S. HRG. 107–332

MANAGEMENT OF INDIAN TRIBAL TRUST FUNDS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

UNITED STATES'TRUST RELATIONSHIP WITH THE SOVEREIGN GOVERNMENTS OF INDIAN COUNTRY

FEBRUARY 26, 2002
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TUESDAY, FEBRUARY 26, 2002

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

The committee met, pursuant to notice, at 10:10 a.m. in room 106, Senate Dirksen Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Campbell, Cantwell, and Murkowski.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee will come to order. I want to welcome everyone to this hearing on the Federal Indian trust relationship and the management of Indian trust funds.

The term "trust" is used in a variety of contexts. The U.S. Supreme Court has found that the treaties with Indian nations and the course of dealings between the United States and Indian tribal governments gives rise to the Federal Indian trust relationship. It is also commonly understood and accepted that the United States has assumed a trust responsibility for Indian lands and resources. There are trust functions performed by various agencies of the U.S. Government, and there are trust assets and trust resources and trust funds. These terms are sometimes used interchangeably, yet they each have distinct meanings and legal implications.

So the committee has called upon two highly regarded professors of Federal Indian law to begin our hearing today, and to address the nature of the United States' trust relationship with the sovereign governments of Indian country. We are seeking an understanding of how this trust relationship and the United States trust responsibilities relate to the standards that apply to the Government management of individual and tribal trust funds.

We have also asked an attorney who has expertise in the matter in which private trusts are administered by financial institutions to help us understand what other standards may be brought to bear on the management of the Indian trust funds. Beginning in 1978, this committee has called upon the General Accounting Office [GAO] to identify the challenges and systemic problems associated with the Government's management of individual Indian and tribal trust funds. The GAO reports issued over that time have repeatedly recommended that before any action is taken to reform the trust fund management system, there should be a comprehensive

assessment of the needs the system must be designed to serve, the kinds of information that the system must maintain and update, as well as the services that are to be provided to trust fund beneficiaries.

The committee assumes that this kind of comprehensive assessment was undertaken in the formulation of the Secretary's proposal to establish a new organizational structure for the management of Indian trust funds, trust assets, and resources. Although a process of consultation with tribal governments was initiated by the Department of the Interior to discuss the Secretary's proposal, there are members of this committee and likely many other members of the Congress who have not had the benefit of briefings on the proposal and who thus need to know more about what operating assumptions, fundamental principles, and what objectives went into the development of this Secretary's proposal.

While the committee appreciates the sensitivity on the part of the Deoartment of the Interior's officials to the fact that other proposals are now the subject of joint review by the Task Force and the Department, and the Department's desire not to appear to be advocating for the Congress' approval of the Secretary's plan, the Department has agreed to respond to questions that members of the committee have on Secretary Norton's proposal, and for that the committee is most grateful.

As a member of this committee for the past 22 years, I would be remiss, however, if I were to fail to address the past efforts of the Congress to respond to the problems identified in the landmark report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund." This report led to the enactment of the American Indian Trust Fund Management Reform Act of 1994, and I must observe that at that time, our objectives were very similar to those which we think the Secretary's proposal seeks to achieve. In the act, we sought to segregate those activities associated with the management of the trust funds from other responsibilities of the Department, and to establish an Office of Special Trustee in the Office of the Secretary to assure that attention would be given to those matters at the highest level of the Government.

So it is natural, I think, that members of this committee will want to ask the Department's representative what is it about the act's provisions that have not worked, and what is different about the Secretary's proposal that you think will make things work better.

The committee will also receive testimony today on a few of the tribal proposals that have been developed. Perhaps the most important fact is that the Department and the tribal governments have agreed to work together. We call upon the Task Force to provide the committee with a report on that work.

Finally, I would say that the committee knows that there is considerable dissatisfaction with the consultation process and widespread opposition in Indian country to the Secretary's proposal. But this hearing is not intended to focus on those dynamics. They are behind us. What would be helpful to the committee, should tribal governments wish to submit such to us in writing, are the reasons why the Secretary's proposal is unacceptable, not from a process

point of view, but in regard to the substance of the proposal. For that reason, the record of this hearing will remain open for 30 days, and we hope the tribal governments will respond.

