaustive listing and we would appreciate the opportunity to continue to work with the committee as we continue to obtain and analyze this important testimony. These observations include the following:

IIM account holders and allottees are becoming more sophisticated and more interested in the management of their trust resources, especially land and mineral resources. Yet the BIA still labors under an organizational structure and policies and procedures that belong in an era where Indian ownership was much more passive. While trust beneficiaries do not reject the idea of a trust relationship, they do demand that the BIA, especially the local offices, have the staff, training, and resources to assist them with identifying their interests, providing records, appraisals, and other support services in a timely fashion.

Trust beneficiaries also have the right to demand immediate action to prevent the improper, unauthorized use, or exploitation of their trust resources, especially trespass.

There is a widespread belief in Indian country that the BIA needs to recognize that it must be accountable to the trust beneficiaries and not to the individuals who lease or develop those resources.

Finally, as trust beneficiaries become more involved in the management of their on-reservation assets, they recognize that it is wasteful, impractical, and inefficient to hold some of these assets in trust status and others in fee. In response, they frequently apply to have some assets returned to trust status. But they frequently encounter strong resistance, delay and sometimes even opposition from the Department.

Because ITMA funding is derived from the general trust reform line item, it is impossible for our organization to make any plans that extend beyond the current fiscal year. As a result, ITMA must scramble to organize meetings once our funding level is determined. We believe that Congress should address this issue by providing a specific line-item to underwrite ITMA activities. This would also remove the temptation to use ITMA's need for Federal support as a method to retaliate against ITMA for any constructive criticism it makes about trust reform.

With respect to Indian tribes, ITMA is working directly with its member and also non-member Indian tribes that are interested in both trust reform and developing a process for resolving tribal claims for losses to or mismanagement of trust resources. With respect to the resolution of tribal claims, ITMA believes that both Federal and tribal interests are served by the creation of a voluntary process ?for settling claims. ITMA is working diligently to develop such an alternative process, especially for those tribes that do not have the resources to commit to initiate or sustain a lawsuit against the Federal Government.

ITMA is also committed to act as a facilitator in inter-tribal discussion and through its work with inter-tribal organizations with general mandates, like NCAI, as well as those entities that are organized around specific resources, such as the Council of Energy Resources Tribes and the Intertribal Timber Council. As President Tex Hall indicated, part of this effort includes ITMA's willingness to serve and participate in a special committee to work with all interested and engaged Indian tribes to provide this committee and the House Resources Committee with as much direction as possible directly from Indian country.

As a starting point for developing a working relationship with Indian tribes and account holders, ITMA strongly encourages the Department to identify any known thefts and losses of trust resources, proceeds or royalties. There are still instances where one part of the Federal Government has prosecuted crimes for such actions, while other parts of the Federal Government denies that any theft or losses occurred. It is difficult to form a relationship built on trust in such a situation. Similarly, as long as the Department is, by its own admission, not in compliance with its own trust standards and, obligations it is both inappropriate and unseemly for the Department to collect administrative fees for its activities. At a minimum a fee collection moratorium should be either self-imposed or imposed by appropriate Congressional action.

In the absence of trust reform legislation Congress needs to fulfill its trust responsibility to the tribal and individual holders of the beneficial title of trust resources by ensuring that strong, independent and adequately financed organizations can monitor and participate in the Department's trust reform activities. Without such oversight, Congress risks the repeated cycle of trust mismanagement and reform. ITMA is pleased to be a part of this important effort and with the support of this Committee, would like to continue to play this role.

I would like to thank the chairman and vice chairman for their dedication to this important, but difficult issue. I would be pleased to answer any of the committee's questions.

STATEMENT
OF
JAMES CASON
ASSOCIATE DEPUTY SECRETARY
ACCOMPANIED BY
ROSS O. SWIMMER
SPECIAL TRUSTEE FOR AMERICAN INDIANS
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON THE DEPARTMENT OF THE INTERIOR TRUST MANAGEMENT

March 9, 2005

We are pleased you called this hearing today to examine the steps we have taken with regard to trust reform in the Department. It is important for Congress to focus on more than just a settlement to the ongoing Cobell litigation. While we all seem to agree that the Cobell case should be settled rather than litigated further, we stand in very different places with regard to how to settle.

Through the efforts of the authorizing committees, a mediation effort began last year. For a report on the progress of the mediation, I suggest the Committee speak directly to the mediators who are in a good position to brief you objectively on the details of the mediation.

While I understand this hearing was called to discuss the Department's trust reform efforts in general, and reorganization in particular, our immediate concern is the recent February 23, 2005 district court order that restored the historical accounting requirements of the district court's September 25, 2003 structural injunction that had been vacated by the Court of Appeals. Using very preliminary estimates, we believe carrying out these requirements could cost billions. My testimony also includes a chart that explains the elements of the accounting required by the district court.

As most of you are aware, in response to the original imposition of the structural injunction issued in 2003, Congress, in P.L. 108-108 stated that there was no requirement to commence or continue historical accounting activities "until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004."

Despite arguments of the plaintiffs to the contrary, the Court of Appeals, on December 10, 2004, held that this provision was constitutional. The Court of Appeals noted that Congress passed the P.L. 108-108 provisions "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Congress, the court pointed out, gave itself until the end of 2004 to come up with a legislative solution.

But now, the district court points out in its February 2005 order "[O]f course, December 31, 2004 has come and gone, and no legislative solution to the issues in this litigation is available or in the offing." In fact, the district court referred to the provisions of P.L. 108-108 as "a bizarre and futile attempt at legislating a settlement of this case . . ."

To be frank, it is time for Congress to act. Both the recent district court order and the December 2004 Court of Appeals decision cry out for Congress to step in and define what it intended when it required an accounting of trust funds in the 1994 Trust Reform Act. Did you intend an accounting of the scope required by the district court and, if so, will Congress fund it?

The Court of Appeals specifically recognized the power of Congress to modify both current statutory and common law rules. In a statement given to the House Resources Committee last month, plaintiffs' attorney states the provisions of P.L. 108-108 were constitutional only because they were temporary in nature. Nowhere does the Court's opinion state this. In fact, the Court references a line of cases affirming Congress's authority to alter the duties of parties and openly acknowledged Congress's ability to change the law. I have attached to my statement the pages from the Court's decision concerning historical accounting for your review.

Just as the Court of Appeals did in its opinion, Congress must recognize that the normal requirements placed on beneficiaries in most other trust situations, i.e. the costs of accountings and general management, are not borne by the beneficiaries and derived from the monies in the trust, but are rather borne by the American taxpayers as a whole through use of the general treasury. In 1994, the Department in a letter to the House Resources Committee recognized "that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs."

The Congress must be clear in what its expectations are and be certain it provides the funding necessary to carry out those expectations, even at the expense of other Department programs. We stand ready at Interior to carry out the mandates of the Congress. However, we must be given the tools to do so, and the mandates should have sufficient clarity to not require decades of litigation to determine the precise scope of the task Congress requires.

With regard to our current trust organization, much of what I have prepared to say today has been previously heard by your Committee. I believe, however, it is vital for you to understand the background and facts in order to fully understand the current situation so that any legislative solutions proposed will be meaningful and lasting.

Background

The Department manages approximately 56 million acres of land held in trust. Over ten million acres belong to individual Indians and nearly 46 million acres are held in trust for Indian Tribes. On these lands, Interior manages over 100,000 leases for individual Indians and Tribes. Leasing, use permits, land sale revenues, and interest, which total approximately $205 million per year, are collected for 245,000 open individual Indian money (IIM) accounts. About $414 million per year is collected in 1,400 tribal accounts for 300 Tribes. In addition, the Indian trust fund manages approximately $3.0 billion in tribal funds and $400 million in individual Indian funds.

One of the most challenging aspects of trust management is the management of the very small ownership interests, which result in many very small IIM accounts and land ownership interests. There are now over 1.65 million fractional interests of 2% or less involving more than 32,500 tracts of individually owned trust and restricted lands. The Department provides a range of trust services – title records, lease management, accounting, probate – to the growing number of land owners. We have single pieces of property with ownership interests that are less than .000002 of the whole interest. The Department is required to account for each owner's interest, regardless of size or whether we can even locate the individual. Even though these interests today might generate less than one cent in revenue each year, each is managed without the assessment of any account management fees, and the revenues generated are treated with the same diligence that applies to all IIM accounts. In contrast, in a commercial setting, these small interests and accounts would have been eliminated because of the assessment of routine management fees against the account. For instance, there are almost 20,000 accounts with no activity for the past 18 months with an average of .30¢ per account. To keep these accounts open, it costs the system $34 per account. Management costs of the IIM accounts, as well as tribal trust accounts, are covered through the general appropriations process and borne by the taxpayers as a whole, rather than by the accountholders.

History

In 1887, Congress passed the General Allotment Act (GAA), which resulted in the allotment of some tribal lands to individual members of tribes, mostly in 80 and 160-acre parcels. The expectation was that these allotments would be held in trust for their Indian owners for no more than 25 years, after which the Indian owner would own the land in fee. Over time, the system of allotments established by the GAA has resulted in the

fractionation of ownership of Indian land. As original allottees died, their heirs received an equal, undivided interest in the allottee's lands. In successive generations, smaller undivided interests descended to the next generation.

In the 1920's the Brookings Institute conducted the first major investigation of the impacts of fractionation. This report, which became known as the Merriam Report, was issued in 1928 and formed the basis for land reform provisions that were included in what would become the Indian Reorganization Act of 1934 (IRA). During discussion on the IRA, the Commissioner of Indian Affairs cautioned Congress that fractionated interests in individual Indian trust lands cost large sums of money to administer, and left Indian heirs unable to control their own land: "Such has been the record, and such it will be unless the government, in impatience or despair, shall summarily retreat from a hopeless situation, abandoning the victims of its allotment system. The alternative will be to apply a constructive remedy as proposed by the present Bill."

Congress in 1934, through the IRA, reaffirmed its commitment to tribal governments, halted the further allotment of tribal property, and required that the allotted lands be held in trust indefinitely by the United States for the benefit of the individual owners. It is important to note however, that the original versions of the IRA included two key titles; one dealing with probate and the other with land consolidation. Because of opposition to many of these provisions in Indian Country, most of these provisions were removed and only a few basic land reform and probate measures were included in the final bill. Thus, although the IRA made major reforms with respect to the ability of tribes to organize and stopped the allotment process, it did not meaningfully address fractionation (and the subsequent adverse impacts in the probate process). As a result, fractionated interests in individual Indian allotted land continued to expand exponentially with each new generation.

In August 1938, the Department convened a meeting in Glacier Park, Montana, in an attempt to formulate a solution to the fractionation problem. Among the observations made in 1938 were that there should be three objectives to any land program: stop the loss of trust land; put the land into productive use by Indians; and reduce unproductive administrative expenses. Another observation made was that any meaningful program must address probate procedures and land consolidation. It was also observed that Indians themselves were aware of the problem and many would be willing to sell their interests.

Similar observations were made in 1977 when the American Indian Policy Review Commission reported to Congress that "although there has been some improvement, much of Indian land is unusable because of fractionated ownership of trust allotments" and that "more than 10 million acres of Indian land are burdened by this bizarre pattern of ownership." The Commission reiterated the need to consolidate and acquire fractionated interests and suggested in this report several recommendations on how to do so. Many of

the observations and objectives made in 1938 and 1977 are the same today.

In 1983 Congress attempted to address the fractionation problem with the passage of the Indian Land Consolidation Act (ILCA). The Act authorized the buying, selling and trading of fractional interests and for the escheat to the tribes of land ownership interests of less than two percent. A lawsuit challenging the constitutionality of ILCA was filed shortly after its passage. While the lawsuit was pending, Congress addressed concerns with ILCA expressed by Indian tribes and individual Indian owners by passing amendments to ILCA in 1984.

In 1987, the United States Supreme Court held the escheat provision contained in ILCA as unconstitutional because "it effectively abolishes both descent and devise of these property interests." (See *Hodel v. Irving* (481 U.S. 704, 716 (1987)). However, the Court stated that it may be appropriate to create a system where escheat would occur when the interest holder died intestate but allowed the interest holder to devise his or her interest. The Court did not opine on the constitutionality of the 1984 amendments in the *Hodel* opinion. However, in 1997, in *Babbit v. Youpee* (519 U.S. 234 (1997)), the Court held the 1984 amendments unconstitutional as well.

In 1984, a Price Waterhouse report laid out a list of procedures needed to align management of these funds with commercial trust practices. One of these recommendations was to consider a shift of the BIA disbursement activities to a commercial bank. This recommendation set in motion a political debate on whether to take such an action. Congress stepped in and required BIA to reconcile and audit all Indian trust accounts prior to any transfer of responsibility to a third party. BIA contracted with Arthur Andersen to prepare a report on what would be required in an audit of all trust funds managed by BIA in 1988. Arthur Andersen's report stated it could audit the trust funds in general, but it could not provide verification of each individual transaction.

Arthur Andersen stated it might cost as much as $281 million to $390 million in 1992 dollars to audit the IIM accounts at the then 93 BIA agency offices. The 1992 Government Operations Committee report describes the Committee's reaction:

> "Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken."

The Committee report then moves on to the issue of fractionated heirships. The report notes that in 1955 a GAO audit recommended a number of solutions, including eliminating BIA involvement in income distribution by requiring lessees to make payments directly to Indian lessors, allowing BIA to transfer maintenance of IIM accounts to commercial banks, or imposing a fee for BIA services to IIM accountholders. The report states the Committee's concern that BIA is spending a great deal of taxpayers' money administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances of less than $50.

On April 22, 1993, the late Congressman Synar introduced H.R. 1846. On May 7, 1993, Senator Inouye introduced an identical version, S. 925. It was in these bills that Congress first included a statutory responsibility to account for Indian trust funds. Section 501 was entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds." Senator Inouye's bill included an effective date provision that stated:

> "This section shall take effect October 1, 1993, but shall only apply with respect to earnings and losses occurring on or after October 1, 1993, on funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian."

The Senate Committee on Indian Affairs held a hearing on S. 925 on June 22, 1993. Elouise Cobell in her capacity as Chairman of the Intertribal Monitoring Association, testified in strong support of the bill. The only amendment Ms. Cobell recommended in her oral statement, as well as her written statement, was to allow Tribes to transfer money back into a BIA-managed trust fund at any time if they so wanted. Ms. Cobell mentioned "[W]e have amendments, and we are willing to work with the committee on these particular amendments. I am not going to devote any more of my time in my oral presentation to the provisions of the bill because we feel it is an excellent bill."

The Navajo Nation and the Red Lake Band of Chippewa Indians were the only tribes to submit testimony. They supported the bill, and did not object to the prospective application of the accounting section in their testimony.

The Director of Planning and Reporting of the General Accounting Office also testified. He was asked if he agreed with the Arthur Andersen estimates I mentioned above. He stated the following:

> "In my statement I talked about how there are a lot of these accounts that maybe you don't want to audit, that maybe what you want to do is come to some agreement with the individual account holder as to what the amount

> would be, and make a settlement on it. We had a report issued last year that suggested that, primarily because there are an awful lot of these accounts that have very small amounts in terms of the transactions that flow in and out of them. Just to give you some gross figures, 95 percent of the transactions are under $500. One of our reports said there that about 80 percent of the transactions are under $50. So in cases where you have the small ones, maybe there's a way in which we can reach agreement with the account holders and the Department of the Interior on how much we will settle for on these accounts rather than trying to go back through many many years, reconstructing land records and trying to find all of the supporting material. It may not be worth it." [page 29 of S. Hrg 103-225]

On July 26, 1994, Congressman Richardson introduced H.R. 4833, which ultimately became the American Indian Trust Fund Management Reform Act of 1994. The House report on H.R. 4833 notes that H.R. 1846 was the predecessor bill to H.R. 4833. One legislative hearing was held on H.R. 4833 by House Committee on Natural Resources Subcommittee on Native American Affairs on August 11, 1994. There is no printed record of that hearing. There was no Senate hearing.

H.R. 1846 and H.R. 4833 were similar in many places. H.R. 4833 did not, however, include the effective date provision explicitly making the accounting requirement prospective only. While the report notes in a number of places why changes were made to the H.R. 1846 provisions, it is silent with respect to this omission.

There is not a single mention of the costs associated with either complying with the Act, or completing the accounting in the Committee's report. Moreover, no analysis from the Congressional Budget Office was included in the Committee's report. The Department sent a letter on H.R. 1846 and S. 925 that was placed in the Committee report on H.R. 4833. Its only mention of cost is the following sentence: "We wish to note that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs." This statement may be viewed as prophetic when one looks at the Department's budget request for the last few years. For example, trust management comprised 9% of the total OST and BIA budgets in 1994; today it comprises 24-25%. The anticipation that programs carried out under the 1994 Act may need to be derived from reallocation of funds from other BIA or Department programs is even more pointed when one examines the tasks required under the Districts Court's recent order.

Given the lack of cost analysis contained in the legislative history, one could assume that Congress in enacting the 1994 Reform Act had no idea it may have required a multi-million or multi-billion dollar accounting.

In 1996, five IIM beneficiaries filed the *Cobell v. Norton* class action lawsuit alleging that the government had breached its fiduciary duty in managing the IIM accounts. In 1999, a Federal district court held, in a decision affirmed on appeal in 2001, that the government had breached its fiduciary obligations to plaintiffs. In the litigation, the plaintiffs have sought an accounting, rather than monetary damages, but their argument is that they are owed any money that the government collected but cannot prove was properly distributed to individual Indians since 1887, some of which the government cannot do because of the unavailability of records. Under the plaintiff's theory, they are owed as much as the total amount collected since 1887 (which is estimated to be $13 billion), plus interest. They have estimated the amount to be over $176 billion.

Organizational Realignment

In August 2001, during our formulation of the FY 2003 budget, various proposals and issues were identified concerning the trust asset management roles of BIA, OST, and other Departmental entities carrying out trust functions. By that time, the Department had heard from many sources – e.g., the Special Trustee, the Court Monitor in *Cobell v. Norton*, and through budget review – and all recommended a multi-bureau consolidation of trust functions throughout the Department. In short, the Department realized it had to provide an organizational structure that focused on its responsibilities to both individual Indians and tribal beneficiaries.

Tribal representatives agreed with the Department that the status quo was not acceptable, and that the Department's longstanding approach to trust management needed to change. Moreover, this change had to be reflected in a system that is accountable at every level with people trained in the principles of fiduciary trust management.

In November 2001, the Department of the Interior submitted to the House and Senate Appropriations Subcommittees on Interior and Related Agencies a request for approval to reprogram funds to establish a new Bureau of Indian Trust Asset Management as well as a new Assistant Secretary for Indian Trust Asset Management. The main concept of the Bureau of Indian Trust Asset Management was to consolidate all fiduciary trust functions performed by the various departmental bureaus and offices under a single, executive sponsor in a separate bureau from the BIA.

Tribal leaders objected to the proposal, articulating a number of concerns including:

1 their view that consultation done on the proposal was insufficient;

2 their uncertainty regarding the effect of the proposed reorganization on tribes that compact or contract for trust functions; and

3 their opinion that stripping trust management responsibilities from the BIA and placing these responsibilities into a new Bureau would ultimately reduce the funding available to the BIA to carry out the other services the United States provides to Indian tribes and their members.

The Senate Appropriations Subcommittee on Interior and Related Agencies asked the Department to resubmit its reprogramming proposal after the completion of additional consultation with the Indian community, a continued review of the management and organization of the Department's trust program, and further coordination with the authorizing committees of Congress.

The Department spent many months addressing this request. Indeed, the issue of trust management reform has eclipsed any other faced by the Department in terms of the time, energy and effort brought to bear on any issue before this Administration.

Consultation Efforts

The Department committed to a consultation process on the issue of trust reform and organizational reform that was one of the most extensive consultation efforts ever undertaken. Over 45 meetings were held with Tribal leaders in which senior level officials from the Department were in attendance. The first meeting occurred in November 2001, in Spokane, Washington. Nine additional meetings followed in different locations, the first of which was attended by the Secretary. During those meetings, participants requested a different format for consultation on this issue.

Early in the process, the Tribes asked the Department to participate in a Task Force in which the Tribes and senior Departmental officers, including the Deputy Secretary, the Assistant Secretary for Indian Affairs and the Special Trustee, could sit down together and discuss collaboratively the organizational issues inherent in trust reform. In January of 2002, the Joint Tribal Leader/ Department of the Interior Task Force on Trust Reform (Task Force) was created, and funded for approximately one million dollars.

The purpose of the Task Force, as defined in the protocol agreement, was to:

> "develop and evaluate organizational options to improve the integrity, efficiency, and effectiveness of the Departmental Indian Trust Operations consistent with Indian treaty rights, Indian trust law, and the government-to-government relationship." [emphasis added]

Its charge included review of the numerous proposals for trust reform that had been submitted in response to the Department's Bureau of Indian Trust Asset Management proposal and to provide proposals to the Secretary on organizational alternatives. In addition to reviewing all proposals, the Task Force was to assist the Department in its

review of current practices.

The Task Force held ten, joint, multi-day meetings throughout the country. Meetings were held in Shepherdstown, WV, Phoenix, AZ, San Diego, CA, Minneapolis, MN, and Bismarck, ND, Portland OR, Anchorage, AK, Billings, MT, Alexandria, VA, and Washington, DC.

Task Force Report

On June 4, 2002, the Task Force presented its initial report containing its findings and recommendations on the Interior trust organization. The Task Force received more than forty separate alternative organizational proposals (or submissions with observations), providing a wide variety of options for consideration. The options ranged from retaining the status quo to the creation of a new Department of Indian Affairs. Some proposals stated a preference to place only the Department's trust responsibilities outside of the Department of the Interior.

Task Force members analyzed all of the proposals and created several generic composite options reflecting the best features and major elements presented by the entire body of the alternative proposals. The Task Force report stated that the principal focus of further consultation should involve the configuration of line management officials, from top to bottom, in each alternative as well as the grouping of staff support functions. At the May 2002 Task Force meeting in Minneapolis, Minnesota, the Task Force agreed to initiate regional consultation meetings in Indian Country during June and early July for the benefit of tribal leaders who were unable to travel to any national meeting. The purpose of those meetings was to discuss the deliberations and recommendations of the task force with local tribal leaders and to receive guidance from them on moving forward.

After the regional consultations, the Task Force ultimately reached agreement to recommend that Congress establish a new position, an Under Secretary for Indian Affairs that would be subject to Presidential appointment and Senate confirmation and would report directly to the Secretary. The Under Secretary would have direct line authority over all aspects of Indian affairs within the Department. This authority would include the coordination of trust reform efforts across the relevant agencies and programs within the Department to ensure these functions would be performed in a manner consistent with its trust responsibility. Also, the Office of the Special Trustee would be phased-out.

The Task Force also reached agreement on the elevation of the Office of Self-Governance to the office of the new Under Secretary for Indian Affairs. This would enhance the abilities of the tribes that are interested in moving toward more compacting and contracting to carry out the services due to Indian beneficiaries. Similarly, the Task Force agreed to recommend to Congress that it create a Director of Trust Accountability reporting directly to the Under Secretary who would have the day-to-day responsibility

for overseeing the trust programs of the Department.

In addition, a working group of the Task Force reached agreement on the restructuring of the Bureau of Indian Affairs to create separate lines of authority for the provision of trust and non-trust services. This structure would provide greater accountability and an increased focus on our fiduciary responsibilities.

The Task Force then began the development of legislation that would accomplish the elements of the agreements regarding reorganization that needed Congressional authorization, namely the new Under Secretary position. However, the Tribal leaders on the Task Force stated that they could not support any legislation unless it also included legislative trust standards and separate provisions providing private rights of action related to trust duties. The inclusion of these provisions was not acceptable to the United States. At that point, the Task Force agreed that it could not go forward to the Congress with a legislative proposal.

On September 17, 2002, the Judge presiding over the *Cobell v. Norton* case ordered the Department to present to the Court by January 6, 2003 "a plan for bringing itself into compliance with the fiduciary obligations it owes to the IIM trust beneficiaries." The first element discussed in the Department's Fiduciary Obligations Compliance Plan is reorganization. The plan describes the reorganization as follows:

> "The reorganization within the BIA and OST places a particular focus on each organization's fiduciary duties to Indian individual and tribal beneficiaries. For instance, land and natural resource management is located in the BIA because it has demonstrated expertise in this area of the trust. The OST has been given the direction to expand its operational role in addition to its statutory oversight duties. As a result, OST will develop a regional and agency presence to ensure that trust standards are followed in the management of these assets and will retain the responsibility for financial asset management. By further developing and taking advantage of the strengths of each organization, Interior will have a more cost effective, efficient and successful trust management system. Simply put, this reorganization dedicates more trained personnel to provide consolidated trust services, increases the emphasis on tribal contracting and provides direct trust accountability."

The Department established an organizational approach that differed significantly from its original proposal presented in 2001 and, instead, was closely aligned with, and was a product of, the insight gained from the consultation process the Department underwent. Importantly, the reorganization complied with concepts determined during the consultation process to be instrumental to any reorganization, including:

- **Keeping specific management decisions about trust assets at the agency level.** The reorganization left decision making at the agency level where expertise and knowledge of an individual tribe's or person's needs is greatest.

- **Creating a Trust Center and trust officers.** The reorganization created these in the Office of the Special Trustee to provide improved and consolidated beneficiary services.

- **Promoting the idea of Self-Governance and Self-Determination.** The Task Force recommended that the Office of Self-Governance be placed under a new Under Secretary to underscore its importance and expand the ability of tribes to compact outside of the BIA. Instead, we created a new Deputy Assistant Secretary for Economic Development Policy and expanded the role of the Office of Self-Governance to include policy development and coordination for all self-determination programs.

- **Ensuring Trust Accountability by creating a new Office of Trust Accountability under the new Undersecretary.** Within OST, a Deputy Special Trustee for Trust Accountability was created to be responsible for trust training; trust regulations, policies and procedures; and a Trust Program Management Center.

- **Creating a new Undersecretary for Trust reporting directly to the Secretary.** The creation of an Undersecretary position would have required legislation. Instead of an Undersecretary, we used the existing statutory framework.

On December 4, 2002, the Department submitted letters to the House and Senate Appropriations Committees regarding the Department's intention to reprogram funds to implement the reorganization. On December 18, 2002, the Department received letters in response from the Committees that were consistent with the Department's intention to reprogram.

On April 21, 2003, Secretary Norton made the reorganization effective by signing the Department of the Interior Manual, which established clear lines of responsibility by which the BIA provides trust services and OST provides fiduciary trust oversight.

Comprehensive Trust Model

The organizational realignment of the Office of the Assistant Secretary for Indian Affairs, the BIA, and OST two years ago was only one component in the Department's efforts to develop a comprehensive approach for improving Indian trust management.
Beginning in 2002, the Department undertook a meticulous reengineering effort using a collaborative approach among all the Bureaus and Offices with trust responsibility. These Bureaus and Offices were the BIA, the Bureau of Land Management (BLM), Minerals

Management Services (MMS), Office of Hearings and Appeals (OHA), and OST. This collaborative approach also integrated tribal input gathered in numerous consultative meetings.

The re-engineering effort began with documentation of "As-Is" processes -- a comprehensive description of the way major trust processes were originally performed -- providing the Department with an understanding of trust business operations, an opportunity to identify needs and places for improvement, and a better understanding of variances of practice among geographic regions and their causes.

The next phase of the effort was the "To-Be" project: redesigning these processes where appropriate. To help guide the "To-Be" project, DOI developed the Comprehensive Trust Management (CTM) Plan to define an approach for improving performance and accountability in the management of the trust. The CTM provides the overall trust business goals and objectives for DOI to achieve its fiduciary trust responsibilities. In addition to the CTM, recommendations from the documented "As-Is" Business Model and DOI subject matter experts were an important part of the effort.

The CTM identified three business lines:

1 Beneficiary trust representation.

2 Trust financial management.

3 Stewardship and management of land and natural resources.

Each business line consists of common business processes focused on a particular activity, and represents a distinct group of products or services for comprehensive trust management. Each business line also encompasses other related processes, products, and services within its scope.

Defining comprehensive trust management in terms of actual business lines is critical, because it provides a logical framework for an efficient organizational structure, and helps manage the expectations of both staff and beneficiaries. The CTM laid the groundwork for trust reform by providing the strategic direction for the Fiduciary Trust Model (FTM), which Secretary Norton approved on August 11, 2004.

The FTM is designed to improve beneficiary services for Tribes and individuals, ownership information, land and natural resource assets, trust funds assets, Indian self-governance and self-determination, and administrative services. When fully implemented, trust services will be transformed by implementing the major objectives identified in the FTM, which include:

1 Operating with standardized procedures that will allow the consistent execution of fiduciary responsibilities nationwide.

2 Utilizing automatic tracking and accountability for trust funds, from collection of receipts through disbursements and reporting to beneficiaries.

3 Providing accountability and protection of trust land and natural resources.

4 Developing partnerships with beneficiaries by engaging them in the management and use of their trust assets.

5 Migrating from 50+ fragmented data systems to an integrated nationwide system with automated workflow tools.

The new organization for trust programs places OST trust officers at the regional and agency level to ensure that the Department meets fiduciary trust responsibilities in the management of these trust assets. These trust officers are the first line of contact for tribal and individual beneficiaries for issues related to their ownership and use of trust assets. Within BIA, the reorganization separates the management of trust functions at the regional and agency levels, establishing regional and agency deputies for trust operations. The overall impact of the new organization is that Indian beneficiaries have an OST employee dedicated to providing answers to specific trust questions while allowing BIA employees to focus on their primary responsibilities. To date, 44 Fiduciary Trust Officers have been hired nationwide to serve as the primary point of contact for beneficiaries. An additional 8 will be hired by June 30, 2005. Within BIA, additional staffing to provide 12 deputy regional directors and 25 deputy agency superintendents for trust will permit more decisions to be made at the local level and provide for more efficient management of trust assets.

Examples of improvements to be made in 2005 and 2006 through implementation of the Fiduciary Trust Model include:

1 Continuing work to migrate from fragmented information data systems to an integrated nationwide system.

2 Standardizing documents to be recorded for approved conveyances and encumbrances in title transactions.

3 Providing for more secure fund processing by use of commercial lock boxes for receipt of funds.

4 Providing for improved and coordinated services for beneficiaries through a nationwide Beneficiary Call Center -- which went online in December 2004, and

is currently providing beneficiaries with 95% first-line resolution.

Fractionation

The fractionation of individual Indian interests in the land that the federal government holds in trust remains one of the greatest challenges facing successful fiduciary trust management. As mentioned earlier in this statement, with each successive generation the individual interests in the allotted lands have become further subdivided or fractionated among heirs, each of whom gets a smaller and smaller interest in the land. As the number of individual interests grows and the size of the interests decreases, it becomes increasingly difficult and costly for the Federal government to manage the tracts and put them to their best economic use.

Many issues contribute to the problem. Individual owners are restricted from selling their interests to non-Indian third parties, and there is a cultural reluctance among some Indians to make wills, which would limit the subdivision of their interests in probate. Further, unlike private trust holdings, the Department maintains an IIM account for each Indian owner at no cost, even if the cost to manage the account far exceeds its revenue. Also, the lands are tax exempt and not subject to bankruptcy. Moreover, because the ownership interests are often very small, individual owners may see little benefit from ownership and have little incentive to find economic opportunities to maximize economic returns on the land.

The number of interests has been increasing annually even though the amount of land is not increasing. The Department worked extensively with this Committee on ways to amend the Indian Land Consolidation Act to halt this growth. The American Indian Probate Reform Act, signed by President Bush on October 28, 2004, contains new tools to improve probate and help slow the growth of fractionation. This new law creates a uniform probate code for Indians who have land held in trust and requires that a highly fractionated interest (less than 5 percent in a parcel of land) be inherited by a single heir when someone dies intestate. This will help prevent the further fractionation of extremely small interests. Also, the new law allows a co-owner of highly fractionated property at any time to request that Interior conduct a partition or forced sale among co-owners, assuming the co-owner is willing to pay at least fair market value for the entire parcel. While the new law is expected to slow the growth in fractionation over time, it will not solve the existing fractionation problem.

Interior spent an estimated $220 million for administrative costs related to management of individual interests in trust lands in FY 2003 and costs continue to grow. These costs will continue to increase as the number of interests continues to grow. The Federal government's costs to manage very small interests can be especially high. For example, Interior maintains about 20,000 individual accounts with a balance between one cent and one dollar, which have had no activity (no revenue or disbursements) for the previous 18

months. The total sum included in these accounts is about $5,700, with an average balance of 30 cents.

Indian Land Consolidation Program

The Interior Department operates the Indian Land Consolidation Program to purchase individual Indian interests from willing sellers at fair market value to consolidate property interests and reduce fractionation. As of December 31, 2004, the program had purchased 117,661 ownership interests. The President's FY 2005 Budget proposed $70 million, more than triple the $22 million appropriated for the program in FY 2004, and Congress ultimately appropriated $34.5 million in FY 2005. The President's FY 2006 budget proposes $34.5 million, the same as the 2005 enacted level. This funding will provide for a nationwide acquisition program that can acquire an estimated 46,000 highly fractionated interests.

The Purchase of fractional interests increases the likelihood of more productive economic use of the land, reduces record keeping and large numbers of small-dollar financial transactions, and decreases the number of interests subject to probate.

Historical Accounting

Section 102 of the American Indian Trust Fund Management Reform Act of 1994 requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. §4011 (a))."

On January 6, 2003, as ordered by the court in the Cobell litigation, the Department filed The Historical Accounting Plan for Individual Indian Money Accounts. The Department's 2003 accounting plan provides for a historical accounting for about 260,000 IIM accounts over a five-year period at a cost estimated in 2003 of $335 million using both transaction-by-transaction and statistical sampling techniques to develop assurances of the accuracy of the statements of accounts.

The 2006 budget request for historical accounting by the Office of Historical Trust Accounting is $135 million, an increase of $77.8 million over the 2005 enacted level. This amount will provide $95.0 million for IIM accounting, an increase of $50.0 million above the 2005 level, and $40.0 million for tribal accounting, an increase of $27.8 million above the 2005 level.

The 2006 budget request for IIM accounting is based on an estimate of the Department's costs to continue implementation of the Department's January 6, 2003 plan. However, on February 23, 2005, the U.S. District Court in the *Cobell* case reinstated its version of the

historical accounting as set out in the district court's September 25, 2003, structural injunction.

To understand the significance of the court order, it is useful to compare it to the historical accounting plan that DOI prepared, but which, in large part, the court rejected.

	Interior's Plan	Structural Injunction
Estimated Cost	**$335 Million1**	**$10-12 Billion2**
Time to Complete	**5 years**	**3 years for most accounting3**
Verification Approach	**Verify all transactions over $5000.00 by review of supporting documents. Verification by statistical sampling of transactions under $5000.00**	**Verify all transactions by review of supporting documents**
Trust Asset Accounting	**Describe trust assets owned by each IIM account holder as of December 31, 2000**	**Describe all trust assets ever owned by current IIM account holders or their predecessors in interest from 1887 to the present**
Deceased IIM Account Holders	**No accounting for beneficiaries who died prior to October 31, 1994; probate considered final**	**Full accounting for all IIM accounts since 1887**
Closed IIM Accounts	**No accounting for IIM accounts closed prior to October 31, 1994**	**Full accounting for all IIM accounts since 1887**
Direct Pay (rents and royalties paid directly to Indians and never held in trust)	**No accounting**	**Full accounting for all direct payments since 1887**
Time Frame	**Accountings back to 1938 or inception of IIM account, whichever is later**	**Accountings back to 1887**

The structural injunction requires the review and documentation of approximately 61 million financial transactions and supporting land ownership records. DOI currently holds

1 2003 Estimate
2 Estimate is preliminary and may possibly be significantly more.
3 Even though the order gives until September 30, 2007 to complete the Special Deposit Accounts, it requires an accounting for individual Indians to be completed by September 30, 2006.

approximately 500-600 million Indian trust records, and the injunction appears to necessitate the indexing and electronic imaging of the vast majority of these records. In addition, the court is requiring DOI to obtain additional records from third parties, which may include state and county record offices, energy companies, timber companies, other former and current lessees, tribes, and individual Indians. The court seems to anticipate that DOI will need to subpoena documents from thousands of private sources and then evaluate the documents' relevance to the historical accounting.

The recent court order will have significant budget implications in both this fiscal year and ones to follow. The cost of doing the historical accounting will rise from the hundreds of millions envisioned by the Department's plan to the billions.

Summary

Trust reform has remained a high priority for this Administration. We have made significant reforms in trust management during the past four years and we will continue to evaluate and improve our management of the trust. Mr. Chairman, we cannot do it alone. We stand at a crossroads in history and must work together to resolve issues, such as *Cobell*, promptly and in a meaningful way that will fulfill our responsibilities to our beneficiaries and to the American taxpayer. This concludes my statement. I would be happy to answer any questions the Committee may have.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 15, 2004 Decided December 10, 2004

No. 03-5314

ELOUISE PEPION COBELL, ET AL.,
APPELLEES

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 96cv01285)

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Peter D. Keisler*, Assistant Attorney General, *Kenneth L. Wainstein*, U.S. Attorney, *Gregory G. Katsas*, Deputy Assistant Attorney General, *Robert E. Kopp*, *Thomas M. Bondy, Charles W. Scarborough, Alisa B. Klein, Lewis S. Yelin,* and *Tara L. Grove,* Attorneys.

Elliott H. Levitas argued the cause for appellees Elouise Pepion Cobell, et al. With him on the brief were *G. William Austin, III, Mark I. Levy, Dennis M. Gingold,* and *Keith M. Harper. Jamin B. Raskin* entered an appearance.

Before: SENTELLE, TATEL, *Circuit Judges* and WILLIAMS, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Five named plaintiffs, members of Indian tribes and present or past beneficiaries of Individual Indian Money ("IIM") accounts, filed a class action in district court in 1996, alleging that the defendants--the Secretaries of the Interior and the Treasury, and the Assistant Secretary of the Interior for Indian Affairs--had "grossly mismanaged" those accounts. The bulk of the funds in the accounts are the proceeds of various transactions in land allotted to individual Indians under the General Allotment Act of 1887, known as the "Dawes Act," ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 et seq. (§§ 331-333 repealed 2000)). The money-producing transactions in question evidently involved such matters as sales of timber and leases of rights to grazing, farming, or extraction of oil, gas, or other minerals. Complaint, ¶¶ 2, 3, 5, 7-11, 17. See also *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 9-12 (D.D.C. 1999) ("*Cobell V*"). (The accounts also contain funds from a variety of other sources, see 25 C.F.R. § 115.702, but the allotment land transactions apparently predominate.)

Plaintiffs' suit draws significantly on Congress's findings of hopelessly inept management of the IIM accounts and its action to remedy the resulting chaos. A 1992 Congressional report, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499 (1992), catalogued Interior's "dismal history of

inaction and incompetence," *id.* at 5, and concluded that the agency had "repeatedly failed to take resolute corrective action to reform its longstanding financial management problems," *id.* at 3. In 1994 Congress moved from findings to legislation, passing the Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. § 162a et seq. & § 4001 et seq.) (the "1994 Act"). The 1994 Act imposed a variety of duties on the Secretary of the Interior, most of them relating directly to trust funds such as the IIM accounts. See, e.g., 25 U.S.C. § 162a(d).

Even apart from the 1994 Act, the IIM funds have quite a different legal status from the allotment land itself. Section 5 of the Dawes Act nominally made the United States trustee of those lands, but did so solely in order to limit alienation by Indians and to assure immunity of the lands from state taxation. See *United States v. Mitchell*, 445 U.S. 535, 540-44 (1980) ("*Mitchell I*"). It gave the Indian beneficiaries the right to possess and manage the lands except insofar as alienation was involved. *Id.* at 542-46. See also *United States v. Navajo Nation*, 537 U.S. 488, 504 (2003) (describing *Mitchell I* and applying its principles to certain unallotted lands). Accordingly, the Supreme Court held in *Mitchell I* that the Dawes Act did not, alone, establish a fiduciary duty on the part of the United States to manage the allotted lands. 445 U.S. at 544, 546. In contrast, the IIM funds are by statute under the full control of the United States, to be invested for the benefit of individual Indians in public debt of the United States or deposited in banks. See 25 U.S.C. §§ 161a(b), 162a(a).