And with that, I would like to call upon the members of the first panel: Reid Chambers of Sonosky, Chambers, Sachse, Endreson, and Perry of Washington; Douglas Endreson of the same law firm; and Don Gray of Nixon, Peabody of San Francisco.

So may I first call upon Mr. Chambers.

STATEMENT OF REID CHAMBERS, ESQUIRE, SONOSKY, CHAMBERS, SACHSE, AND ENDRESON

Mr. CHAMBERS. Thank you very much, Mr. Chairman, and thank you for the invitation and the opportunity for my partner, Doug Endreson, and I to appear before the committee today.

We will talk about three subjects—the origins of the vital trust responsibility of the United States to American Indians; the case law on how that trust responsibility has been interpreted over the last 200 years; and finally the scope and extent of the trust responsibility, both as defined by the case law and by enactments of the Congress, such as the statute that you spoke about, the 1994 Trust Management Reform Act.

I will talk about the first two items, and Doug will talk about the third item. As you know, we have a common written testimony that will be much lengthier than my summary here this morning.

Mr. Chairman, the trust responsibility originated in two decisions by the early Supreme Court—the Marshall Court—in the 1830's, the two Cherokee cases. The cases involved specifically the issue of whether Georgia had any authority over people and activities on Cherokee-reserved lands—lands reserved by treaty within the State of Georgia. The statutes that the State was trying to enforce would have destroyed the Cherokee Government. They would have required permits by all people entering Cherokee lands. They would have extended State criminal law over all the Cherokees and over all their lands. So it is hard to imagine more intrusive statutes than the ones that Georgia was trying to enforce in the late 1820's, early 1830's.

The Cherokee Nation itself brought the first suit, *Cherokee Nation* v. *Georgia,* in the Supreme Court of the United States, and sought to bring suit originally before the court without going to any trial courts, any lower Federal courts. And to do that, the Cherokee Nation under the Constitution would have to show that it was a foreign state or a foreign nation, because only particular kinds of governments can bring suits in the original jurisdiction of the Supreme Court.

In the first case, the Cherokee Nation was unsuccessful. Chief Justice Marshall, speaking for a majority of the court, held that the Cherokee Nation was indeed a state or a nation. So it was a government. He held it was a distinct political society. The Cherokee's right to be a distinct political society was protected by treaties between the nation and the United States, and by statutes of the United States. But the court held that the Cherokees were not a foreign nation; that rather, they were a domestic sovereign and that their relationship with the United States was similar to a guardian-ward relationship.

The second Cherokee case involved a prosecution by the State of Georgia of people entering the Cherokee lands without complying with the State permit statutes. When that case reached the Supreme Court, the Supreme Court did have a case that it had jurisdiction over. It held that the Georgia laws were unlawful; that the Federal Government had exclusive authority under the Constitution over Indian matters and over Indian-reserved lands. The States had no authority. The opinion at great length discussed how the treaties with the Cherokees and statutes of Congress, the Indian Non-Intercourse acts prohibited dealing in Indian land by anyone other than the Federal Government. It completely preempted any State authority in the area, and also protected the rights of the Cherokee Nation both to its lands and to its right to function as a distinct political society.

So the lesson to draw, I think, for present purposes from the two Cherokee cases is that there is no possible conflict between the trust responsibility of the United States, and the right of the tribe to be self-governing as one of the principal, if not the chief purposes, of the guardianship. The trust responsibility in the Cherokee cases was intended to protect the right of the Cherokees to function as a distinct political society.

Now, I should add, and I know the committee knows this—yourself and Vice Chairman Campbell know this well—that the Cherokee Nation in the 1820's and 1830's was in fact, as well as law, a distinct political society. It had a written constitution. It had a bicameral legislature. It had courts. It actually had a military. It had developed a culture where it had reduced the Cherokee language to written symbols, and had a higher adult literacy rate among the Cherokees than any State of the Union at that time. So it was a flourishing and prominent political and civil society. There is no sense that the trust relationship that was formulated by Chief Justice Marshall was premised in any way on the theory that the Cherokees were incompetent to manage their own affairs—quite the opposite.