As the label *Cobell V* suggests, this litigation has generated many legal opinions, including three of this court. In

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) ("*Cobell VI*"), we affirmed the district court's holding that the officials had breached their fiduciary duties and remanded for further proceedings. In *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) ("*Cobell VIII*"), we vacated a contempt citation of successor defendants Interior Secretary Gale Norton and Assistant Secretary of Indian Affairs Neal McCaleb, and reversed the district court's appointment of a court monitor. And finally, in *Cobell v. Norton*, No. 03-5262, 2004 WL 2753197 (D.C. Cir. Dec. 3, 2004), we vacated an order of the district court directing Interior to disconnect its computers from the Internet pending a security determination, excepting only certain essential systems and ones that would not provide access to Indian trust data. Those opinions, as well as the many opinions of the district court, provide an array of background data.

Here we address a district court injunction issued September 25, 2003. *Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003) ("*Cobell X*"). The decree, see *id.* at 287-95, imposes obligations on the defendants in two main categories. Duties related to "Historical Accounting" are intended to unravel the tangle resulting from past accounting failures, see *id.* at 70-211; those related to "Fixing the System" are intended to compel the issuance of a plan for future trust administration as a whole, see *id.* at 239-87. To assure fulfillment of both sets of duties, the court appointed a court monitor to oversee compliance and said it would retain jurisdiction until December 31, 2009. These two different sets of commands raise quite different issues.

"Historical Accounting," we find, is governed by Pub. L. No. 108-108, a provision adopted after the district court opinion issued, which radically changes the underlying substantive law and removes the legal basis for the historical accounting elements of the injunction. We therefore vacate those elements.

The core of "Fixing the System," by contrast, requires the Interior defendants to produce a "plan" that would fix the IIM trust management system, and requires the Interior defendants to explain how the Department will comply with various constraints or objectives identified by the court, such as sixteen specific common law trust duties and tribal law. Although we agree that Interior is subject to many of the common law trust duties identified by the court, we find that much of the "Fixing the System" injunction exceeds the court's remedial discretion because the court failed to ground it in the defendants' statutory trust duties and in specific findings that Interior breached those duties. Aside from the requirement that Interior complete its so-called "To-Be Plan," as promised in its Comprehensive Plan, we thus vacate the district court's injunction and remand for further proceedings consistent with this opinion.

Historical Accounting

In *Cobell VI* we ruled that the 1994 Act, 25 U.S.C. § 4011(a), conferred a right on IIM beneficiaries to "a complete historical accounting of trust fund assets," explaining that "'[a]ll funds' [as used in that provision] means *all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." 240 F.3d at 1102. In *Cobell X* the district court ruled that Interior must account for all

funds deposited since 1887 and issued rules permitting some accounting methods and prohibiting others--e.g., rejecting any use of statistical sampling. *Cobell X*, 283 F. Supp. 2d at 288-90.

Defendants raise a variety of objections to the district court's historical accounting order, but the objection based on Pub. L. No. 108-108 trumps the others. Adopted November 10, 2003, less than two months after the issuance of *Cobell X*, Pub. L. No. 108-108 appropriates funds and provides as follows:

> For the operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $189,641,000, to remain available until expended: *Provided*, That of the amounts available under this heading not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support: *Provided further*, That nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have

> occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004.

Pub. L. No. 108-108. A later sentence of the same section provides that the statute of limitations will not begin to run on any claim for losses or mismanagement of trust funds "until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *Id.*

Thus Pub. L. No. 108-108 appears to give Interior temporary relief from any common law or statutory duty to engage in historical accounting for the IIM accounts. The provision's legislative history makes clear that Congress passed it in response to *Cobell X*, to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required. The conference committee explained that "[i]nitial estimates indicate that the accounting ordered by the Court would cost between $6 billion and $12 billion . . . ." H.R. Conf. Rep. 108-330, at 117. The committee "reject[ed] the notion that in passing the American Indian Trust Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court. Such an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources." *Id.* at 118. "Indian country would be better served by a settlement of this litigation than the expenditure of billions of dollars on an

accounting." *Id.* at 117. Congress thus gave itself until the end of 2004 to come up with a legislative solution. See *id.* at 118.

In addition, individual legislators said in effect that the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, "nuts": "If this is a $13 billion fund, or somewhere in the neighborhood of $13 billion, would the Native Americans want us to begin a process in which we spend up to $9 billion to hire accountants and financial folks and others to sift through these accounts? I think that is just nuts. That doesn't make any sense at all to anybody." 149 Cong. Rec. at S13,786 (2003) (statement of Sen. Dorgan). See also *id.* at S13,785 (statement of Sen. Burns) ("If there is one thing with which everybody involved in this issue seems to agree, it is that we should not spend that kind of money on an incredibly cumbersome accounting that will do almost nothing to benefit the Indian people.").

Plaintiffs make a vague claim that we should simply disregard Pub. L. No. 108-108, allowing the district court to address its effect in the first instance. But apart from an allusion to the possibility of considering it in conjunction with post-decree developments, they offer no reason overcoming the usual principle that a court is to apply the law in effect at the time the court rules. See *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994). As the provision deprives the decree's "historical accounting" mandates of any legal basis, it is hard to see how post-decree developments could affect the matter. As a fallback position, plaintiffs argue that the law violates separation of powers principles and the takings and due process provisions of the Fifth Amendment. We reject both claims.

First, plaintiffs assert that Pub. L. No. 108-108 amounts to a "legislative stay" of a final judicial judgment. They cite language in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), to the effect that Article III judicial decisions cannot "be liable to a revision, *or even suspension*, by the legislature." *Id.* at 413 (emphasis added) (quoting decision of the circuit court for the district of North Carolina, consisting of Iredell, Justice, and Sitgreaves, district judge). In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court explained that *Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch," *id.* at 218, and held that Congress could not require a federal court to reopen a completed case for money damages, *id.* at 240. But the Court also said that an appellate court must apply any law enacted after the judgment under review and clearly intended to have retroactive effect. See *id.* at 226.

Even more critical is the distinction between statutes that in effect reverse final judgments in suits for money damages, as in *Plaut*, and ones that alter the substantive obligations of parties subject to ongoing duties under an injunction, as in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855). Indeed, *Plaut* explicitly distinguished the latter. See 514 U.S. at 232. In *Wheeling Bridge* a court had entered a decree requiring removal of a bridge pursuant to a statute rendering it unlawful. Congress then amended the law to legalize the bridge. The Court held that because the act of Congress modified the law "so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced." 59 U.S. at 432. For purposes of the rule limiting congressional reversal of final judgments, an injunction is not "final." As we said in *National Coalition To Save Our*

Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001), applying *Wheeling Bridge*, "[A]lthough an injunction may be a final judgment for purposes of appeal, it is not the last word of the judicial department because any provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." *Id.* at 1096-97 (quoting *Miller v. French*, 530 U.S. 327, 347 (2000)) (internal quotation marks omitted).

At oral argument plaintiffs seemed more to stress the idea that Pub. L. No. 108-108, rather than *changing* the substantive law, directed the courts how to *interpret* or apply pre-existing law. In *Save Our Mall* we assumed that under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), such an interpretive direction would invade the powers of the judicial branch. 269 F.3d at 1097. Here as there, however, we do not read the statutory language as such a directive. Some of the phrasing--especially the statement that nothing in the 1994 Act or any statute or the common law "*shall be construed or applied* to require the Department of the Interior to commence or continue historical accounting activities" (emphasis added)--might be said to support such a reading. But "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

We believe Pub. L. No. 108-108 is most plausibly read simply to say that the Department of Interior shall not, under any statute or common law principle, *be required* to engage in historical accounting in the specified period, i.e., all statutes and common law rules requiring any such accounting are

temporarily and partially repealed or modified. Compare *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992) (rejecting claim that statute should be construed as mandate of judicial findings under unchanged substantive law rather than as a change in the law). Indeed, the Supreme Court has interpreted very similar wording--that "nothing . . . shall be construed" to allow--as simply repealing prior legislation to the contrary. See *Carroll v. United States*, 354 U.S. 394, 408-415 (1957); see also *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302-03 (9th Cir. 1995).

Finding neither an effort to mandate a particular interpretation of the substantive law nor an impermissible legislative modification of a final judgment, we reject plaintiffs' separation of powers theories.

Second, plaintiffs say that Pub. L. No. 108-108 is an unconstitutional deprivation of property, in violation of the due process and takings clauses of the Fifth Amendment. The claim is obscure, as plaintiffs do not explicitly identify the property right that they believe enforcement of Pub. L. No. 108-108 would take. They do, however, mention the right to "interest earned on trust accounts," if only in a parenthetical to a case citation. Plaintiffs' Brief at 53.

But we see no reason to think Pub. L. No. 108-108 will affect plaintiffs' entitlement to interest. As trust income beneficiaries are typically entitled to income from trust assets for the entire period of their entitlement to income, and for imputed yields for any period of delay in paying over income or principal, see G. G. BOGERT & G.T. BOGERT, LAW OF TRUSTS AND TRUSTEES § 814, pp. 321-25 (rev. 2d ed. 1981), we do not

see--and plaintiffs make no effort to explain--how the accounting delay allowed by Pub. L. No. 108-108 could deprive them of interest or any comparable returns.

Plaintiffs' references to temporary takings suggest that they regard a delay in the *accounting* itself as a taking. But the accounting is a purely instrumental right--a way of finding out the size of their claims. If the moratorium imposed by Pub. L. No. 108-108 actually delays conclusion of the accounting (which it may not, as Congress may provide a simpler scheme than the district court's, while nonetheless assuring that each individual receives his due or more), the ordinary trust principles referred to above will automatically give the plaintiffs compensation for the delay.

Accordingly we find no constitutional obstacle to enforcement of Pub. L. No. 108-108 as written.

* * *

In Pub. L. No. 108-108 Congress in effect gave itself until December 31, 2004 "to develop a comprehensive legislative solution to what has become an intractable problem." H.R. Conf. Rep. 108-330, at 118. Absent Congressional action by that date, obviously Pub. L. No. 108-108 will cease to bar the historical accounting provisions of the injunction. We do not address the issues that would be relevant if the district court then reissued those provisions. At the present time, however, they are without legal basis.

Fixing the System

Although the defendants argue that Pub. L. No. 108-108 "deprives the injunction of any arguable legal basis" (Defendants' Br. at 40), the statute suspends only "historical accounting activities." Because certain portions of the district court's injunction are at least conceptually separable from the historical accounting duty, we must address these aspects of the order on the merits.

What we will call Part III(IV) of the injunction (mislabeled Part III by the district court because there is already a Part III), "Compliance with Fiduciary Obligations," is primarily an order that Interior complete its To-Be Plan within 90 days. *Cobell X*, 283 F. Supp. 2d at 290-91. The To-Be Plan, which Interior sketched out broadly in its Comprehensive Plan, is intended "to provide a comprehensive statement of the manner in which trust management will be conducted after Interior's proposed internal changes." *Id.* at 250. Given that the Comprehensive Plan only described Interior's intention to create the To-Be Plan, the court said that the Comprehensive Plan was "really only a plan to make a plan." *Id.* at 284. Part III(IV) also orders the Interior defendants to implement the Comprehensive Plan (including the To-Be Plan). *Id.* at 290.

Part III(IV) of the injunction goes on to direct that Interior's To-Be Plan identify any portions of the plan that might be deemed inconsistent with the common law trust duties previously identified by the district court, and explain why the identified portion or portions should not be considered inconsistent with these duties. *Id.* at 291.

Additionally, the court's injunction required Interior to file with the Court, within 120 days, a "list of tribal laws and ordinances that the Interior defendants deem applicable to the administration of the Trust," including "a full statement of the manner in which the Interior defendants consider these laws and ordinances to affect such administration." *Id.* The court also ordered Interior to file within 90 days a detailed plan of measures it will take to correct certain "problems with the leasing, title, and accounting systems of the Trust," and a plan identifying how Interior will "distinguish principal from income during [its] historical accounting of the Trust." *Id.*

In Part IV(V) the court set forth a detailed timetable for implementing its order. The timetable not only covers requirements set forth elsewhere in the injunction, but also imposes several additional requirements on Interior, including several steps outlined in Interior's Fiduciary Obligations Compliance Plan of January 6, 2003. *Id.* at 292-93. (The Compliance Plan was an early version of Interior's plan to fulfill its fiduciary obligations and was subsequently replaced by the Comprehensive Plan. See *id.* at 243-44.) The court ordered that all of these requirements be completed within roughly three to six months. *Id.* at 292-93.

In Part V(VI) the court appointed a Judicial Monitor, endowed with "all authority bestowed on special masters pursuant to Rule 53" of the Federal Rules of Civil Procedure, "to report on the Interior defendants' compliance with the provisions of this Order." *Id.* at 294. According to the court, the monitor must have "unlimited access to the Interior defendants' facilities and to all information relevant to the implementation of this Order." *Id.* Finally, in Part VI(VII) the

district court retained jurisdiction over the case until December 31, 2009. *Id.* at 295.

The government offers a number of reasons why we should vacate these provisions in their entirety (even to the extent that they are completely separate from "historical accounting"), as well as targeted arguments for vacating individual elements. We first reject two government arguments that, if sound, would call for vacating all "Fixing the System" aspects of the injunction. We then address the government's argument that those elements violate the Supreme Court's holdings in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), which read the Administrative Procedure Act as limiting APA review to attacks on specific "agency action[s]" (or the unlawful withholding of such an action), and precluding its use for claims of broad programmatic failure. In light of this last argument, we reverse and remand for further action consistent with this opinion.

Government contentions applying to all elements of the injunction apart from historical accounting. Against the "Fixing the System" elements of the injunction, the government argues that (1) any consideration of trust deficiencies outside the realm of historical accounting represents an improper expansion of the lawsuit; and (2) under *Mitchell I* the government is not subject to any trust duties other than the statutorily created duty to account. We reject both contentions.

1. *Expansion of the lawsuit.* Interior claims that the district court cannot "expand[] its jurisdiction to include the entire field of trust management" because our decision in *Cobell*

VI held "that the only actionable duty was the duty to perform an accounting." Defendants' Brief at 77. We made no such ruling.

First, we are puzzled by the idea that the "fixing" issues represent an expansion of the lawsuit. The complaint's prayer for relief asked for an order "construing the trust obligations of defendants to the members of the class, declaring that defendants have breached, and are in continuing breach of, their trust obligations to such class members, and directing the institution of accounting and other practices in conformity [with the defendants' trust] obligations." Complaint at 26. It also claimed a wide range of past trust violations independent of accounting failures, e.g., that the government "[f]ailed to exercise prudence and observe the requirements of law with respect to investment and deposit of IIM funds, and to maximize the return on investments within the constraints of law and prudence," and "[e]ngag[ed] in self-dealing and benefiting from the management of the trust funds." Complaint at 10. And at an early stage the district court responded to this range of attacks by bifurcating the case into the parts now before us--"fixing the system" and "correcting the accounts." Scheduling Order at 2 (May 4, 1998).

Interior misconstrues *Cobell VI* in arguing that our holding there limited the issue in this case to the provision of a historical accounting. We held that the duties identified by the district court, such as the duty to create specific written policies and procedures pursuant to the 1994 Act, 25 U.S.C. 162a(d)(6), were "subsidiary" to the duty to account, *Cobell VI*, 240 F.3d at 1105, *not* that the duty to account was the only fiduciary obligation in this case. "The 1994 Act did not create those

obligations any more than it created the IIM accounts. . . . [The Act] . . . recognized and reaffirmed what should be beyond dispute--that the government has longstanding and substantial trust obligations to Indians, particularly to IIM trust beneficiaries, *not the least of which is a duty to account*." *Id.* at 1098 (emphasis added).

2. *Statutory basis for fiduciary obligations.* The government quotes *United States v. Navajo Nation*, 537 U.S. 488 (2003), for the proposition that a purported trust beneficiary must "identify a substantive source of law that establishes specific fiduciary or other duties." *Id.* at 506. The difficulty facing the government, however, is that, for the IIM accounts, such a duty is not far to seek.

In two matched pairs of cases the Supreme Court has stated what is needed to infer creation of conventional fiduciary duties with respect to Indian interests, sufficient to sustain claims for monetary damages under the Indian Tucker Act, 28 U.S.C. § 1505. (The modifier "conventional" is critical, to distinguish such duties from the concept that a trust relationship between the government and the Indians requires that statutory ambiguities be resolved in favor of Indians. See, e.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).) We described at the outset how in *Mitchell I* the Court found no enforceable fiduciary duty in the "trust" established for allotment lands themselves, given the limited purposes of the authority retained by the government. Conversely, in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Court found that where allotment land was subject to "elaborate [government] control" over property belonging to Indians, "a fiduciary relationship necessarily arises." *Id.* at 225. Instead of

the "bare" trust arising from the operation of the Dawes Act alone, *id*. at 224, the land involved in *Mitchell II* was subject to statutes and regulations asserting government control and responsibility, and compelling the inference of a genuine trust over the resources so controlled. A similar pair of cases applies the same principle to non-allotment land: see *Navajo Nation*, 537 U.S. at 507 (rejecting inference of enforceable fiduciary relationship because the statutes and regulations failed to give the government full responsibility to manage the resources in question for the benefit of the Indians), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (finding such a responsibility in the government).

The IIM accounts fall emphatically on the "full responsibility" side. Section 161a(b) directs that "[a]ll funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of individual Indians shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund . . . ." 25 U.S.C. § 161a(b). The statutory mandate, added in the 1994 Act, appears in large part to codify Interior's prior practice, which involved the exercise of complete control over the IIM funds. See H.R. Rep. No. 103-778, at 11-12 (1994). Thus the statute assumes a set of funds "held" by the United States and directs its officials' investment of these funds.

Another provision, 25 U.S.C. § 162a(a), authorizes an alternative investment for funds held in trust for the benefit of individual Indians--namely, deposits in banks selected by the Secretary of the Interior. And at the request of an individual Indian for whom funds are held, investments may also be made

in obligations unconditionally guaranteed by the United States, or in mutual funds holding only such obligations. 25 U.S.C. § 162a(c). Although this extremely narrow band of permissible investments takes off the table many potential disputes over prudent investment, it plainly assigns the government full managerial responsibility.

Under the four cases just discussed, these statutory mandates compel an inference of enforceable fiduciary duties. Indeed, the district court so held early in this litigation, see *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 22 (D.D.C. 1999) ("*Cobell III*") ("The basic contours of defendants' fiduciary duties under this trust are established by the statutes [applicable to the IIM trust] and, as in *Mitchell II*, construed in light of the common law of trusts."). Thus the trust duties that in *Cobell VI* we said the 1994 Act reaffirmed, 240 F.3d at 1100, see also *id.* at 1098, are the fully enforceable variety found in *Mitchell II* and *White Mountain Apache Tribe*.

That does not mean, however, that the district court may simply copy a list of common law trust duties from the Restatement and then order Interior to explain how it will satisfy them. Putting aside the litigation innovation (requiring defendants to explain how they will cure a long list of defaults as to which the court has made no evidence-based finding), the court has abstracted the common law duties from any statutory basis. Though the district court cites *White Mountain Apache Tribe* to support this incorporation of common law trust duties, see *Cobell X*, 283 F. Supp. 2d at 265-67, it ignores the Supreme Court's actual approach, which was to look to trust law to find that a particular common law duty--"to preserve and maintain trust assets"--was implied in a 1960 statute that, by permitting

government occupation, made property "expressly subject to a trust," *White Mountain Apache Tribe*, 537 U.S. at 475. Thus, once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation.

The district court itself so held in *Cobell V*, 91 F. Supp. 2d at 38, finding that it could not grant plaintiffs' prayer for a declaration of all trust duties arising from the IIM trust solely on the basis of plaintiffs' common law trust claims. The court subsequently reversed itself on the point, saying that our decision in *Cobell VI* "supercedes" the district court's prior observation that plaintiffs were wrong to think that once a trust relationship was established they could automatically "invoke all the rights that a common law trust entails." *Cobell X*, 283 F. Supp. 2d at 260 n.12. Insofar as plaintiffs may have said that, they were wrong. In *Cobell VI* we actually held that the government's duties must be "rooted in and outlined by the relevant statutes and treaties," 240 F.3d at 1099, although those obligations may then be "defined in traditional equitable terms," *id.*

Programmatic review under the APA. Plaintiffs invoke the APA as the basis for securing review of defendants' conduct. Complaint at 26 ("Plaintiffs are entitled to review [of defendants' various breaches of trust] under 5 U.S.C. § 702."). Defendants argue that the district court's "fixing the system" orders exceed the court's jurisdiction because they are insufficiently pinned to discrete agency action (or inaction).

As *Southern Utah* notes, §§ 702, 704 and 706 of the APA "all insist upon an 'agency action.'" 124 S. Ct. at 2378. This of course includes § 706(1)'s provision of authority to

"compel agency action . . . unreasonably delayed." See *id.* at 2379 n.1. Because of the requirement of specific agency action, the Court held initially in *Lujan* and again in *Southern Utah* that APA review was not available--even in the face of allegations of "rampant" violations of law--for claims seeking "*wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891; see also *Southern Utah*, 124 S. Ct. at 2380. The APA's requirement of "*discrete* agency action," *Southern Utah* explained, was

> to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved--which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management . . . . The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such [broad] congressional directives is not contemplated by the APA.

Id. at 2381.

The district court itself, earlier in this litigation, acknowledged the risk of taking on what were really legislative or executive functions: "The court has no present intention to entertain a request to sit as a pseudo-congressional oversight body that tells defendants everything that they must do to meet their obligations programmatically. That is a role that only Congress can fulfill." *Cobell III*, 52 F. Supp. 2d at 31.

The application of *Lujan* and *Southern Utah* is complicated here by the availability of common law trust precepts to flesh out the statutory mandates, and, indeed, as we said in *Cobell VI*, at least partially to limit the deference that we would normally owe the defendants as interpreters of the statutes they are charged with administering. See *Cobell VI*, 240 F.3d at 1101. See also *id.* at 1104 (noting defendants' obligation to "pass scrutiny under the more stringent standards demanded of a fiduciary") (internal citation and quotation marks omitted).

The government accepts and even endorses our observation that interpretation of statutory terms is informed by common law trust principles, see Defendants' Reply Brief at 26-27 (citing *Cobell VI*, 240 F.3d at 1099), but makes two key points as to why those precepts do not eliminate the risks that *Lujan* and *Southern Utah* saw in broad programmatic remedies. First, it notes that while the expenditures that plaintiffs seek are to be made out of appropriated funds, trust expenses for private trusts are normally met out of the trust funds themselves. Defendants' Reply Brief at 27. Thus plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures. Second, private trustees, even though held to high fiduciary standards, are generally free of direct judicial control over their methods of implementing these duties,

and trustee choices of methods are reviewable only "to prevent an abuse by the trustee of his discretion." *Id.* at 28 (citing Restatement (Second) of Trusts §§ 186-87 (1959)).

While a court might certainly act to prevent or remedy a trustee's wrongful intermingling of trust accounts, this does not imply that the normal remedy would be an order specifying *how* the trustee should program its computers to avoid intermingling, as opposed to, for example, barring the use of a program that had caused forbidden intermingling or was clearly likely to do so. See BOGERT & BOGERT, LAW OF TRUSTS AND TRUSTEES § 861, p. 22 ("If the trustee has been given discretion with respect to the act in question, . . . the court will not interfere by ordering him to take a certain line of conduct unless there is proof of an abuse of the discretion . . . ."). "[A] court of equity will not interfere to control [trustees] in the exercise of a *discretion vested in them by the instrument* under which they act." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (internal quotation marks and citation omitted). The availability of the common law of trusts cannot fully neutralize the limits placed by the APA and the Court's *Lujan* and *Southern Utah* decisions. Compare *Cobell VI*, 240 F.3d at 1104 (approving district court's expression of intent to leave issue of choice of accounting methods, including statistical sampling, to administrative agencies), with *Cobell X*, 283 F. Supp. 2d at 289 (forbidding use of statistical sampling).

That said, the question remains what specific elements of the "Fixing the System" decree run afoul of those decisions or are otherwise ill-founded. For the reasons explained below, we uphold the requirement to submit a plan and otherwise vacate and remand the case for further proceedings.

Plan. The core of Part III(IV) of the district court's injunction is its order that Interior complete a detailed plan to fulfill its fiduciary obligations--specifically to fill in the as-yet inchoate To-Be Plan promised in the Comprehensive Plan. This command rests on the court's prior order to file a Comprehensive Plan (issued in *Cobell v. Norton*, 226 F. Supp. 2d 1, 162 (D.D.C. 2002) ("*Cobell VII*"), and on the district court's finding here that the incompleteness of the To-Be Plan rendered the Comprehensive Plan only an interim step, see *Cobell X*, 283 F. Supp. 2d at 284. The order thus in some respects continues or logically extends the original order to file the Comprehensive Plan. In *Cobell VIII* we upheld that order as a device to gather information for the court, "akin to an order . . . relat[ing] only to the conduct or progress of litigation." 334 F.3d at 1138 (internal citation and quotation marks omitted). Thus, standing alone, the order to file the To-Be Plan simply enforces the prior order, which in effect required discovery of Interior's plans consistent with the district court's broad case management authority. To that extent we uphold it.

But Part III(IV) frames the plan by reference to the Interior defendants' bringing themselves "into compliance with the fiduciary duties imposed upon trustees at common law, as identified by this Court in its memorandum opinions issued this date," *Cobell X*, 283 F. Supp. 2d at 291 (referring to sixteen specific common law trust duties enumerated by the court, *id.* at 267-71). And it requires Interior to "identify any portion of the To-Be Plan that might be deemed to be inconsistent with any of these fiduciary duties, and include a full explanation of why the identified portion or portions should not [be] considered to be inconsistent with any of these fiduciary duties." *Id.* at 291.

Finally, the district court ordered Interior to implement its plan. *Id.* at 290.

Thus the court evidently proposes to use the "plan" as a device for indefinitely extended all-purpose supervision of the defendants' compliance with the sixteen general fiduciary duties listed. There are three difficulties with this approach.

First, the sole findings of unlawful behavior (other than accounting defaults) are stipulations acknowledging specific failures measurable against specific statutory mandates. See *Cobell V*, 91 F. Supp. 2d at 32-34. See also *Cobell VII*, 226 F. Supp. 2d at 66 (relying on the stipulations). The various plan filings can serve as the jumping-off point for judicial monitoring of Interior only to the extent that the monitoring is anchored either in these specific stipulations or in some future adjudicated findings. While in *Cobell VI* we upheld a requirement that the government produce periodic reports, we relied on specific findings by the district court "that appellants had unreasonably delayed the discharge of the[ir] duties by failing to ensure the provision of a complete historical accounting." *Cobell VI*, 240 F.3d at 1107; see also *Cobell V*, 91 F. Supp. 2d at 40 (finding commission of four specific accounting-related breaches of the 1994 Act). The district court cannot issue enforcement remedies--by any means--for trust breaches that it has not found to have occurred. The sixteen common law trust duties are pertinent only to the extent that they illuminate breaches already found (i.e., those named in the stipulations) or adjudicated in the future.

Second, the court's innovation of requiring defendants to file a plan and then to say what "might" be wrong with it

turns the litigation process on its head. However broad the government's failures as trustee, which go back over many decades and many administrations, we can see no basis for reversing the usual roles in litigation and assigning to defendants a task that is normally the plaintiffs'--to identify flaws in the defendants' filings.

Third, in the absence of specific findings of unreasonable delay in Interior's performance of its fiduciary duties, the court's order that the defendants implement the entire Comprehensive Plan, including the full To-Be Plan, amounts to an order to obey the law in managing the trusts. Under this implementation order defendants would be subject to contempt charges for every legal failing, rather than simply to the civil remedies provided in the APA. See, e.g., *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435-36 (1941) ("[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.").

Finally, we note that the district court used language suggesting an intent to take complete charge of the details of whatever plan Interior might submit: "If the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability." *Cobell X*, 283 F. Supp. 2d at 142. This is in sharp contrast with *Southern Utah*'s point that "§ 706(1) empowers a court only to compel an agency . . . to

take action upon a matter, without directing *how* it shall act." 124 S. Ct. at 2379 (internal citation and quotation marks omitted).

In sum, while we uphold the district court's order that Interior complete the To-Be Plan, we vacate the injunction insofar as it directs Interior, rather than the plaintiffs, to identify defects in its proposal and requires the agency to comply with the Comprehensive Plan.

Tribal laws and ordinances. The district court issued two directions about the trusts' relations to such laws. In its "General Provisions," it ordered the Interior defendants to "administer the Trust in compliance with applicable tribal law and ordinances." *Cobell X*, Part II.D., 283 F. Supp. 2d at 287. In a later section, it ordered them to compile a list of tribal laws and ordinances that they deemed applicable, with "a full statement of the manner in which the Interior defendants consider these laws and ordinances to affect such administration." Part III(IV).C., *id.* at 291.

The first of these edicts--to apply tribal law to the extent applicable--appears meaningless, except as a general mandate to obey the law. It gains meaning, of course, because it is embodied in an injunction. Thus any violation is punishable by contempt, and the mandate is impermissible on the grounds stated above.

The instruction to *list* tribal laws deemed applicable poses a different issue. On its face it seems a specification not of Interior's trust duties but of the court's preferred methodology for assuring Interior's fulfillment of those duties.

As such it collides with the APA, *Lujan*, and *Southern Utah*. It may be helpful for defendants in fulfillment of their trust duties to compile such a list (perhaps including tribal provisions on title, ownership, leasing, and contract for the purposes identified by the district court, *Cobell X*, 283 F. Supp. 2d at 275, or provisions on inheritance, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 634 (1982 ed.)). But a list of applicable tribal laws is no more essential to ensure that Interior "accelerate[s]" rather than "delay[s]" fulfillment of its fiduciary obligations, see *Cobell X*, 283 F. Supp. 2d at 275, than would be a list of all federal and state laws with which Interior must comply in administration of the IIM trusts. Although the district court may declare the government's legal obligations--whether rooted in federal or tribal law--pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, see *Cobell V*, 91 F. Supp. 2d at 38, it may not prescribe the specific steps the government must take to comply with these obligations unless it has found that government actions (or inactions) breached a legal duty and that the steps ordered by the court constituted an essential remedy.

Appointment of a court monitor. In Part V(VI), the court "appoint[ed] a Judicial Monitor to report on the Interior defendants' compliance with the provisions of this Order." *Cobell X*, 283 F. Supp. 2d at 294. "The Judicial Monitor shall be appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure, and shall possess *all authority bestowed on special masters* pursuant to Rule 53." *Id.* (emphasis added). Thus the label "Monitor" is inaccurate; the authority purportedly bestowed is really that of a "Master." Whereas a monitor's "primary function is to monitor compliance," a master's role is broader: to "report[] to the court and, if required, make[]

findings of facts and conclusions of law." Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 827-28 (1978) [hereinafter "*Special Project*"]; see also *id.* at 829 ("[A] monitor's activities are so unlike those of a rule 53 master that the court should not [designate a monitor a master]. . . . Monitoring rarely, if ever, proceeds by the quasi-judicial hearings envisaged by rule 53."). The district court also specified that "Interior defendants shall provide the Judicial Monitor and his or her agents with unlimited access to the Interior defendants' facilities and to all information relevant to the implementation of this Order, in order that the Judicial Monitor and his or her agents may be made cognizant of any failures to comply with the provisions of this Order." *Cobell X*, 283 F. Supp. 2d at 294.

According to the Interior defendants, the appointment of a monitor exceeds the scope of the district court's authority. We agree.

In April 2001 the government consented to the appointment of a court monitor for one year. In April 2002, notwithstanding the government's objection, the district court reappointed the court monitor, a decision we reversed in *Cobell VIII*. In rejecting the monitor, we wrote: "The Monitor's portfolio was truly extraordinary; instead of resolving disputes brought to him by the parties, he became something like a party himself. The Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Cobell VIII*, 334 F.3d at 1142. We distinguished the monitor in this case from the permissible appointment of a master in *Ruiz v. Estelle*, 679 F.2d 1115, 1161-62 (5th Cir.) (prison reform), *amended in part, reh'g denied in*

part on other grounds, 688 F.2d 266 (5th Cir. 1982). We explained:

> The role of the special master in *Ruiz* was not nearly as broad as the role of the Monitor in this case. There the master was specifically instructed "*not to intervene in the administrative management* of [the department] and . . . *not to direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance*." [679 F.2d] at 1162. Most important, the court of appeals clarified that the special master and the monitors were "not to *consider matters that go beyond superintending compliance with the district court's decree*," thereby assuring the special master would not be an "advocate" for the plaintiffs or a "roving federal district court." *Id.*

334 F.3d at 1143 (emphasis added).

Unlike the monitor in *Ruiz*, we said, the monitor appointed in 2002 could not "have been limited to enforcing a decree, for there was no decree to enforce, let alone the sort of specific and detailed decree issued in *Ruiz* and typical of such cases." *Id.*

In appointing a monitor in *Cobell X*, the district court adopted almost verbatim the language we used to explain that the court monitor in *Ruiz* was permissible because of its circumscribed role. According to the district court:

> The Judicial Monitor and his or her agents *shall not intervene in the administrative management* of the Interior defendants. The Judicial Monitor and his or her agents *shall not direct the Interior defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance* with this Order. The Judicial Monitor and his or her agents *shall not consider matters that go beyond superintending or reporting upon compliance with this Order.*

283 F. Supp. 2d at 295 (emphasis added).

Despite the similarity of the language we used to distinguish *Ruiz* and the language used by the district court to limit the monitor's authority, there is a significant difference between the two cases. The "Fixing the System" part of the present injunction (especially given the excisions already discussed) is not nearly as complex as the specific relief ordered in *Ruiz* (embodied partly in two consent decrees appearing at *Ruiz*, 679 F. 2d at 1127-28, 1165-68, 1174-84, partly in a hotly contested order summarized *id.* at 1164). If at some future time the non-accounting aspects of the case culminate in a true remedial injunction with specific duties tied to specific legal violations cognizable under the APA, the usual latitude for masters to oversee compliance would come into play. See *United States v. Microsoft*, 147 F.3d 935, 954 (D.C. Cir. 1998). Alternatively, appointment of a true judicial monitor, with duties focused on determining just how defendants' management of their trust duties is proceeding, might become appropriate. "Monitors are appropriate if the remedy is complex, if

compliance is difficult to measure, or if observation of the defendant's conduct is restricted." *Special Project*, 78 Colum. L. Rev. at 828. Compare *Cobell X*, 283 F. Supp. 2d at 218 (observing that Interior's quarterly reports have given an overly optimistic and inaccurate portrait of their reform efforts).

Additional provisions. The injunction imposes several additional duties on defendants. For example, the court revived elements of Interior's Compliance Plan, which was replaced by its Comprehensive Plan, *Cobell X*, 283 F. Supp. 2d at 244, to require Interior to "request legislation from Congress to satisfy part of its imbalance of Trust fund balances with" Treasury. *Id.* at 292. The court also ordered Interior to "request an expansion of the fiscal year 2004 annual audit to include all funds held in trust by the United States for the benefit of an individual Indian" and invested pursuant to 25 U.S.C. § 162a, *id.*, among numerous other requirements. Thus, rather than acting to assure that "agency action" conforms to law, the court has sought to make the law conform to the court's views as to how the trusts may best be run. The limits on the court's remedial authority, discussed at length above, apply equally to these additional requirements in the injunction. The court's authority is limited to considering specific claims that Interior breached particular statutory trust duties, understood in light of the common law of trusts, and to ordering specific relief for those breaches. To the extent Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate, as we held was the case in *Cobell VI* for the government's failure to provide a statutorily required accounting. Yet the court may not micromanage court-ordered reform efforts undertaken to comply with general trust duties enumerated by the court, and then

subject defendants to findings of contempt for failure to implement such reforms.

* * *

The "historical accounting" elements of the injunction are vacated because of the mandate of Pub. L. No. 108-108, and the remainder of the injunction, aside from the requirement that Interior complete its To-Be Plan, is vacated and remanded to the district court for revisions not inconsistent with this opinion.

So ordered.

TESTIMONY OF ELOUISE C. COBELL, LEAD PLAINTIFF IN *COBELL V. NORTON*

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARING ON TRUST REFORM

MARCH 9, 2005

INTRODUCTION

Good morning, Chairman McCain, Vice-Chairman Dorgan and Members of the Committee. Thank you for inviting me here today to provide testimony to the Committee on this most critical of issues – reforming the management and administration of the Individual Indian Trust, finally, after nearly a century of malfeasance and mismanagement by the Department of Interior.

I am here today, once again, on behalf of myself and the other more than 500,000 individual Indian trust beneficiaries represented in the lawsuit we filed nearly nine years ago in the Federal District Court of the District of Columbia, *Cobell v. Norton,* Civ. No. 96-1285 (RCL). First and foremost, as representative of all trust beneficiaries who are the owners of all the assets held in this Trust, we thank you for your continuing leadership on this matter and your sincere interest and effort to both reform the trust and resolve the the *Cobell* litigation. We will do whatever is necessary to aid you in achieving a fair and just resolution of this matter.

In addition, before we discuss the subject of the oversight hearing – namely trust reform – I wanted to make my position, as lead plaintiff, on one critical issue unmistakably clear: **There is nothing that I want more than an immediate and fair resolution of the *Cobell* case**. It is a matter of record that the government has mismanaged this trust for over a century. In November 1989, this Committee explicitly found that fraud and corruption pervades the management and administration of this Trust. In the Fall of 1995, Mr. Chairman, you yourself noted during the confirmation hearing of the First Special Trustee, that the management of this trust has been "criminal." Sadly, nothing has changed. *Cobell v. Norton* has shed further light on the gross mismanagement of this Trust and has raised this serious problem from the deepest and most

secluded shadows of government bureaucracies to the light of day, where everyone can see the extraordinary injustice and abuse. A century of deplorable mismanagement is far, far too long.[1] A century with no accounting of trust assets is unconscionable and unprecedented. A century of harm to hundreds of thousands of this nations poorest citizens in inexcusable. And the harm done to the plaintiff class everyday is unquantifiable. This is often a matter of life and death. A resolution is long past due. I along with other class representatives and our my counsel who have aided us in pursuing our rights will work with whomever is capable of achieving a fair resolution.

Moreover, I want to emphasize that this is not a new position. From inception, we have always sought an expeditious resolution of this case. We continue to do so. We have been and continue to be willing to participate in any resolution process conducted in good faith that is reasonably calculated to lead to resolution of this matter in an expeditious and fair manner – whether that be working with Congress for acceptable legislation, mediation, arbitration or continuing litigation. Simply put, plaintiffs have no interest in prolonging these proceedings.

While we will remain steadfast in our commitment to seek a prompt resolution of this case, we have an unconditional ethical obligation to ensure that any settlement is fair. We and our counsel will, of course, vigorously resist "settlement" that allows pennies on the dollar to the beneficiary class or that fails to address in a meaningful way the on-going and profound mismanagement of their trust assets. It is my obligation as lead plaintiff and my lawyers duty as class counsel to work towards immediate settlement, while at the same time forcefully resisting any resolution that would further harm the beneficiary-class.

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[1] *See, e.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.").

As stated, any acceptable settlement of the *Cobell* litigation must include meaningful trust reform. Below, we will discuss some ideas about the potential ways to achieve such meaningful reform. Prior to doing so, however, I want to raise one preliminary issue – the need to achieve one overall resolution to the *Cobell* case.

As government officials have stated countless times in various fora, the United States would like to achieve a settlement that addresses four related but distinct matters: (1) A historical accounting for individual Indian trust beneficiaries; (2) reform of the management and administration of the individual Indian Trust; (3) Asset mismanagement claims and (4) fractionation of land. While some of these matters may fall outside the scope of the *Cobell* case, plaintiffs agree that an omnibus approach to settlement is best. In particular, we believe that resolution of the historical accounting without addressing trust reform – or vice-versa – is necessarily inadequate and will merely lead to further litigation in the future. Thus, our comments below on what are appropriate considerations for trust reform should not be viewed in isolation. These ideas for appropriate trust reform proposals are merely one aspect of an overall resolution that must include, but perhaps not remain limited to, a resolution of the historical accounting claim central to the *Cobell* case.