I want to turn now briefly to a survey of the case law dealing with the trust relationship in the next century and a half after the Cherokee cases. Around the turn of the century, there were cases of the Supreme Court that actually used the trust relationship actually as a basis for the power of Congress to enact statutes in Indian affairs, on the theory that the commerce power in the Constitution was not as extensive as we think of it today.

Some of those cases even suggested, particularly the *Lone Wolf* v. *Hitchcock* case at the turn of the century, that the power of Congress to enact a statute might not be reviewable by the courts of the United States. But that suggestion has been rejected by modern cases. The standard clearly in the *Mancari* case and the *Delaware* v. *Weeks* in the 1970's is that the courts do have the power to review even statutes of Congress to determine whether the act Congress is tied rationally to the unique trust obligations of the United States to the Indians.

So even Congress' power is not unlimited. It is constrained by the trust responsibility, but it is extensive and it is still seen as exclusive vis-a-vis States. So that means that Congress does end up ultimately being the manager of the trust responsibility, and Congress

can, if it acts clearly and plainly, alter the terms of the trust because of the Lone Wolf v. Hitchcock case, which is unfortunately still good law today, does hold that Congress can even change the terms of a treaty, if it does it clearly and plainly.

But the cases also hold that where Congress has not acted in a clear and plain fashion, then the trust responsibly continues in full force as a limitation on Federal power; that indeed statutes of the United States dealing with Indian matters where there is doubt about how they should be construed, where there is ambiguity, should be construed consistent with the trust responsibility, favorably to the Indians; that general acts of Congress do not operate to abrogate or alter Indian rights unless Congress has clearly and plainly stated that they do.

And most importantly for the trust management issue that you have precisely before you today, the cases are very clear that where Congress has not clearly and plainly changed the rules, then executive officials who are dealing with the management of Indian property or Indian rights, must adhere to the trust responsibility and must adhere to the commonlaw trust standards of a private trustee.

I know there has been some claim that the *Cobell* litigation, and we do testify in the shadow of that case as it proceeds in the Federal courts here in town, established some new or tougher standard dealing with executive management of Indian affairs. I want to refer in a little bit of detail to the controlling Supreme Court and other lower Federal court cases that show this is not so, and of course it is elaborated more fully than I can do here orally in the testimony Doug and I have submitted to the committee.

The two Supreme Court cases I do want to talk about are the *Seminole Nation* case in 1942 and the *Mitchell* case—it is known as the *Mitchell II* case, because there were two Mitchell cases like the two Cherokee cases—in 1985. Seminole Nation is 6 decades old, 60 years old, those cases held clearly that in administer Indian trust money or trust property—and the Seminole dealt with money; Mitchell dealt with timber property—the United States is a trustee subject to the fiduciary duties attendant on the trust relationship.

I want to quote from Mitchell II, because it reads:

> Where the Federal Government takes on or has control or supervision over tribal moneys or properties, the fiduciary relationship normally exists with respect to such moneys or properties unless Congress has provided otherwise, even though nothing is said expressly in the authorizing or underlying statute or the fundamental document—I would suppose sections of treaties—about a trust fund or a trust or fiduciary connection.

Now, that is vintage Cherokee Nation. Cherokee Nation did not talk about a trust in treaties. It didn't say "trust." It was a principle that Chief Justice Marshall articulated that has governed the relationship between the United States and the tribes ever since that was implicit in the treaties and implicit in the statutes of the United States at the time.

And similarly in Seminole Nation, the court held that the conduct of the United States as trustee for the Indians should—and I am going to quote this— "be judged by the most exacting fiduciary standards, not honesty alone, but the punctilio of an honor the most sensitive." That is language quoting directly from Justice

Cardozo when he was a judge on the New York Court of Appeals deciding a case dealing with a common law private trust.

The same standards apply to private trustees that apply to government trustees. That was clear in Seminole Nation. That is clear in Mitchell. In Mitchell, the court looked to the Restatement Second of Trusts to find that all commonlaw elements of a trust relationship are present with regard to the Government's obligation to Indians, and following those principles, held in that case that the Government was liable if it violated them.