LEAVING TRUST REFORM UP TO INTERIOR DEFENDANTS IS NOT A SOLUTION

A discussion of how to reform any system must obviously begin with a discussion of where the reform effort is presently. That is easy. Simply put, ***no*** progress has been made on trust reform, despite the fact that –

- The United States has held these assets in trust for individual Indian since 1887 and the

assets "have been mismanaged nearly as long."[2]

- More than a decade ago, in 1994, Congress enacted "remedial" reform legislation requiring fundamental changes in Trust management – changes the Interior Department officials admit have yet to to be instituted.
- Five years ago, the District Court ruled following the Phase One trial that defendants were in breach of their trust duties and remanded the case to the Trustee-Delegates to allow them to rectify identified trust management problems and bring themselves into compliance with trust duties – a decision the Court of Appeals unanimously affirmed on February 23, 2001.
- Pursuant to Court order, the Interior Department reports on a quarterly basis regarding the "progress" of their trust reform efforts. It is a judicially-established fact that Interior's quarterly reports are routinely "false and misleading." Despite their sanitized nature, however, Interior routinely acknowledge the utter failure of Interior to implement even the limited reforms to which they themselves have committed. For example, the report filed February 1, 2005 concedes, in their common watered-down bureaucrat-speak, that the historical accounting "will take longer" than they initially told the Court and that trust reform "will consume several more years of activity."[3]
- This past month, the district court reaffirmed that the accounting duty along with relevant subsidiary duties are the basis of a "live" claim in this case and with it comes a requirement that defendants reform the "the processes by which records and other

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[2] *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

[3] *Department of Interior's Twentieth Quarterly Report,* at 2-3 (February 1, 2005).

documentation of transactions involving trust assets and the actions of the trustee-delegate are created, stored, preserved and so forth."[4]

- The Interior Department's newest "reorganization" does little but move around boxes within the department. It does not address the fundamental problems of trust mismanagement and is widely opposed in Indian Country.

This record makes plain certain inescapable facts. Specifically, accountability and meaningful trust reform will come only when the government is forced to change. They will not do so voluntarily. If a century of failed reform is not long enough to demonstrate this fact, certainly the experience of the last two-decades of more promises and more rhetoric – but no reform – should be. I, along with many others from Indian Country, attempted to work with Interior defendants for over a decade prior to bringing this lawsuit. We heard many promises and many commitments made to Congress in hearing after hearing, but never reform, never a meaningful movement towards bringing the government into compliance with its trust duties.

The sole source of the limited progress has been this lawsuit – the constant prod requiring the Interior Department to at least look like its interested in managing our property better. But even with the litigation, the government has fought us every step of the way. One of the Court's recent orders referenced defendants' obstructionist tactics throughout this case and the resulting delay and harm to the beneficiary-class:

> As this case approaches its ninth year, it is this Court's hope that the defendants' next appeal will be truly expedited, and will lead to the resolution of these legal issues.

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[4] *Cobell v. Norton*, slip op. at 15 (D.D.C. February 8, 2005). In the same opinion the Court invited plaintiffs to amend the Complaint to include asset management and other types of trust reform. *Id.* at 23-24. Also, the Court made clear that the processes associated with the APA, such as limited discovery, do not apply in this case. *Id.* at 47-50.

> Elderly class members' hopes of receiving an accounting in their lifetimes are diminishing year by year by year as **the government fights – and re-fights – every legal battle**. For example, the defendants continue to contend today that this is a simple record-review Administrative Procedures Act case – a proposition that has been squarely rejected by this Court on more than one occasion, as well as by three different Court of Appeals panels in *Cobell VI, Cobell XII,* and *Cobell XIII.*
>
> **In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics.**[5]

It is these insidious litigation tactics by the government that have led to numerous contempt proceedings[6] and our calls in 2001 for a receivership. Let me be clear on this point, the record amply supports the conclusion that the Interior Department does not have the political will or the institutional competence to reform itself. A receiver – temporarily appointed during the pendency of reform – with the requisite competence and charged with, and singularly focused on, instituting reforms that permit the safe and sound management and administration the Individual Indian Trust is, in my view, the sole way to **ensure** reform will occur.

But I also understand that the government is highly resistant to the receivership approach and has called it a "non-starter." So while plaintiffs will continue to pursue this relief, among others, through judicial proceedings, I understand that this is not likely an acceptable avenue to attain the requisite political support for settlement legislation. It is with this baseline understanding that we propose certain other alternatives ways that may lead to successful trust

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[5]*Cobell v. Norton*, __ F. Supp. 2d __, 2005 WL 419293 at *7 (D.D.C. February 23, 2005) (emphasis added).

[6]While plaintiffs would prefer not to have to resort to contempt, we have been left with no alternative in light of the government's persistent violation of court orders and other serious misconduct. In addition, we note, that we have offered to drop all contempt charges if the government would agree to stop its obstructionist behavior and consent to a prompt accounting trial date. To date, the government has not accepted this offer.

reform. These alternatives will not ensure success like a receiver would. But a proposal that contains at least these measures **may** be sufficient for reliable and meaningful reform.

ELEMENTS OF AN APPROPRIATE TRUST REFORM APPROACH

Often times, Interior Department officials come up to Congress and discuss the Individual Indian Trust as if it is not fixable. They complain of the enormity of the problem and they speak of the challenges involved. We hear excuse after excuse as to why they have not brought themselves into compliance with the most rudimentary and basic fiduciary duties.

What belies their contention that reform is impossible or near impossible is that there are millions of trusts managed in the private sector all over this Nation that do not have these problems and do not suffer from malfeasant management. To be sure, this system has not evolved into a gold standard for mismanagement overnight, it is the result of a century of fraud, corruption and institutional incompetence that has enriched many, but left the Indian owners poor. Contrary to the pleas of government officials, however, the cure need not be decades away.

To achieve real and meaningful reform requires certain fundamental changes that must be made immediately. If one compares the mismanaged Individual Indian Trust with any other trust in the United States, certain observations are easily discernable. There are baseline elements that the Individual Indian Trust lacks which are elements of all other trusts. Moreover, the lack of these elements perfectly explains why the Individual Indian Trust is so profoundly mismanaged and wholly lacks accountability.

In all other trusts, there are, among other things: (1) clarity of **trust duties** and standards; (2) clarity regarding the complete **enforceability** in courts of equity of trust duties and clarity regarding the availability on **meaningful remedies** against a trustee breaching its

responsibilities; and (3) **independent** oversight with substantial enforcement authority to ensure that beneficiary rights are protected. The Individual Indian Trust, by contrast, does not have these elements.

These commonplace elements in other trusts ensure accountability and make it impossible for trust to deteriorate to the extent the Individual Indian Trust has. Their absence ensures no accountability and permits the trustee to abuse the beneficiary with impunity. What possible incentive is there for a trustee to manage trust assets safely and soundly and for the best interests of the beneficiary, if it is near impossible to hold them accountable when they mismanage?

Reform must, at a minimum, bring the Individual Indian Trust in line with all other trust by addressing these three missing elements. Duties must be stated expressly in statute. Congress must clarify that Indian beneficiaries, like all non-Indian trust beneficiaries, can bring an action to enforce **all** trust duties in courts of equity. And Congress must provide for effective oversight.

This is the bottom line: **We know that the Congress of the United States is serious about trust reform. To be effective, these three elements must be included in any legislative effort**. Otherwise, Congress too will be part of the problem, not part of the solution, and equally responsible for the continuing victimization of Indian people through the abusive and malfeasant management and criminal taking of our property.

Mr Chairman, we do not state the choice before Congress is such stark terms lightly. Unfortunately we have already experienced in real and profound ways the impact of when Congress takes action that undermines rather than furthers the goal of a fair resolution. As you are well aware, one example of problematic legislative action occurred in the late Fall of 2003,

when Congress enacted the Interior Appropriations Act, P.L. 108-108. That law included a provision, commonly called the "Midnight Rider" that you opposed. The Midnight Rider was so dubbed because it was not vetted through the authorizing committee of jurisdiction – this Committee and the House Resources Committee – rather it was hastily snuck in to a conference committee report directly prior to enactment.

The Midnight Rider is a prime example of why legislating on an appropriations bill is folly. While one of the stated purposes of the Rider by its sponsors was to provide a "time out" so the appellate court could review the trial court's decision requiring a historical accounting be performed, the actual effect was to negate the appellate court's ability to review the historical accounting part of the structural injunction decision altogether. Specifically, the December 10th appellate decision held that the Midnight Rider temporarily "removes the legal basis for the historical accounting elements of the injunction."[7] By Congress' doing so, the appellate court could not review the trial court's historical accounting duty until after the Rider expired on December 31, 2004.

Rather than expedite resolution of this case, the Midnight Rider caused serious and irreparable delays. It is not an overstatement to suggest that the Midnight Rider delayed this case and relief for the plaintiff class for no less than three years. In this instant, Congress was not a force for resolution, but provided justification for delay and recalcitrance.

There are a couple of important lessons that can be gleaned from this experience with the Midnight Rider. First, when Congress acts it must do so carefully. Hastily drawn riders without proper review through appropriate committees and hearings can have unintended consequences

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[7] *Cobell v. Norton,* 392 F.3d 461, 465 (D.C. Cir. Dec 10, 2004).

that dramatically impact the lives of people – here, 500,000 individual Indians. Second, while the Court of Appeals clarified that the Midnight Rider was constitutional, that was so only because of the temporary nature of the rider. Had the Rider completely eliminated the duty to account, it would have violated the Fifth Amendment Takings clause.[8] Third, and perhaps most importantly, the appellate court acknowledged that Congress had some authority to address the accounting issue through legislation, but that it was obligated to "assur[e] that each individual [beneficiary] receives his due or more."[9] Put another way, any legislative alteration of the accounting duty that does not provide each beneficiary "his due or more" would necessarily be a taking of that individuals' property and, hence, constitutionally infirm.

The point is, we believe that with your involvement, Congress will play the important role as the primary agent of fair resolution. To do so, we believe certain base level reforms outlined below in greater detail must be part of the trust reform settlement legislation.

1. Restatement Trust Duties

It is axiomatic that one cannot ensure fulfillment of duties unless there is clarity, in the first instance, as to which duties are applicable. Because of the lack of clarity and uncertainty regarding enforeability of trust duties, even when the government plainly breaches its trust duties – as in this case – litigation can drag on for years. The argument – as in *Cobell* – does not center around whether the government's conduct meets ordinary fiduciary standards, but whether they must meet those standards, or alternatively, even if they do not meet the standards, can the courts order appropriate redress.

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[8] *Id.* at 468.

[9] *Id.*

In the *Cobell* case, for example, the government has long admitted that they have never performed an accounting – not for one transaction for one beneficiary, even though it is well-settled that the accounting duty is the most central of trust duties. In fact the leading treatise states in unequivocal terms: "If the settlor attempts to eliminate any accounting duty of the trustee, by providing that it shall not be necessary for his trustee to account to anyone at any time, it would seem that the clause should be invalid and the duty of the trustee unaffected."[10] Simply put, a trust without an accounting duty is considered a contradiction in terms.[11]

Despite the clarity of this common sense rule, the government nevertheless argued, for six years, that they did not have to provide us the accounting we sought. In turn, we were forced to spend the first six years in litigation establishing a proposition presumed for any other trust. Not until the appellate court held that indeed defendants must account for all assets in February 2001 was this issue settled.[12] Such costly and time-consuming litigation would not occur in cases involving any other trust, because it is clear that a trustee owes a duty to account, along with all other ordinary fiduciary duties. Such uncertainty and concomitant cost are only suffered by Indian beneficiaries. This is true even though courts have ruled time and time again, as they did in *Cobell* that they "'must infer that Congress intended to impose on trustees **traditional**

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[10]Bogert, The Law of Trusts & Trustees (rev 2d ed), § 973, pp 462-464, 467

[11]*Id.* ("A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself."). *See also, e.g., Wood v. Honeyman*, 178 Or. 484, 566, 169 P.2d 131, 166 (1946) "We are completely satisfied that no trust instrument can relieve a trustee from his duty to account in a court of equity.").

[12]*Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001).

fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.'"[13]

With the uncertainly comes a lack of accountability. The Justice Department is well aware that even where the conduct constitutes patent mismanagement, they can argue that those duties are inapplicable to Indian trusts. Perhaps they will find a court to agree with them and prevent beneficiaries from achieving appropriate redress. At a minimum, Justice Department counsel can drain the resources of Indian litigants by arguing each point of law for years, often decades. The result is plain: unabated abuse and malfeasance without amelioration.

But there is an answer. Any settlement legislation must state in express terms the specific duties that apply to Indian Trust. Uncertainty will be eliminated. Enforceability will be enhanced and Interior officials confusion – feigned or otherwise – as to the applicability of ordinary fiduciary duties will be eradicated. Moreover, such legislation should make clear that those duties normally applicable to trust, apply with equal force to this trust, even though the beneficiaries are Indians. Discriminatory distinctions will become a thing of the past. If the trustee-delegate can demonstrate with specificity the need to depart from the ordinary trust duties, the reasons should be articulated with particularity and departures from ordinary principles should be narrow.

2. Express Cause of Action

Clarified duties alone are insufficient. In addition, Congress must clarify that Indian beneficiaries, like all other beneficiaries of trusts, can hold accountable their trustee in courts of equity. It is worth repeating, it is not an accident that the trustee with the absolutely worst record for mismanagement – our trustee – is a trustee that is difficult to hail into court when it

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[13] *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001)(emphasis added) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981)).

mismanages assets of a beneficiary. It is wholly predictable. All other trustees – even those created statutorily such as ERISA trustees, can be easily sued when they breach responsibilities and court's of equity can grant any appropriate relief.

But consistently in Indian trust cases, the government is able to tie up litigation by raising jurisdictional questions and issues as to whether the courts can grant the type of relief available to any other beneficiary of any other trust. By clarifying a cause of action and stating that normal equitable remedies are available to Indian beneficiaries – like they are to non-Indian ones – Congress will eliminate uncertainty and secure accountability.

Coupled with clarified duties, Indian beneficiaries will finally begin to approach the position that all non-Indian trust beneficiaries take for granted. Conversely, without such basic legal reform, Indian beneficiaries will continue to suffer abuse at the hands of a discriminatory system that permits their trustee – and their trustee alone – to abuse them with impunity.

3. Independent Oversight

As you know, Mr. Chairman, I am a banker by trade. I cannot begin to tell you how much regulation there is for me and other bankers when we hold other peoples' monies in our institutions. You well know the extent of oversight by regulatory bodies such as the Office of the comptroller of the Currency (OCC). Such oversight whether it be the OCC or the Securities & Exchange Commission (SEC) is vital to ensure that when one entity manages or administers a persons' assets – even in the non-trust context – they do so with care and pursuant to well-established rules.

Indeed, whenever any institution manages an American's assets, it is regulated – bar one. There is no entity that regulates or oversights the Department of Interior's management of the

Individual Indian Trust. In that context, is it any surprise that this trust is so poorly managed? Of course not.

In order to ensure that the Interior Department abides by ordinary rules and operates pursuant to best practices, there must be oversight. That oversight must be independent of the Department itself – and cannot – like the Office of Special Trustee – be under the control of the Secretary of Interior. That oversight body must also have real authority and, at a minimum, have cease and desist powers – like other oversight bodies do.

Mr. Chairman, these three elements are not a finite list, but they are necessary conditions to reforming this trust. What I have stated hear, moreover, is in outline form, and we look forward to working with you and other members of this Committee to fill out the details. But let me reiterate that without these three elements we will not achieve meaningful reform.

HOW TO PROCEED

Mr. Chairman, I understand that this is the first hearing on these issues and that there are many interested stakeholders in how reform occurs. I want you to know that we and our attorneys are committed to working with you and this Committee as well as tribal leadership to achieve reform in a manner acceptable to all. I am also pleased to note that the reform principles I discussed above are the same ones that have received widespread support by tribal leaders. And indeed, irrespective of those enduring forces that are always attempting to divide and conquer Indian Country, it has been my experience that we in Indian Country share widespread agreement of the vast majority of issues concerning trust reform.

Through the leadership of NCAI President Tex Hall and ITMA Chairman, Chief Jim Gray, we will participate in the working group that will seek to derive a consensus approach to

addressing trust reform and resolution of the *Cobell* case. It is my firm belief that if Indian Country comes together in this manner along with your staff, we will be able to take this opportunity to achieve proper reform and formulate a fair settlement of the *Cobell* case.

We are also pleased that President Hall has recognized our role in evaluating the fairness of any settlement proposal. As he stressed not so long ago in the "Guiding Principles of the Settlement Process," a settlement process must be acceptable to the *Cobell* plaintiffs and must "provide for judicial review and fairness."[14] We agree with this approach.

CONCLUSION

Mr. Chairman, let me conclude by reiterating the plaintiffs commitment to resolving this case. We have vigorously pursued litigation because we want resolution. We do not care if achieving fairness and stopping abuse of individual Indian beneficiaries comes through litigation, mediation or a settlement act, or arbitration for that matter. The means are unimportant. What is important is that we do so quickly and fairly.

I will leave you with the following passage from a report commissioned and prepared for Congress some years ago:

> In the first place the machinery of government has not been adapted to the purpose of administering a trust.
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> On the other side, behind the sham protection which operated largely as a blind to publicity, have been at all times great wealth in the form of Indian funds to be subverted; valuable lands, mines, oil fields, and other natural resources to be despoiled or appropriated to the use of the trader; and large profits to be made by those dealing with trustees who were animated by motives of gain. This has been the situation in which the Indian Service has been for more than a century – the Indian during all this time having his rights and properties to greater or less extend

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[14]Testimony of Tex G. Hall, NCAI Testimony on Potential Settlement Mechanism for *Cobell v. Norton,* Senate Committee Indian Affairs July 30, 2003 at 1, 4.

> neglected; the guardian, the Government, in many instances, passive to conditions which have contributed to his undoing.
>
> And still, due to the increasing value of his remaining estate, there is left an inducement to **fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension**.[15]

As you can see from the citation, this is a report from 1915. They knew back then of the "fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension." I can show you similar findings in reports from the 1920s, 30s, 40s 50s, all the way up to present – not least of which is the 1989 Report of this Committee that also found similar fraud and corruption. When and how will this criminal administration of our trust property end?

We have a chance right now to stop this "fraud, corruption, and institutional incompetence." With help from this Committee, we can make sure that the abuse present in 1915 is not still present in 2015 and Indian children will not suffer the indignities and abuse of their parents and grandparents.

We look forward to working with you and tribal leaders on this important issue.

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[15]"Business & Accounting Methods, Indian Bureau," Report of the Joint Commission of the Congress of the United States, 63rd Cong. 3d Sess., at 2 (1915) (emphasis added).

HON. CHARLES C. COLOMBE,

PRESIDENT

ROSEBUD SIOUX TRIBE OF SOUTH DAKOTA

Testimony Before the Committee on Indian Affairs

United States Senate

Oversight Hearing on Indian Trust Reform

March 9, 2005

Russell Senate Office Building, Room 485

9:30 a.m.

Chairman McCain, Vice-Chairman Dorgan, and members of the Committee, my name is Charles Colombe. As Tribal President, I am honored to testify today on behalf of the Rosebud Sioux Tribe of South Dakota. At Rosebud, we are descended from the Sicangu or Burnt Thigh Band of the Lakota Oyate also referred to as the Great Sioux Nation. On behalf of the Rosebud Sioux Tribe, I thank the Committee for holding this hearing as well as for its continuing commitment to meaningful trust reform.

The Rosebud Sioux Reservation has approximately nine hundred thousand acres of trust land. There are twenty five thousand tribal members. Twenty one thousand live on the reservation. Like most of the Great Plains Region Tribes, my Tribe is a large land-based tribe with fractionated lands, a large population, grinding poverty, and an unemployment rate of close to 80%. We consider ourselves rich in traditions and trust lands.

Land should be the foundation of our reservation economies. Since the reservations were created, the United States has had management and control of our land. As I'm sure you're aware, the Bureau of Indian Affairs'(hereafter "BIA") land management on the Great Plains has been a dismal failure.

Land management is therefore the heart of trust reform in our region, and I know trust land well. I ran the Tribe's land purchase program during the 1970's. From 1979 to 1994, I contracted to provide land title systems to the BIA. In those contract years, I completed chains of title and curative work, and computerized all of the land records on all trust title in the Minneapolis area and the Great Lakes, Great Plains, Rocky Mountain, and Northwest Regions. I built the title plant in the Pacific Region for all California trust lands. I provided the same service for eleven of the nineteen pueblos in New Mexico.

In that time I also did quite a bit of work on title relating to legal claims. For example, law firms asked me to reconstruct heirship files after they won claims against the United States for timber mismanagement. This sometimes required me to construct records for land that had been probated twenty or thirty years earlier, some of which had passed out of trust. Beginning in 1979, I ran the 28 U.S.C. § 2415 claims process for Dakota Plains Legal Services. The United States had filed actions against local governments and utility companies on behalf of tribes and allottees for damaging and using trust lands without first obtaining perfected rights of way. The 2415 claims process was an effort to assist tribal members in filing land claims before the statute of limitations expired.

On a personal level, as a rancher, I have leased and permitted thousands of trust acres, bought and used land, and mortgaged it. I understand the way the Bureau manages land not only on my own reservation, but on many others where I provided contract title services.

Before I get too far into my testimony, I want to acknowledge that almost every tribe has a dog in the fight over the ongoing reorganization of the BIA. Most tribes have been impacted by the deep cuts in the Tribal Priority Allocation budget, which have gutted school construction funds and crucial program funding at the agency level. Because most tribes are impacted, the Department of the Interior (hereafter "DOI") should collaborate

with all tribes for the BIA's trust system to be reformed in a way that truly benefits Indian people.

The United States, the Office of Special Trustee, the BIA and Indian Tribes can collaborate. One has to look at the successful passage of the American Indian Probate Reform Act of 2004. I personally believe that this is the most significant piece of legislation enacted to benefit Indian tribes and their members since the 1934 Indian Reorganization Act.

The Great Plains and the Rocky Mountain Region have the majority of Individual Indian Money Account (hereafter "IIM") stakeholders and we want to collaborate with the United States to come up with meaningful trust reform. These Regions also recognize that some other regions, like Oklahoma, may very well have higher dollar values in their IIM accounts due to the development of mineral resources on their lands.

Every region and every tribe have different trust resources. Two examples from my area illustrate the land management problems we face with the BIA. Both cases involve progressive, forward-thinking initiatives to consolidate land, going back sixty or seventy years. In both cases, current reorganization efforts provide our tribes with no assistance in fixing very old problems.

My first example is from my reservation. In 1943, the BIA created the Tribal Land Enterprise (hereafter "TLE") for the Rosebud Sioux Tribe under a federal charter. The BIA wrote TLE's bylaws and retained supervisory authority over all actions by the Board of Directors. The Board is appointed by the Tribal Council and the shareholders, and as President, I am also a TLE Board member. The BIA today retains signatory authority over all accounts, land transactions, and leasing, and is responsible to ensure that fair value is received by the allottee when he sells his property to TLE.

TLE seemed like a good idea at the time it was created in 1943. Originally, TLE was supposed to work for the Tribe and its members. TLE has worked well for the BIA and sometimes, but not always, for the tribal government. Here's how it is supposed to work:

- TLE purchases land from individual tribal members; instead of paying them cash, TLE provides tribal members with a certificate of ownership in the corporation comparable to a stock certificate;
- These certificates allow individual allottees to retain a financial interest in a corporation that manages the land that would otherwise be of little or no use to them because it was rapidly turned into fractionated undivided interests;
- Thus, TLE consolidated fractionated undivided land interests and returned those interests to tribal ownership;
- TLE manages such lands by leasing most of it for agricultural uses;
- TLE assigns other lands to individual tribal members thereby allowing them to use their certificates of interest to purchase land assignments; and
- Profits from leased land have been re-invested through the purchase of additional fractionated undivided individually held land interests.

Regrettably, the TLE Bylaws have not been followed for a variety of reasons: the TLE Board of Directors and TLE staff, for the most part, have not been trained in land management. Moreover, the BIA, through acts of omission and nonfeasance, has stood on the sidelines and allowed shareholders, i.e., former allottees, to be defrauded.

On paper, TLE has been wildly successful since its creation in 1943. It appears to have acquired over five hundred and seventy thousand acres of individual land that it now manages for the Tribe. TLE generates approximately three million dollars every year in gross lease income. After expenses, it shows a profit of close to two million dollars a year. In reality, however, TLE has become a black hole for the financial interests of individual certificate holders. Since 1943, TLE has systematically failed to perform the annual land valuations mandated by its bylaws. Increases in land values have not created the concomitant rise in the value of certificates held by individual tribal members.

By our calculations, individuals selling 3 certificates today that were obtained in 1943 would receive less than $42 per acre for land that is now worth more than $300 per acre (3 certificates were/are issued for each acre of land). That amounts to a net loss of about $260 per acre, and isn't difficult to see how quickly that would add up. Thus, individual certificate holders have lost many thousands of dollars worth of value through TLE's failure to follow its bylaws. Since 1943, the BIA has done very little to ensure that correct annual valuations, required under the bylaws, are performed annually. The inability of the BIA to perform its responsibility pursuant to those bylaws and the Code of Federal Regulations has caused tribal member shareholders and the Rosebud Sioux Tribe to lose millions of dollars.

In addition, TLE typically violates leasing regulations, leasing land to relatives, friends and other insiders, rather than to the highest bidder under sealed bid, as required by the Code of Federal Regulations. Again, the BIA has not lifted a finger to assist tribal allottees and certificate holders who are the victims of this racket.

Honorable Chairman, Vice-Chairman, Committee members, we have a problem here. My tribe and its membership have been robbed blind and the BIA has continued to look the other way. I am therefore requesting that the Senate Committee on Indian Affairs provide the Rosebud Sioux Tribe with a General Accounting Office auditor to ensure that the Tribe and individuals who have been harmed by BIA misfeasance be made whole. If a G.A.O. Audit cannot be completed by the government, I would request that your office accept a C.P.A. Audit and that can be completed with Tribal Accountants. Then, I would ask that you assist us with remedial legislation.

Unfortunately, the new BIA reorganization has been almost totally non-responsive to this massive fraud, which has been accruing for more than sixty years. I support meaningful trust reform, but it's got to do more than take money away from vital services. It must recognize that allottees and Tribes have real issues as stakeholders in trust administration. As stakeholders, we have much to offer the BIA and the Office of Special Trustee in their efforts to reform the trust.

I'll give you another example of a homegrown land consolidation program that has not received much assistance from the BIA, and needs it today. The Lower Brule Sioux Reservation, located in central South Dakota, encompasses two hundred and thirty five thousand acres. In addition to being allotted, many acres of the Lower Brule Sioux Reservation were illegally homesteaded by non-Indians. By the time the Indian Reorganization Act was passed in 1934 the Tribe retained only 30% of its land, about seventy thousand acres out of the original two hundred and thirty five thousand.

In 1936, almost seventy five years ago, the Lower Brule Sioux Tribe made restoration of allotted reservation lands its highest priority. Using a gratuity fund established by the IRA, the Tribe repurchased allotted lands. When that fund ran out, the Tribe used a combination of federal funds, private loans, and the Tribe's own funds to restore lands inside their reservation boundaries.

For the past thirty years, the Lower Brule Sioux Tribe has used primarily its own revenue to continue to buy back reservation land. The total amount allocated to land consolidation by the Tribe now stands at about ten million dollars. Of this amount, the Tribe itself has pitched in six million dollars. The good news is that the Tribe now owns about twice as much land as it did in 1936, one hundred and forty four thousand acres of its original two hundred and thirty five thousand acres. The bad news is that the Lower Brule Sioux Tribe still needs five hundred and fifty thousand dollars to purchase the remaining twenty eight thousand acres of allotted lands. In the face of BIA inaction, the Tribe put its own resources on the line to restore its land base. Today the BIA is still not willing to provide the Tribe with funding to restore the said lands.

* * *

So how are my problems at Rosebud, and Chairman Mike Jandreau's problems at Lower Brule, relevant to trust reform and the reorganization? Based on these experiences, we have specific recommendations on how to create a road map for fixing trust administration.

First, the DOI's leadership needs to become proactive, instead of reacting to problems. As an example, the BIA should be promoting land partition and exchange that would also serve to alleviate the fractional interest problem. Trust land partitions and exchanges between the Tribe and individual allottees could put as much as fifty million dollars in Rosebud's economy. Further, such partition and exchange would provide many home buyers with merchantable title to homes they have already paid for.

Second, the DOI needs to listen to Tribes that deal with these issues on a daily basis regarding the relatively minor repairs that need to take place at the agency level. For example, I can remember only two land partitions that were done at Rosebud during my lifetime. To improve this particular situation, we need staff positions to perform the work. Another example of a minor repair is the need to exempt monies derived

from the sale of trust property via ILCA funds from being used as an offset against welfare dollars.

Third, decision-making authority must be maximized at the local level. Otherwise, true accountability will always beyond our reach. So, too, will true Indian self determination.

Fourth, the DOI needs to immediately take its hands off those funds that are designated to provide services at the agency level. Certainly, tribes should not be made to choose between life and death programs, such as law and order, to fund a top heavy bureaucracy. My reservation has one cop for every 1,300 members. Further, the trust responsibility to Tribes must not be relegated to a lesser priority than the DOI's duty to individuals.

Fifth, the DOI cannot be accountable unless it defines its terms. A year ago, Special Trustee Ross Swimmer testified that Trust Officers serve both individual and tribal beneficiaries. However, the examples of services he provided were all focused on individuals.

If the Office of Trust Management will really help individual tribal members, I'm all for it. In fact, I have a Trust Officer on my reservation. But it is difficult to evaluate their contributions when we don't know if they primarily serve individuals, tribes, or both; we don't know whether they have program duties, such as will writing, or are confined by DOI policy and the 1994 Act to monitoring activities; what their relationship is to the Superintendents; and a whole other list of questions that have not yet been adequately or clearly answered by the DOI. We would like to take this opportunity to request more collaboration with the Office of Special Trustee on this particular issue.

Finally, a few words about the *Cobell* litigation. I understand why a legislator would hesitate to interfere in ongoing litigation. But when you consider that individuals in the plaintiff class are being hurt by the drastic funding cuts at the agency and regional levels, that hesitation may not be helping them.

While we as tribal leaders do not represent our IIM accountholders legally in that case, we do speak for them in a more general sense as their elected leaders. Todd County, which is the interior boundary of the Rosebud Sioux Reservation, is the second poorest county in the United States. Only one in five adults works. At the same time, IIM accountholders from my reservation may not be aware that they cannot recover money damages in the United States District Court, where the suit was brought.

Federal funding for any IIM or Trust claims paid in connection with any historical accounting or internal restructuring required by trust reform under the *Cobell* suit or tribal claims should be paid from the United States' permanent judgment appropriation under 31 U.S.C. § 1304 and should not be paid or reimbursed from appropriations for the Department of the Interior/Bureau of Indian Affairs. The Permanent Judgment Fund

should pay for the historic accounting, not current BIA appropriations because it is not right for the victims of this terrible mismanagement to be asked to forego services to pay for the accounting which should have been due tribes and their members since 1887. If the Cobell claims and the historic accounting are not paid from the said Permanent Judgment Fund it is unlikely that the accounting will be effected and that those historic claims will ever be paid.

On their behalf, and as President of the Rosebud Sioux Tribe, I respectfully request that you prioritize a legislative settlement process that is voluntary and fair. Obviously, this cannot be the mother of all claims settlement. However, with collaboration of all stakeholders we can effectuate a meaningful plan to end this litigation that has immobilized the DOI. Wouldn't it be much better to develop a forward thinking road map for the next five years, ten years, and fifty years, together?

I want to thank Chairman McCain, Vice-Chairman Dorgan, and all their staff for their continued hard work on the trust reform issue. I look forward to collaborating with all parties to create a working road map for Indian trust.

Charles C. Colombe, President
Rosebud Sioux Tribe

Charles C. Colombe is President of the Rosebud Sioux Tribe, the land of the "Sicangu Lakota Oyate" or "Burnt Thigh People". Born on January 12, 1938, Colombe grew up on the Family Ranch on the Rosebud Indian Reservation.

Colombe attended the Todd County School District, St. Francis Mission, Sinte Gleska University on the Rosebud Reservation and also attended the University of Texas in Austin, Texas.

- 1999 – 2003, Charles C. Colombe worked with son, Wesley Colombe developing AllStop Inc., opened in 1999 and is one of the most successful and major competitors on the Rosebud Reservation.
- 1994 – 1999, Charles C. Colombe operated the Rosebud Casino with 44% net profit after debt service.
- 1993 - Present, Charles C. Colombe has been the President & CEO of B.B.C. Entertainment Inc., a casino management company, incorporated in Minnesota and doing business in South Dakota which employs 150 tribal members and non-members.
- Since 1979 - 1990, Charles C. Colombe has been President & CEO of Colombe Inc., a land title search company working in the following states on all tribal trust lands in the Great Lakes, Minneapolis, Aberdeen, Billings, and Portland Area Office for the Bureau of Indian Affairs inclusive of the following states: Michigan, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, South Dakota, Wyoming, Montana, Idaho, Washington, Oregon, and California.

- Since 1983 – 1989, Charles C. Colombe has been the President & CEO of Lamro Inc., a General Construction Company which specializing in Government Contracts, thereby creating up to 300 jobs in Indian Country.
- Since 1964 – Present, Charles C. Colombe has maintained a successful Ranching Operation on the Rosebud Sioux Indian Reservation, which includes the following participation while running a full-time ranch operation:
  1. Rodeo Cowboy – Professional and Amateur
  2. Rosebud Sioux Tribal Council – Representative of Antelope Community 1971 – 1979
     A. Served on the Executive Committee
     B. Chairman – Land & Natural Committee
     C. Chairman – Education Committee
     D. Chairman - Housing Authority - Board Member
     E. Managing Director – Natural Resources Department
     F. Administrator – Land Purchase Program and Personnel
     G. Representative - American Indian Agricultural Credit Consortium
     H. Co-Director for South Dakota Legal Service Corporation 2415 Claims Program.

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Testimony before the United States Senate
Committee on Indian Affairs

Oversight Hearing on Trust Reform

March 9, 2005

Introduction

Chairman McCain, Vice-Chairman Dorgan, and members of the Committee, 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 and to upholding the trust and treaty responsibilities of the federal government.

The National Congress of American Indians strongly shares the views of the leadership of this Committee that it is time for Congress to establish a fair and equitable process for settling the *Cobell v. Norton* litigation. Tribal leaders have consistently supported the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting fiasco that has lingered for too long at the Department. At the same time, tribes are concerned about the impacts of the litigation upon the capacity of the United States to deliver services to tribal communities and to support the federal policy of tribal self-determination. Significant financial and human resources have been diverted by DOI in response to the litigation. The BIA has become extraordinarily risk averse and slow to implement the policies, procedures and systems to improve its performance of its trust responsibility. Perhaps most significantly, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Because of this, NCAI believes that 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 a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX-03-040.

We understand that Congress will be unwilling to settle the *Cobell* litigation unless there are significant reforms made to the DOI's trust management system and policies to ensure that the problems do not reoccur. With or without *Cobell*, trust reform is long overdue and tribal leaders strongly support the goal of fixing the trust system. These necessary changes to the future of the trust system are the subject of today's hearing, and they are the primary interest of tribal leadership in the *Cobell* settlement discussions.

I have been asked today to report on the background of the Tribal Leaders-DOI Trust Reform Task Force, and the areas of agreement and disagreement that arose during our collective efforts. In addition, I have been asked to discuss the formation of a working group of tribal leaders to work with Congress in developing trust reform legislation. I am truly appreciative that this Committee understands that a process of consultation with tribal leadership is necessary to develop a lasting solution to the trust reform problem, and I greatly look forward to working in close coordination with you on this issue that is so critical to the future of Indian country.

Background on the Tribal Leaders-DOI Trust Reform Task Force

As you know, the United States Government has committed to a broad trust relationship with Indian tribes that requires the federal government to protect tribal self-government, to provide services to Indian communities, and to exercise the highest degree of care with Indian lands and resources. In the period from 1887 to 1934 the federal government grossly violated its trust responsibilities and

imposed reservation allotment programs, largely in order to gain the advantage of the unallotted Indian lands which were opened for non-Indian homesteading, agriculture, mineral and timber development. Over time the Indian allotments have become highly fractionated through the inheritance laws, which has spawned the proliferation of millions of ownership interests and hundreds of thousands of individual trust fund accounts. It is well documented that the Department of Interior has mismanaged billions of dollars worth of the trust funds derived from Indian land, timber, oil & gas, and hard rock minerals.[1]

The Trust Funds Management Reform Act of 1994 mandated specific responsibilities for the Department in accounting and management of Indian trust funds. Among other things, the Department is under a requirement to render an accurate accounting for all funds held in trust, develop integrated and consistent trust policies and procedures, and ensure that the trust fund accounting system is integrated with the land and asset management systems of the Bureau of Indian Affairs, the Bureau of Land Management and the Minerals Management Service. To date, the Department has achieved none of these objectives under the 1994 Act.

In November 2001, Interior Secretary Gale Norton announced her intention to establish a new agency, a Bureau of Indian Trust Asset Management (BITAM), to administer responsibilities for trust funds and resources and separate trust assets management from the Bureau of Indian Affairs. Tribal leaders throughout Indian country overwhelming rejected this idea and demanded that they be consulted on matters that would so profoundly affect the rights and interests of their tribes as well as their constituencies. We reached an agreement with the DOI to create a Trust Reform Task Force comprised of Tribal Leaders and representatives of the Department of Interior.

The Task Force was formally established in January 2002 and met every month until October of 2002 when the Department of Interior stopped its participation. The Task Force membership included 24 Tribal representatives (2 each from 12 BIA regions), a group of about a dozen federal representatives from the DOI, and was chaired by myself, Susan Masten, Chairwoman of the Yurok Tribe, Steven Griles, Deputy Secretary of Interior and Neil McCaleb, Assistant Secretary of Interior for Indian Affairs.

Tribal leaders were greatly concerned that the BITAM proposal to separate all trust asset management into a separate Bureau would harm other areas of the trust relationship. The various aspects of the trust relationship -- tribal self-government, tribal services, and tribal land and resources -- are interrelated at the local level. Indian people live on trust land and every day we are going to school, building houses and roads, and making a living on trust land. Our strong tie to the land is an integral part of who we are. Tribal leaders did not want a "stove piped" bureaucracy that separated trust lands from all of the activities that we do on our lands. We knew that reorganization alone cannot solve problems; we knew that a two-headed bureaucracy could never get decisions made, and we knew it would inequitably shift resources away from other services and programs.

Unfortunately today it seems that we are living with the effects of BITAM, even though it goes by a different name. We were ultimately unable to come to agreement with the Department on the elements of trust reform, and driven by litigation concerns the Department imposed its own

[1] See Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 499, 102ND Cong., 2ND Sess. 1992, 1992 WL 83494 (Leg.Hist.), and, Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results (Letter Report, 05/03/96, GAO/AIMD-96-63).

reorganization where many of the trust functions have been shifted over to the Office of the Special Trustee.

We are seeing many of the concerns that we had about BITAM come to life today, as more and more resources and authority are shifted away from the BIA. The President's budget for FY06 proposes to cut $108 million from the BIA budget, mostly from education construction, and add $76 million to OST. This is on top of last year's shift in resources. The OST has created "Trust Officers" but these positions have no job description. They are just wandering around the reservations without knowing what to do. But their presence creates more bureaucracy, overlapping responsibilities, and conflicting decision-making authority. This is not an efficient way to spend federal money. Since the Department broke off discussions in 2002, all of this is being done without consultation with tribes, so we have great difficulty making the program work at the local level.

Despite the fact that we were ultimately unable to reach agreement in 2002, I believe that the Trust Reform Task Force held some very useful discussions and it is worthwhile to briefly revisit the major concepts of trust reform that we discussed, and the areas of agreement and disagreement between tribal leaders and the DOI:

1) **Creation of an Independent Entity with Oversight Responsibility for Trust Reform.**

The Indian trust within the Department of Interior is the only trust in the United States that is not subject to any type of external regulation or oversight. The Office of Special Trustee, which was created under the 1994 Act, was originally envisioned as an independent office, but was placed in a position subordinate to the Secretary of Interior at the Administration's insistence. Each of the Special Trustees has testified to this Committee that their ability to perform their duties has been impaired by the lack of independence.

The tribal leadership on the Task Force worked on a proposal to create an independent entity or commission that is capable of oversight authority over the Indian trust within the Department of Interior. We considered authorizing responsibilities for that Commission that would include auditing financial accounts, investigations and compliance, establishment of standards and regulations, and monitoring the DOI budget. The Office of Special Trustee would then be phased out over an identifiable timeframe.