These are the two major Supreme Cases on the subject, Mr. Chairman and members of the committee. The Court of Claims held shortly after the *Seminole* case, in the *Menominee* case in the 1940's, during the Second World War, that the ordinary standards of a private trustee govern the Government's dealing with Menominee property and Menominee trust funds.

The Court of Claims held that again in the *Cheyenne-Arapahoe* case dealing with trust funds in the 1970's; the Eighth Circuit held the same thing in the *Red Lake Band* v. *Barlow* case dealing with management of tribal funds by the BIA in the 1980's; the Federal District Court Judge Renfrew, former Deputy Attorney General Renfrew in the Carter administration, held that in the *Manchester Band of Pomo* case in the 1970's. Other cases dealing with trust property hold the same—the 10th Circuit in the *Hickory-Ashton Tribe* v. *Supron* case; the Ninth Circuit in the *Covelo* case, also in the *Assiniboine and Sioux Tribes* v. *Board of Oil and Gas Conservation;* the Eighth Circuit in the *Loudner* case and the *Blue Legs* cases—all of those cases say that the United States is subject to the same standards as a private trustee in its dealing with Indian property.

So there is nothing new in the *Cobell* case. We are not obviously the attorneys in the *Cobell* case. We have no dealings with the *Cobell* case professionally, but we have read the opinions by the Court of Appeals and by the District Court. Those opinions simply apply the common private fiduciary standards that are in Menominee, that are in Seminole Nation, that are in Mitchell II. They are in all these other cases from the past 6 decades.

So there is no basis for claiming that there is some new or tough standard being applied, and there is no basis for changing the law as that case moves forward.

Now, I take it you probably want to defer questions, Mr. Chairman. I yield to my colleague, Mr. Endreson, if that is agreeable to you, to talk about the scope of the trust responsibility.

The CHAIRMAN. I thank you very much, Mr. Chambers. Your testimony is most enlightening, but before we proceed to Mr. Endreson's testimony, may I call upon the vice chairman for any remarks he may have.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. Thank you, Mr. Chairman.

I apologize for being a little bit late. I was over voting. And I am sorry that I missed Mr. Chambers' complete testimony. I think I got most of it. I am always delighted when he is here. He is cer-

tainly one of the leading authorities on the history of America and its relationship to Indian tribes, and it has always been a wealth of information to me when you appear here. So I am glad you are here this morning, Mr. Chambers, at this hearing.

Mr. CHAMBERS. Thank you very much, Senator.

Senator CAMPBELL. Unfortunately all of us who have chaired these kinds of hearings in the past at some point have dedicated enormous time and effort in trying to reform the Indian trust management systems. You have done it in the past, Mr. Chairman. I did it for 5 years. It is once again your turn. Very simply, I have to tell you it is beyond frustrating for me, and I am sure it is for the Indian beneficiaries as well, that this thing never seems to reach a conclusion.

Let me start off by saying the issue is clearly a problem of historic proportions. I know Secretary Norton has been on the spot lately, but very clearly she inherited this mess, as did her predecessor. It has been going on for years. I am somewhat disturbed that very often when we do hearings when we hear from the Administration they tell us that if they only had more time or if they had more money or if they had new computer systems or if there was a different trust management staff, or on and on and on, we could get it fixed. And we don't get it fixed. We just seem to go around and around and don't get it fixed.

In my own opinion and despite the 1994 act and the vigorous involvement and encouragement of this committee, the trust reform strategy of the last Administration was to litigate, lurch from hearing to hearing by putting on sort of a dog-and-pony show for us everytime they came over, and to make sure that the Federal funding spigot did not get turned off. The strategy, as we note and must recognize today, not only didn't work, but has led us to today's hearing, with no end in sight.

Mr. Chairman, this thing reads like a bad soap opera. We have had several bills signed into law, documents lost, contaminated and shredded, Federal lawsuits filed, senior Department officials resign and being held in contempt by a Federal judge, and countless hours of legislative and oversight hearings. Just 2 weeks ago, we passed out of this committee legislation designed to discourage more litigation and encourage the tribes and the department to negotiate settlements, and I believe that bill was the best option for all parties at this juncture.