The Department of Interior preferred that any oversight be advisory in nature and that it be subordinate to the Secretary of Interior. This was an area of substantial disagreement between the tribes and the Department. It should also be noted that tribes also had some serious debate over the authorities of an independent commission. There were concerns about creating another expensive bureaucracy that would have powers inconsistent with the goals of tribal self-determination. Tribes who manage trust function on their reservations do with the limited amount of money provided through federal contracts and compacts, and they were concerned about a sudden increase in demands on their systems that they are simply not funded for. At a minimum though, there was some agreement among tribes that the audit function could be independent, and the federal budget monitoring and reporting should be independent.

In the 108th Congress, Senator McCain introduced S. 1459, a bill which included the creation of an independent commission for trust reform, but one with limited powers. Essentially this

commission would review and assess federal laws and policies relating to the management of Indian trust funds and make recommendations (including legislative and administrative recommendations) relating to management of Indian trust funds. This may be a useful place to start discussions for this round of trust reform legislation.

2) High-Level Responsibility for Indian Affairs.

The Department agreed with tribal leadership on the creation of an Under Secretary of Interior for Indian Affairs. This position would have direct line authority over all aspects of Indian affairs within the Department, including the coordination of trust reform efforts across all of the relevant agencies and programs. A similar proposal for a Deputy Secretary is included in S. 1459.

The creation of this position would address a major issue that has been raised in every significant study of trust management at Interior, including the EDS Report and by the Cobell court: the lack of clear lines of authority and responsibility within the Department to ensure accountability for trust reform efforts by the various divisions of the Department of Interior. The two major entities responsible for trust assets and accounting are the Bureau of Indian Affairs and the Office of Special Trustee. The lines of authority, responsibility and communication between these two entities has been uncertain and at times has come into direct conflict. In addition, the Minerals Management Service, the Bureau of Land Management, and the U.S. Geological Service all play important roles in trust management, and various responsibilities are spread throughout the Office of Hearings and Appeals, the Office of American Indian Trust, and the Office of Historical Accounting. Finally, nearly every agency in the Department of Interior has some significant trust responsibilities. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies. This absence has particularly hurt the progress of those issues that cut across agencies, such as the development of a system architecture that integrates trust funds accounting with the land and asset management systems of the BIA, BLM and MMS (as required by the 1994 Act).

3) Reorganization of the Bureau of Indian Affairs.

Tribes and the Department found some degree of agreement on an organizational realignment, but differed on the structure of decision-making at the local level. The principal goal of the Tribal Task Force members was to have the resources and decision making at the local level of the Bureau of Indian Affairs, coupled with an adequate internal oversight mechanism. Tribes had great concerns that a "stove piped" reorganization that sharply separates the ability to make decisions on trust resource management and trust services at the local level would put an unbearable level of bureaucracy into a system that is already overloaded with bureaucratic requirements. The Department preferred splitting the authority at the local level, which is what we are seeing today with the development of the Trust Officers. The tribally proposed structure would have been as follows:

- As noted above, the Task Force proposed to establish a new Undersecretary for Indian Affairs to coordinate and unify policy direction for the Bureau of Indian Affairs and all other agencies operating programs or providing services to Indians within the Department of Interior.

- An office of Self-Determination/Self-Governance would report to the Undersecretary to advance long-standing policies that support greater involvement of Indian tribes in managing programs for the benefit of their communities.

- A new office of Trust Accountability would report to the Undersecretary to provide internal control and quality assurance in trust administration throughout the Department as well as ensuring timely resolution of problems.

- Within the Bureau of Indian Affairs, a trust services section would provide technical support for field operations, train services for BIA and tribal staff, and controls to ensure that programs are administered in accordance with defined standards for trust administration, and help avoid problems before they reach serious proportions. The trust services section would also be responsible for operating trust fund accounting, cash management, and appraisal accountability functions.

- The structure would retain a single line of authority for delivering programs and services to tribal communities in accordance with overwhelming tribal preferences. Substantial changes to operations would be sought in adequate staffing, training and funding levels, technical assistance would need to be readily available, and performance standards reflecting modern practices of trust administration would need to be established and enforced.

4) <u>Trust Standards and Legal Obligations of the Department.</u>

During the Task Force, tribal leaders strongly supported the creation of trust standards and a clear right of action against the Department if they violate their trust responsibilities. Decades of trust reform efforts have produced little change in DOI's willingness to take corrective actions because the DOI and the Department of Justice view their primary role as ensuring that the U.S. is not held liable for its failure to properly administer trust assets. For this reason, they have never been willing to put standards into regulations that would govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new understanding of DOI's role in Indian trust management. Once the DOI understands that mismanagement will no longer be tolerated, the system will change and true reform will begin. In effect, the DOI is acting as a bank for Indian trust funds -- and just like every other bank in the U.S., the DOI must be subject to standards and accountability.

Not surprisingly, the DOI did not agree to standards and accountability. The conversations we had were illuminating, however. DOI did not so much object to the concept of trust standards, but from a more practical standpoint felt that they were not in a position to meet those standards in any near time frame and would not subject the Department to liability until it had a chance to put a new system into place. NCAI believes that this is ultimately an issue for Congress to determine, and that it is critical for Congress to substantively address the underlying issues of standards and accountability in fixing the trust system. This is an issue that S. 1459 would have resolved.

5) Adequate Funding and Staffing for Trust Management.

The DOI and tribal leaders on the Task Force agreed that one of the primary issues in trust reform is getting adequate resources to perform the trust duties. The BIA has never been provided with an adequate level of financial and human resources to fulfill its trust responsibilities to Indian country. This chronic neglect of staffing and funding has contributed to dysfunctional management and financial systems at all levels of the BIA.

One of the primary concerns of Tribal Task Force members was that the trust reform effort not result in a shifting of resources to trust management away from critical tribal services such as law enforcement, education, alcohol & substance abuse prevention. There must be new appropriations for trust management. This is not what we have seen over the last two years as the Administration has proposed cannibalizing other BIA programs to pay for trust reform.

The 1994 Trust Reform Act provides that the Special Trustee is to review the federal budget for trust reform and certify that it is adequate to meet the needs of trust management. In practice, the Special Trustee has no independence, and simply certifies whatever budget is submitted by the Administration. Tribal leaders strongly supported the concept that an independent entity should have the job of reviewing the federal budget for trust management and provide an assessment to Congress of its adequacy. I believe this role may be more important than ever today, as the Administration moves to assess federal budgets under the Program Assessment Rating Tool (PART). We are going to have to show measurable result for trust programs, and we could greatly use an independent assessment of the appropriate ways to measure the effectiveness of trust asset management programs.

6) Participation in Trust Asset Management Activities by Indian Tribes.

The tribal leadership and the DOI found some agreement on further refining the relationship between trust reform and the laws and policies that underpin Tribal Self-Determination. I think I can say without fear of contradiction that all tribes around the country are increasing their capacity to manage their lands. Tribes are very interested in increasing their ability to make decisions about how the reservation lands will be used for the long term benefit of their people. We found support among tribes for legislation that would give tribes the option to establish a 10 year management plan that would establish management objectives for Indian trust assets, define critical values of the Indian tribe, and provide identified management objectives. This is obviously an issue that should be considered again in any trust reform package.

7) Core Business Systems

Tribes and the DOI found some agreement in focusing efforts on three core systems that comprise the trust business cycle: 1) Title; 2) Leases/Sales; and 3) Accounting. NCAI believes that this Congress should focus its oversight efforts on these core systems to ensure that reform efforts meet requirements for fiduciary trust fund administration. Correcting the DOI's performance in these core functions will also require the DOI to employ sufficient personnel, provide staff with proper training, and support their activities with adequate funds. We still have a terrible backlog in probate and title transactions that result in inordinate delays and extremely inefficient and repetitive use of BIA resources.

8) Fractionation of interests in land.

Perhaps the most significant success of the Trust Reform Task Force was that we did come to a lasting agreement with the DOI on the importance of land consolidation. Fractionation of ownership exponentially increases the complexity and cost of federal administration, deprives Indian beneficiaries of the full benefit of their resources, and jeopardizes tribal jurisdiction over our reservations. Even after the Task Force stopped meeting, both the Tribes and the DOI continued to work collaboratively on amendments to the Indian Land Consolidation Act. This legislation was completed and passed at the end of last year, and should be considered a success for all involved, including this Committee. At this time we are continuing to work with the Department in implementing the new law.

The new law will limit the growth of fractionation, and it creates some important tools for land consolidation. But the problem is far from fixed. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest. Management of this huge number of small ownership interests has created an enormous workload problem at the BIA. Now is the time for Congress to fully invest in land consolidation and fix this horrendous problem. We believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system. Land consolidation should be at the forefront of any settlement/trust reform package.

Formation of a Working Group of Tribal Leaders to Work with Congress in Developing Trust Reform Legislation

Tribal leaders met last week to discuss the need to organize for a consultation process with Congress on trust reform legislation. We have heard the messages from Chairman McCain, Vice Chairman Dorgan, and Chairman Pombo of the House Resources Committee. There is a sense of urgency as we understand that Congress would like to see these matters resolved as soon as possible.

I strongly believe that any legislative proposal concerning trust settlement/ legislation should be heavily influenced, if not developed, by tribes, prior to being introduced for consideration by Congress. Given the impending nature of this legislation, NCAI has created a special committee to work with Congress to develop trust reform/settlement legislation. I plan to serve as Co-Chair of the Special Committee along with Chief Jim Gray, of the Osage Tribe and the Chairman of the Intertribal Monitoring Association (ITMA).

We plan to reach out to all tribes and all national and regional tribal organizations. Advance notice of any meetings of the Special Committee will be broadcast by NCAI and we are going to work closely with the ITMA in facilitating the meetings. Any tribal leader or leader of any tribal organization that would like to attend these meetings to offer comments and provide input will be invited to participate. We plan to welcome and encourage participation at these meetings by all entities and individuals who have an interest in the legislation.

Objectives of a Settlement Process

It is critically important that the scope of any settlement process be determined clearly at the outset. Should the settlement:

- be limited to equitable resolution of liability for the failure to properly account and disburse the proceeds of Individual Indian Money accounts?
- provide for equitable resolution of claims for mismanagement of trust assets that generate income processed through trust accounts?
- attempt to address issues raised in tribal litigation?
- ensure efficiency and accountability in future trust administration?
- address fractionation?
- accept court determinations of issues already litigated?

These key questions will have to be answered. At this point, however, the focus should be on developing a process for settlement that will have sufficient legitimacy that it can be accepted by the litigants.

Guiding Principles for a Settlement Process

I would like to suggest a number of principles that I believe should be taken into account in developing any settlement process:

1) Involve all necessary parties and frame the settlement process. Timely and good faith consultation with the elected tribal leadership is essential in the settlement process. Tribes have a number of very important interests in the outcome:

    a. Tribal lands are often co-owned or co-managed with individuals' lands.
    b. Future delivery of all trust services is a key issue in the case.
    c. Tribal regulatory authority, self-determination programs, and natural resource management could be affected.
    d. The federal budget for tribal programs could be affected.
    e. The settlement for individual account holders could set precedent for tribal claims.

    I believe that the House Resources Committee and the Senate Committee on Indian Affairs should forge an alliance to work on this issue and participate in meetings to keep Congress informed of progress and keep the pressure on for settlement.

    Formal consultations should be held to enable those not directly involved in the discussions to have an opportunity to comment before the settlement process is finalized.

2) Take the time to do it right. NCAI has witnessed the 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 looking for a quick fix. We should allow the affected parties, to define the settlement process rather than quickly impose a process that may not be well received and will spell failure.

3) Establish a process that will keep the pressure on for settlement. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement.

4) Ensure that the settlement also fixes trust systems for the future. The historical record has shown that DOI will only move forward in improving Indian trust systems if there is exterior pressure from the courts or from Congress. There are two critical issues here that need to be addressed: (a) the establishment of account balances (historical accounting); and (b) the functionality of accounting systems. It would be disastrous to create a settlement that would resolve the past liability and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and accounting.

5) One size will not fit all. 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) Account holders should have the opportunity to negotiate and make a choice. You cannot force a "settlement." In today's world, the hallmark of fairness is the ability to negotiate an arms length agreement based on a reasonable knowledge and understanding of the underlying facts and circumstances. Indian account holders must also have this ability. The settlement process should, however, contain incentives that would encourage participation.

7) Move quickly to bring relief to elder account holders. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to improve their financial conditions without delay.

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, work to understand the viewpoints of all parties, and exercise leadership, we can make informed, strategic decisions on key policies and priorities necessary to bring about true reform in trust administration.

TESTIMONY OF A CONSORTIUM OF INDIAN NATIONS SEEKING ENACTMENT OF THE "AMERICAN INDIAN TRUST FUND MANAGEMENT REFORM ACT AMENDMENTS OF 2005"

My name is Darrell Hillaire. I am the Chairman of the Lummi Indian Nation. We work in cooperation with the California Tribal Trust Reform Consortium tribes (Big Lagoon, Cabazon Band of Mission Indians, Hoopa, Karuk, Quilliville Rancheria, Redding Rancheria, and the Yarok Tribe). We are joined by the Rocky Boy Nation. Our nation is one of the fifty-five member tribes of the Affiliated Tribes of N.W. Indians (ATNI). The ATNI enacted a resolution (#5-02) that calls upon the House of Representatives and Senate to conduct hearings to 'examine the status of the implementation of the 1994 Reform Act, the on-going role of the Office of the Special Trustee, the effects of the reorganization of the Bureau of Indian Affairs on the implementation of the policies of self-determination and self-governance and the feasibility of a legislated settlement to the Cobell v. Norton litigation.' In addition, the ATNI called upon their peer tribes, regional & national intertribal leadership and organizations to come forward and participate in the oversight hearings.

We have drafted and submitted for consideration proposed legislative language that addresses our concerns regarding the national conflicts associated with 'Trust Reform' and the 'Settlement of the Cobell litigation.' Riding on both issues is the Office of Special Trustee (OST) and its failure to limit its activities and scope of work within the boundaries set by the 1994 American Indian Trust Fund Management Reform. Indian tribes and leadership, nationwide, have become polarized by the terminationist and paternalistic insensitivity that the OST has displayed toward the impacted tribes and the damages caused by prior mismanagement of trust funds and assets. The topic of OST

'Consultation' with the Indian tribes has become a farce that Indian Country does not take kindly too.

The draft language can be divided up into five synoptic topics. The first is the consortium tribes' concerns that the legislation include protection of treaty rights and self-determination. The second is the recommendation to create a 'Deputy Secretary for Indian Affairs' that will replace any counterpart duties and functions assigned to an Assistant Secretary or the Office of Special Trustee; and, that the funding and resources that were temporarily placed under the OST will be completely transferred to said Deputy Secretary. The third concern is that Indian tribes should be provided every right and opportunity to fully assume the functions of trust fund and asset management, along with the financial resources essential to accomplish the tasks. The fourth concern was the idea of a 'Commission' to provide advisory services to the Deputy Secretary, for the purposes of assessing the fiduciary and management responsibilities of the Federal Government with respect to Indian tribes and individual Indian beneficiaries; although this recommendation has surfaced before, our consortium is concerned that it will simply become a commission to circumvent the concerns of the tribes and beneficiaries. The fifth issue is associated with the call for mandatory 'Mediation' of the Cobell litigation. It is, sometimes, to easy for parties that are not plaintiffs to the litigation to recommend settlement when the impacts are not directly felt by their tribe or their individual membership. However, the consortium, at least, believes that the subject could be submitted for consideration during the hearings. It recommends that major plaintiffs and their lawyers are given agenda time during the hearing process.

The most common theme that unites the consortium tribes together is the principles of Indian Self-determination and Self-government. The Individual Indian Money Accounts are trust funds that were created as a result of the enactment of the General Allotment Act. The Indian lands were divided. The trust patents were created. And, the BIA assumed control over the estates of all 'incompetent or non-competent Indians.' This even included control of 'tribal' trust funds. The Allotment Act nearly completely destroyed Indian tribal governance. It did destroy tribal reservation economies and impoverished the Indian people. Since then, the Indian Reorganization Act (1934) and the Indian Self-determination and Education Assistance Act (1975) have been enacted. Then, the latter was amended to provide tribes with the opportunity to become 'self-governing' as a matter of federal Indian law.

Indian tribal leadership was aware that the 'trust system' has been a failure since it began. The Indians have always suffered as the 'wards' and the 'guardian' has always failed to protect the interests of the Indians. This failure was why the War Department transferred Indian Affairs to the Department of Interior (1848). This continuing failure is why President Grant (1872) placed church leadership in control of Indian Reservations. This is why the U.S. Congress held hearings (1870's) as to the extent of the BIA mismanagement that then resulted in modification of the laws that governed legal contracts with the Indians. The Cobell case is litigation that was simply forming over one hundred years ago.

Indian Country suffers from the highest infant mortality, shortest life expectancy, highest poverty levels, lowest vocational & educational attainment, poorest housing, highest teenage suicide rates, poorest infrastructure development, is most often extremely

isolated, is forced to witness as non-Indian criminals enter Indian Country and cannot be prosecuted. We witness drug dealers and gangs entering our reservations and victimizing our youth and community. We witness a people that are generally still suffering from historical traumas caused by the application of federal Indian law and policy.

Throughout this, the Indian lands and inheritance has been destroyed beyond recovery due to the fractionated heirship problems instituted by federal/BIA mismanagement of Indian Affairs. The Indian Land Consolidation Act must be seriously funded by the Congress in order to reverse the damages done to the Indian land titles. Major appropriations should be ear-marked specifically for the use of the tribes to clear land titles. Clear titles are essential to Indian housing development, as well as tribal governance and economic development projects. This is a concern of the self-governance tribes in the consortium.

The consortium tribes want every opportunity to develop a tribally-based trust fund and asset management system that will guarantee the protection of the rights and benefits to both the tribe and the individual beneficiaries at the local level. The standard of the DOI/BIA thus far has been mismanagement and failure. Indian tribes should not have to confront OST or other similar types of officials that work to squash tribal efforts to develop honest, fair, and equitable trust fund & asset management systems.

The main point is that tribes and tribal leadership deserve to be heard. They deserve to be treated fairly. And, in this light, they will continue to voice their concerns that the damages done, per findings in the Cobell litigation, to the plaintiffs should not be resolved by taking additional revenues from Indian programs and BIA functions. The OST has already severely damaged Indian services and benefits by taking over three

hundred million dollars out of the BIA and out of Indian Country. Any settlement of Cobell should come from the U.S. Treasury. Any resolution of the OST problem should only result in the OST duties, functions, responsibilities, and even personnel, being merged back into the DOI-Bureau of Indian Affairs under the Deputy Secretary of Indian Affairs.

In addition, there is inadequate attention paid to the difference between the individual trust and the collective trust owed to the Indian people. The individual trust is associated with BIA management of the trust assets created by the general allotment act. Then, there is the 'sacred trust of civilization' that is tied to the government-to-government relationship the Indian tribes have with the United States. Under the latter, the Indian tribes are concerned about assuring that they are given access to the rights, services, and benefits provided to other population segments of the United States by the other federal departments and agencies. The 'trust' concept has been abused. In history, it was always the BIA, and only the BIA, that serviced Indians and Indian Tribes. Indian Tribes have treaty relationships with the whole United States and not just the BIA.

Trust Reform is more than simply undoing the damages caused to the Individual Indian Money Accounts beneficiaries. It is more about providing Indian people and Indian Tribes the opportunity to really exercise Indian self-determination and self-government. This will take the cooperation of the whole United States. It will require re-establishment of the government-to-government relationship between the Indian Tribes and the United States as founded upon the U.S. Constitution.

1 *Be it enacted by the Senate and House of*
2 *Representatives of the United States of America in Congress*
3 *assembled,*
4 **SECTION 1. SHORT TITLE.**
5 This Act may be cited as the "American Indian Trust
6 Fund Management Reform Act Amendments Act of 2005".
7 **SEC. 2. DEFINITIONS.**
8 Section 2 of the American Indian Trust Fund
9 Management Reform Act of 1994 (25 U.S.C. 4001) is
10 amended—
11 (1) by redesignating paragraphs (1), (2), (3),
12 (4), (5), and (6) as paragraphs (7), (4), (6), (5), (2),
13 and (3), respectively, and moving those paragraphs so
14 as to appear in numerical order;
15 (2) by inserting before paragraph (2) (as
16 redesignated by paragraph (1)) the following:
17 "(1) AUDIT.—The term 'audit' means an
18 audit using accounting procedures that conform to
19 generally accepted accounting principles and auditing
20 procedures that conform to chapter 75 of title 31,
21 United States Code (commonly known as the 'Single
22 Audit Act of 1984')."; and
23 (3) by adding at the end the following:
24 "(8) TRIBAL GOVERNMENT—The term
25 'tribal government' means the governing body of an
26 Indian tribe.
27 "(9) TRUST ASSET.—The term 'trust asset'
28 means any tangible property (such as land, a mineral,
29 coal, oil or gas, a, forest resource, an agricultural

1 resource, water, a water source, fish, or wildlife) held
2 by the Secretary for the benefit of an Indian tribe or
3 an individual member of an Indian tribe in accordance
4 with Federal law.
5 "(10) TRUST FUNDS.—The term 'trust
6 funds' means—
7 "(A) all monies or proceeds derived
8 from trust assets; and
9 "(B) all funds held by the Secretary for
10 the benefit of an Indian tribe or an individual
11 member of an Indian tribe in accordance with
12 Federal law.
13 "(11) TRUSTEE.—The term 'trustee' means
14 the Secretary or any other person that is authorized to
15 act as a trustee for trust assets and trust funds.".
16 **SEC. 3. RESPONSIBILITIES OF SECRETARY.**
17 Section 102 of the American Indian Trust Fund
18 Management Reform Act of 1994 (25 U.S.C. 4011) is
19 amended to read as follows:
20 **"SEC. 102. RESPONSIBILITIES OF SECRETARY.**
21 "(a) ACCOUNTING FOR DAILY AND ANNUAL
22 BALANCES OF INDIAN TRUST FUNDS.—
23 "(1) IN GENERAL.—The Secretary shall
24 account for the daily and annual balances of all trust
25 funds.
26 "(2) PERIODIC STATEMENT OF
27 PERFORMANCE.—
28 "(A) IN GENERAL.—Not later than
29 20 business days after the close of the second

1 calendar quarter after the date of enactment of
2 this paragraph, and not later than 20 business
3 days after the close of each calendar quarter
4 thereafter, the Secretary shall provide to each
5 Indian tribe and individual Indian for whom
6 the Secretary manages trust funds a statement
7 of performance for the trust funds.
8 "(B) REQUIREMENTS.—Each
9 statement under subparagraph (A) shall
10 identify, with respect to the period covered by
11 the statement—
12 "(i) the source, type, and status
13 of the funds;
14 "(ii) the beginning balance of
15 the funds;
16 "(iii) the gains and losses of the
17 funds;
18 "(iv) receipts and
19 disbursements of the funds; and
20 "(v) the ending balance of the
21 funds.
22 "(3) AUDITS.—With respect to each account
23 containing trust funds, the Secretary shall—
24 "(A) for accounts with less than
25 $1,000, group accounts separately to allow for
26 statistical sampling audit procedures;
27 "(B) for accounts containing more than
28 $1,000 at any time during a given fiscal
29 year—

"(i) conduct, for each fiscal year, an audit of all trust funds; and

"(ii) include, in the first statement of performance after completion of the audit, a letter describing the results of the audit.

"(b) ADDITIONAL RESPONSIBILITIES.—The responsibilities of the Secretary in carrying out the trust responsibility of the United States include, but are not limited to—

"(1) providing for adequate systems for accounting for and reporting trust fund balances;

"(2) providing for adequate controls over receipts and disbursements;

"(3) providing for periodic, timely reconciliations of financial records to ensure the accuracy of account information;

"(4) determining accurate cash balances;

"(5) preparing and supplying to account holders periodic account statements;

"(6) establishing and publishing in the Federal Register consistent policies and procedures for trust fund management and accounting;

"(7) providing adequate staffing, supervision, and training for trust fund management and accounting; and

"(8) managing natural resources located within the boundaries of Indian reservations and trust land.".

1 **SEC. 4. AFFIRMATION OF STANDARDS.**

2 Title I of the American Indian Trust Fund
3 Management Reform Act of 1994 (25 U.S.C. 4011 et seq.) is
4 amended by adding at the end the following:

5 **"SEC. 105. AFFIRMATION OF STANDARDS.**

6 "Congress affirms that the proper discharge of trust
7 responsibility of the United States requires, without
8 limitation, that the trustee, using the highest degree of care,
9 skill, and loyalty—

10 "(1) protect and preserve Indian trust assets
11 from loss, damage, unlawful alienation, waste, and
12 depletion;

13 "(2) ensure that any management of Indian
14 trust assets required to be carried out by the
15 Secretary—

16 "(A) promotes the interest of the
17 beneficial owner; and

18 "(B) s upports, t o t he m aximum e xtent
19 practicable in accordance with the trust
20 responsibility of the Secretary, the beneficial
21 owner's intended use of the assets;

22 "(3) (A) enforce the terms of all leases or
23 other agreements that provide for the use of
24 trust assets; and

25 (B) take appropriate steps to remedy
26 trespass on trust or restricted land;

27 "(4) promote tribal control and self-
28 determination over tribal trust land and resources

without diminishing the trust responsibility of the Secretary;

"(5) select and oversee persons that manage Indian trust assets;

"(6) confirm that Indian tribes that manage Indian trust assets in accordance with contracts and compacts authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) protect and prudently manage those Indian trust assets;

"(7) provide oversight and review of the performance of the trust responsibility of the Secretary, including Indian trust asset and investment management programs, operational systems, and information systems;

"(8) account for and identify, collect, deposit, invest, and distribute, in a timely manner, income due or held on behalf of tribal and individual Indian account holders;

"(9) maintain a verifiable system of records that, at a minimum, is capable of identifying, with respect to a trust asset—

"(A) the location of the trust asset;

"(B) the beneficial owners of the trust asset;

"(C) any legal encumbrances (such as leases or permits) applicable to the trust asset;

"(D) the user of the trust asset;

"(E) any rent or other payments made;

1 "(F) the value of trust or restricted land
2 and resources associated with the trust asset;
3 "(G) dates of—
4 "(i) collections;
5 "(ii) deposits;
6 "(iii) transfers;
7 "(iv) disbursements;
8 "(v) imposition of third-party
9 obligations (such as court-ordered
10 child support or judgments);
11 "(vi) statements of earnings;
12 "(vii) investment instruments;
13 and
14 "(viii) closure of all trust fund
15 accounts relating to the trust fund
16 asset;
17 "(H) documents pertaining to actions
18 taken to prevent or compensate for any,
19 diminishment of the Indian trust asset; and
20 "(I) documents that evidence the
21 actions of the Secretary regarding the
22 management and disposition of the Indian
23 trust asset;
24 "(10) establish and maintain a system of
25 records that—
26 "(A) permits beneficial owners to
27 obtain information regarding Indian trust
28 assets in a, timely manner; and

"(B) protects the privacy of that information;

"(11) invest tribal and individual Indian trust funds to ensure that the trust account remains reasonably productive for the beneficial owner consistent with market conditions existing at the time at which investment is made;

"(12) communicate with beneficial owners regarding the management and administration of Indian trust assets; and

"(13) protect treaty-based fishing, hunting, gathering, and similar rights-of-access and resource use on traditional tribal land.".

SEC. 5. INDIAN PARTICIPATION IN TRUST FUND ACTIVITIES.

Section 202 of the American Indian Thrust Fund Management Reform Act of 1994 (25 U.S.C. 4022) is amended by striking subsection (c) and inserting the following:

"(c) MANAGEMENT THROUGH SELF-DETERMINATION AUTHORITY.—

"(1) IN GENERAL.—An Indian tribe may use authority granted to the Indian tribe under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) to manage Indian trust funds and trust assets without terminating—

"(A) the trust responsibility of the Secretary; or

"(B) the trust status of the funds and assets.

"(2) NO EFFECT ON TRUST RESPONSIBILITY.—Nothing in this subsection diminishes or otherwise impairs the trust responsibility of the United States with respect to the Indian people.".

SEC. 6. DEPUTY SECRETARY FOR INDIAN AFFAIRS.

(a) IN GENERAL.—Section 302 of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4042) is amended to read as follows:

"SEC. 302. DEPUTY SECRETARY FOR INDIAN AFFAIRS.

"(a) ESTABLISHMENT.—

"(1) IN GENERAL.—There is established within the Department the position of Deputy Secretary for Indian Affairs (referred to in this section as the 'Deputy Secretary'), who shall report directly to the Secretary.

"(2) APPOINTMENT.—The Deputy Secretary shall be appointed by the President, by and with the advice and consent of the Senate.

"(b) DUTIES.—

"(1) IN GENERAL.—The Deputy Secretary shall—

"(A) oversee the Bureau of Indian Affairs;

1 "(B) be responsible for carrying out all
2 duties assigned to the Assistant Secretary for
3 Indian Affairs as of the day before the date of
4 enactment of the American Indian Trust Fund
5 Management Reform Act Amendments Act of
6 2005;
7 "(C) oversee all trust fund and trust
8 asset matters of the Department, including—
9 "(i) administration and
10 management;
11 "(ii) financial and human
12 resource matters; and
13 "(iii) all duties relating to trust
14 fund and trust asset matters;
15 "(D) engage in appropriate
16 government-to-government relations and
17 consultations with Indian tribes and individual
18 trust asset and trust fund account holders on
19 matters involving trust asset and trust fund
20 management and reform within the
21 Department; and
22 "(E) carry out such other duties
23 relating to Indian affairs as the Secretary may
24 assign.
25 "(2) TRANSFER OF DUTIES.
26 (A) ASSISTANT SECRETARY FOR
27 INDIAN AFFAIRS.—As of the date of
28 enactment of the American Indian Trust
29 Fund Management Reform Act

1 Amendments Act of 2005, all duties,
2 functions and funding assigned to the
3 Assistant Secretary for Indian Affairs shall
4 be transferred to, and become the
5 responsibility of, the Deputy Secretary.
6 (B) SPECIAL TRUSTEE. The Office of
7 Special Trustee is hereby terminated. As of
8 the date of enactment of the American Indian
9 Trust Management and Reform Act
10 Amendments of 2005, all duties, functions,
11 and funding assigned to the Special Trustee
12 shall be transferred to, and become the
13 responsibility of, the Deputy Secretary.
14 "(3) SUCCESSION.—Any official who is
15 serving as Assistant Secretary for Indian Affairs on
16 the date of enactment of the American Indian Trust
17 Fund Management Reform Act Amendments Act of
18 2003 and who was appointed by the President, by and
19 with the advice and consent of the Senate, shall not be
20 required to be reappointed under subsection (a) to the
21 successor position authorized under subsection (a) if
22 the Secretary approves the occupation by the official
23 of the position by the date that is 180 days after the
24 date of enactment of the American Indian Trust Fund
25 Management Reform Act Amendments Act of 2003
26 (or such later date determined by the Secretary if
27 litigation delay's rapid succession).
28 "(c) STAFF.—In carrying out this section, the Deputy
29 Secretary may hire such staff having expertise in trust asset

1 and trust fund management, financial organization and
2 management, and Federal Indian law and policy as the
3 Deputy Secretary determines is necessary to carry out this
4 title.
5 "(d) ASSUMPTION BY TRIBES. All funds and
6 functions of the Deputy Secretary, including those transferred
7 from the Office of Special Trustee, are available for
8 assumption by an Indian tribe in the same manner as any
9 other Indian program, services, functions, or activities.
10 (e) EFFECT ON DUTIES OF OTHER
11 OFFICIALS.—
12 "(1) IN GENERAL.—Except as provided in
13 subsection (c) and paragraph (2), nothing in this
14 section diminishes any responsibility or duty of the
15 Deputy Secretary of the Interior appointed under the
16 Act of May 9, 1935 (43 U.S.C. 1452), or any other
17 Federal official, relating to any duty established under
18 this Act or any other provision of law.
19 "(2) TRUST ASSET AND TRUST FUND
20 MANAGEMENT AND REFORM.—
21 Notwithstanding any other provision of law, the
22 Deputy Secretary shall have overall management and
23 oversight authority on matters of the Department
24 relating to trust asset and trust fund management and
25 reform (including matters that, as of the day before
26 the date of enactment of the Indian Trust Asset and
27 Trust Fund Management and Reform Act of 2003,
28 were carried out by the Commissioner of Indian
29 Affairs).

1 "(f) TRUST IMPLEMENTATION AND
2 OVERSIGHT.—
3 "(1) ESTABLISHMENT.—There is
4 established within the Office of the Deputy Secretary
5 responsibility for Trust Implementation and
6 Oversight.
7 "(2) DUTIES.—The Deputy Secretary shall—
8 "(A) provide direct oversight of the
9 day-to-day activities of all Department of
10 Interior agencies to the extent that such
11 agencies administer or manage any Indian
12 trust assets or funds;
13 "(B) administer, in accordance with
14 title II, all trust properties, funds, and other
15 assets held by the United States for the benefit
16 of Indian tribes and individual members of
17 Indian tribes;
18 "(C) require the development and
19 maintenance of an accurate inventory of all
20 trust funds and trust assets;
21 "(D) ensure the prompt posting of
22 revenue derived from a trust fund or trust asset
23 for the benefit of each Indian tribe (or
24 individual member of each Indian tribe) that
25 owns a beneficial interest in the trust fund or
26 trust asset;
27 "(E) ensure that all trust fund accounts
28 are audited at least annually, and more

1 frequently as determined to be necessary by
2 the Deputy Secretary;
3 "(F) ensure that the Deputy Secretary,
4 the Director of the Bureau of Land
5 Management, the Commissioner of
6 Reclamation, and the Director of the Minerals
7 Management Service provide to the Secretary
8 current and accurate information relating to
9 the administration and management of trust
10 funds and trust assets;
11 "(G) provide for regular consultation
12 with trust fund account holders on the
13 administration of trust funds and trust assets to
14 ensure, to the maximum extent practicable in
15 accordance with applicable law and a Plan
16 approved under section 202, the greatest
17 return on those funds and assets for the trust
18 fund account holders consistent with the
19 beneficial owners' intended uses for the trust
20 funds; and
21 (H) oversee and coordinate the management
22 of trust assets by Department of Interior agencies.
23 "(f) AUTHORIZATION OF APPROPRIATIONS.—
24 There are authorized to be appropriated such sums as are
25 necessary to carry out this section.".
26 (b) CONFORMING AMENDMENTS.—
27 (1) IN GENERAL.—
28 (A) Section 5313 of title 5, United
29 States Code, is amended by inserting "Deputy

1 Secretary of the Interior for Indian Affairs"
2 after "Deputy Secretary of the Interior".
3 (B) Section 5315 of title 5, United
4 States Code, is amended by striking "Assistant
5 Secretaries of the Interior (6)" and inserting
6 "Assistant Secretaries of the Interior (5)".
7 (C) Title III of the American Indian
8 Trust Fund Management Reform Act of 1994
9 (25 U.S.C. 4041 et seq.) is amended by
10 striking the title reading and inserting the
11 following:
12 **"TITLE III—REFORMS RELATING TO TRUST**
13 **RESPONSIBILITY".**
14 (D) Section 301(1) of the American
15 Indian Trust Fund Management Reform Act
16 of 1994 (25 U.S.C. 4041(1)) is amended by
17 striking "by establishing in the Department of
18 the Interior an Office of Special Trustee for
19 American Indians" and inserting "by directing
20 the Deputy Secretary .
21 (E) Section 303 of the American
22 Indian Trust Fund Management Reform Act
23 of 1994 (25 U.S.C. 4043) is amended—
24 (i) by striking the section
25 heading and inserting the following:
26 **"SEC. 303. ADDITIONAL AUTHORITIES AND**
27 **FUNCTIONS OF THE DEPUTY**
28 **SECRETARY.";**

(ii) in subsection (a) (1), by striking "section 302(b) of this title" and inserting "section 302(a)(2)";

(iii) in subsection (e)—

(I) by striking the subsection heading and inserting the following:

"(e) ACCESS OF DEPUTY SECRETARY.—"; and

(II) by striking "of his duties" and inserting "of the duties of the Deputy Secretary"; and

(iv) by striking "Special Trustee" each place it appears and inserting "Deputy Secretary".

(F) Sections 304 and 305 of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4044, 4045) are amended by striking "Special Trustee" each place it appears and inserting "Deputy Secretary".

(G) The first section of Public Law 92-22 (43 U.S.C. 1453x) is repealed.

(H) Any reference in a law, map, regulation, document, paper, or other record of the United States to the Assistant Secretary of the Interior for Indian Affairs shall be deemed to be a reference to the Deputy Secretary of the Interior for Indian Affairs.

1 (2) EFFECTIVE DATE.—The amendments
2 made by this subsection take effect on the date on
3 which a Deputy Secretary for Indian Affairs is
4 appointed under section 302 of the American Indian
5 Trust Fund Management Reform Act (as amended by
6 subsection (a)).
7 **SEC. 7. TRIBAL MANAGEMENT OF TRUST**
8 **ASSETS DEMONSTRATION PROJECT**
9 (a) IN GENERAL - The American Indian Trust Fund
10 Management Reform Act is amended to add a new Section
11 307 as follows:
12 **SEC. 307 - ESTABLISHMENT OF THE**
13 **TRIBAL TRUST REFORM PILOT PROJECT**
14 (a). PURPOSE. The Tribal Trust Reform Pilot
15 Project ("Project") is intended to - :
16 (1). Enhance the working relationship
17 between the participating tribes and Department of
18 the Interior for trust management activities by
19 establishing mutually acceptable methods for
20 addressing trust issues in a manner that is consistent
21 with tribal priorities and applicable federal laws;
22 (2). Maintain a standard of good faith in
23 the administration of federal trust responsibilities to
24 Indian tribes, the right of tribal self-determination and
25 self-governance, the government-to-government
26 relationship between the Indian tribes and the United
27 States, and provide a meaningful working
28 relationship with participating tribes.