Having said that, we are still at a crossroads at this historic moment. We recognize and admit that the litigation has served its purpose, but ultimately these issues have got to be resolved. I was interested in your statement, Mr. Chambers, that Congress can change the terms of a treaty. Let me tell you, the history of this Nation is that the United States has changed the terms of a treaty too much without tribal involvement, and just pulled the rug out from under tribes, which is basically what is being done right now by the Federal Government, in my opinion.

But I, for one, are ready to write that bill and get involved in it and get this mess behind us. This committee, the chairman and I, have done and are doing and will continue to do everything we can to bring fair and equitable solutions to the issues, but it requires some healthy, honest and open debate. And I don't think it

has really been held yet. Unlike many who have criticized the current Secretary's proposal, I believe she should be lauded, not criticized, for offering a proposal that may get this thing behind us.

The only disagreement I have with her is that I think there was not enough tribal involvement. When the current Secretary came in to tell me about the proposal that she had, I don't think there was enough time for the tribes to be involved, and I think that there have been a number of hearings now around the country. She has been involved in at least one personally. There have been about eight or ten. There probably should be a lot more, and they should have been done a long time ago.

But nevertheless, right to the present day, the Department of Justice and the BIA have proven themselves pretty much incapable of reforming the system. That is why I proposed in February 2000 the Indian Trust Resolution Corporation. I am not sure the Federal Government is ever going to be able to resolve this on its own, frankly, and under that draft legislation it would have turned the whole trust fund problem over to an independent commission with a sunset clause after people who are trained in straightening out trust responsibilities could have done it as well as anybody in the country, even with the missing documents, it could have then come back under the jurisdiction of the Bureau.

But I firmly believe that we should analyze all options, whether it is legislation to take it completely away from the Federal Government and put it in the private sector for a while, or whatever the answer is.

Let me also say that in the past, many times tribes have come in here to tell us that the Federal Government does not consult enough with them. But I hope that with this hearing, the committee can spark some kind of healthy and constructive dialog to make something happen to bring final justice for this whole problem that Indians have been waiting for so many years.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Cantwell.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman

Thank you for the opportunity for the committee to examine the problem of trust fund mismanagement and the recent efforts toward reform. Obviously, the trust fund mismanagement marks a significant failure of the U.S. Government in its trust responsibility toward tribes and individual account members.

As the chairperson of the Colville Tribes from Washington State framed it, one of the saddest chapters in American history is the long-term mismanagement of the trust resources, which were intended to benefit Native American tribes. Most recently, the class action suit of *Cobell* v. *Norton* has brought renewed urgency to the need to reform trust management. I share the dissatisfaction of the court on the failure of the U.S. Government's trust responsibilities, and I echo its call to reform trust management.

However, it is critical that this reform be done with careful calculation and in ways that affirm, not diminish, trust responsibil-

ities, tribal self-determination and self-governance. Numerous tribes are here from Washington State and have expressed serious concerns about the Department of the Interior's proposal to create a Bureau of Indian Trust Assets Management, and I share these concerns. In fact, several tribal leaders from Washington State are in attendance and I would like to thank them for their leadership in coming to Washington today to speak on this very important issue.

The tribes agree that there is significant room for improvement in the management of trust functions. However, they are concerned both about the merits of Interior's plans to create a new Bureau, and the fact that the tribes were not consulted prior to the development of this proposal. Indeed, tribes and individual Indians are the beneficiaries of trust assets, and the United States has a responsibility to honor the government-to-government relationship that it has with tribes. Therefore, it is absolutely critical that tribes play a central role in any successful trust management reform.

Representatives from Interior have advised the committee that the trust management would be improved by removing all trust management duties from BIA, therefore keeping the services BIA provides to Native Americans and trust management completely separate. Washington State tribes have expressed their serious concern that by removing trust functions from BIA, it would effectively dismantle the agency, which has been the foothold for tribes in the Federal Government.