1 (3). Establish a process for the full
2 implementation of the Project and further the
3 continuation of meaningful partnerships between the
4 participating tribes and the Secretary;
5 (4). Recognize and utilize tribal expertise
6 and systems to accomplish appropriate management of
7 trust resources, use those opportunities to explore the
8 development of effective working models relating to the
9 management of trust resources, and develop meaningful and
10 measurable means of quantifying the respective values,
11 standards and priorities of the participating tribes and
12 the Department.
13 (5). Identify ways of resolving
14 conflicting management prescriptions between tribal
15 and federal standards, priorities and values in non-
16 litigation and cooperative government-to-government
17 forums, and memorialize those conflict resolution
18 methodologies in a participating tribe's funding
19 agreement.
20 (b). AUTHORITY. The Secretary of the Interior
21 shall, for a period not to exceed five years following
22 enactment of this section, administer a demonstration project
23 to be known as the Tribal Management of Trust Assets
24 Demonstration Project according to the provisions of this
25 title. The Project shall provide for the direct Tribal
26 administration and management of trust resources and trust
27 assets, including the administration of any funds appropriated
28 by Congress for the management of Indian assets and funds,

1 which also includes such funds intended for trust
2 improvement activities.
3 (c). TRIBAL PARTICIPATION
4 (1). Any tribe that has entered into
5 an agreement with the Secretary for the management and/or
6 improvement of trust resources shall be eligible for inclusion
7 as a participating tribe in the Project. Each tribe must first
8 submit a formal request to the Secretary to be included
9 in the demonstration project.
10 (2) The Secretary shall negotiate and enter into
11 agreements with tribes to implement the purposes of this
12 section.
13 (3). A participating tribe may withdraw from the
14 project at any time.
15 (d). STANDARD TRUST MANAGEMENT
16 PRINCIPLES AND PROCEDURES. - Management
17 standards for trust resources which have been developed and
18 adopted by tribes, and approved by the Secretary, shall be the
19 applicable s tandards un der t he P roject. T he S ecretary s hall
20 interpret Federal laws and regulations in a manner that
21 facilitates approval of a Tribe's management standards. The
22 Secretary may only refuse to accept Tribal standards that are
23 inconsistent with applicable Federal treaties, statutes, case
24 law or regulations not waived, governing the performance of
25 trust functions. In the event that the Secretary declines to
26 accept a tribe's management standards, the Secretarial shall
27 inform the tribe in writing of the specific ways in which the
28 Tribe's management standards fail to meet the standards and
29 principles of the applicable Federal law governing the

1 performance of trust functions. The Secretary may propose
2 additional standards to a tribe for its consideration if the
3 Secretary believes such standards will assist in promoting the
4 Tribe's participation in the Project and managing the trust
5 resources in a prudent manner. Tribal management standards
6 may be in any format, including law, plans, procedures, and
7 policies; provided that:
8 (1). The standards are formally approved by the tribe
9 in a manner consistent with the tribe's constitution or
10 other governing law of the tribe.
11 (2). The standards are established in a manner that
12 allows the tribe and the Secretary to readily compute
13 the amount of revenues that are expected to be
14 received from each trust transaction(s).
15 (3). The standards must describe in measurable and/or
16 quantifiable terms the expected goals and/or intended
17 results from application of the standards.
18 (4) The standards provide methods for resolving
19 disputes between tribes, individual Indians and the
20 Federal Government.
21 (5). The standards include a process whereby the
22 Tribe and the Secretary can conduct mutually
23 acceptable annual evaluations of the management of
24 trust resources.
25 (e). JOINT EVALUATION CRITERIA AND
26 PROCEDURES/REPORTING - Each participating tribe and
27 the Secretary will develop joint reporting requirements,
28 which are consistent with the annual trust evaluation
29 requirements. Based on a mutually acceptable reporting

1 format, the report will include methods for determining that
2 trust transactions are carried out consistent with the
3 requirements contained in trust resource management
4 prescriptions and can be easily reconciled with trust fund
5 accounts. The Secretary may conduct additional trust
6 evaluations if sufficient information exists from credible
7 sources that the Tribe is not operating consistently with the
8 approved Tribal/Federal management standards.
9 (f). GRIEVANCE AND DISPUTE
10 RESOLUTION PROCEDURES - Each tribe participating in
11 the Trust Reform Pilot Project will develop and maintain
12 with the Secretary non-litigation grievance and dispute
13 resolution procedures that shall be incorporated into the
14 tribes' funding agreement.
15 **SEC. 8. MEDIATOR.**
16 The American Indian Trust Fund Management
17 Reform Act is amended by adding at the end of the Act a new
18 Title IV, as follows:
19 **SEC. 401 MEDIATOR**
20 (a)APPOINTMENT; DUTIES; QUALIFICATIONS;
21 TERMINATION OF DUTIES - Within thirty days after the
22 date of enactment of this Act, the Director of the Federal
23 Mediation and Conciliation Service shall appoint a Mediator
24 hereinafter referred to as the "Mediator") who shall assist in
25 negotiations for the settlement of the rights and interests of
26 the parties in the case of Cobell v. Norton, Civ No. 96-1285
27 (RCL). The Mediator Shall not have any interest, direct or
28 indirect, in the settlement of the interests and rights of the
29 parties to the litigation. The duties of the Mediator shall

1 cease upon the entering of a full agreement into the records
2 of the District Court or the submission of a report to the
3 District Court after a default in negotiations or a partial
4 agreement among the parties.
5 (b) NATURE OF PROCEEDINGS - The
6 proceedings in which the Mediator shall be acting shall be
7 those in the Cobell case now pending in the United States
8 District Court for the District of Washington, D.C.
9 (hereinafter referred to as "the District Court").
10 (c) ASSISTANCE FOR MEDIATOR - The Mediator
11 is authorized to request from any department, agency, or
12 independent instrumentality of the Federal Government any
13 information, personnel, service, or materials he deems
14 necessary to carry out his responsibilities under the
15 provisions o f t his T itle E ach s uch de partment, a gency, o r
16 instrumentality is authorized to cooperate with the Mediator
17 and to comply with such requests to the extent permitted by
18 law, on a reimbursable or nonreimbursable basis.
19 (d) STAFF ASSISTANTS AND CONSULTANTS -
20 The mediator may retain the services of such staff assistants
21 and consultants as he shall deem necessary, subject to the
22 approval of the Director of the Federal Mediation and
23 Conciliation Service.
24 SEC. 402 NEGOTIATING TEAMS
25 (a) APPOINTMENT; TIME; MEMBERSHIP;
26 NATURE OF AUTHORITY - Within thirty days after the
27 appointment of the mediator by the Director of the Federal
28 Mediation and Conciliation Service, the mediator shall
29 communicate in writing with the parties directing them to

1 appoint a negotiating team to represent each party. Each
2 negotiating team shall be composed of not more than five
3 members. Each party shall promptly fill any vacancies which
4 may occur on its negotiating team. Notwithstanding any
5 other provision of law, each negotiating team, when
6 appointed, shall have full authority to bind its principals with
7 respect to any matter concerning the Cobell litigation.
8 (b) FAILURE TO SELECT AND CERTIFY - In the
9 event either or both of the parties fail to select and certify a
10 negotiating team within thirty days after the mediator
11 communicates with the them under subsection (a) of this
12 section or to select and a replacement member within thirty
13 days of the occurrence of a vacancy, the provisions of section
14 404 of this title shall become effective.
15 (c) FIRST NEGOTIATING SESSION; TIME AND
16 PLACE; CHAIRMAN; SUGGESTIONS FOR
17 PROCEDURE, AGENDA, AND RESOLUTION OF
18 ISSUES IN CONTROVERSY - Within fifteen days after the
19 designation of both negotiating teams, the Mediator shall
20 schedule the first negotiating session at such time and place
21 as he deems appropriate. The negotiating sessions, which
22 shall be chaired by the Mediator, shall be held at such times
23 and places as the Mediator deems appropriate. At such
24 sessions, the Mediator may, if he deems it appropriate, put
25 forward his own suggestions for procedure, the agenda, and
26 the resolution of the issues in controversy.
27 (d) FAILURE TO ATTEND TWO CONSECUTIVE
28 SESSIONS OR BARGAIN IN GOOD FAITH - In the event
29 either negotiating team fails to attend two consecutive

1 sessions or, in the opinion of the Mediator, either negotiating
2 team fails to bargain in good faith or an impasse is reached,
3 the provisions of section 404 of this title shall become
4 effective.
5 (e) DISAGREEMENTS WITHIN TEAM - In the
6 event of a disagreement within a negotiating team the
7 majority of the members of the team shall prevail and act on
8 behalf of the team
9 SEC.403 IMPLEMENTATION OF AGREEMENTS
10 (a) FULL AGREEMENT - If, within one hundred and
11 eighty days after the first session scheduled by the Mediator
12 under section 402 of this title, full agreement is reached, such
13 agreement shall be put in such form as the Mediator
14 determines best expresses the intent of the parties. The
15 agreement shall be reviewed by each negotiating team and
16 the mediator shall consider their comments, if any, thereon.
17 The mediator shall then put the agreement in final form and it
18 shall signed by the members of negotiating teams and the
19 Mediator. The Mediator shall then cause the agreement to be
20 entered into the records of the proceedings in the Cobell case.
21 The provisions of the agreement shall be adopted by the
22 District Court and put into effect immediately thereafter.
23 (b) PARTIAL AGREEMENT - If, within the one
24 hundred and eighty-day period referred to in subsection (a) of
25 this section, a partial agreement has been reached between
26 the parties and they wish such partial agreement to go into
27 effect, they shall follow the procedure set forth in subsection
28 (a) of this section. The partial agreement shall then be
29 considered by the Mediator in preparing his report, and the

1 District Court in making a final adjudication, pursuant to
2 section 404 of this title.
3 (c) CONSISTENCY WITH EXISTING LAW - For
4 the purpose of this section, the negotiating teams may make
5 any provision in the agreement or partial agreement not
6 inconsistent with existing law. No such agreement or any
7 provision in it shall result in a taking by the United States of
8 private property compensable under the Fifth Amendment of
9 the Constitution of the United States.
10 SEC. 404 DEFAULT OR FAILURE TO REACH
11 AGREEMENT; RECOMMENDATIONS TO DISTRICT
12 COURT; FINAL ADJUDICATION - If the negotiating
13 teams fail to reach full agreement within the time period
14 allowed in section 403 of this title or if one or both of the
15 parties are in default under the provisions of section 402(b)
16 or (d) of this title, the Mediator, within ninety days thereafter,
17 shall prepare and submit to the District Court a report
18 containing his recommendations for the settlement of the
19 interests and rights set out in section 401(a) of this title which
20 shall be most reasonable and suitable in light of the law and
21 circumstances and consistent with the provisions of this
22 subchapter. Following the District Court's review of the
23 report and recommendations and any further proceedings
24 which the District Court may schedule, the District Court is
25 authorized to make a final adjudication and enter judgment in
26 the Cobell case consistent with the report and
27 recommendations of the Mediator, and the District Court
28 shall do so no later than 180 days after receipt of the
29 Mediator's report and recommendations.

1 **Sec. 9. RESOLUTION OF TRIBAL CLAIMS**
2 There shall be a process for resolving tribal claims
3 against the United States for the mismanagement of trust
4 assets and funds, including the possibility of a tribal claims
5 commission. [detailed language needed.].
6
7 **Sec. 10. FRACTIONATED HEIRSHIPS AND**
8 **HEIRSHIP**
9 Enacted tribal laws governing heirship and probate,
10 shall be the prevailing law governing such issues. [detailed
11 language needed].
12
13 **Sec. 11. INDEPENDENT LEGAL COUNSEL FOR**
14 **TRUST ISSUES**
15 The Deputy Secretary shall have independent legal
16 counsel to resolve conflicts involving trust matters.
17
18 **SEC. 12. REGULATIONS.**
19 The Secretary of the Interior, in consultation with
20 interested Indian tribes, shall promulgate such regulations as
21 are necessary to carry out this Act and amendments made by
22 this Act.
23
24 **SEC. MISCELLANEOUS SAVINGS PROVISION**
25 Nothing in this Act diminishes or otherwise
26 impairs the:
27 (A) trust responsibility of the United States
28 with respect to the Indian people, or

1 (B) The rights pursuant to the Indian Self-
2 Determination Education and Assistance
3 Act, 25 U.S.C. Sec. 450 et seq.. All
4 agreements entered into pursuant to such
5 law shall remain in full force and effect.
6

SUPPLEMENTAL TESTIMONY OF THE LUMMI INDIAN NATION REGARDNG THE TRUST RESPONSIBILITY OF THE UNITED STATES

By Darrell Hillaire, Chairman
Lummi Indian Business Council
Submitted to the Senate Committee on Indian Affairs
March 9, 2005

SHIFTING JURISDICTION OVER INDIAN AFFAIRS:

After the formation of the United States, during President Washington's administration, Indian Affairs was under the jurisdiction of the War Department. Commerce with the Indian Tribes was regulated through legislation and Indian Trading Houses. Over time, the War Department proved to be in conflict with managing Indian Affairs versus going to war with the tribes. But, the main problem was that military personnel were not trustworthy. In 1848, Indian Affairs was transferred to the Department of Interior. But, first, in 1846, the Department conducted a survey of Indian Country to determine over who, what, and where it was assuming jurisdiction. At this time, it was believed that Indian Affairs may be better managed by civil servants rather than military personnel.

By the early 1870's, the Bureau of Indian Affairs was called before congressional committees. There were on-going congressional investigations into extensive fraud & mismanagement of the contracts governing access to Indian land & natural resources. It became clear that to protect the Indians' interests would require a revamping of the federal laws governing contracts with Indian Country. At this time, in search of a better system, President Grant transferred jurisdiction over Indian Country to the Churches. This lead to the institutionalization of the Religious Crimes Code (DOI Circular #1665) that deprived Native Americans of their rights to practice traditional spirituality.

Indian Affairs has been within the Department of Interior since 1848, along with fish, wildlife, and parks. All the other federal departments, until recently, failed to provide services or benefits to Indian Country because "Indian Affairs" was subject to the jurisdiction of the Department of Interior. Thus, they had little history with serving Indian Country. Indian leadership has advocated creation of a 'Department of Indian Affairs.' If created, it would require the Chief Executive assures that all other federal departments and agencies funnel a fair percentage of their services/benefits through the department as a part of the government-to-government relationship with the Indian Tribes.

POLICY CONFLICTS- FROM PATERNALISM TO SELF-GOVERNANCE:

The national debates associated with the "reorganization" and "realignment" of the Department of Interior's Trust Responsibility is one in which the Indian Self-Determination & Self-Governance Policy is challenged by BIA bureaucrats that favor "paternalism." Dictating paternalistically to the tribal leadership has been a standard mode of operation of the Bureau of Indian Affairs since it was transferred to the DOI. In the past, the Indian Reservations were governed over by the "Agent-in-charge" or "the

Farmer-in-charge" or the "the Teacher-in-charge" or the "Priest-in-charge" of the Indians and the respective reservations. The Indians were classified as incompetent and non-competent by federal law and policy. Traditional leadership was prosecuted, usually under the Religious Crimes Code (DOI/BIA Circular #1665). The leadership of a tribe needed to be recognized by the BIA agent for legitimacy. In time this expanded to require BIA supervisory powers instituted into tribal constitutions.

The 1887 General Allotment Law focused upon the destruction of tribal government and the turning of tribal people into property owning individual citizens. Tribal governments fought to exist. Contrary to federal oppression, the tribal governments continued to exist and govern over their membership. The impacts of the allotment laws were devastating to the tribal governments and to tribal property owners. In the beginning two-thirds of the tribes treaty-reserved lands were taken under authority of the General Allotment Act as surplus. More land, over time, was taken from Indians by authority of the 1910 amendments to the GAA and sold to non-Indians. In reaction to the Merriam Report (1928), the tribes encountered a sympathetic U.S. Congress that enacted the Indian Reorganization Act (1934). The congressional sympathy was short-lived as the Congress then moved toward Termination (H.J.R. #108 of 1953) as the national policy.

The next major change came in the form of the Indian Self-Determination and Education Assistance Act (P.L. 93-638 of 1975). In time, due to tribal leadership lobbying efforts, the 638 Law was amended (late 1980's and mid-1990's) to authorize tribal "Self-Governance." By national law, the DOI/BIA is obligated to honor and respect the "Self-Determining" (638 contracting) and "Self-Governing" (compacting/AFA) tribes. The current mode of operations being instituted by the BIA, as pertains to the "Trust Responsibility" conflict brings the relationship of the tribes to the federal government all the way back to the era of the General Allotment Act (1887-1934). The paternalistic domination of the BIA over the tribal governments is unacceptable. The relationship should be "government-to-government" in form. Currently, the BIA is hiding behind the bureaucratic reshuffling to avoid real exposure for the enormous damages it instituted against the native trust estates and Indian people. It has been estimated that six to fifteen billion dollars in trust funds are unaccounted for by the 'guardian.' The interest alone would bring the bill up to one hundred billion dollars, if historical accounting was performed and interest was calculated at fair market value.

THE HISTORY OF THE LEGAL FICTION OF "INDIAN TRUST ESTATES:"

At the time of "Discovery" (1492), Christopher Columbus summarized his impressions of the "Natives" found in the "New" World as, "Una Gente In Dios." This translates as "One People in God." He continued to document that the Natives were so kind and giving that he had to forbid his men from braking up ceramic jars and trading the small pieces with the Natives- for the Natives would give all they owned for those small gifts of the new arrivals. In the end, it was decided to translate the name of the Natives from a description that said "In Dios" to "Indios." Rather than being "In God" people, they became the "people east of the Indus River" (known today as Indians).

On the third ship of Columbus' journeys, a young man named "Las Casas" arrived as a "Conquistador." However, what he witnessed was a "Native People" that were "Christian" by any other name. He witnessed the atrocities being waged by the Conquistadors against the Indians. He became the "First Born Again" Christian in the New World. He would spend the rest of his life "IN DEFENSE OF THE INDIES." His major debate was over whether the Sovereign of Spain had a right to wage or authorize an "unjust war" against the Natives. His opponent was Juan Gines Sepulveda (who never stepped foot in the New World). Sepulveda was defending the rights of the Conquistadors to rape, pillage, and steal all the property of "Indians," as well as enslave them and work them to death. Sepulveda argued that in comparison to Spaniards the "Indians" were less than human and the relationship was more like "apes to humans." And, if the Indians were not animals, then their relationship to the Spaniards was more like "women were to men" or "like children to adults." He argued the teachings of Aristotle properly classified the Indians as only fit for being "slaves." Las Casas made a mistake at this time of his life that he lived to regret, he argued that it would be better to import the Blacks of Africa than to enslave the Indians. He lived to witness the birth of the Black Slave Trade into the New World.

In the 1830's, Chief Justice Marshall picked up on the argument that was debated three hundred years earlier. He ruled that the relationship between the Indians and the United States was more like "a ward to a guardian" (same as Sepulveda's "children to adults") and that the Indians "were quasi-dependent sovereignties." This ruling gave legal birth to "federal superiority" to the Indian Nations. It made law the belief that "Whites" were a superior race and the Indians were an inferior race of people. This concept of racial "superiority" would be a driving force behind the relocation of the Indians from the states east of the Mississippi and Missouri Rivers, under the Indian Removal Acts. Although the United States would continue to enter many treaties with the sovereign Indian Nations west of these rivers, it would also move toward legalizing the concept of "white racial superiority."

In 1887, the treaty tribes of the United States still owned 138,000,000 acres of territory. This was land and natural resources that was not given to them by the United States but retained by them as the original owners. They had aboriginal title and inherent sovereignty over the territories. They never ceded the lands to the United States. The General Allotment Law (Dawes Act) was enacted that year. It claimed that the United States would give to each man, woman, and child on the reservations 40 to 160 acres (depending on availability of water for farming). The U.S. was allegedly giving to the Indians that which the Indians already owned. The alleged surplus lands were then claimed by the United States and issued out to homesteading whites under the Homestead Laws. By act of congress, the tribes were forced to accept pennies on the dollar value for the lands being taken as 'surplus.'

Under the General Allotment Law, the United States claimed to own the title to the remaining "patented lands" until it, the United States, decided the Indian was competent enough to own the land (in other words, until the day the Indian was no longer inferior to the white man). Thus, the Indian's land was to be protected by the "Trust

Patent System." Under this system the "superior" white local governments could not tax the Indian's property until authorized by the United States. Almost always, whenever a fee patent was issued to the Indians then local whites and their governments found ways to defraud the Indians of their property or take the land for failure to pay local taxes. This gave birth to the checker-board jurisdiction battles that are waged across Indian Country today between Indian tribal governments and the non-Indians living inside the reservation boundaries.

To make the whole process even worse, the U.S. Congress amended the Dawes Act in June of 1910. This amendment gave the BIA complete control over the estates of any Indian person that was considered incompetent or non-competent. Bureaucratically, this meant that all Indians were either too young or too old to manage their own lands and natural resources. This law gave the BIA complete power to sell, lease, or rent the lands owned by the incompetent/non-competent Indian wards. As a consequence of this amendment, the BIA became a local real estate agent that specialized in cheaply selling Indian lands to local whites- theoretically for the betterment of the Indian ward. This process multiplied the number of land titles transferred to whites within the reservation boundaries. These "whites" today consider themselves too superior to Indians to be governed over by Indian governments. As a consequence, the local white governments always intervene to protect these "poor oppressed whites that are being unfairly subjected to the allegedly inferior governmental powers of the Indians."

The Indian Reorganization Act (1934) was supposed to end the damages imposed upon the Indians by the Dawes Act (1887, as amended 1910). Many tribes claimed their inherent sovereignty still existed and they did not need to "incorporate" under the laws of the United States. A lot of tribes were so devastated by the powers of the Dawes Act that "incorporation" was their only solution for salvation. The IRA did not return the 90,000,000 of treaty-protected lands taken from the Indians; nor did it stop the BIA from using the powers of the 1910 amendments to further alienate more Indian reservation land holdings. The BIA aggressively continued to sell Indian lands under this power. By 1948, with the firm congressional policy declaration of Termination of 1953 (HJR #108), the powers of the BIA to sell Indian lands was well entrenched. Indian elders and families, living on the reservations or off, could not even receive public assistance until the BIA sold all their reservation properties. The choice was "sell or starve." And, Indians could not receive the treaty promises of education or medical assistance unless they relocated to the cities away from the reservations.

Federal Indian Law and Policy continues to be guided by the belief that whites are superior to the Indians and that Indians are not capable of governing over themselves or managing their own properties. Las Casas argued that the Indians had an inherent, God-given right to be "Self-Governing." The United States, in response to the political pressures of the Indian Nations, began to amend the Indian Self-determination Act (1975) to provide for Indian "Self-governance." Five hundred years after Las Casas came to the New World, Indian tribes are finally getting what he sought to defend- their right to be self-governing. This transition has only been taking place since the late 1980's. In this process the BIA bureaucracy is actually being replaced by the self-governing tribes. The

BIA (Ross Swimmer, as Assistant Secretary of Interior) aggressively sought to undermine and stop the "Self-Governance Compacting" amendments that were initially introduced. They failed and self-governance is a modern day reality for tribal people.

FOUNDATIONS TO INDIAN SOVEREIGNTY ARE FOUND WITHIN THE PEOPLE AND THE LAND:

As a part of its political theory of how to protect the Indian People from unscrupulous dealings by non-Indians and their governments, the U.S. government had placed Indian lands into "trust status." This status, along with the state constitutional disclaimers of jurisdiction over Indian lands, was believed to be an adequate means to protect "treaty or statutory" set-aside of land for Indians only. A part of the statutory theory was that the Indians, and their tribal governments, were too "incompetent or non-competent" to manage their lands and natural resources. The Indians had to be "civilized" and "Christianized" before they could be considered and treated the same as "mature, white people." This view of Indian Affairs is a main part of the development of federal Indian law and policy. As noted above, the major part of this system of governing over Indians land holdings was instituted by the Dawes Act (1887, as amended 1910). Taking the away the Indians' control over their own lands and natural resources, by federal law, undermined a foundation stone to inherent Indian self-government.

In addition, the Indian Citizenship Act (1924) claimed to make "tribal Indians" citizens of the United States. For tribal government, Indian people are the foundations to their delegated form of sovereign (popular) governance, as is their tribal relationship to their aboriginal territory. However, by unilateral action, the national government declared both Indian lands and individual Indians as properly under the paternalistic control of the BIA (acting in the place of the U.S. proper). To apply the same theory of federal power over local non-Indian communities would undermine the theory of U.S. constitutional republicanism. It has only been acceptable because it was applied to what non-Indians considered the "savage, uncivilized, un-Christianized, tribal Indians" that were kept by the federal government on the reservations to protect good white folk.

Since the BIA was managing the Indian estates, it had the "legal authority" to control all contracts (sales, leases, rents, etc) on those properties. The funds that derived from these contracts became "trust funds" and were placed in Individual Indian Money Accounts." The conflict over the "trust funds" of individual Indian estates reveals a claim of BIA mismanagement of nearly fifteen billion dollars in lost accounts. The number of individual Indians impacted by the "Cobell" case ranges from 300,000 to a half million. The BIA was supposed to track the heirs of the tribal Indians; as a part of their legal duty to probate the estates of deceased Indians and assure their heirs received titles to the land. But the BIA is not even sure how many 'Indian heirs' exist. The heirs were dependent upon the BIA. The estate and accounts records were important in the end distribution of the revenues derived from trust land sales, rents or leases. Now the BIA claims to have lost the records, on land & natural resources sold, and the correlating financials on revenues derived from rents, leases, and sales contracts. The BIA is uncertain as to the number of Indian estates it must account for or damaged.

The eleven (to fifty) million or more acres of trust lands addressed in the Cobell case symbolizes the tip of the bureaucratic iceberg. There remains the fact that the BIA mismanagement of Indian lands (trust and restricted fee patent) has destroyed the economic value the reservation lands have for Indian owners and tribal governments. Because of the fractionated ownerships, the only way the lands can make income for the owners is for the BIA to issue contracts to non-Indians to exploit the lands and natural resources thereon. An individual Indian heir is rarely in the position to secure enough of a consolidated number of heirs to demand control over contracts tied to the estates. But, the BIA can do this because the 1910 amendment to the Allotment Act authorizes the BIA to sign for incompetent and non-competent Indians- which by law covered all Indians that did not have a Certificate of Competency issued by the BIA. And, now the Indian Land Consolidation Act is suppose to help undo this damage to Indian Country.

The value of land is directly associated with its use. You can harvest the natural resources from it. You could develop it for industrial use. You can use it for housing. These are examples of economic/social factors that could benefit the owner. However, the economic value of inherited Indian lands has been destroyed by the BIA's failures in processing probates, and the BIA mismanagement of the lands, the contracts, and the applicable accounts. These problems are compounded by the BIA failure to secure clear titles for the individual heirs (fractionated ownership). Indian Country suffers the highest socio-economic ills in the United States. Our people and tribal governments are kept impoverished by the federal control over our lives and resources. However, the alternative in the "white mind" is that the Indian must accept the "trust status" or lose it and have to pay taxes on their Indian lands to local white governments. Why is it such a leap of imagination for the non-Indians, and their representatives in government, to understand that Indian lands simply should remain a part of "Indian Country" and not be subjected to any alienation, zoning, jurisdiction, or taxation by external local, white governments.

Three hundred and seventy ratified treaties set the reservation lands aside for the exclusive use and occupation of the "treaty Indians." Additionally, since the 1871 congressional limitation on treaty negotiations with the Indian tribes, the use of congressional enactments or executive orders had added additional lands to Indian Country. Regardless of the type of legal authority that set the land aside for Indian Country- it was intended to be Indian land for Indians. These lands, and the assessed economic values, were not intended to be land reserves or set-asides to be used to stimulate local white economies as needed. The treaty reservation lands were set-aside by the Indians for their own use. The Indian treaty-ownership of land was intended to extend in perpetuity, for all future generations of "tribal Indians." Any treaty wording to the contrary was added the treaties contrary to the Indians' understanding.

Thus, it should be concluded that Indian lands, whether set-side by treaty, executive order, or federal statute, are reserved as a permanent part of Indian Country. Said lands are absolutely intended for the use and occupation of tribal Indian people. All Indian lands, currently not in fee status, should remain a part of Indian Country. Sales by Indians of trust or restricted land should only be to the tribal government henceforth. The

tribal government should pay current assessed value per acreage, unless otherwise agreed. Non-Indian ownership of reservation lands should have their lands subjected to a tribal governmental first right to purchase. Failure of the tribal government to purchase said land would free the current owner to accept the next offer. The Indian Land Consolidation Act should be more appropriately amended to help implement this federal policy intent. And, Congress should authorize and finance these purchases of non-Indian fee lands. The U.S. Congress, supported by the Administration, should annually appropriate five hundred million dollars for tribal governments to purchase fee lands located inside the exterior boundaries of the reservations. Said funds should annually be appropriated until all fee lands within the exterior boundaries of all the Indian Reservations are brought back into Indian ownership. And, finally, all lands inside Indian Country should be placed completely under tribal governmental control- whether in trust or fee status. No non-Indian government should exercise any right of taxation or jurisdiction over said lands. As a part of this separation, and to ease the fears of local white economies, the Congress should exercise it's Article I, Section 8, Clause 3 powers to "regulate commerce with the Indian tribes" and establish an interstate/intertribal commission to develop, by negotiation, an Indian Commerce Code that respects the conflicting sovereignties per questions of jurisdictional authority.

WHEN THE SACRED TRUST OF CIVILIZATION IS VIOLATED THE VICTIMS HAVE TO PAY BASED ON CONGRESSIONAL PRECEDENCE.

Once again, the U.S. Congress has been forced (in attempts to resolve legal, political, and financial problems created by the Cobell Case) to investigate "fraud, corruption, and mismanagement of Indian Affairs" within the BIA/DOI. The BIA has had a major but small role in Indian Affairs. Indian Affairs is more then BIA functions. It should be reflective of the government-to-government relationships the United States has with the Indian nations. The BIA should have been held responsible for coordinating the implementation of the "sacred trust of civilization" duty assumed by the United States, as well as more specific statutory-imposed trust responsibilities & duties; but in cooperation with all other federal departments and agencies. These duties are direct consequences of the United States entering treaties with the Indian Nations. The conflict associated with the mismanagement of Indian Affairs was behind the intent for transferring Indian Affairs from the Department of War to the Department of Interior, in 1848. In less than thirty years following that transfer, the Interior Department found itself subjected to congressional investigations (1870's)- due to fraudulent and gross mismanagement of the Indian estates and contracting. This gave foundation to President U.S. Grant's transfer of BIA control over Indians Affairs to the Christian Denominations in 1872. He believed that the moral underpinnings of Christian leadership would help prevent fraud and abuse from resurfacing in the management of Indian Affairs and estates. So the numerous Christian denominations divided up Indian Country between themselves. Indian reservation had their church priest or minister in charge of their Indian affairs. In the mean while, the Congress continued to investigate the contracting frauds and mismanagement claims against the BIA.

In the Forty-second Congress, the Committee on Indian Affairs ordered to be printed (March 3, 1873) a report entitled: "REPORT OF THE COMMITTEE ON

INDIAN AFFAIRS, CONCERNING THE FRAUDS AND WRONGS COMMITTED AGAINST THE INDIANS, WITH MANY STATISTICS OF VALUE IN THE MANAGEMENT OF INDIAN AFFAIRS." On page 8, it was noted" "*A guardian who wasted his ward's estate as we have wasted and permitted to be wasted that of the Indians, who are by treaty stipulations with them put under our care and protection, would be mulched in damages by any court examining his accounts and held to be responsible on his bond.*"

This report was seven hundred pages long and justified the drafting of new U.S. Code provisions on Indian Contracting. We note the statement from Page 7: "*From these false grounds it is the duty of the nation to server itself at once, and for all time, with these is wards and defenseless ones, whom by treaties almost without number we have with the solemnities of supreme law, and with the nation's honor involved, promised protection. If the Indians were our prisoners of war they are entitled to protection of person and private property from despoilers. Their weakness and incapacity in financial transactions with designing and bad men is the open doorway leading to their danger and to our duty toward them, demanding, as the Indians have a right to do, our protection and the fulfillment of treaty stipulations with, and the high command of Christian duty to a helpless and untutored people, whose history fully shows that we, as a people, are largely accountable for their present condition, and of whose misfortunes we have no right to take or permit advantages. Despite the severe prejudice that has become nationalized and crystalized toward them, no honest man, who has traced the record, and considered the facts, from the discovery, considering the simple character of the aboriginies when discovered, will fail to condemn the provocations that on our part drove the Indians to be the enemy of our race, and to fear and avoid a civilization that, with kind and just treatment, they would have accepted and become a part of.*"

The report continued on page 9 to state: "*It is the bounden duty of the United States to see to it that no one or more of its citizens, whether officials or otherwise and no person within our borders shall cheat, defraud, or do injustice to any Indian and Indians residing legally within our national domain. Their protection is our moral, and generally by treaty provisions and locality, our legal duty, against all persons whomsoever whether citizens of the United States or not. And any monies or other property fraudulently, forcibly, or by exorbitant contracts taken from them by other persons, the United States is duty bound to require returned to them, and to enforce that request by the necessary powers of the Government. And especially is this true where the fraud has been perpetuated by, or with the knowledge of, or with the assistance of, or in the presence of, a United States officer, or near to the Government, where the Indians, in their untutored and dependent state, are induced to act with less freedom than if not surrounded with the evidences of our power and superiority of advantages, both national and individual, even our manners and language being not well understood by them. We must consider the Indians as they are, and not as we are.*"

In the 101st Congress, a congressional investigation was began in the aftermath of the 1986 Arizona Republic Newspaper expose on fraud and corruption associated with the BIA management of the Indian Trust Funds (Individual Indian Money Accounts).

During the congressional inquiries, the national media was diverted toward focusing public attention to claims of fraud associated with the President of the Navajo Nation. The focus was no longer upon the multi-billion federal fraud conducted by the BIA, against the Indian wards' estates under the Trust Management system. Now the general public focus was upon the fact that an Indian leader may have received a gift from a corporate interest that had a contract with the Navajo Nation.

During this hearing process, the Alliance of American Indian Leaders was monitoring the testimonies being presented. It was, at that time, Ross Swimmer, as Assistant Secretary of Indian Affairs presented testimony that "we (the BIA) did not lose billions of dollars, we only lost hundreds of millions of dollars, and that if the Indians could do better, we would like to see them try!" This arrogant challenge did not go unheeded and eventually gave birth to the "Self-governance" amendments to the Indian Self-determination and Education Assistance Act (P.L. 93-638). Today, different aspects of the BIA and the Indian Health Services are subjected to the authority of the Self-Governance amendments, to the benefit of the Indian Tribes that choose to participate in the self-governance initiatives. These are great 'first' steps away from the dominating paternalism of the past exercised by the BIA and I.H.S.

The Interior Assistant Secretary continued to testify that the BIA diverted ninety-percent of all Appropriations for Indian Affairs to cover the operational costs of the Bureau; with only ten percent going to help the Indians. With this ten percent, the tribes were required to create mini-bureaucracies that would be held accountable to the BIA (93-638 Contracting). This tribal bureaucracy would then use a majority of the small contract funds on itself, with little authorized for indirect costs. The appropriations for "Indian Affairs" have always been extremely under-funded in comparison to the ratio of funds appropriated for non-Indian populations. This 93-638 contracting process resulted in very little direct services to the dependent tribal communities and people.

Following this logic, it does not take a genius to figure out why the tribal leadership worked to secure the "Self-governance" amendments. Self-governance has resulted in more funds passing from the BIA and going into tribal governments and societies directly. This new process has helped but it is not the completed solution. Indians are still suffering because of other forms of mismanagement that has not been corrected. And, other federal departments and agencies have not been required to participate in the self-governance initiatives. The other federal departments and agencies have a history of providing very little or absolutely no funding and services to Indian people or tribal governments. So, the process of identifying a historically based funding level for Indian tribes would not exist. Congress and the self-governing tribes would have to devise a financial formula to help meet the need for tribal communities.

Examples of on-going problems is evident in the BIA's "guardianship" over Indian trust lands and natural resources. The BIA exercises control over the land records. It controls the heirship and probate of Indian estates. It controls legal "contracting" over trust land and natural resources development. These "trust responsibilities" are directly tied to the individual Indian whose land is held in 'trust' because he or she is classified

incompetent This system does not consider the long-term tribal economic interests. This process hinders rather than stimulates economic development. Tribal control and management of land and natural resources would be more feasible and successful because of their local position and identification with the land and people. Most often, because the BIA failed to properly maintain the land records, probate records, and assure the heirs received benefits from their inherited estates, the "Indian lands" became useless to the owners. Some fractionated land have thousands of people inheriting a piece.

Because of "BIA Relocation" of Indian members into the major cities, during the Termination Era (1948-1975), many of the Indian Heirs could not be located. And, just as many heirs are located on other reservations, away from the respective reservation estates of their parents or grandparents, or they are resident Indians of Canadian Bands. Thus, it has become impossible for on-reservation tribal members to secure enough authorization from the collective owners to secure permission to develop, lease, or rent the lands or natural resources. All to often, the BIA simply exercised the authority of the Act of June 25, 1910. This gave it the power to sign off for incompetent or non-competent Indians. The BIA had the power to sell the land, or lease or rent the land, or authorize harvest contracts, without the Indians' actual consent. Theoretically, the funds would go into the "trust accounts" and be dispersed to the individual heirs by the BIA.

Congress recognized that the majority of inherited Indian lands were trapped in this legal maze and causing severe problems for Indian Country. The Congress has recognized that the BIA had created a legal nightmare that could not readily be resolved to the benefit of the Indian wards/heirs. So, the Congress enacted the Indian Lands Consolidation Act in the mid-1980's (as recently amended). The act gave authorization for tribal governments to begin buying out fractionated shares of inherited Indian lands. However, the Congress has not appropriated adequate funds to pay for the fractionated lands. The tribes end up paying the fair market price for the land. Thus, by buying out fractionated shares the tribes end up paying for the damages caused by the BIA mismanage of trust lands. If the tribes choose not to purchase the shares then the lands remain in limbo. In the meanwhile, the tribes are also caught in the struggle to purchase the 'fee status lands' in order to secure their homelands for future generations. Once again, the victim pays for the damages done to them.

This is pretty much the same pattern of federal settlements of Indian land claims. The payments ultimately come out of intertribal funding allocated in the BIA budget. As a first step, settlement is paid out of the U.S. Settlement Account. But the federal department responsible for the damage claim has to reimburse the funds into the account. This means, for Indian Claims, that DOI/BIA appropriations are diverted back to pay for the settlement. This is the process favored by the Department of Justice as a policy matter. It will not support payments directly from the U.S. Treasury. It always results in funding for Indian programs/services being cut from Indian Country. This process is punitive to Indian Country. When a tribe wins and the federal government is forced to pay damages Indians and tribal governments end up with even less services.

The Lummi Indian Nation is very concerned about the Congressional investigations on BIA Mismanagement of Trust Accounts. The Cobell Case has brought the matter to a head. Congressional and Administration demands for a case settlement have been circulated. It has been stated that there will 'be no Cobell settlement without trust reform and no trust reform without settling Cobell.' It has been estimated that fifteen billion IIMA dollars is unaccounted for by the BIA. And, the interest on the missing funds, if historical accounting is successful, would amount to one hundred billion dollars owed to the 'wards.' If the past is any example then the future resolution of this problem will result in retaliation against Indian Country for being the victim. Will the U.S. Congress appropriate one hundred billion dollars to cover these accounts? No! But it legally should since the funds were held by the 'Guardian' in trust.

Congress will appropriate one hundred billion annually for supplementing the War on Terrorism; but it will not honor its past commitments with Indian County. What type of message is this to the World? We, as Indian People, cannot rely on the Administration- since it cannot even keep its commitments to countries that are currently helping in the War on Terrorism. Indian Country has suffered under the "Terror" of "U.S. racial superiority" for five hundred years, and over two hundred years since the U.S. Constitution, and over one hundred and seventy years since the "ward to the guardian" ruling of Chief Justice Marshall. In the sixty-nine years since the IRA (1934), no treaty-lands and natural resources unlawfully taken by the Dawes Act (1887-2003) have been returned to the Indian Country. The many tribes have sued for recovery of their treaty protected lands but have only found settlements at pennies on the dollar. Tribes continue to deny acceptance of the settlements ordered by the Indian Court of Claims or Indian Claims Commission. Some are forced by congress to take the settlement offers. These funds, whether accepted or not, have been held by the 'guardian' for the 'ward' until the ward comes to their sense and accepts the unconscionable offer.

The socio-economic conditions of the Indian people, living within the reservation boundaries, are just as bad as those existing in any third or fourth world country. The poverty, the desperation, the misery of survival on the reservations are direct reflections of failed Federal Policies. Instead of respecting native inherent sovereignty, the federal government has continued to institutionalize and exercise "paternalistic plenary power" over Indian Affairs. Added to this is the "states rights activists" that argue Indian jurisdiction over reservation lands, natural resources, and over commerce/civil actions taking place upon those lands are a threat to non-Indian landowners and local white government & economies. The non-Indians willfully entered Indian Country to buy cheap land from the BIA and then claimed they should not be subjected to Indian governmental jurisdiction. How many more centuries can "constitutional government" and "Christian Society" sanction claims that the "Indian" is the enemy, a threat to Christian government and society? How much longer can the Indian People continue to be victimized and then forced to pay for the damages done to them by the federal and state governments, and their citizens?

Felix Cohen once said: "*Like the Miner's Canary, the American Indian marks the shift from fresh air to poison gas in our political atmosphere; our treatment of the Indian,*

even more than our treatment of other minorities, marks the rise and fall in our democratic faith." It cannot be repeated enough, "The suffering of the Indian people on the reservations is a direct reflection of the impact of federal Indian laws and policies." Reading behind the scenes and in between the lines, these laws and policies have always been drafted to protect the non-Indian more than the Indian. These laws have been intended to 'kill the Indian and save the man.' The Indians have been brainwashed, over the centuries, to believe they have to become a non-Indian, Christian farmer & citizen. Is this racist- well think of "Indian Reservations" and then the "Jewish concentration camps in Europe" and the "Japanese relocation camps in the United States." Tomorrow there may well be concentration & detention centers for 'alleged terrorists and their co-conspirators.' The only real difference is that Indians reserved their lands for homelands. It was not land given to the Indians by the United States. It was land set aside by the Indians for future generations. Today, the Indian people still refuse to surrender their reserved lands to non-Indian governments. Tribal governments still deny non-Indian governments have any lawful jurisdiction inside reservation boundaries. This sovereign right is so engrained in the tribal people that they choose to suffer rather than surrender what little treaty-protected land that is left in their care and ownership.

THE TREATMENT OF THE AMERICAN INDIANS SHOULD BE A STATEMENT TO THE WORLD BY THE UNITED STATES ABOUT HOW FIRST WORLD NATIONS SHOULD ADDRESS RELATIONSHIPS WITH INDIGENOUS PEOPLES.

The United States is one of the first (written) constitutional forms of government that had proclaimed that sovereignty was derived from the "People" represented. The Constitution is a conglomerate of Old World and New World beliefs about the endowed rights of humankind, and that leadership is responsible to and held accountable by the people (See: SCR #76 of 1987 and HCR #331 of 1988). Shortly after the 1776 American Revolution, the French People were moved to revolt and establish the same form of government. All this time, England continued to support and debate its unwritten constitution as an acceptable & flexible form of stable government. While the written constitutional governments favored the incorporation of articles authorizing processes for amendments so that the constitutions mature with the people represented. After WWI, U.S. President Wilson helped lead the world in the formation of the League of Nations- which was modeled on a concept borrowed from the Iroquois League of Nations. The Wilson League failed, and after the Second World War, the United States led the world in the formation of the United Nations (modeled and improved upon the idea of the League of Nations). Since then, more than 160 nation/states of the international community have moved to constitutional governments (primarily Republican Forms of Government). In all these nation/states there are indigenous peoples that have been colonialized as minority groups that have been regulated to near extinction or marginalized to the fringes of society. Some of these people(s) have resorted to the formation of "liberation movements"- to voice their needs, concerns, and to protect the little they have kept or regained, over the centuries, in land and religious freedom. The status quote in these countries, as in the United States, has been continued acceptance of the domestic laws that had been enacted by the colonial governments to govern and marginalize these indigenous populations to inferior status. However, there have been successful de-

colonialization movements. The diplomatic trick for the U.S. is to develop Native American Self-governance as a de-colonialization movement without hinderance to U.S. domestic, national governance; but with definite changes in the laws to eliminate the racial undertones of federal Indian law that undermines true self-determination.

The United States is a colonial government that has regulated the lives and property of its indigenous peoples. It has created more laws about the Native Indians than any other (minority) group in the continental United States. The majority of these laws were drafted with the intent of taking land and natural resources owned by the natives but desired by the non-Indians (individuals, corporations, or states). Because of the constant demands to take more and more from the Indians, many laws were enacted to protect the Indians from the unscrupulous dealings of non-Indians and local & state governments. While the Constitution empowers only the national government to deal with the Indians, many laws have been enacted or amended that have placed states in a position to apply their laws (e.g., P.L. 280, General Crimes Act, etc.). Other laws allowed non-Indians to inherit Indian estates (e.g., Dawes Act, 1887 & 1910 amendments).

Theoretically, the United States should have been bound by the "sacred trust of civilization" in all decisions to protect the native people and their lands & natural resources. However, because of fluctuating federal policies, even the federal officials that were charged with the management of Indian Affairs were found to be incompetent or untrustworthy in their relationships with the Indians. For example, the Department of War was not managing Indian Affairs properly so the responsibility was transferred to the Department of Interior in 1848. Eventually, the civil servants of Interior would be charged with improper conduct (1870's), so President Grant transferred Indian Affairs to church inter-denominational leadership for management. In a short time, the churches would secure and implement the Religious Crimes Code (DOI/BIA Circular #1665) to stop Indian traditional religious practices. During this time, the Dawes Act (1887) was enacted to tale alleged surplus lands owned by the Indians (basically, the U.S. nationalized Indian lands because they decided Indians could survive with less). Maybe all U.S. citizens or corporations that "have too much" should be nationalized as well. In forty-seven years, the Dawes Act devastated Indian land ownership, tribal government, tribal societies, and tribal economies. In reaction to public shock over the conditions of the American Indians, the Indian Reorganization Act (1934) was enacted to try and stabilize tribal society and government.

After WWII, the United States repaid our Indian War Veterans with "Termination" of their tribal governments. Their lands were sold and the families were relocated into cities all across the nation. Tribal Indians entered the class of landless, inner-city, blue-collar working, poverty-stricken families. Many faced unemployment and ended up on general assistance. This supposedly assimilated the tribal Indians into mainstream society. The Termination era lasted from 1948 to 1975. The impacts of "Relocation" were suppose to be permanent. But, beginning in the 1970's, many natives returned to the reservations for a lack of a better life off-reservation. The promises the BIA made to these "relocation Indians" were never fulfilled. Upon their return, they

found much of their family lands had been alienated. The elders left behind had to sell their lands to get health services or public assistance.

The United States enacted the Indian Self-determination and Education Assistance Act of 1975 in order to provide Indian people, and their governments, the opportunity to help deliver essential governmental services to the people in lieu of the BIA. The theme was to place Indians in charge of their own affairs. The BIA was to fade into the background, occupying a monitoring position, and significantly decreasing its level of federal employees to a minimum. However, the self-determination regulations that were applied were inadequate and were not accomplishing the intent of the law. The BIA continued to operate Indian Affairs under "paternalistic" management styles. The bureaucracy grew even more dependent on securing their Cost of Living Allowance (COLAs) pay increases each year. Eventually, under tribal pressure, the Congress enacted the Self-governance laws in the 1990's. Also, it authorized several amendments to the American Indian Religious Freedom Act to reverse negative Supreme Court Decisions. Both movements were returning basic, human rights back to the Indian people, and re-empowering tribal people with inherent rights to self-government and spiritual freedom.

The U.S. message to the world should be a model of how other first and second power Nations should treat their indigenous peoples as colonialized populations. Like the Statue of Liberty, the U.S. should stand tall and be reflective of honor and respect, amongst nations, across all racial or religious barriers. The words "Life, Liberty, and the Pursuit of Happiness" should be more than a paper dream. The Nation's integrity should be reflected in its actions. It should not be a model of deception, corruption, mismanagement, or insensitivity to the plight of the first Americans. The American Indian has the worse socio-economic conditions in the United States. On the reservations exist the highest levels of poverty, highest infant mortality, highest unemployment or underemployment, lowest levels of educational and vocational attainment, highest levels of suicide, poorest housing, poorest infrastructure development essential to economic development. Additionally, economic development is hampered because the lands are very isolated in desolate/rural locations; compounded by local to federal claims to taxation authority over all economic activity inside Indian Country. What type of model is this to other First and Second World Nations on the treatment of their indigenous peoples? It is a model of marginalization of indigenous peoples that is close to genocide.

If the United States has a message to the world it should proclaim that our nation is one that holds governmental honor and respect above all else. And, that all members of the international community must live in respect to the international laws of justice, as a global community. The U.S. should diplomatically be a model to the other member states of the United Nations. It should be a positive role model on how to address domestic, internal affairs, in a manner that protects the interests of the nation but respects the inherent rights of the indigenous people. It should show other nations how to establishment and maintain government-to-government relationships with the indigenous people- one that allows the native nations to be self-determining and self-governing. It should show the world that the "sacred trust of civilization" duties owed to these oppressed, colonialized, marginalized populations can be honored and implemented. The

United States owns half of the North American Continent, all secured by treaty-relationships with the Indian Nations. It can afford to be honorable and generous in its dealings with the Native Nations. Currently, instead of legislating to improve the economic opportunities afforded Indian commerce, the Congress is influenced by the anti-Indian sentiments and rationalizations. All this while, the Internal Revenue Service annually extracts hundreds of millions of dollars in illegal federal income taxes from within Indian Country. Tribal Indians are still constitutionally classified as "excluding Indians not taxed." The Indian Citizenship Act (1924) is unconstitutional as legal authority to apply federal income taxes to Indian commerce activity in Indian Country.

We, as indigenous, native people and nations have demanded that our voices be heard in all hearings and investigations that were being held as pertains to the creation of the Office of Special Trustee. Indian people have always been federally regulated as second-class humans by the United States. We were kept under the "trusteeship" of the guardian. In addition to the lands and natural resources taken by law or thieves, we had billions of dollars that was suppose to be in government bank accounts, under the protection of the U.S. Department of Interior. Now, we find the funds have disappeared. The government is court ordered to develop a better system and to conduct historical accounting of missing funds and accounts. Indian Country wanted to be involved in the solutions. Instead, w are told that the government is creating the Special Office of Trust Responsibility- whether we (the tribes) want it or not. This is a strict act of paternalism. This year alone the new Office of Special Trustee will consume over three hundred million dollars on itself. It has consumed nearly a billion dollars since it was created. All these funds are cut from Indian programs and services. Return the funds first and then negotiate with us about the creation of a new "paternalistic guardian system." Return the lost accounts first. How can the government lose billions of dollars in Individual Indian Money accounts? Is it fraud or mismanagement? Did someone simply stuff billions of dollars in a drawer and simply forget which drawer it was in? Yes it is ridiculous unless you admit fraud. Does this only happen to the Indian people, or is the U.S. in the habit of letting their Department heads loose untold billions of dollars on a regular basis?

We, the Lummi Nation, believe that the continuation of government-to-government relationships, as based on congressional enactments about Self-governance, is an absolute necessity. We should be allowed to hold the national government accountable for its actions- and not just the Department of Interior. Holding the government accountable is an inherent right of the people that delegated the governance powers by the 1787 written Constitution. If we are really "U.S. Citizens" then we have a right to demand the accounting for damages and lost estates. It is a requirement of constitutional governance. However, in the past, when there was wrong done against the Indians, usually the Indians ended up paying the bill for damages done to them (the victim paid the restitution for damages done to them, rather than the predator). We should not be confronted with "terminationist and paternalistic" policies because of this federal sham. But, this is what Indian leadership is witnessing, once again. Based on historical patterns, we can expect that Indian Country will be punished for the wrongs done to the Indians whose accounts were lost or stolen by federal officials and departments. We ask the Congress to find a higher standard of fair dealing with the Indians. We ask the

Congress to not hide behind the "political question doctrine" and continue to believe they can do with us as they choose fit or decide what is best for us- even when we protest against these "good intended actions." Remember, "power corrupts and absolute power absolutely corrupts!" Forcing the Office of Special Trust Responsibility upon the Indian Nations is an absolute exercise of "plenary power" in an absolutely corrupt manner. This is outrageous since we live in the time that "Indian Self-governance" has been guaranteed as a matter of federal law. So long as the Office of Special Trustee exists the tribes will annually loose hundreds of millions of dollars in services direly needed within the poverty stricken communities.

THE INDIAN NATIONS HAVE HISTORICALLY HAD A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE UNITED STATES.

The truth that the government-to-government relationship between the Indian Nations and the United States was based on the U.S. Constitution was proclaimed in S.C. R. #76 in 1987 and H.C.R. #331 in 1988. The U.S. Congress acknowledged that Native Nations were contributors to the type of constitutional government created in 1787. The contributions of the Iroquois and Choctaw Confederacies to the conception of popular sovereignty and personal liberties were specifically referenced by the Congress in the resolution of celebration for two hundred years of the Constitution (1789-1989). This does not deny the significant European contributions that were initiated as far back as the Magna Carta, or the revolutions that sought to limit the kings' attempts to tax the people without their representation in the decision-making. We all must acknowledge that millions and millions of people died during the Age of Reformation- in attempt to secure religious freedom and to create societies that practiced religious tolerance, with the people having the right & liberty to read the bible themselves. However, the form of government created in the new United States was a blending of Old World and New World ideas and beliefs in the inherent rights of man. The United States of 1787 became a world model that would give birth to the true concepts of popular (constitutional) sovereignty. Popular sovereignty became even more entrenched, as time and experience led to several U.S. constitutional amendments. The amendments were placing the power to choose and remove the national leadership into the hands of the average citizen (e.g., changing of the Electoral College to popular voting systems, or direct election of Senators, securing the franchise to all colored persons, women, and youth 18 and older). Additionally, this pattern of popular sovereignty was the required form of government state governments under Article IV of the U.S. Constitution.

Before the formation of the Union, establishing diplomatic relationships with the Indian Tribes was under the complete sovereign power of the King, and under popular constitutional government the People (represented by the national government) replaced the King. Based on the debates of the Founding Fathers, the colonies (as new states under the Articles of Confederation) could not to be trusted with the management of Indian Affairs and the establishment of treaty-relationships with the Indian nations. This position was made more definite in the new Constitution- with the Union securing the power to establish & govern relationships with the Indian Nations. The individual states could not be trusted to exercise this power for fear of wars being started, just as the earlier colonial governments could not be trusted with this power under the King. At the

Constitutional Convention, the states' rights advocates lost their bid for power. The states' rights advocates argued that state sovereignty predated the sovereignty of the people they represented. Today, however, every school child is taught that the Constitution was founded upon popular sovereignty. This is why it begins with the words "*We the People of the United States,...*". Under this constitutional plan, Indian Affairs was permanently made a subject of national governance and not subject to states' rights or powers. At this time, the proclaimed Congressional Policy was the Northwest Ordinance which stated that "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress."

Now, the N.W. Ordinance played an important role in the formation of all future states that would enter the Union as well. It provided the original draft process for the governance of new territories and the eventual qualifications moving toward acceptance into the Union as an equal member state. With the discovery of gold in California, Manifest Destiny became the national policy banner. As the United States continued to expand further and further westward into Indian Country, the formation of more and more territories transpired. New states were created in those territories. Each state would have a "guaranteed Republican form of government" (i.e., constitutional government based on popular sovereignty). Each new state that entered the Union would do so on an "equal footing" with the original states-as required by the U.S. Constitution. This equal footing included not having jurisdiction or sovereign authority to deal with the Indian Tribes. Before a new territory could be formed the United States had to negotiate peace and land cession treaties with the Indian Tribes. These treaties were essential to secure lawful title to the territory based on national and international laws of nations. Until that happened, the Indian Nations retained aboriginal title and the only right the United States had was the right to negotiate with the tribes based on the Discovery Doctrine (see: Johnson v. McIntosh, 1823). Thus, only by treaty would legal title transfer to the U.S.. In addition, the treaties were essential to secure peace for the protection of the non-Indians arriving and occupying the territory. However, as history proves the truth, treaty negotiations usually only happened due to the massive number of trespasses taking place by trappers/gold diggers/settlers moving into the Indian territories. Peace Treaties were used to prevent war with the Indian Nations. The U.S. chose the more diplomatic government-to-government path of treaty negotiation and ratification as the means to secure permanent peace and to avoid the massive costs of war on multiple fronts.

The new states had to disclaim jurisdiction over Indian Affairs in their organic territorial government documents. Indian Affairs was a national power not to be shared with the states. Nor could this power be delegated to the individual stats- not unless the Constitution is amended (to amend Article I, Section 2, Clause 3; Article I, Section 8, Clause 3; Article I, Section 10, Clause 1; Article II, Section 2, Clause 2; and, Section 2 of the 14th Amendment). The states created between the original thirteen states and west to and along the Mississippi and Missouri Rivers accomplished the "disclaimers" by territorial legislative enactments made a part of their organic state documents preceding their written & approved constitution. As experience became the teacher, the new western

states would be required to permanently add "Disclaimers" into their state constitutions (e.g., Washington, Idaho, Montana, North Dakota, South Dakota, New Mexico, Alaska, etc.) as a matter of national policy. Thus, the disclaimers could only be removed by a proper constitutional amendment of the state constitution.

What is important here is the fact that historically, under the state and national constitutions, the states did not have a legal right to interfere with the management of Indian Affairs and relationships. States' rights advocates had lost power under the new 1787 Constitution. States that sought recognition by the national government had to comply with the process created. This processed assured that they, like the original states, did not have sovereignty or jurisdiction over Indian Affairs and their property. The tribal Indians were governed over by their own tribal governments. Tribal Indians were separate from the United States. The Indians governed over their own territories. Anyone entering their territory was subject to their jurisdiction. Thus, the U.S. would use statutory powers to regulate the trade and activities of its "citizens" that did enter Indian Country. But, this was an exercise of power over its own "citizens." It was exercising powers delegated to it by the "We the People of the United States." The people of the individual territories, states, and Union can only delegate those powers they have. They cannot delegate powers to the national government over Indian territories- since the same was outside their domain.

This is important. The national government has never ceded complete control or sovereignty over Indian Affairs to state governments. And, the national government could only cede that authority which the Indian Nations granted them inside the respective treaties. The only reason states can justify the violations of Indian exclusive jurisdiction over the reservations, otherwise forbidden by treaty and the Constitution is due to the 1924 Indian Citizenship Act. This was accomplished by legislative language even though the 14th Amendment was drafted to prevent this very thing from happening. Section 1 of the 14th Amendment forbids the national government from making tribal Indians U.S. Citizens. Section 2 forbids the states from making tribal Indians state citizens. But, under the theory that a "state" has jurisdiction over it's citizens, the making of tribal Indians U.S. or state citizens then allegedly allows those governments to cross-over tribal boundaries since the people therein are "their citizens." But, the 1924 Act did not authorize states to ignore the 14th Amendment. Making tribal Indians state citizens is still unconstitutional. The 1924 Citizenship act did not amend the (14th) Amendment to the U.S. Constitution. It is constitutionally invalid. Two wrongs do not make a right. Just because the national government chose to ignore the national constitution does not relieve the state governments & officials of the duty to honor the Constitution.

Tribal Indians are still under the national power of the United States, as consequence of established treaty relationships. Tribal Indians are still protected by the "sacred trust of civilization" duty of the United States. Tribal Indians are members of their Indian Nations first and foremost. Their relationship with the United States, established by and through their tribal government, is one of government-to-government. This relationship is established by a combination of treaties, executive orders or federal statutes. The tribal lands and natural resources owned by the individual tribal member or

tribal government is still protected under the federal "treaty trust responsibility." This "treaty trust responsibility" is derived from the numerous peace treaties ratified. The power of the Indian Nations to retain some of their aboriginal lands and natural resources for their permanent homelands was diplomatically recognized by the treaty-reservations being set-aside and not included in the ceded lands. The "reservation" of these lands and natural resources for the tribal people should and must continue because of the impoverished conditions suffered by the Indians. It should continue as a "treaty trust responsibility" because "individual states" still seek to eliminate the Indian holdings and titles for the benefit of state taxation schemes and economic expansion. Removal of the "treaty trust status" enriches the state and expands control over Indian Affairs to the state governments. The state, after the trust status removal (from restricted fee or trust title to fee status), begins exercising jurisdiction over said lands and resources- to the detriment of tribal government and individual tribal Indian ownership. Why, in this day and age, is it popular to believe that an Indian is only competent if he or she walks, talks, works, and worships just like the white man? And, why can they only be "competent" if and only if they are paying taxes to the very white governments that have always been their historical enemies? The answer, obviously, is that the foundations to federal Indian law and policy are cemented to "racism" and not Indian self-determination and self-governance.

THE GOVERNMENT-T0-GOVERNMENT RELATIONSHIPS WITH THE INDIAN TRIBES IS CONSTRUCTED BY THE U.S. CONSTITUTION.

The U.S. Constitution is based on the Power of the People, and not states. It is a constitution that enumerates/delegates certain powers to the national government, and reserves all powers not delegated... to the people. Article I creates the Congress (Senate and House of Representatives). Article II creates the powers of the Chief Executive, Presidency, and Commander-in-chief. Article III creates the national Judiciary. Article IV addresses states and new states. Article V addresses the power to amend the Constitution. Article VI addresses prior debts, engagements, the "supreme law of the land" and obligations of oath and allegiance of all national and state officials. Article VII provided the system for ratification of the Constitution. Of course, in order to secure the number of states needed to ratify the Constitution, the commitments to add the first ten amendments (The Bill of Rights) was conceded and eventually added to the Constitution. And, U.S. Constitutional History is full of evidence as to the necessity of adding more amendments to the Constitution. The amendment power assures the Constitution is a living document that expands with the best interests of the People represented.

Thus, the Constitution structured the national government and limited "states rights." It is important to keep in mind that the constitutional power was derived from the people and not the states. In this scheme it is evident that the "checks and balances" and the "separation of powers" doctrines were structured in light of Indian Affairs and the established or potential to establish government-to-government relationships as well. The relevant applications of Article I, II, III, IV, V, VI, and the Fourteenth Amendment is proof enough that the Constitution is a foundation stone to the government-to-government relationship with the Indians. It is the Constitution that has kept this power over Indian Affairs out of the hands of the individual states. It has been the individual, and sometimes collective, actions of the Presidency, the Congress, and the Court that

have periodically transferred jurisdictional power over Indian Affairs to the individual states. At times, the nation or congress would politically mobilize and seek to undo some of the damage done to Indian Country. The resulting action was always "for the best interests of the Indians."

Article I, Section 2, Clause 3 provided the language of "*excluding Indians not taxed.*" This language was retained in the intent and wording of the 14th Amendment. The wording referenced those Indians that were in tribal relationship with their own nations and not citizens of the United States or individual states. The Indians were always governed by their own people and maintained traditional forms of governance. Article I, Section 8, Clause 3 was provided "*To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.*" Article I, Section 10, Clause 1 provided that "*No State shall enter into any Treaty, Alliance, or Confederation.* This was an absolute constitutional negative upon any state attempts to treaty/compact with the tribes as well (See: Constitutional Convention Minutes). It was not even possible with the consent of congress for states to exercise this power. Article II, Section 2, Clause 2 empowered the President to negotiate *treaties* with the tribes, and the Senate to ratify. The proof of this power was reflected when several hundred treaties were negotiated and 370 treaties were ratified by the Senate. Article III, Section 2, Clause 1 empowered the Supreme Court to review the Constitution, the laws of the United States, *and treaties made*. These three types of laws were classified as the "*supreme law of the land*" under Article VI, Section 2. Article IV provided for the creation of *new states* and the *guarantee of a republican form of government* for each of those states admitted into the Union. These new states were created once the Indians ceded territory to the United States by lawful treaty. Of course, admission into the Union required the *State Constitutional Disclaimers of Jurisdiction* over Indians and their property. The process was governed by the structure created by the N.W. Ordinance. If there was a problem with the constitutional system, then the amendment provision under Article V could be applied. In the case of Indian Affairs, the application of it under the *14th Amendment* (by wording of "*subject to the jurisdiction thereof*" in Section 1 and "*excluding Indians not taxed*" in Section 2) was to maintain the constitutional negative on tribal Indians becoming citizens of the United States and the non-Indian states. The amendment did not recognize tribal Indians as members of the population represented by the national or state governments. Tribal Indians were not a part of the 'We the People' that were delegating their authority to the national or state governments. And, all state and national governmental officials were/are required to take an *oath* swearing their allegiance and support of the Constitution by Article VI, Clause 3.

THE INDIAN NATIONS HAVE BEEN SUBJECTED TO MANY DIFFERENT POLICIES INTENDED TO RESOLVE THE INDIAN PROBLEM.

As noted in the beginning, the evolution of the Federal Indian Policy/laws began five hundred years ago with racism as its foundation. As addressed in the opening of this testimony, in the beginning Columbus said, "Una gente in dios" (One People in God). But, he needed gold to repay the debts for the exploration. The conquest of the Indians began from that day forward. Following Columbus came the Spanish Conquistadors. The "Conquista" (Conquering) began with the Blessings of the Pope. During this time, the

Church and Pope had to find a new source of "souls" for the "bank of souls" that was being emptied by the impacts of the "Reformation" that was started by Luther and Calvin, and others. Indians, if they were declared humans, would be the source to replenish the bank. However, if they were "Christian by any other name" then the Conquistadors should not be allowed to enslave or kill them. Bartolome' de Las Casas become the defender of the Indians. He argued, in "In Defense of the Indians," that the Indians were endowed as children of God with the same inherent rights as the Spanish, and with the rights to "Self-governance." The chosen representative of the Conquistadors was Sepulveda (who never came to the New World). He argued that the Indians were only deserving of conquest, enslavement, and death. He believed Indians were not any better than the beasts of the wilds. He would be proud to know that, today, "Indians" are placed in the very federal department that is charged with management of parks and wildlife (Department of Interior).

Spain, at the time, was still debating the contents of the Laws of the Indies- which would become the cornerstone for modern federal Indian law and the "trust doctrine" that came to characterize U.S. law after the 1830's Marshall Court Indian Cases. *The common concept being that Indians could not be trusted to protect and care for their own interests. They needed guardians. But, in reality, it was the failure of the Spanish Crown, the Catholic Church, and later the U.S., to control their people that mandated the development of the "trust relationship."*

THE INDIAN NATIONS ARE CONCERNED ABOUT THE MISMANAGEMENT OF THE NATIVE AMERICAN INDIVIDUAL INDIAN TRUST ACCOUNTS.

The United States has the burden of the "sacred trust of civilization." The Indian Nations and individual tribal members have relied upon the Department of Interior, Bureau of Indian Affairs, to assure that the management of the revenue from contracts, leases, and rents from Indian trust lands and resources would be competently handled and accounted for. It is the duty of the guardian not to waste away the estate of the ward- this holds true for the United States as the trusted guardian of the Indian estates. In the case of the Individual Indian Money Accounts, Indian Country has witnessed federal financial mismanagement of the trust funds. The lands and natural resources that have been the source of the revenues were suppose to be protected as a requirement of treaty, executive order, or federal statute. The U.S. Constitution has made treaties and acts of congress the "Supreme law of the land" under Article VI, in conjunction with the Constitution itself. All personnel of the federal agencies and departments are required to swear an oath of allegiance to honor this commitment of constitutional government. The failure to adhere to the obligations assumed by solemn treaty and federal statute creates a situation of dishonor for the Nation itself. The numerous pieces of legislation intended to implement treaty commitments to protect these resources or revenues were drafted to assure that the "utmost good faith shall be extended to the Indians." The United States and individual states have not kept the "utmost good faith." The "sacred trust of civilization" has not protected the Indian interests in land, natural resources, and trust accounts. Currently the Office of Special Trustee argues that Indian Tribes have to live up to the same standards that the federal government has had too; but, what standard- the standard of BIA mismanagement and fraud, and then blaming the victim?

The Indian Nations are righteously concerned and indignant. It appears that the greatest effort to address this subject matter has been more focused on federal diversionary tactics. This is most manifest by the necessity of tribal filings of federal lawsuit to secure compliance with the law. We ask, "where is the money"? When will the Individual Indian Money Accounts be reconciled in a fair and equitable manner? We want justice not promises of a better tomorrow. The same problems of mismanagement lead to major congressional enactments in the 1870's to govern contracting with Indians. Decades after that, the Nation reacted to the findings of the Merriam Report on the impacts of the General Allotment Laws- resulting in the Indian Reorganization Act of 1934. The Federal/Congressional solution has always been to enact new administrative policies, draft new legislation, but never return the property taken. The resolutions never provide restitution for the lost funds, resources, and damages done to the native communities and people. Why not give the ward what was unlawfully taken from him by the guardian? Why should the guardian benefit from his unlawful gains? Is this justice?

The Indian Nations find it very difficult to place "trust" back into the very federal system that has caused so much damage over and over again. Resolution of the "Indian Problem" has always been driven by the "paternalistic demands" of a federal government that has supported "takings" of Indian rights and resources more often then it has provided protection of those same rights or resources. No government official could seriously believe that there are no grounds for native suspicions over proposed solutions completely originating from federal officials. The modern tribal leadership demand a participating role in the securing of solutions to the problems created by unscrupulous or incompetent federal officials. Consultation with the tribes is more then listening to their grievances or advice. It is important that the tribal concerns be understood and given serious consideration. The majority of the tribes do not appreciate having Ross Swimmer forced upon them in the role of "Special Trustee." He is a terminationist.

The new "Office of Trust" division is a threat to Indian Country. It drains funds away from Indian Country, funds needed for other dire needs of Indian Country. And with the war on Terrorism occupying center stage in world and U.S. politics, it is unlikely there will be new money appropriated for Indian programs. It has been a congressional and administrative pattern to provide financial restitution for wrongs done to Indian Country by taking funds away from other parts of the Indian services, programs, and essential governmental functions. The "victims" witness remedial actions being taken at the expense of other Indians (who in turn become the new victims). Thus, more of Indian Country becomes victimized in the resolution process. The proposed three hundred million or more dollars taken this year from other parts of the BIA causes great stress for Indian Country because it deprives tribal people of needed services. Indian Country cannot provide essential services to the tribal membership under current funding.

We, the Lummi Nation, believe the Congress should continue to indirectly authorize the Office of Special Trustee. The real solution would be to remove the Bureau of Indian Affairs completely out of the Department of Interior and create a Department of Indian Affairs (DIA). The DIA would draw a share from all other federal departments'

appropriations to assure Indian Country is qualified for and secured the same respective services delivered to other Americans by the whole federal government. All federal departments and agencies would be obligated under the "sacred trust of civilization" to assist Indian Country. The Department of Interior is, most often, at odds with Indian Country as pertains to the delivery of its duties and responsibilities within the subparts and agencies housed under it. With the Administration's packing of its appointments heavily from the energy/fossil fuel industries, it is evident to Indian Country that Interior would willfully dismantle Indian Affairs in favor of its other clients- those that seek to exploit these resources. This conflict of interest is a threat to Indian Country. It is becoming more evident as the energy industries move into the Executive Office, with no support coming from the Administration for a positive "Indian Policy" that is endorsed by tribal leadership nationwide.

TERMINATION OF INDIAN TRUST RELATIONSHIPS AND THE ELIMINATION OF LEGAL PROTECTION OF NATIVE AMERICAN NATURAL RESOURCES IS AT THE HEART OF INDIAN FEARS.

There have been more than 370 treaties of peace and friendship with the Indian Tribes ratified by the U.S. Senate. These treaties provided for cession of nearly four million square miles of land over to the United States. The ceded lands became apart of the common land holdings belonging to the people of the United States. The lands not ceded remained the exclusive property of the Indian tribes. From the ceded lands, or territories, derived the formation of the individual states that would enter the Union on an equal footing with the original states. The residue of land/territory left to the tribes amounted to one hundred and thirty-eight millions acres. These lands, and natural resources, were to be protected from encroachment by the states and their citizens (remember, until the 14th Amendment there was only state citizenship), or any non-Indian corporations. However, the Indian/Non-Indian relationship has been one of deception and mass takings. The hunger for more Indian land and natural resources has continued.

After the treaty era, the Congress unlawfully confiscated 90,000,000-plus acres of land and natural resources taken in violation of treaty agreement. Believe it or not, the taking of treaty-protected lands was always rationalized as in the best interests of the Indians. These takings were, also, justified as a part of the "political question doctrine." The United States, as a Nation, always suffered short-lived shame for their illegal takings. This national shame, once acknowledged, never resulted in return of the lost lands and natural resources. In the Laws of Nations, the United States held a greater claim, as Victors in Lawful War, to the lands of Germany and Japan- post-World War II, than it did to the Indian peace treaty lands it took under the general allotment laws.

Many tribal leaders believe that the proposed creation of a new office of trust is simply a diversionary tactic to isolate the "trust resources" and "trust accounts" in such a manner as to allow the congress and administration to terminate its long-term treaty obligations and dismantle the BIA in the near future. History has taught Indian Country that it cannot believe in the very system that was charged with the duty to fulfill the treaty commitments or protect trust resources of Indian Country. As the aboriginal peoples, whose nations have government-to-government relationships with the United States, the

Indian Nations deserve to have a "Department of Indian Affairs." Presently, the Indian Nations are coordinating their own "National American Indian Embassy." Indian Country is organizing for long-term survival. As Nations, the Indian Tribes deserve to have all the lands within the exterior boundaries of their reservations subject exclusive to the "self-governance authority" of the resident tribe, to the exclusion of foreign, non-Indian governments (i.e., individual states and exercise of limited federal jurisdiction). Intertribal support of each other has been one of the main reasons tribes continue to exist today. The tribes have always recognized the 'divide and conquer' strategy used by the administration, as well as the historical 'scorched earth policy' to starve Indians into submission and relocation upon the reservations. Tribes will surrender their rights to be self-determining, self-governing, and to become self-sufficient. The BIA is an important mediator between the tribes and the Congress and Administration.

THE FEARS OF THE AMERICAN INDIAN PEOPLE RESIDE IN THE PERCEIVED WAR ON TERRORISM AND INFIDELS.

The Republican White House is filled with administrative appointees that came right out of the energy industry. The energy industry considers Indians as a problem that stands in the way of progressive development. Indian ownership of vast fossil fuels or uranium resources is perceived as a hindrance under the theory of the old Trilateral Commission. The crisis created by the collapse of Enron proves that "energy" and "politics" combined can accomplish anything. In addition, the White House is becoming obviously anti-Indian and pro-states' rights in philosophy and policy. Indian Affairs seems to be placed on the backburner for later termination when the time is ripe. Now, with the War on Terrorism, it appears that the White House can do no wrong in the eyes of the polled public. This means, to Indian leadership, that Indian Country could easily be depicted, once again, as an enemy to be subdued, or at least forced to assimilate into mainstream America. Local governments always rejoiced when this happened because it expanded their jurisdiction and added to their tax base and stimulated local economy.

We are confronted with a "Republican War" since that party controls the Congress. Opposition to the war budget could become a stigma to politicians trying to hold out and protect the Indian Affairs budget. Indian Country does not want to be a victim of the War on Terrorism. Indian Affairs is already extremely under-funded. The finances to cover the costs are appropriated by both parties in Congress Assembled. Indian Country does not want to witness an 'appropriation rider' in which the Office of Special Trustee is authorized permanently and allowed to continue to raid the budgets for Indian Affairs (BIA). And, yet, an appropriation rider placed on the War on Terrorism appropriation request would eliminate any opportunity for the Indian tribes to testify in opposition. This 'rider' system should not be used to force Indian Country to accept an unfair settlement of the Cobell Case or to accept unfair 'trust reform' that favors the Office of Special Trustee and not Indian Country.

Thus, Indian Country fears that almost anything advocated to eliminate programs, services, functions, activities and the rights to self-governance secured to the Native Americans would be forgiven by the public if it is perceived as beneficial to the soldiers and resolution of the War on Terrorism. This was the lesson learned by the

returning WWII Indian Soldiers, as they came home only to witness rapid institutionalization of terminationist policies. This was the same policy pattern witnessed by our Indian Veterans that participated in the Korean Police Action. The same held true for our veterans returning from Vietnam. The past reward for Indian patriotism has been the lost of more lands, natural resources, and self-government under the Termination Policy implemented by the Presidential Administration and Congress. There limited congressional friends willing to defend Indian Country from budget cuts and the resulting elimination of Indian programs and services. It is difficult for a politician to argue against the national interests (the War on Terrorism). Everyone is expected to share in the budget cuts but Indian Country was never funded at equal levels of non-Indian Country.

The American Indian Nations live in constant fear of extermination, termination, genocide, relocation, forced assimilation, and severe "Christian" policies of "civilizing the savage." Why? Because this has been the inherited history since Columbus "discovered the New World." It was not a world that could justifiably be taken over under the doctrine of "Terra Nullis." The western continents were unquestionably occupied by an estimated 100-plus million non-Christian natives in North, Middle, and South America. The wars between the dominant religions of the world have resulted in the slaughter of hundreds of millions of innocents over the past two thousand years-especially during the Age of Reformation. The American Indians were and have continued to be victims of this religious mind-set that justifies the actions of the more powerful over the weaker. We have witnessed the formation of a nation that used "God" to justify their conquests, their takings, their slaughters, and their destruction of native societies. It was 'Christian-made law' that has justified our 'trust status' as 'unfit people.' In the modern global community, and within the nation itself, the average American can always argue that that was ancient history and not today. They disown the responsibility of their collective actions as a nation. They refuse to surrender the plunder taken. They claim that the power they hold justifies the takings from a weaker people. The power to ignore past injustices or the failure to acknowledge and deal with pass conflicts is manifest in the roots of the current conflict with terrorism. A Great Nation must deal with all factions and facets of their constituency. The same holds true with the United States' relationship with the American Indians.

The history of government-to-government relationships between the United States and the American Indians has been one of conquest by deception. We were deceived in the value of the treaty relationships with United States. When wars could no longer be justified then deceptive peace treaties were used to conquer the native Nations. When treaties would no longer be honored then legislation became the new form of conquest. When legislation could no longer protect the rights, resources, and governments of the native people then court decisions became the weapon of choice. Today, the Native American Nations are unsure if they can trust the President, the Congress, or the Courts. Concern for the rights of Indians has most often been quickly forgotten when the public demand for more native resources heightened in popularity.

We fear that if the American People, the electors, consolidate the power of all three branches of the national system (the Presidency, the Congress, and the Court) into

one party then we will be confronted with a bleak future. The potential for the rebirth and implementation of the "Final Solution to the Indian Problem" through termination policy actions is ever in the mind of Native America. We believe that as long as the powers of national governance are divided between the Republicans, Democrats, and the few independents that occasionally surface, we have a chance to survive for another decade, another generation. While Indian Country has been making a difference in some congressional elections, the collective number of Indian votes is too few to make major changes in the composition of either house. Indian economic might and strategic planning have made some differences- e.g., the removal of a senior, anti-Indian U.S. Senator (R-WA) echoed a significant message in the halls of the Senate.

However, currently, we are confronted with a "Holy War of Retaliation" against the infidel enemy that has attacked everything that reflects the American Dream. This war on terrorism is consolidating public support for the Presidency. We fear that much of the states' rights movement (which has always been anti-Indian) is finding favor with the President. We are, already, seeing it manifest in proposed termination of Indian programs and services directly. We fear that the War on Terrorism shall spill over into Indian Country and be used to depict the American Indian as un-American. We fear that it will be too easy for congressmen to ignore the voice of the American Indian. *We are not "Terrorists" we are "Patriots!"* We deserve to be heard. Our Indian people have served in every modern war confronting or threatening the United States. Our people are America's decorated war veterans. They fought for the values of life, liberty, and justice. They fought for constitutional government. They were "Code Talkers" and a part of America's line of defense.

Indian Country has a right to be worried about the state's rights movement that is permeating the current Administration. The state's rights argument goes all the way back to the time of the "Articles of Confederation." In that time, the states claimed sovereignty derived from their expulsion of the king, and not from the people. But, the 1787 U.S. Constitution was founded upon "Popular Sovereignty" and not sovereignty delegated from the states. Thus, U.S. sovereignty is founded upon the collective will of the American People. Representative government then is a manifestation of the people's collective beliefs. We cannot believe that the dominant majority of the U.S. Citizenry still believes there exists an "Indian problem." We cannot believe that they collectively want to exterminate or terminate our rights to exist. In fact, recent national public polling has shown a large majority of the public in support of the Native Indians. The only threat we pose, as Indian people, is that we still collectively own natural resources and territory that is jealously desired by corporate America and their plans to exploit all sources of energy fuels and resources. The others that see us as a threat are the non-Indians that buy land inside our exterior boundaries and then do not want to be subjected to our tribal governmental jurisdiction. However, the consolidation of the Administration with the energy industry poses a very serious threat to Indian land and natural resource ownership and protections. We do not believe the "Office of Special Trustee" would be immune to such undue influences, especially without a Presidential Policy protective of Indian rights and a favorable government-to-government policy.

Our lands and natural resources are covered by the "sacred trust of civilization" that has been assumed by the United States. Neither the Republican or the Democratic Parties should be individually or collectively empowered to simply secure enough congressional votes to eliminate our rights to these lands and resources as a matter of political prerogative or economic necessity. A part of the "sacred trust of civilization" must extend to the conscience and morality of the individual congressional members that exercise the power entrusted to them by their constituents. Additionally, this duty extends to the members of the Administration as much as the Courts. All have sworn allegiance by oath. All have sworn to honor and uphold the U.S. Constitution as the "Supreme law of the land." The same holds true of all public personalities that represent state governments and citizens. It is constitutionally required that each state have a "Republican form of government" with "Disclaimers of Jurisdiction" over Indian Affairs. Both the individual state and the national constitution have to be honored and respected.

We believe the "sacred trust of civilization" presumes that the United States would be governed by high moral standards and integrity that would be a model of governmental behavior amongst the Nation-States of the world community. The United States is the undisputed "Super Power" of the world. This power is reflected both in its policies & laws that govern internal relationships as much as external relationships. If World War II taught the global community anything then it is the fact that a nation cannot be left to simply do anything it wants to its "undesired" citizens (as in the Nazi treatment of the Jews). Presidential, Congressional, and Court treatment of the "American Indians" is a message to the world. The message is either "Do as I say" or "Do as I do." If the United States used its paternalistic "Indian Policy" as the model to govern over and rebuild or Iraq then the populations of that nation would arm themselves and form a militant liberation movement that would never surrender. The most appropriate policy is the one that advocates indigenous self-determination and self-governance based on popular sovereignty. This is a model that can be respected.

Now, more than ever, the message to the world is important. The President has declared in the recent past that there exists an "evil" group of nation/states that are a direct threat to the world community, and the interests of the United States. If these dozen of more nation/states that have been publicly identified perceive the United States as a nation that is unfair and untrustworthy in its international dealings, then there may be a reason for their formation of a united front and an international network. It is obvious that the "evil empire" concept that has been forged in the Administration is a spin off on the Reagan application of the concept to the Soviet Union. *Indian Country, during the process of demanding justice, does not want to be grouped or included in the "evil empire" group. The enemy came from outside the continental United States. It is not the American Indians.*

A NATION MUST JUDGE ITSELF IN LIGHT OF NATIONAL HONOR.

The membership of the U.S. Senate and House of Representatives are like most Americans- they have learned what they know about the history of the American Indians based on selective concepts of U.S. historical truth. The United States advocates that it is a "Christian" Nation. This is evermore manifest during the recent public statements of the

Presidential Administration after the horrid attack upon the World Trade Center, the Pentagon, and the crash of Flight #93 in Shanksville, on September 11th. We were being warned that this may be a Christian Nation at war with an Islamic Nation, and we regretted this statement as soon as it set within our memory. The whole world is bearing witness to the retaliation that the United States has waged upon "Terrorism" no matter where it may hide upon the globe. The war in Iraq, the means by which it is managed, and the results of victory, should create a mirror that should cause the United States to look inward. The civilians of Afghanistan and Iraq are not all Terrorists. They are a people that find faith in their own concepts of right, wrong, and religious persuasion. We, as an American People, as a Christian Nation, are confronted with a dilemma- how shall we pass judgment upon the defeated? This is not five hundred years ago- a time in which conquest in the name of the Christian God (Jesus the Christ) was the banner leading toward victory and enslavement of the natives or their genocidal demise. Nor was this a war waged for plundering the land, the people, and securing all their wealth in gold (oil), as happened to the Native Americans. The Iraq people are not the new conquerable "Indians" of today! They cannot simply be discarded or disposed of as the U.S. sees fit. The whole world is watching. The United Nations is watching. The globe has become the home of the international laws of nations. And, the world watches it play out on international news and within international diplomatic circles.

No matter what, the American People shall continue to bear the burden of rebuilding the defeated country after the war. This is a subject matter of great concern for all nations of the world. We hold ourselves out to be an enlightened, democratic, republic that is governed by the honorable will of the people. We believe ourselves to be guided by the Laws of Nations and it's more modern manifestations found within the United Nations Charters, and the multitude of multilateral treaties, conventions, and covenants governing the conduct of "states" toward other states and peoples, even in times of war. *It would be so easy for the American mind-set to believe that the people of Iraq are the modern savages, heathens, or infidels that must be subdued, conquered, and brought into the Christian light.* However, America can no longer clothe itself in the racism that stimulated the actions and policies of President Andrew Jackson, the tactics of General Custer, or the fears generated by the "red scare" created by Congressman McCarthy. Nor can the United States turn the middle-east over to Christian Denominations as was done by President U.S. Grant for the management of Indian Country. The whole world shall bear witness to whether or not the United States shall use this "War on Terrorism" to completely subdue and dominate the Peoples of Iraq or help rebuild the country into a form that will respect human freedoms and differences, and allow the "natives" to institute a government of their own choice. This is what Indian Country demands- respect, basic human rights, rights of self-determination and rights of self-governance. We retained inherent rights to our lands and natural resources. What we want and demand today is what the people of Afghanistan, Iran, and Iraq will want in the post-war era of rebuilding.

The duty to the conquered is politically, socially, legally, and morally a very difficult task and must be shared with the guidance of the United Nations. To rebuild the conquered governments, in forms that are acceptable internationally, does not mean these

nation/states must become a micro-version of the United States in form of governance (popular sovereignty based on a written constitution, with corporate underpinnings)- as was tried after the "Police Action" in South Korea. Any government that is installed must reflect all aspects of the indigenous society. There shall continue to be the dissatisfied that shall flock to the "militant" or "liberation" movements that shall manifest over time.

Could it even be conceived, in this time and age, that the dispossessed sovereignty of the most recent governments can be simply assumed to have been transferred to the conquerors- not guided under the current international law of nations. Many may believe this is a trivial question- and, yet, the United States has continued to maintain a position of "absolute power" over its own Indigenous Peoples. By legislative act it has assumed the sovereignty of Indian nations. It is not exercising "sovereign powers" the Indian Nations delegated to the United States. If the treatment of the American Indians is a model, then perhaps, the dispossessed governmental officials and their religious colleagues should all be placed within "Iraq Reservations" and a policy of U.S. paternalism and "trust duty" installed. This latter could then be used to justify U.S. plenary power over indigenous governance. This cannot and should not happen. It would be unacceptable under the international laws accepted by modern nation/states. And, yet, this type of control over Indian Affairs is considered acceptable in U.S. domestic standards and federal policy. Indians are still the "incompetent and non-competent" wards. *Ironically, the Indian Nations were never "conquered in war." The Indians were conquered by the Supreme Court decision in Tee-hit-ton. We were conquered by judicial decree and legal fiction generated by nine justices, not the armed forces of the United States. Thus, the international laws that apply are still treaty laws and not the laws of conquest.*

We ask, "What will govern the actions of the United States and any participating states sanctioned by the United Nations, in their plans to rebuild Iraq? It will be the international laws of Nations/States, and it will be the "sacred trust of civilization." In this light, the lesser nation (Iraq) will be guided by the more powerful nation (the U.S. and/or participating UN States). Successful rebuilding of Iraq shall be a message to the world that "terrorism is unacceptable" and civilized resolution of differences of belief in God is more profitable for the peoples impacted. Any actions that may take place, after the war, that treats the people of Iraq as less than human and undeserving of Christian mercy will only further perpetrate the belief that this really is a "religious war" between infidels and the followers of the true god. *America's treatment of the Indians, as a Christian Nation, seems to stimulate the idea that "Jesus the Christ" was a War God of Righteous Conquest, and no restitution is owed to an inferior, non-Christian people.*

The United States must take time to reflect upon their treatment of the American Indians, in light of Afghanistan and Iraq. As Felix Cohen said, "*Our treatment of the American Indian, even more than our treatment of other minorities, mark the rise and fall of our democratic faith.*" This same truism holds value in the estimate of the aftermath treatment of the Peoples of Afghanistan and Iraq. What "enlightened form of self-governance" shall be advocated to meet the needs of the sovereign peoples of Iraq as consolidated collectives? The modern constitutional governments of the world work because of their ability to incorporate religious tolerance and differences. Popular

sovereignty is founded upon the collective will of all the people in the country. It is founded upon concepts that all people, members of that collective, are equal participants in the delegation of authority and powers to the national government. How will the collective will of the Iraqian peoples be generated into new or modified forms of government that shall discourage "terrorism" and prevent the permanent institutionalization of religious fanatic liberation movements? The UN Bon Accords have helped structure the process for redesigning "constitutional" governance of the proposed "Islamic Republic of Afghanistan. We can imagine that the same process will follow in the war-aftermath period of Iraq. The proposed solutions must incorporate the inclusion of respect for Iraq sovereignty over their own peoples, territories, and forms of social/theological governance. A micro-American version of "religious tolerance" in governance will most likely not work or be completely incorporated in these constitutional governments. But, there are 160 member states of the UN that have collective constitutions that may be models for resolution. However, they can only be models for the acceptable solution must be derived from the belief system of the people to be governed or it shall only result in accusations of "imperialism" and "colonialism" and an attempt in "Christian domination." The Indian Nations demand no more than that. We seek to have our solutions incorporated in the resolutions of the "Trust" problem. We have our own belief systems and value systems that govern our treatment and use of our lands and natural resources, regardless of the artificial "trust relationship" controlled by the U.S. Department of Interior.

The Native American Indian Nations have begun to secure "self-governance" rights only in the 1990's. These are inherent rights that were never lawfully taken by conquest or surrendered by treaty. We are very experienced with the defeating and suffocating atmosphere created by negative federal Indian policies that viewed Indians as savages, uncivilized, or unworthy of self-determination and self-government. Any past wars that were fought by a very limited few individual Indian Nations were wars of self-defense or retaliation for great injustices perpetrated against them by U.S. citizens and states. Very few of the Indian Nations ever fought wars against the United States. And, yet, they experienced over two hundred years of federal policies of domination as if they were conquered people, conquered nations. Starvation and disease conquered our people. We have been treated as an inferior race that is not qualified to manage our own affairs. And, in reality, the reason there have been so many legal/economic problems in Indian Country is because federal policy has consistently favored the non-Indian over Indian interests. Federal transfers of jurisdiction to individual states resulted in the destruction of Indian self-governance. The guardian has been hesitant to protect the estate of the ward when their racial brothers needed access to the estates and reserved lands & natural resources.

IN CONCLUSION

*All lands, whether in trust or fee status, inside Indian Reservation boundaries should be placed in the complete jurisdiction of Indian Tribal governments, to the exclusion of non-Indian governments. No right of taxation attached to the land should extend beyond tribal governance and reservation boundaries. Tribal governments should have a "first right of refusal" to purchase all restricted, trust, or fee status lands located inside the reservation

boundaries- primarily using federal funding for the same (as a settlement in the Indian Land Consolidation Act problem).

*Congress should create an interstate/intertribal commission to draft an Indian Commerce Code, based on its Article I, Section 8, Clause 3- Indian Commerce Clause powers. This code would be negotiated with the intent to respect the conflicting sovereignties and encourage inter-jurisdictional economic cooperation. In the meanwhile,

> Amendments to the Indian Tribal Governmental Tax Status Act should be enacted to provide that (1) all tribal income tax assessments shall be written off as a foreign tax against the U.S. Income Taxes applied in Indian Country; (2) All income derived from natural resources owned by an Indian or Indian tribe, located within the exterior boundaries of the respective Indian Reservation, shall be exempt from federal and state taxation the same as the exemptions provided for the fishing resources under Section 7873 of the Internal Revenue Code.

*The United States is and should continue to be a model form of popular sovereignty based on written constitutional forms of Governance. And, its domestic treatment of the American Indian, as a matter of federal policy and law, should be a prime model for other nation/states of the global community in their treatment of similar native populations.

*The United States is undeniably a colonial government that has maintained government-to-government relationships with the indigenous (American Indian) nations of the continent. Indian people will never completely submerge themselves as U.S. nationals. They will continue to owe their allegiance to their own nations, governments, and people first and foremost. This concept should be recognized not only in the treaty relationships but considered when laws of commerce are enacted to govern the commercial relationships with the Indian Nations and people.

*The United States is bound by the "Sacred Trust of Civilization" and had assumed that responsibility based on the three hundred and seventy-plus treaties entered into with the Indian Nations and ratified by the U.S. Senate. And, that the Indian Nations paid for all "trust protections" in perpetuity at the costs of vast land and natural resources being ceded to the Nation. Therefore,

> The Indian Land Consolidation Act should be amended "to provide for the legal right of all tribal governments to have the first right of refusal to purchase reservation fee lands being sold on the common market. And, that all lands located within the exterior boundaries of any Indian Reservation, whether created by treaty, executive order, or federal statute, shall be subjected to the exclusive criminal and civil jurisdiction of the Indian Tribe, except as provided under the Major Crimes Act; nor shall any local or state taxation or zoning authority apply thereon."

*Since formation of the Union, the development of Federal-Indian Policies have constantly fluctuated, usually to the detriment of Indian land and natural resource ownership, and the demise of their inherent rights as human beings living in tribal collectives. The Congress and Presidential Administration should both work cooperatively to institute federal Indian policies that seek to permanently protect and expand Indian Self-governance. Thereby,

> The Congress should expand the Indian Self-governance laws to assure that all federal departments and agencies are obligated to assure funding and services are ear-marked for Indian Country, and shall be set-aside under Annual Funding Agreements with the Indian Nations participating in the Self-governance system.

*The way the United States treats and relates to the Native American Indian Nations should be a positive model for member states of the United Nations; especially when those nation/states have large minority groupings of colonialized indigenous populations that believe they have no recourse but to join liberation movements.

*The voiced concerns of the Indian Nations should always be given due regard and serious consideration through a permanent process of government-to-government consultation with the Indian Nations. Indian Affairs is a national power and should be managed with the integrity of the whole United States in mind. As it now stands, Indian Affairs is a minor division of the Department of Interior.

*Self-determination, Self-governance, and basic human rights protected by international conventions, covenants, and treaties should be a permanent feature of all federal governmental policies and laws made applicable to the domestic Indian Nations. The U.S. should police it's own actions to be the international role model for other nation-states.

*Indian Nations were great contributors to the type of constitutional government formalized by the U.S. Constitution. And, Native American Veterans have fought in every war and police action entered into by the United States, receiving most often the highest decorations for combat duty. Indian People have always supported the protection of life, liberty, and the pursuit of happiness. Indian People have earned a right to be recognized as honorable members of the Union and the People of the United States, without having to surrender their allegiance to their tribes first and foremost.

*The U.S. Constitution had structured the government-to-government relationship with the Indian Nations, within the confines and aspects of the "Separation of Powers" and "Checks and Balances" doctrines. And, without constitutional amendment, the scheme designed by the Founding Fathers at the Constitutional Convention is still binding today.

*Indian Affairs has always been a national power of the United States and new states that joined the Union on an equal footing were always required to "disclaim jurisdiction" over Indian Affairs as the price paid for entering the Union. Any laws or policies attempting to reverse these requirements, without due regard for the amendment processes, are contrary

to constitutional intent. Because of the intended separation and treaty-relationships, Indian Nations should not be required to go through state governments to secure services, benefits, and programs offered other Americans. Federal funding should go directly to the Indian Nations.

*The "Sacred Trust of Civilization" is a part of the established international law of nations and is applicable to the government-to-government relationship between the Indian Tribes and the United States. Such trust duty is a matter of the honor and integrity of the whole nation and not simply the BIA, Department of Interior. All federal departments and agencies are obligated to assist in implementing the "sacred trust of civilization" duty of the United States.

*The "Trust Protection" extended to the Indian People and their lands & natural resources was intended to prevent unscrupulous actions of non-Indians and assumption of jurisdiction by state governments over the same. All trust protection should be extended to the Indian people and their property indefinitely, as a permanent part of the National Indian "Treaty" Policy. All laws and policies that attempted to transfer any aspect of Indian Affairs to the state governments should be reversed, to assure compliance with national constitutional intent.

*The United States should not continue to authorize the Office of Special Trustee. The U.S. Congress and the Administration should seek to create and establish a permanent Department of Indian Affairs- what would then include a permanent office of trust responsibility that abides by and implements the "Sacred Trust of Civilization."

*The Department of Indian Affairs would incorporate all current functions of the BIA/DOI. The DIA would be expanded by congressional authorization to include those aspects of the other federal departments and agencies that deliver services to the American Population of which the Native Americans would be qualified to receive. The purpose and goals of DIA would be to deliver the same services to the Indian People but through the consolidated operations of the DIA. Each department or agency would have an "Indian Desk" inside the DIA, and a respective allocation of funds to implement their duties and responsibilities.

*Indian Country, their rights, and resources, should never again be subjected to anti-Indian policies- as are advocated by the states' rights movements, racist organizations, or self-seeking corporate interests. These policies have always alleged they are for the best interests of Indian Country but in reality sought to deprive tribal people of the ownership of their land, natural resources and jurisdiction over people entering Indian Country. Indian Nations should be recognized 'state governments' as argued by Chief Justice Marshall in the Cherokee Cases and the use of the constitutional 'compacting' powers (Article I, Section 10, Clause 3) shall be directly applied to all state/tribal agreements as an extension of the national control over Indian Affairs.

*The United States should declare that after five hundred years of alleged conquest, and two hundred years of constitutional government, it recognizes that Indian People are not

savages, heathens, atheists, agnostics, incompetent, non-competent, the enemy, or terrorists. Indian people and their traditional governments should be recognized as welcomed members of the family of governments that compose the United States, as structured by the U.S. Constitution.

*The U.S. Indian Policy of Self-determination (which incorporates Self-governance) is a matter of inherent right, and a legitimate exercise of Indian sovereignty. The U.S. should continuously and permanently recognize and expand the Indian entitlement to these rights as a matter of national policy and law. As a matter of international law, the treatment of American Indian Nations should be a model of how other member nation/states of the United Nations should treat their indigenous peoples or colonialized or marginalized populations. These policies should be an example of how government-to-government relationships between nation/states and indigenous peoples could be structured- so as to prevent or discourage such peoples from ever having to resort to liberation movements to secure such basic inherent rights.

*The development of a separate Office of Trust Special Trustee, without the support of Indian Country, will never be fully supported by the Indian Nations. The United States should guarantee to the Indian Nations that they will never again be subjected to genocide, extermination, termination, assimilation, enculturation, and domination by paternalism as a matter of Federal-Indian Policy. The United States, by act of Congress, should require direct consultation with the Indian Nations in all subject matters that impact tribal status and rights as a matter of national law. The creation of a Department of Indian Affairs would be sure indication that the American Indians will no longer be regulated as "incompetent wards" but entitled to their complete human and sovereign rights as a part of the national political/legal landscape of the United States.

The Unite States should replace the lost Individual Indian Money Accounts by new appropriations from the Treasury and not by diverting funds/appropriations already ear-marked for Indians Affairs. Indian Country should not be penalized for the gross mismanagement by the "Guardian."

TRUST RESPONSIBILITY VERSUS INDIAN SOVEREIGNTY

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The development of what became known as the 'trust responsibility' the United States owned to the individual Indians has a long history. Trust Responsibility is an issue behind the Cobell case. Federal 'trust responsibility' interprets to mean 'incompetency' of the Indians and a guardianship duty of the government. To understand this relationship, we have to know the history of 'Federal Indian Law.' We know that Indians are declared 'incompetent and non-competent' as a matter of federal law. This declaration is the foundation that justifies the type of trust responsibility imposed upon Indian Country. But, we have to go back five hundred years to begin to understand how long ago this concept began to emerge. Keep in mind the words of Felix Cohen (1953), when he completed his Hand Book of Federal Indian Law, *"Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."*

Keep in mind also, that since the late 1980's, the Indian Tribes and United States have worked diligently to create the opportunity for Indian Self-government to become a reality. Half of the federally recognized tribes are classified as participants in self-governance. The colonies revolted against the king (1776) in order to secure their right to local, self-government. The individual states, as members of the Union, demand protection of state rights to local, self-government. Counties and cities all across the United States seek to secure the rights of local self-government. Indian nations are demanding the same rights. However, federal Indian law and policy has evolved in a manner that denies the possibility that Indians could be competent enough to manage their own lands, resources, people, economy, and governmental administration.

"Our Indian law originated, and can still be most closely grasped, as a branch of international law, and... in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish theological jurists of the 16th and 17th centuries..." (See: "The Spanish Origin of Indian Rights in the Law of the United States," 31 Geo. L.J. 1 17, Felix Cohen (1942). "In Defense of the Indians," Bartolome' de Las Casas (1550) concluded: "The Indians are our brothers, and Christ has given his life for them. Why, then, do we persecute them with such inhuman savagery when they do not deserve such treatment? The past, because it cannot be undone, must be attributed to our weakness, provided that what has been taken unjustly is restored." Las Casas relied upon four principle sources to base his "Defense of the Indians" (translated by Stafford Poole) upon- the Bible, theologians, canon and Roman Civil law, and Aristotle. Las Casas refuted Juan Gines Sepulveda's attack upon the rights of the Indians in his "On the Just Causes of War"- in which Sepulveda created fictions to justify the "Conquistas" that killed, enslaved, and justified the inhumane treatment of the Indians. Sepulveda argued that the Indians relationship to the Spaniards was like women to men, **children to parents**, or apes to humans, and war against them was justified. Las Casas argued that

the Indians "should be restored to freedom, and further that all the Indians should be placed under the authority of the Kings of Spain in all matters and their natural rulers and lords should retain their power and jurisdiction."

The right of the King to govern over the relationships with the Indians would continue on into the centuries preceding the formation of the United States. Once the United States came into existence, it declared in the Northwest Ordinance of 1787, 1 Stat. 51, that "good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent." In place of the King, we would witness, the national government retaining control over relationships with the Indian nations, as provided within the U.S. Constitution itself (e.g., the treaty making power, the Indian commerce clause, treaties as supreme law of the land, etc.). The Founding Fathers recognized that the individual states, and their citizens, could not be trusted to treat the Indians with honor and fairness and would, most likely, cause war to erupt. In fact, the individual states would not be allowed to enter any treaties or compacts with the Indian nations by constitutional mandate. Jurisdiction over Indian Affairs had to remain a national power.

Competent Indian Nations entered government-to-government treaty relationships with the United States. Rather than waging unjust wars with the Indian Nations, the United States chose to enter peace treaties with the tribes. The Presidents (via their representatives) negotiated about seven hundred treaties with the Indian tribes and 370 of those treaties were ratified by the U.S. Senate. How, then, could the U.S. Supreme Court legitimately declare all the tribes that signed those Peace & Friendship Treaties were conquered- as it did in the case of Tee-hit-ton (348 U.s. 272 (1955))? This only means that the Indian Tribes conquered by a legal fiction and not by acts of war. How could Marshall legitimately declare that the relationship between the Indian Tribes and the United States "resembles that of a ward to his guardian" in Cherokee Nation (30 U.S. (5 Pet) 1 (1831)), if government-to-government relations were established by treaty and not war? Marshall was declaring a policy view of the court and not the diplomatic realities of the government-to-government relationship between the Indian Nations and the United States- not unless we take into consideration that this view was more in light of the 'Sacred Trust of Civilization' duty found in international law. In this case, the greater nation owes a duty to the lesser nation, and the lesser nation did not concede it right to sovereignty and self-government.

The 'Cherokee Case' decisions set the groundwork for the paternalistic "trust responsibility" doctrine of Indian Affairs. Rather than governing its (non-Indian) citizen's actions, while they were inside Indian Country for criminal or commercial purposes, the United States began to shift focus toward governing the actions and affairs of the Indians. The national government began to develop laws and policies that seemed to be founded upon a belief that the trust responsibility was dictated by constitutional mandate. To legally declare that the Indians were incompetent to manage their own affairs was a form of white, Christian, racial superiority that would have made Sepulveda proud. This belief in Indian inferiority was most recently evident in "Oliphant" (435 U.S. 191 (1978)) in

which the court limited tribal criminal jurisdiction over non-Indians that enter Indian Country as contrary to the Indians' "dependent status." The non-Indians would enter reservations established by treaty between sovereigns; but, now, due to the "trust doctrine" the Indian governments would be considered to incompetent (immature, non-competent) to even arrest white criminals that commit crimes within their exterior boundaries.

The U.S. Supreme Court has, at times, been considered the protector of the Indians. But, in reality, the Supreme Court has done much harm to Indian Country. It fails to recognize the constitutional foundations for governance of the relationship between the United States and the Indian tribes. Some of it's decisions justifies Sepulveda's argument that Indians are like children, or less. Even in this day and age where the U.S. Congress has enacted "Indian Self-determination" and "Indian Self-governance" laws the Supreme Court continues to issue opinions that advocate Indian inferiority. To the Supreme Court, both the Indian individuals and the tribal governments are incompetent, non-competent and do not have the full rights of self-governance and the exercise of jurisdiction over non-Indians that willingly enter Indian Country. At one time, the United States required non-Indians to have "Traders Licenses" to enter Indian Country. These licenses were recognition of two truths- one was that non-Indians were not suppose to be inside Indian Country, as required by treaty agreement; and, two- the non-Indians that did enter had to be licensed by the United States, and then it was only for purposes of trade. Under U.S. interpretation of its treaty responsibilities, the U.S. Marshalls would be responsible for the arrest of any non-Indians that entered Indian Country unlawfully or conducted unlicensed trade.

Indian Country was not open to non-Indians. The claims of access was secured to the United States only after it entered treaty relationships with the Indian tribes and it secured title to the treaty-ceded territories. After the treaty reservations were created, as a vehicle to govern over the former Indian territory, and encourage white settlement, the territorial governments were created. The settlers would move into the territory but be forbidden to trade with the Indians or enter the established reservations- at least not without a federal trader's license. Over time, the settlers would demand access to more Indian lands and natural resources. The congress politically responded and created the General Allotment Act- which resulted in 90,000,000 acres of treaty-protected lands being taken from Indian Country for white settlement. The GAA of 1887 was commonly referenced as the Dawes Act. This act would be amended (1910) to give the BIA/DOI jurisdiction over the estates of "incompetent" or "non-competent" Indians. This meant that the Indian individual was either to young or to old to manage their own estates and the BIA was empowered to lease or sell it for them. These sales of 'trust patented' land resulted in large numbers of non-Indians entering Indian Country for residential purposes. The BIA sold the lands as benefit to the 'ward.' Many more forced sales came when the "trust period" expired and the Indians could not afford to pay taxes to local white governments. Although contrary to treaty-agreement, the Supreme Court has never invalidated the unlawful takings or sales of Indian treaty protected lands under alleged legal authority of the Dawes Act.

The American form of government is founded upon the popular sovereignty of "WE THE PEOPLE OF THE UNITED STATES." The constitutional mandate of Article IV, Ssection 4, on the guarantee to every state a "Republican Form of Government" meant that the individual states' sovereignty was founded upon the people of the state as well, and not some type of pre-existing state sovereignty (as in the replacement of the King). If the government-to-government relationships between the Indian Tribes and the United States can constantly be changed, regardless of the constitutional governance of the relationship, to justify popular political actions of the day, then the constitution does not belong to the "People" but to the politicians and their corporate sponsors. We must, then, reflect upon the words of President Roosevelt (Radio Address March 9, 1937)- *"I want--- as all Americans want-- and independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written--- that will refuse to amend the Constitution by arbitrary exercise of judicial power--- amendment by judicial sayso."* It was well stated by Milner Ball (Constitution, Courts, Indian Tribes, American Bar Foundation Research Journal, Volume 1987 Winter, Number 1, p.3)..."*If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted with a fundamental contradiction between our political rhetoric and our political realities.*"

The 100th U.S. Congress declared in House Concurrent Resolution #331 (1988) and in Senate Concurrent Resolution #76 (1987) its purpose: "To acknowledge the contribution of the Iroquois (and Choctaw) Confederacy(ies) of Nations to the development of the U.S. Constitution and to reaffirm the continuing Government-to-government relationship between the Indian Tribes and the United States established in the Constitution." The U.S. Constitution is the foundation to the American form of popular sovereignty ("We the People of the United States"). The "Separation of Powers" and the "Checks and Balances" doctrines have operated in unison to assure that the National Government retained the power to govern relationships with the Indian Tribes, to the exclusion of the individual states assuming jurisdiction over Indian Affairs on their own.

The 109th Congress should recognize that the government-to-government relationship between the United States and the Indians Tribes is founded upon the United States Constitution. And, that a careful reading of the constitution, in light of its historical intent and legal relationships with the Indian Nations, clearly shows that the Constitution must be understood in its entirety. This Congress should recognize that the U.S. Constitution is to be held high above all other laws, whether created by statute or court decision. Also the Congress should recognize that until "We the People of the United States" amend our Constitution to the contrary then Indian Affairs must remain a subject matter of national governance, guided by the constitution. The U.S. Congress should recognize and acknowledge that the U.S. Constitution still provides for the following truths associated with the relationship with the Indian Nations and tribal Indian people. That these constitutional truths do not hold that Indians are incompetent and non-competent. These truths should be taken into consideration in any congressional debates as to why 'Trust Reform' should be changed in light of Indian Self-determination and Self-governance.

CONSTITUTIONAL FINDING #1: In 1787, under Article I, Section 2, Clause 3, the U.S. Constitution provided: "*Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free persons, including those bound to Service for a Term of Years and excluding Indians not taxed, three fifths of all other persons.*" This is still a legitimate part of the U.S. Constitution. The 14th Amendment to the U.S. Constitution was not worded to include tribal Indians within that class of persons admitted as citizens of the individual states or United States. Indians would not be represented by the national government. At this time, the House represented the people and the Senate represented the states and the people had not choice in senatorial choice. Now, the senators are elected by popular choice as well. The language of "excluding Indians not taxed" has not been amended, deleted, or altered from its original wording and intent. The Founding Fathers at the U.S. Constitutional Convention worded Article I, Section 2, Clause 3 to constitutionally classify tribal Indians as "Excluding Indians not taxed." This classification was used to differentiate tribal Indians from the possible citizen Indian. A citizen Indian was completely separated from their tribal ways & allegiances. They were accepted as members of the state citizenry, the same as a foreign person would be. The 14th Amendment did not remove this constitutional prohibition on making "tribal Indians" citizens of the individual states or the nation.

After the Civil War, during the Reconstruction Debates that lead to the enactment of the Civil Rights Act and the final version of the 14th Amendment, the 39th Congress used the words "Subject to the jurisdiction thereof" (Section 1) to clarify that tribal Indians were not included in the class of persons made national citizens. The Congress held that Indians were citizens of their own nations and owed their allegiance to it. The Congress found that if the United States wanted to enter relations with Indians then it used the treaty provision or the Indian Commerce Clause to do so. In addition, in order to guarantee that the individual states will not do that which the United States could not do, the 14th Amendment (Section 2) repeated the language "Excluding Indians not taxed" in that section addressing state citizenry. The Reconstruction Debates records clarify and the special report of the U.S. Senate confirms (1870) that stopping tribal Indians from becoming state or national citizens was the intent and purpose of the language contained in the 14th Amendment. The effect of the 14th Amendment application to tribal Indians was further clarified when the Senate Judiciary Committee filed a report pursuant to Senate Resolution of April 7 1870, concluding that the Indians did not attain citizenship by the Fourteenth Amendment (Senate Report No. 268, 41st Cong., 3d Sess. (1870)).

In Elk vs. Wilkins (112 U.S. 94 (1884)), the Supreme Court confirmed that tribal Indians could not be citizens of the United States or individual states- not without passing the same rigid proceedings applicable to foreign nationals applying for citizenship. The tribal Indians submitted himself before the Court. He had to prove that he had completely surrendered his tribal ways, gave up his tribal allegiance and membership, and sworn allegiance to the United States.

The 1924 Indian Citizenship Act was not a legitimate amendment of the language contained in the 14th Amendment or the original Article I, Section 2, Clause 3 language inserted by the Founding Fathers. The Indian Citizenship, as alleged, was instituted nationally in order to secure First Amendment Rights (Religious Freedom) to Native Americans, to eliminate the problems caused by the Religious Crimes Code (Dept. of Interior Circular #1665) that was being applied to the tribal Indians. However, fifty-four years later (1978) the Congress found that Native Americans were not secured their religious freedom under the First Amendment. Therefore, the Congress enacted the American Indian Religious Freedom Act (AIRFA). The Supreme Court invalidated this act in 1988, declaring it was not only bad law but bad policy. After several Supreme Court negative decisions impacting Indian Religious Freedom were released, the Congress (in the 1990's) enacted amendments to AIRFA to secure some religious freedoms to Native Americans.

CONSTITUTIONAL FINDING #2. In 1787, the United States Constitution, under Article I, Section 8, Clause 3 provided: "*To regulate Commerce* with foreign Nations, and among the several States, and *with the Indian Tribes*." This Article has not been amended to limit the power of the United States to regulate commerce with the Indians or to regulate the actions of citizens or states as regards trade relations with the Indians. This Article has not been amended to transfer this national, congressional power to the individual states. Nor has it been amended for other purposes. It is still the constitutional foundation for governing trade 'with' the Indian tribes, to govern interstate commerce (among the several states) and international commerce (with foreign nations) as well.

The national government was delegated constitutional power over trade and commerce with the Indian Nations. This national power is plenary as it pertains to commerce. It is not shared with the individual state. In the early formation years of the Union, it was common practice of the Congress and Presidency to regulate the trade/commerce with the Indian tribes by and through authority of the Trade and Intercourse Acts and established 'Trading Houses.' Non-Indians that sought to conduct trade with the Indians had to secure special permits from the federal government. All non-Indian persons were prohibited to enter Indian Country unless permitted to do so by federal authority and license. Most often, the unscrupulous acts of non-Indians was cause for war between the races. Federal interests were geared toward assuring this state of affairs did not exist. An example of a modern trade or commerce act is the National Indian Gaming legislation. Congress enacted this with complete constitutional legitimacy. This act sought to devise a compatible means to regulate the gaming industry's relationships with the Indian Nations. It was done to protect the interests of the citizens that enter the Indian reservations for gaming purposes. It provided a vehicle for the tribes, states, and nation to cooperate in regulating crime free gaming activity. This example shows that Congress can address "Indian Commerce" by exercising its legislative power to structure trade relationships that do not damage Indian Country.

CONSTITUTIONAL FINDING #3: In the U.S. Constitution, under Article II, Section 2, Clause 2, the President and Senate secured the "treaty making powers" as provided by: "*He shall have Power, by and with the Advise and Consent of the Senate to make*

Treaties, provided two thirds of the Senators present concur;...". This Article has not been amended from the original wording of the Founding Fathers. This power has been exercised to enter domestic treaties with the Indian Tribes as well as for foreign treaties. What is very obvious is that it is a national power and not one exercised by states. In fact, states are forbidden this power under Article I, Section 10.

The Presidents utilized this delegated power to negotiate several hundred treaties with the tribes. The Senate used it to ratify three hundred and seventy (domestic) of those treaties. These treaty "tribes" were defined as "Nations" in the Cherokee Cases decided by Chief Justice Marshall. It was a legitimate exercise of national power to enter treaties with Indian Nations. There are, of course, numerous other Indian treaties that were negotiated by the Presidency but were not ratified by the U.S. Senate. The California Indian Treaties were not ratified. This constitutional power has never been lawfully amended to prevent the President from negotiating or the Senate from ratifying Indian Treaties.

In 1871, the House of Representatives held the Appropriation bills hostage to its constitutional power to control the purse. The House had sought to influence and exercise some control over the treaty making powers of the President and Senate, in view of the numerous Indian Treaties. The House refused to appropriate funds for the national government until the President and Senate conceded to their demands; thus, in the 1871 Appropriations Bill there was enacted an Appropriation Rider that ended treaty-making with the Indians. While this Appropriation Rider is not a legitimate amendment of the U.S. Constitution, it is a declaration of congressional policy on Indian Treaties at the time. This "policy statement" could be overridden by a following congress and treaties with Indian tribes could be negotiated, re-negotiated, and ratified, as a matter of national constitutional power of the President and Senate.

The President, in consequence, circumvented this 'congressional policy' by utilizing "Executive Orders" to accomplish what he could no longer do by treaty. Indian Reservations were typically created by treaty. Now Indian Reservations were being created by Executive Orders (e.g., the establishment of the Colville Reservation in Washington State). Executive Orders were used to add land to established reservations as well (e.g., the addition of land to the Lummi Indian Reservation in Washington State, 1873). However, Executive Orders could not diminish a reservation. Only the Congress could enact laws that would diminish an established Indian reservation. The problem for Indian Country, In Sioux Tribe v. United States, 316 U.S. 317 (1942), is that the Court ruled that the U.S. can take the added land without compensation to the tribes. Since 1919, the Congress has declared that Indian reservations could only be created by statute and not by executive order. 43 U.S.C.A., Section 150; 25 U.S.C.A., Section 211.

Indian Country has, time and time again, encountered direct diplomatic conflicts with the Presidential and Senatorial reliance upon securing U.S. title to Indian Territory by use of the treaty making power. In the aftermath of a treaty, the tribes would witness the U.S. Congress use its general congressional powers to circumvent the treaties and reduce the territory reserved to the tribes. This is most typified by the enactment and implementation of the General Allotment Laws (1887, as amended in 1910 especially). The GAA

enactment was a form of "taking" Indian lands contrary to treaty commitment. Nationally, the result was a lost of 90 million treaty protected acres of Indian Reservation land. The land ended up in the ownership of non-Indian homesteaders. It was transferred to the jurisdiction of local white governments. Often the Congress even failed to pay for the lands taken. Indian Nations had to wait to be authorized by law to submit land claims before the politically created Indian Claims Commission. If the tribes did not like the outcome per their claims to the treaty lands taken, then they could file suit in the Court of Claims. This court would order payments for pennies on the dollar.

The lands removed by the Dawes Act was a form of congressional taking (in violation of treaty commitments). These removed lands were declared surplus to the Indian needs by special acts of congress. The lands were then opened up to white settlement. After this, the BIA would sell Indian land inside the boundaries of the adjusted, post-Dawes reservations. These actions of the BIA, more than any other, created the checker-board jurisdiction nightmare that exists inside Indian reservations today. While tribes were objecting to the application of the Dawes Act to the treaty-protected reservations, the BIA was rapidly selling lands owned by children and elders under the alleged authority of the 1910 amendment. To make matters worse, even after the Indian Reorganization Act (1934) stopped the impact of the Dawes Act, the BIA continued to use the 1910 Amendment authority to sell off lands of incompetent and non-competent Indians. Many of these sales were without the heirs' approval. And, under the law, all Indians were incompetent or non-competent unless the BIA issued them a Certificate of Competency. The Dawes act created the 'trust patented properties' and the associated Individual Indian Money Accounts.

CONSTITUTIONAL FINDING #4: In the U.S. Constitution, under Article III, Section 2, Clause 1, the national judiciary was delegated specific jurisdiction as follows: "*The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...*". It is apparent that any challenges to a ratified treaty would be within the legitimate jurisdiction of the federal judiciary/U.S. Supreme Court. State courts do not have jurisdiction over treaty questions. This power of review extended to all treaties made- Indian and foreign. This Article has not been amended from its original wording and intent.

The federal court was given a constitutional mandate to help guide it in its review of legitimate treaties. In Article VI, Clause 1 and Clause 2, is found the "Supreme Law of the Land" provision. Under Clause 1 "*All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.*" By 1787, the Confederated United States had entered into engagements with the Indian Tribes and the same was valid under the Union Constitution. In Clause 2 it was provided: "*This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;...*". In numerous cases the Supreme Court has upheld the validity of treaties made with the Indian tribes.

As pertains to state court attempts to secure jurisdiction over treaty questions, Clause 2 of Article VI was very specific, as it continued to declare *"and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."* Decisions made by the Supreme Court about a matter Indian Treaty became binding upon the state courts and state constitutional government.

For the Indian Tribes, this article is key to transference of treaty questions from state to federal venues. All to often, politically sensitive and active state courts would attempt to take jurisdiction over Indian treaty questions, and thereby supplement state political attempts to assume control over Indian rights and resources. Modern politicians, state and national, rarely take the time to understand the significance of the U.S. Constitutional support for recognizing the separate status of Indian tribes. Political responses to emotional demands by their constituents for access to more Indian resources has resulted in constant loses for the tribes, regardless of constitutional mandates and treaty commitments.

All to often the Courts, have concluded that that the Indian nations were "domestic, dependent Nations" and that their relationships with the United States was like the "ward to his guardian" (Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 (1831). This language is important in light of the words that surround them, as follows: "Though the Indians are acknowledged to have an unquestionable, and, heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. *Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.*"

The modern interpretation of this legal fiction has been a counter-stone to US claims to ultimate title to the Indian lands. How does this work. The US enters Indian Country. It negotiates treaties to secure legal title by peace and not war. It gets title to treaty ceded lands. In this process, the competent Indian tribes reserve aboriginal lands for their own people. After the treaty is ratified, the US tells the Indians their ownership is only temporary and only at the good will of the US. And, now that treaty relationships have been established, the Indians are incompetent wards. This wardship status becomes the foundation for the trust responsibility relationship. However, the treaty is with the Indian Nation. The trust should develop the whole Indian nation and all its people at the same rate of progress experienced by the people of the United States.

What is not quoted here is the fact that Chief Justice Marshall decided that the Cherokee had succeeded in demonstrating it was a "state" but not qualified as a "foreign state" for purposes of federal question jurisdiction. He found that as a state *the Cherokee were "a distinct political society separated from others, capable of managing its own affairs and*

governing itself" and that treaties between the tribe and the United States had so recognized this truth. (30 U.S. (5 Pet) at 16. In Worcester v. Georgia, 31 U.s. (6 Pet) 515 (1832) at 557, Marshall ruled that "The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force***". We must understand, as regards the U.S. asserting "title" to Indian lands that Marshall had ruled that the *"discovery doctrine" applied in regards to the U.S. relationships with foreign nations* that may compete for claims to Indian territory otherwise considered within the domain of the U.S. claims. The U.S. claimed a superior first right to "treaty" with the Indians and secure title to lands ceded thereby in the case of Johnson v. McIntosh (8 Wheat. 543 (1823)).

We must keep in mind the reasoning of Marshall in Worcester v. Georgia, when the state argued that the Indians surrendered control over their internal affairs. This was vigorously rejected by the Court, as follows:

> To construe the expression of "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; and influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands and the security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? Or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities and to make war. It would convert a treaty of peace, covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed." (at pp. 553-554)

Congress and Indian Country have witnessed the creation of legal fictions, that run contrary to the original findings of Chief Justice Marshall, as in the case of United States v. Wheeler, 435 U.S. 313 (1978). The original Marshall decision, in the Cherokee cases, found no incorporation while the modern Court finds "incorporation" and ironically cited Marshall as if he had ruled this fiction to be true. Indian self-governance suffered serious set backs in Wheeler. Continuing, the Rehnquist Court leveled another attack upon tribal

self-government in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011 (1978), in which tribal criminal jurisdiction over non-Indians was found to be "inconsistent with their status." The Justice Marshall of the 1978 term dissented in Oliphant and held that, "I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation." Non-Indians were, once, required to only enter Indian Country by federal license, and this had nothing to do with the "competency" of the Indian Tribes. It was to govern the activities of the non-Indians to assure their behavior did not damage the government to government relationship between the United States and the Indians. Indian tribes did not surrender "self-government." And, in the logic of Winans (1905), anything not surrendered by treaty with the United States was retained as an inherent right of the Indian Nations.

CONSTITUTIONAL FINDING #5: In the U.S. Constitution, in Article VI, Clause 3, we find: "*The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers both of the United States and of the several States, shall be bound by Oath and Affirmation, to support this Constitution;...*". This Clause has not been amended as to its original wording and intent.

We have found that the U.S. Constitution was not amended to make Indians Citizens of the Nation or the individual states. To do so is contrary to the specific language of the original constitution and the 14th Amendment. The Indian Commerce Clause was not amended to give the individual states jurisdiction over trade and commerce with the Indian tribes or within the exterior boundaries of established Indian reservations. And, still today, the President's and Senate's treaty making powers were never amended to prohibit the negotiations of and ratification of Indian Treaties. The state legislatures and executives, as well as their courts do not have jurisdiction over treaties made or commerce with Indians, nor over tribal Indians living under the protection their Indian Nations. Assertion of these powers or matters of jurisdiction by the individual states, within an established Indian reserve, is contrary to the constitutionally intended relationship and delegations of power. The Senators and Representatives are not empowered to give away to state interests the lawful powers delegated to the national government by the People of the United States. This Oath or Affirmation was key to assuring that those assuming public office, national or within the several states, would be held accountable for their actions in accordance to constitutional mandates and limitations of power. And, as we will find out, even state constitutional disclaimers were required for any new state to enter the Union, as regards disclaiming jurisdiction over Indian rights, resources, and reservations.

CONSTITUTIONAL FINDING #6: In the U.S. Constitution, under Article I, Section 3 Clause 1, we find: "*The Senate of the United States shall be composed of two Senators from each State,...*". This Article has been amended. It has been amended to assure that the selection of the Senators from the individual states was founded upon popular sovereignty (selection by the people). This was instituted in place of the elitist system of selection that was created by the 1787 language. The old system gave the State legislatures control of the selection of their U.S. Senators.

For Indian Country, we must note that the proper process for "State" Senators to influence the process of treaty-making or regulation of commerce with the Indian tribes was by their participation in the quorum, debates, and voting of the U.S. Senate. It is by and through the exercise of their debates and votes that they influenced the outcome of national Indian policy and laws governing relations with Indian Country, especially in ratification of Indian treaties. Even though it may have been in the interest of their state constituency, Senators were not relieved of their lawful Oath or Affirmation to uphold the U.S. Constitution. For example, treaties made are one of the types of "supreme law of the Land" they had to honor. The acts of congress and the Constitution are the other two types of supreme law that bound them. The Courts have held the Congress' power is "plenary" (in some areas as delegated). Still, it reasoned that treaties may be politically circumvented by congressional enactments or the Congress may simply fail or refuse to appropriate funds to implement treaty commitments. Still, these circumventions do not relieve the Senators of the constitutional duty to honor the treaties and make sure the treaty process (and its counter part "congressional abrogation") is not used to simply disguise the unlawful taking of Indian lands and natural resources.

The Congress and Courts have shielded themselves under the political question doctrine and the plenary power rulings. These two politically expedient vehicles have been used to deny that circumvention of treaty commitments were simply means to unlawfully reap the benefits of the treaties (taking title to the lands and natural resources from the Indian Nations) without fair compensation to the Indians. It became even more an injustice when the national government failed to deliver the affiliated treaty commitments or protections promised to the Indians. We must not forget Justice Black, "*Great Nations, like great men, keep their word.*" Without a lawful declaration of war, without the legitimate conquest in light of that war, the United States cannot simply assert ownership and title to occupied Indian lands. The Discovery Doctrine and the M'Intosh Decision (1823) opened the way for the United States to assert a claimed superior right to secure lawful title to the lands- if the Indians were willing to cede the lands by lawful treaty. Indian Country was not conquered, as alleged in by the Supreme Court in the termination era decision of the Tee-hit-ton case (348 U.S. 272 (1955)). And, the President's & Senate's treaty making powers was not constitutionally amended or limited. Thus, for Senators to condone or participate in unjust takings of Indian lands and natural resources, otherwise protected by ratified treaties and the U.S. Constitution, is unacceptable and contrary to their Oath. And, the President, as the Chief Executive, should assure that all federal departments and agencies, as parts of the national government, honor the treaty commitments.

CONSTITUTIONAL FINDING #7: In the U.S. Constitution, under Article I, Section 10, Clause 1, the Founding Fathers provided: "*No State shall enter into any Treaty, Alliance, or Confederation;...*". This Article has not been amended from its original wording and intent.

It is apparent to the whole U.S. public and government that the formation of a "Confederation" was declared unconstitutional. The 1787 (Union) Constitution replaced that of the Articles of Confederation (states) Constitution. This, of course, was a

monumental accomplishment of the Founding Fathers. The Nation shifted from "State Sovereignty" to "Popular Sovereignty" as the foundation to the delegated powers of national governance. This is very clear in a reading of the Preamble: "We the People of the United States,….., do ordain and establish this Constitution of the United States of America." Thus, when the Southern States split away from the Union and established the Confederacy then the Union legitimately declared war and conquered those states (Civil War). The Country was very much aware, at the time of its founding, that there were foreign governments very much interested in entering "Alliances" that would or could undermine the territorial claims of the Union. This is very evident during the wars with Great Britain (e.g., War of 1812). However, what is very little understood is the wording of "Treaty" or "Alliance" between the individual States and its significance to relationships with the Indian Tribes.

The States rights advocates, at the 1787 Constitutional Convention, wanted to secure the right to enter treaties or alliances with the Indian Tribes. The Convention responded that these are powers reserved to and delegated to the National government. The same interests sought to secure this power by inserting the words "without the Consent of the Congress" into the Clause. In other words, the treaty or alliance would be illegal if the Congress did not consent. However, the Founding Fathers wanted to make it very clear that this could not happen even with the Consent of Congress (See: David Hutchinson, Foundations of the Constitution). So, Clause 1 does not have this wording like Clause 2 and Clause 3 has incorporated directly. This was clearly intended to be an absolute negative on state attempts to do so- i.e., enter treaties, alliances, or compacts with the Indian tribes. This was the intended restriction of the Founding Fathers.

Today we find that Indian tribes and states are entering into 'Compacts' with the blessings of the national congress. The most explicit example is authorized per the National Indian Gaming Regulatory Act. Therein, the Congress had given its "Consent" to this compacting. But the word "Compact" has the same meaning as the words "Treaty or Alliance" in light of their intended objective- governance over Indian Affairs. Now, we witness some tribes entering compacts to govern police protection and jurisdiction over Indians and non-Indians residing inside the boundaries of Indian Country. And, we witness tribes and states entering compacts dealing with the issue of taxation of commerce (tobacco, alcohol, fuel products, and other articles of general commerce, etc.). These types of agreements fall within the type of activity covered by the absolute negative intended by this constitutional clause. If Congress cannot "Consent" then it could not delegate this power to the individual states. The control of commerce with the Indian tribes was to be governed by treaty or act of congress. This power was and is completely within the exclusive, plenary powers of the national congress.

We find that the Founding Fathers used the word "Compact" in Clause 3 to authorize interstate compacts by the words: "No State shall, without the Consent of Congress,…., enter into any Agreement or Compact with another State,…". Now, here it is clear that no state shall enter said compacts- unless it secures the consent of congress. It is worded in such a fashion as to say "no" but that this negative can be overcome by the state or states petitioning the Congress for permission for the compact. In the situation of Tribal

and State Gaming Compacts then the individual tribes are treated the same as "states" for the purpose of compacting. In this situation, then, the compact relationship is not treated as a "treaty" or "alliance" relationship. Tribes, by act of congress, are inserted into the language that authorizes 'compacts' between states. This is a governmental paradigm shift. At one time, the tribes were considered as separate from the United States and especially outside the jurisdiction of the individual states. In Cherokee v. Georgia (1831), Chief Justice Marshall concluded that the Cherokee Nation was not a foreign nation but did classify as a "state." In Worcester v. Georgia (1832), the Court found that the Cherokee had exclusive jurisdiction over their territory- being extraterritorial to the State. Thus, if states are forbidden to enter treaties or alliance (per compacts) with Indian tribes under Clause 1, then the authority to authorize these compacts must belong to Clause 3 powers- since the Supreme Court has classified tribes as states but not foreign states.

CONSTITUTIONAL FINDING #8: The U.S. Constitution successfully was ratified by all the original thirteen states due to the Great Compromise of 1787 of the large and small states. Those states that originated as "colonies" that had charter grants from the King to all lands to the "South Seas" (Pacific Ocean) agreed to surrender their large territory land claims provided new states shall be created from the lands and admitted into the Union. Article IV was, therefore, added to accomplish this compromise. It has not been amended since the original wording was ratified. Article IV, Section 3 and Section 4 are tied to the new states qualifications for membership in the Union. Article IV, Section 3, Clause 1 provides: *"New States may be admitted by the Congress into this Union;..."*. Clause 2 provides: *"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;..."*. Article IV, Section 4 provides: "*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall...*".

Once the 1787 Constitution was completed, the National government enacted the Northwest Ordinance. This Ordinance proclaimed the government's commitment to fair & honorable dealing in the relationships established with the Indian tribes. This was accomplished by the implementation of treaty negotiations and ratification. In addition, it set the process for the lands ceded by the tribes to the United States to qualify as part of the national Territory- which would later result in one or more states being created from the lands. Under Article IV, Section 3, Clause 1 the "New State" could be admitted into the Union. Under Article IV, Section 3, Clause 2 the Union could set the process, rules, and regulations for governing the transition from territory to statehood. However, in order to qualify for statehood the form of state government had to be "Republican" (Article IV, Section 4) which meant based on constitutional popular sovereignty. In this process, the N.W. Ordinance of 1787 governed. It required recognition that the National Government controlled Indian Affairs and relationships (e.g., by treaty or commerce laws). So, for the New States that wanted to enter the Union they had to do so on an "equal footing" with the original thirteen states. This required the inclusion of a state constitutional "Disclaimer of Jurisdiction" over Indians and their lands and resources.

Herein, we find a direct challenge to the stability of the "guarantee of a Republican Form of Government" language in Article IV, Section 4. New States were admitted, with the

provision that they disclaim jurisdiction in their organic documents (territory legislation tied to their constitutional activity) or (as was the later cases) included directly in their state constitutions. Washington State included the constitutional disclaimer under Article XXVI, and has not amended this constitutional article since the state constitution was ratified in 1889. In 1953, the U.S. Congress gave its consent to the assumption of state jurisdiction inside reservation boundaries by the words *"to the people of any State to amend, where necessary, their State constitution or existing statutes as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act."* (P.L. 280, Section 6, 67 Stat. 588, 590 (1953)). Washington State did not use a territorial legislative disclaimer. Washington's disclaimer was directly incorporated into the state constitution. Thus, the language in Public Law 280 that is directly applicable is "the people of any State to amend, where necessary, their State constitution....".

The several Washington Indian Tribes legally argued that the state failed to amend its constitution and therefore unconstitutionally exercised jurisdiction inside their exterior boundaries. Many lawyers reference the court's ruling on this question in Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) as res judicata. But, as a matter of federal law, the U.S. Supreme Court chose not to force the State of Washington to abide by constitutional construction per the amendment process required by the federal legislation. Instead, the court ruled that state constitutional amendment was a subject of state law; even thought the federal legislation required the amendment before the state to legally exercise the jurisdiction. Other states that tried to amend constitutional disclaimers by legislative enactment were directly challenged, in state court, by the "people of the State" and lost. The unanswered federal question here is whether or not the national government, per Article IV, Section 4, has an interest in assuring the "guarantee of a Republican Form of Government" requirement is enforced. The power to amend a state constitution is a power reserved to the people of the state, under the U.S. Constitutional guarantees. It was very important to the infant United States to assure that "popular sovereignty" prevailed over the "state sovereignty" that existed under the Articles of Confederation. This is why the "Republican" guarantee was included in the U.S. Constitution. The national congress, and the Supreme Court, should not allow even one state to lose sight of this important constitutional vision.

The State of Washington has to institute a lawful amendment to the state constitution to be in compliance with the respective national public law, in order to allegedly exercise lawful jurisdiction inside tribal reservation boundaries. The state's failure to amend the constitution denies the "state citizens" their lawful power and exercise of the reserved amendment power & right. As it is now, the only lawful relationship of the Indian tribes, inside this state, with other governments is the treaty established government-to-government relationship with the United States. The state citizens ignore this breach of constitutional duty and their failure to take corrective action undermines the value of popular sovereignty in the continental United States. Just because the state has historically violated its state constitution for more than forty-five years does not make it legal.

CONSTITUTIONAL FINDING #9: The Indian Self-determination and Education Assistance Act of 1975 (25 U.S.C., Section 450-451n,, 455-458e) was a declaration of congressional policy that "*recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination*" and the Congress "*declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people.*" In furtherance of this policy, the Congress enacted P.L. 103-413 (The Tribal Self-Governance Act in 1994) and P.L. 106-260 (The Tribal Self-Governance Amendments of 2000). These enactments established the opportunity for Tribes to exercise their inherent self-governing powers through greater control over tribal affairs and enhanced tribal governmental responsibilities. The Congress has continued to support the government-to-government relationship with the Indians tribes, as founded upon the constitution, and to encourage tribal self-determination and self-governance. In numerous court citations, it is well recognized that treaties are to be interpreted as the Indians would have understood them, and not the way of learned lawyers. The Indians would not have understood that the treaties were being used to undermined and deny them of their inherent rights to self-government.

The United States has recognized that the three hundred and seventy-plus treaties negotiated with Indian Tribes, as ratified by the U.S. Senate. These treaties have forced the United States to assume the responsibility and duties associated with the "Sacred Trust of Civilization." This duty is owed to the Indian Nations. The United States benefited from the treaty cessions of nearly four million of square miles of territory and natural resources. This was the "consideration" paid to assure the US. The tribes trust the national government will honor their treaty commitments. The GAA act took 90 million acres of land from the Indian Tribes. Indian Country did not willfully surrender that land. This act impoverished the Indian people and their governments. This act created the individual Indian estates. This act authorized the BIA to manage the sales, leases, or rents of Indian Trust lands. These was intended to be the legislative vehicle that would destroy tribal government and breakup the tribal community. The Indian Reorganization Act was enacted to end this anti-tribal government policy. Regardless of the IRA, the GAA created the individual trust patented lands and the respective Individual Indian Money Accounts. Its the problems tied to this 'trust question' that is at issue before the Congress and the Court today. The "Sacred Trust of Civilization" and the "individual Indian Trusts" are two separate duties.

The whole United States owes the duties and responsibilities associated with the "Sacred Trust of Civilization" to the Indian Tribes. It is under this 'sacred trust' that Indian Self-determination and Self-government should be recognized and honored. No federal department or agency is excluded from this duty. The treaties are between the U.S. and the Tribes and not between the tribes and the BIA. This "sacred trust duty" requires the U.S. to work toward elevating Indian self-government to be at par with the United States. Delivering and assuring the Indian Tribes have the capacity and means to deliver essential services and perform the essential governmental functions to and for their Indian people is a part of the U.S. responsibility, as result of their treaty commitments and massive land transfers. The duty to protect the individual trust estates and accounts is a

"trust responsibility" the U.S. assumed under the General Allotment Act, as amended. The BIA mismanagement of the "inherited estates" has resulted in the tribes and their membership being deprived of the benefit of inherited lands- due to the massive fractionated land titles. The U.S. enactment of the Indian Land Consolidation Act only transferred the fractionated title problem to the tribal governments. Without compensation or financial assistance, the congressional solution only further victimized the Indian "wards" and "tribes."

The Cobell case is not without precedent. When Indian tribes have asserted their rights and sued the United States for damages done to them and their estates, and won then they end up being more damaged. It has been the pattern of the United States to not appropriate new money to pay restitution to the tribes or Indian people after they win their suit. Damages come out of the claims fund. These funds then have to be paid back by the department or agency causing the settlement. The replacement funds, after an Indian settlement is won, is then ultimately taken from budgets that are allocated to provide services to Indian people in general. Thus, the "victim" ends up compensating himself for damages done by the "Guardian." This is not in compliance with the N.W. Ordinance that mandated treating the Indians with honor and fairness. It still ends up being another form of "unjust taking."

In the atmosphere and policy of Indian Self-determination and Self-governance, it should be the policy of the U.S. Congress to work toward not further victimizing Indian Country and Indian people. The Congress should commit to treating the Indian Nations with respect, honor, and fairness. The Congress should commit to the "Sacred Trust of Civilization" as a duty imposed by conventions of international and national law. And, The Congress should recognize and understand the difference between the trust responsibility owed to the Indian Nations versus that owed to the individual Indians due to the General Allotment Laws. The Congress should commit to providing fair and honorable compensation and restitution to the Indian people that lost their IIMA due to BIA mismanagement. Indian Country should not have to pay the damages. Congress should appropriate new funds from the U.S. Treasury to cover any settlement of Cobell. The funds should not come Self-determination and Self-government funds.

A MATTER OF CONGRESSIONAL POLICY: It should be the policy of the United States Congress that the Indian Nations continue to deserve to be treated in honor and fairness. That the United States, as required by the Constitution, recognizes that it has inherited the responsibility to honor the treaty relationships with the Indian Tribes. And, that the national congress realizes that it still has the "power to regulate commerce… with the Indian tribes" and shall exercise this power to eliminate some of the socio-economic injustices that have been forced upon Indian Country. In furtherance of congressional policy, this Congress declares that it shall work toward a definition of the 'Trust Responsibility' that brings honor to the United States.

The Congress is aware of the fact that Indian Country has the highest infant mortality, highest teenage suicide rates, shortest life expectancy, highest levels of poverty, lowest educational & vocational attainment levels, highest levels of under/unemployment,

poorest housing, poorest road systems and other infrastructure problems in the nation, in addition to their isolation. Added to this problem, the reservation lands are not available for housing or economic development because of the fractionated heirship problems created by BIA mismanagement. And, funds generated from the lands have been placed into BIA managed IIMA systems that have been mismanaged and are the subject of the Cobell case. In addition, the Courts, Congress, and Presidency have all failed to clarify the jurisdictional nightmare Indian Country has to deal with as regards criminal and civil jurisdiction over non-Indians. Violence against Indian Women by non-Indians entering the reservations is at plague level and tribal enforcement is helpless to take action. Drug dealers multiple because the federal government fails to prosecute felony crimes committed on Indian reservations. And, the drug dealers prey upon the young juveniles in the tribal communities by use of gang activity. Socio-economic conditions on Indian Reservations are so bad that a majority of the tribal populations are experiencing problems associated with self-medication (and the resulting addictions). Added to the top of all this, the state and local white governments are allowed by federal law to extract taxes from Indian economies first and foremost, as if they had a 'racially superior' right to do so. Then, when tribes try to exercise their tax powers, the tax rates are to high to allow business to succeed economically.

The Lummi Indian Nation believes that the 'Trust Responsibility' duty of the United States should be redefined to allow greater opportunities for Indian Tribes to become self-determining and self-governing. The concept of 'Indian racial inferiority' is no longer acceptable as the foundation to Federal Indian Law. The Congress should begin with its declaration (Senate Concurrent Resolution #76 and House Concurrent Resolution #331) that the relationship with the Indian tribes is government-to-government as based on the U.S. Constitution. The Lummi Nation recommends the following actions be taken to help Indian Country overcome the damaged done to it by the way the United States implemented its 'Trust Responsibility." The Congress should guarantee to exercise its constitutional powers over Indian Affairs to assure:

1. Passage of a 'Native American Sovereignty Protection Act' that shall protect tribal sovereignty by declaring that states do not have jurisdiction inside Indian Country- unless authorized by the Congress in ratification of a State/Tribe Compact; and,
2. Passage of additional amendments to the Self-determination and Self-governance Acts to require all federal agencies and departments to enter compacts with the Self-governance Indian Tribes to assure their tribal populations receive access to the respective benefits, services, and rights; and,
3. Passage of an "National Indian Commerce Act" that seek to improve the economic opportunities of Indian Country to participate in the local, regional, national, and international fields of commerce- by authorizing Indian tribes to use economic empowerment zones, Foreign Trade Zones, easier access to SBA 8A Contracting, elimination of federal labor standards that impact the financial ability to Indian Nations to create jobs and develop commercial projects, regulatory flexibility, and tax incentives to participating corporations that invest in Indian Country; and,
4. That Indian governments will be able to self-govern over and influence the type and quality of education their children and people shall receive, and that the Congress

shall appropriate funds for Indian Education at the same levels it appropriations for the non-Indian populations; and,

5. That Indian governments will be able to self-govern over and influence the type of health care their children and people shall receive and that the Congress will appropriate funds for Indian Health Care at the same levels it appropriates for the non-Indian populations; and,
6. That Indian governments will be able to self-govern over and influence the type of mental health care their children and people shall receive, and the Congress will appropriate funds for Indian mental health at the same levels it appropriates for the non-Indian populations. And, that tribes shall be directly recognized to govern over and manage billing programs that shall directly bill Medicare and Medicaid for all cases they qualify to manage over; and,
7. That the individual states and their governments shall abide by their state Constitutional Disclaimers of Jurisdiction if they had not amended their state constitutions, and that this may require streamlining and expediting PL 280 Retrocession authorization if requested by the respective tribes; and,
8. That the Indian Land Consolidation Act shall be amended to assure that tribal governments exclusive taxation and regulatory authority over any and all lands and commerce located inside the exterior boundaries of the established Indian reservation, regardless if the land is in fee or trust status; and,
9. That the Internal Revenue Code (Section 7873) shall be amended to assure that all lands and natural resources owned by an Indian or Indian tribe, located inside an established Indian reservation, are exempt from all state and federal taxes- if those lands are set aside by treaty, executive order, or federal statute. That is would simply be a fair & equitable application of Section 7873 IRC; and,
10. That the Indian Tribal Governmental Tax Status Act/Internal Revenue Code shall be amended to assure that that tribal income taxes will be treated the same as a foreign tax and written against the federal income taxes, in order to help tribal governments meet their needs to generate revenue for self-governance functions; and,
11. That the Congress shall appropriate the necessary funds to support of tribal law enforcement and court systems, as a matter of treaty commitment and agreement, especially in those cases of federal law violations that the US fails to prosecute on a regular basis. That funding shall be included to help finance implementation of the Violence Against Women Act, and that Indian Country shall be included in reauthorization of said enactment; and,
12. That as a part of the Native American Sovereignty Protection bill the Congress shall require all federal departments and agencies to draft their Federal Indian Policies to recognize and honor the United States' sacred trust of civilization duty owed to the Indian People. That said policy statements shall reflect the congressional declarations found in Senate Concurrent Resolution #76 and House Concurrent Resolution #331. And, the Congress shall, by and through the Judiciary Committees, conduct Hearings to Determine the Extent and Limits of the Government-to-government Relationships between the Indian Tribes and the United States as founded upon the Constitution; and,
13. That tribal governments shall be authorized to gather their own scientifically valid tribal population statistics that can replace the U.S. Census results used for federal

funding formulas, and that the Congress shall appropriate funds to help conduct the information gathering on an annual basis; and,

14. That the Congress shall appropriate the necessary funds to allow the tribes to implement the benefits of the Indian Land Consolidation Act, as amended. And, that this act shall be amended to assure that all lands inside the exterior boundaries of and Indian reservation are subject to the tribal governments jurisdiction only, unless otherwise provided by federal law. And that the intention is to secure the reservations as the permanent homelands for the Indian people; and,
15. That the congress shall amend the Internal Revenue Code to assure that all income generated by an Indian or Indian Tribe from Indian Arts and Crafts shall be exempt from any federal and state taxation- if the same is produced and marketed from inside Indian Country; and,
16. That Congress shall amend the Alternative Energy bills and laws to authorize Indian Country to conduct research and development of alternative energy systems and economic ventures. And, that the Indian Tribes, by amendment to the Indian Tribal Governmental Tax Status Act, shall be authorized to develop these alternative energy systems through tax exempt economic bonding. And, that there shall be instituted flexibility in the application of federal laws, rules, and regulations that apply to the systems development, construction, and management; and,
17. That the Congress shall amend the Indian Tribal Governmental Tax Status Act to allow Indian tribes to participate in economic bonding capacity provided the business bonded does not use the bonding to finance ventures that are primarily dependent upon the sale of fossil fuels, tobacco products, or gaming; and,
18. That the Congress shall expand the benefits of the National Indian Gaming Regulatory Act to be more favorable to those Indian Tribes that are rurally isolated. And, that this may require a ruling of 'hardship' that shall authorize land to be taken into trust status that is off reservation, provided local and state governments enter a compact with the tribe(s) to authorize the same, and the Department of Interior shall not deny any such application that is agreed to via compact; and,
19. That the Congress shall support and improve the ability of tribal governments to exercise assumption of jurisdiction and care over their Indian Children per the Indian Child Welfare Act by providing the necessary appropriations to implement the act; and,
20. That the Congress shall assure fair and equitable distribution of services and benefits from the Veterans Administration to Native American Veterans, as a result of direct consultation with the Indian tribes and their respective Veterans representatives; and,
21. That the Congress recognizes that the Indian Nations have no future without water to service their populations and future needs, and commitments to appropriating annual funds to finance the legal defense of Indian Water rights. And, the Congress shall amend the laws to assure that no legal case can adjudicate the water rights of an Indian Nation if it is not a party to the case; and,
22. That the Congress recognizes that only by treating the Indian Tribes as 'states' can the government-to-government compacts be entered lawfully under the U.S. Constitution, as in the case of gaming or other jurisdictional agreements. And, that a special act of congress shall declare, as part of the sovereignty protection bill, that Indian tribes are entitled to direct funding rather than state-pass through funding in

those cases in which the tribes would otherwise be subjected to a pass-through requirement; and,

23. That the Congress recognizes that repatriation of "sacred objects" that have been removed from Indian country by non-Indian governmental and church officials is a right of Indian Country and a law shall be drafted to secure the same; and,
24. That the Congress recognizes that additional amendments to the Native American Graves Protection and Repatriation Act need to be enacted to protect ancestral Indian cemeteries located outside of Indian Country but located upon lands that are being developed or impacted by projects funded with federal grants and contracts; and,
25. That the Congress recognizes that there is a need for an Native American Sacred Lands Bill to be enacted to protect sacred sites of identified by Indian tribes but located on federal lands; and,
26. That the Congress shall enact authorization language that shall qualify and quantify the right of tribes to fully receive Contract Support for all Self-determination and Self-governance compacts and AFAs.
27. That the Congress shall review and hold hearings to develop a domestic version of the Draft Declaration of Indigenous Peoples pending review in the United Nations system, as so much may be incorporated into any act that seeks to provide recognition and protection of Native American Indian Sovereignty; and,
28. That the Congress shall provide greater opportunities for the Indian Nations to participate, as full fledged governments, in the Homeland Security Act activities. And, that a part of the hearing process shall address Native American rights to cross back and forth over the US/Canada and US/Mexico Borders.

March 9, 2005

TESTIMONY OF THE CALIFORNIA TRIBAL TRUST REFORM CONSORTIUM

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

March 9, 2005, OVERSIGHT HEARING ON INDIAN TRUST REFORM

Submitted by The Hoopa Valley Indian Tribe

On behalf of the California Tribal Trust Reform Consortium (Consortium), we appreciate the opportunity to submit written testimony for the March 9, 2005 hearing record concerning the trust resource management. We also appreciate your support for Sections 139 and 131 of the FY 2004 and 2005, provisions of the Appropriations Bills that allow our Consortium and others to continue their progressive measures toward achieving meaningful long-term trust resource improvements outside of the Department of the Interior's Office of Special Trustee (OST) reorganization plans.

The Consortium is comprised of the Big Lagoon, Cabazon, Guidiville Rancheria, Hoopa, Karuk, Redding Rancheria and Yurok Tribes. Our member Tribes represent a diverse group of tribes with varying experiences and resources. Some have faced termination of Federal recognition followed later by Congressional and court-ordered restoration of recognition. Many had significant reductions -- and in some cases, the elimination -- of land and resource bases, the elimination and partial restoration of tribal governmental functions and revenue sources, as well as a host of other difficulties.

Today, our Tribe individually and the Consortium continue to work with our federal trustees to develop what has been described as one of the most aggressive and positive examples of Federal/Tribal trust improvement programs in the Nation. Working with the Bureau of Indian Affairs Pacific Regional Office (PRO), our Tribes have developed trust procedures and agreements that allow the fulfillment of our respective trust obligations and the integration of our agreements to create effective partnerships to solve historic trust problems. It is this working relationship that is preserved and protected under Section 131 of the 2005 Appropriations Bill.

The Consortium was established in 1997 to work with the PRO to address the trust resource management issues upon which many of the claims made in the

OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS' PROPOSALS WILL NOT SOLVE TRUST PROBLEMS.

With respect to issues before your Committee on March 9, 2005, our Consortium continues to believe that OST proposals are designed to displace local tribal government authority in favor of enhancing centralized federal bureaucratic control in the Albuquerque and Washington, D.C. offices. Furthermore, the Consortium believes that OST continues to give the false impression to Congress and tribal leaders that its written proposals can be implemented. The Consortium believes that the OST proposals are critically flawed because both staffing and funding limitations will prevent their implementation. It is interesting that one of the basic legal requirements imposed on the Special Trustee by the American Indian Trust Funds Reform Act of 1994 is the written certification of adequate funding for federal trust programs. However, this legal requirement has not been met. The Consortium continues to believe that the primary reason for this non-compliance is that OST knows that it cannot justify to either the Administration or the Congress the budgets and staffing which will be required to implement its proposals.

Because OST has not undertaken the task of providing funding and staffing estimates for its proposals, the Consortium has done so on its own. Our preliminary analysis of funding needs is attached. We have determined that it may take almost $1.0 billion in new funding to implement the TO BE Model, Records Policy and Trust Examination Handbook. Moreover, because a significant portion of the BIA trust resource personnel is near retirement age, the Consortium questions where the necessary experienced staff will be found to implement the OST proposals. The recent OST budget requests of nearly one-third of a billion dollars ($322 million in FY 2005 and $295 million in FY 2006) and the accompanying written justifications demonstrate a severe shortage of funds needed to implement the TO BE Model, Records Policy and Trust Examination Handbook on a nation-wide basis. While the Consortium strongly supports the continuing requests of tribal leaders around the Nation to provide adequate funding for trust resource programs, we do not support the concept that creating new multi-million dollar centralized bureaucracies located thousands of miles from where the resources need to be managed is the best way to accomplish trust improvements. The Consortium does, however, understand that in light of present-day situations with federal budget deficits and conflicting funding and national priorities, counting on an additional $1.0 billion or more in new funding to implement the OST proposals is not a realistic expectation.

The Consortium/PRO agreement proves that trust improvements are best solved at the local levels. An independent review of trust activities of our Consortium/PRO trust activities by OST in 2004 demonstrated that we have been able to accomplish significant levels of trust improvements outside of the OST reorganization plans. While the Consortium does not intend to pass judgment on

the adequacy of the OST reorganization proposals for those areas where they are supported and needed by tribal leaders, after numerous meetings with OST policy decision makers, field trust officers and other federal agency representatives that are managing the now seriously fragmented Indian trust processes under OST, we strongly believe that the OST proposals do more to complicate and obstruct the proper management of trust resources than they do to correct and streamline anything. Perhaps an even more critical issue that the OST proposals must overcome is the probability of their own lack of longevity. Quite simply, any plan that is based on the premise of displacing local governmental control will not survive over the long term. Without tribal support, the OST proposals will not have the resources, staffing and budgets to ensure its ultimate success. In stark contrast, the Consortium/PRO plan has already demonstrated meaningful trust resource management improvements because it was developed based on a commitment of Tribal and BIA partnerships.

THERE IS CLEAR EVIDENCE OF TRUST RESOURCE IMPROVEMENTS AT THE LOCAL LEVEL.

Indian Self-Governance and Self-Determination laws have been one of the most successful, self-sustaining improvements in the history of Federal/Tribal relationships since the treaty-making era. These laws are based upon the basic understanding that local governmental control and authority and responsibility are keys to both short and long term problem-solving. Key positive results of the Self-Governance and Self-Determination laws are that although they are not themselves appropriations laws, they have generated hundreds of millions of new and alternative funding sources for Indian trust programs. For example, the BIA only has access to federally appropriated funding; however, tribes can access not only BIA funding, but also other federal and state funding, and have authority to establish local taxes and undertake other revenue-generating actions on a project-by-project level, all of which support an improved trust management system. OST is a notable exception to access to federal program funding by Tribes because few OST funds are available to Indian tribal governments even in cases where Tribes have demonstrated that significant improvements claimed to be a part of OST's ultimate goals have taken place.

Under Self-Governance and Self-Determination, Tribes have demonstrated not only that improvements in trust resource management and partnerships can occur, but also that the development, maintenance and stability of tribal governmental functions is a prerequisite to successful economic development and job creation. Quite simply, there are no "bright lines" between the management of trust resources and generating local economic and job development and addressing other social problems. In case after case, tribal governments have demonstrated significant success in improving trust and other issues under Self-Governance and Self-Determination laws. Unfortunately, the OST proposals are based on a philosophy of undermining and displacing local

tribal government control. A typical argument put forth in support of OST proposals is that they must protect the Secretary from liability for trust responsibility violations. However, the positive working relationships in both the Consortium/PRO environment as well as many others under Self-Governance and Self-Determination around the Nation have demonstrated just the opposite result. The Consortium is unaware of a single outstanding breach-of-trust claim made by any Tribe or individual Indian when Self-Governance or Self-Determination laws have been implemented. The bottom line is that Self-Governance and Self-Determination laws have become meaningful, financially-beneficial and solution-oriented ways to addressing historic problems between our federal trustee, individual Indians and tribal governments.

In conclusion, while the confusion and controversy continues to cloud the OST reorganization proposals, there are more and more indicators throughout Indian Country which show that real long-term trust management solutions are taking place. OST has neither the staffing nor budgets to implement its proposals. The Consortium believes the positive examples of trust improvements taking place at the tribal and BIA local level are the most viable way of ensuring that meaningful long-term trust improvements are developed and implemented. We appreciate your continuing support for our efforts and are committed to sharing with you, the Administration and other Tribes how we have been able to accomplish such significant trust improvements in a relatively short period of time.

Should you have questions or want additional information regarding the Consortium and Pacific Regional Office efforts, please do not hesitate to contact us or our administrator, Sara Dutscke, at (916) 978-6115.

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PRELIMINARY COST ANALYSIS OF DOI TRUST REFORM PROPOSALS
HOOPA VALLEY INDIAN TRIBE
November 2004

OST officials continue to imply that tribes will lose Self-Governance and Self-Determination agreements if they do not comply with OST requirements, even though no funding has been provided to implement them. For example:

- OST officials have proposed a records policy that they say will be imposed on tribes even without funding being provided. OST has received more than $40.0 million just in FY 2004 and 2005 for their records programs.
- Appraisal functions have been reorganized without first identifying a problem that needed to be fixed. Now, appraisal functions have been further removed from Reservation activities by placing it in the Business Service Center, which further removes the function from the local trust support systems that were previously in place.
- The trust examination handbook is being imposed without any consideration of whether the BIA was ever funded to carry out many of the functions being evaluated. In addition, there is no consideration of the fact that tribes received far less funding that even the BIA received for carrying out the same function by 1) reducing tribal shares by amounts needed by the Agencies for inherently federal functions, 2) reducing other amounts needed to protect against reducing services to other tribes, and 3) reducing the amounts needed for retained services (such as appraisals).
- There is a $54 million DOI reduction in the FY 2005 BIA budget, 41% of which is on trust programs. Yet, OST has a proposed funding increase of $113 million. It is expected that OST will contract/compact with tribes for much less than the BIA's historic contract amounts of 10% that led to sweeping amendments to the Self-Determination/Self-Governance laws.

Funding and Implementation Issues regarding DOI's trust reform proposals:

Trust Examination Handbook. There are many grand and expensive schemes outlined in the Handbook that will prove it to be difficult (possibly impossible) for it to be implemented as written, such as its costs and staffing needs, how and where to find experienced people, how the amount of reviews needed (4 to 6 months per review) can ever be accomplished, whether OST will ever be able to design and implement their proposed "Trust Asset Management Rating System" to mention only a few. But the most immediate issue that DOI must address is the budget requirements, which is outlined as follows:

- The Handbook is proposed to be applied to both tribes and BIA offices, which means:

a.	562 tribes, less 141 (25%) for direct service tribes =	421 tribal sites
b.	85 BIA agencies and 12 Regional Offices	97 BIA sites
	Total Sites to Review	518

- OST's FY 2005 budget justification (page 68) states that they need $5.6 million for 77 tribal compact reviews, or $73,000 ea.
- At a rate of $73,000 per review, 518 trust reviews will cost approx. $38 million.

Budget and Staffing Issues related to the TO BE Model:

The following formulas were used to determine budget and staffing needs relative to the TO BE Model:

- The BIA budget is typically around $2.2 billion and the staff is around 10,000 employees. A detailed line item-by-line item analysis of the BIA budget in 2001 demonstrated that the BIA's trust activities represent 35% of the budgeted items and that the agency provides an estimated 15% on trust administrative support. Based on this analysis, we estimated that 50% of the BIA's budget and staff is spent on trust functions, or $1.1 billion.

- Sections 1-4 of the TO BE Model include various schematics of the proposed trust business model. However, no cost estimates have been developed regarding the amount of increases in staffing and budgets that will be necessary to carry out these processes. While one can only guess about the amount of new funding and staffing that will be needed, even a 25% increase would mean a budget increase of more than $275 million and 1,250 new employees. (Given the fact that OST's FY 2005 budget request is $322 million without yet hiring field-level workers, this need of $275 million is not unrealistic).

- Sections 5-6 of the TO BE Model contain proposals to develop land and natural resources use and management plans. Obviously, these proposals will require staffing and budgets within both the federal and tribal programs to develop and implement. An example of this is the process of developing forest management plans (FMP) under the Forestry Act. Under that process, funding was provided to both the BIA and tribal programs, however after more than 10 years later, only 44% of the tribes have FMPs today. The experience of FMPs demonstrates that implementation of Sections 5-6 of the TO BE Model will not only require staffing and budgets, but that the process will obviously take more than 10 years to develop and implement resource management plans for all tribes, reservations, resources, and possibly allotments and allottees. Therefore, it is likely to cost between $500 million to more than 1.0 billion to implement Sections 5 and 6 of the TO BE Model. (Again, given the OST FY 2005 budget request of $322 million without getting to these reservation-based activities, budget estimated of $500 million to 1.0 billion (or more) are not unrealistic.)

- OST Records Proposal. OST's records proposal for Self-Determination and Self-Governance agreements provides that tribes must preserve indefinitely records that are associated with trust resources. Today, Hoopa spends $280,000 for its records activities that were never included in resource management funding from the BIA. Using an average of only $200,000 per tribe to implement the proposed policy, it would take $84 million to implement the proposed records policy for 421 tribes.

In conclusion, our estimated costs to implement the OST trust reform and TO BE Model are as follows:

a.	OST Trust Examination Handbook	$ 38,000,000
b.	Sections 1-4 of TO BE Model	275,000,000
c.	Sections 5-6 of TO BE Model ($500 million to 1.0 billion +)	500,000,000
d.	OST proposed Records Policy	84,000,000
	Estimated minimal OST Trust Reform Budgets needed	$ 897,000,000 +

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