For example, many tribes have partnerships with BIA in the execution of several trust responsibilities, such as natural resource management, and tribes do not want to see their role in the management of their resources diminished if these trust fund actions are taken out of BIA. I intend to ask some of the witnesses today about their concerns.

We will have the opportunity today to hear about a few of the proposals for trust reform designed by the tribal organizations. In addition, the Tribal Task Force is reviewing these proposals and several others that have been generated by various tribes. It is my hope that Interior will seriously consider the concerns, suggestions and the proposals from tribal communities, and also take advantage of the wisdom and insight the leaders who have been working hard to create a viable plan are putting forth. Again, any success at reforming this and the century-long problems must include input from the tribes.

Again, thank you, Mr. Chairman, and I would also like to thank the witnesses that are here today and representatives from Washington State. I look forward to hearing their testimony and hearing more about what our committee can do to make sure that meaningful trust management reform takes place.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

And now may I call upon Mr. Endreson.

STATEMENT OF DOUGLAS ENDRESON, ESQUIRE, SONOSKY, CHAMBERS, SACHSE, AND ENDRESON

Mr. ENDRESON. Thank you, Mr. Chairman, Mr. Vice Chairman, committee members.

I, too, am honored to have the opportunity to speak with you about the trust responsibility. I would like to begin by summarizing very briefly what I want to talk to you about.

Mr. Chambers has set out for you the law which demonstrates today that the trust responsibility applies to all actions of the Federal Government. This could not be clearer from the decisions that recognize that the constitutionality of Federal actions affecting Indians is to be measured by the trust responsibility itself. It is underscored by the cases that Mr. Chambers referred to that recognize that if Congress is to affect Indian rights, it must express its intention to do so clearly and plainly, leaving no doubt. The same point is underscored by the rules of construction that recognize that ambiguities, uncertainty as the Congress' intention won't result in Indians losing rights. Ambiguities, instead, are to be construed to the benefit of Indian tribes and Indian people.

It is also clear that the trust responsibility applies to lands, natural resources, trust funds, other property. There is no dispute over that.

What I want to talk with you about this morning is the trust responsibility in three other areas. First, I want to briefly pick up on and expand Mr. Chambers' discussion of the congruence between tribal self-determination and the trust responsibility. I then want to discuss the trust relationship in two related areas. First, the duty to provide services, which has been recognized by the courts and repeatedly recognized by Congress in health, education, housing, cultural rights, economic development—among other areas.

I also want to discuss with you very briefly how the cases in services came to support and reinforce the duty to consult with Indian tribes when Federal actions that would affect their rights are under consideration.

Let me begin by talking about the congruence of self-determination and the trust responsibility. It has been suggested that these two may be in conflict. Well, the self-determination policy, as Mr. Chambers indicated, has as its basic purpose furthering and protecting rights of self-government. That is the same purpose that Congress has acted on repeatedly since the self-determination policy was announced in 1970 by President Nixon, and Congress has made its intention abundantly clear. In enacting the landmark Indian Self-Determination Act, Congress stated:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy.

The same point underlies the 2000 amendments concerning the self-governance program, where Congress declared as its purpose to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals.

In addition, Congress has repeatedly recognized the trust responsibility as the foundation of Federal efforts to strengthen tribal governments. Most recently, in enacting the Indian Tribal Justice Support Act, Congress stated in its findings:

> The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government.

The same point was made by Congress just last year in enacting the Indian Tribal Justice Technical and Legal Assistance Act of 2000.

These enactments, the *Wooster* and *Cherokee Nation* decisions, show a history of over 200 years of recognition that the trust responsibility's basic mission is to protect tribal rights of self-government. That mission continues and Congress has repeatedly recognized it.

Let me now talk about a different area—services. The provision of services to Indian tribes and Indian people through the BIA and through other Federal agencies is part of the trust responsibility. The courts have recognized this. Congress has repeatedly confirmed it. Perhaps the best judicial statement of the origin of the trust responsibility and its role in providing services in particular comes from a decision by Diana Murphy, who was a District Court judge in Minnesota and subsequently joined the Eighth Circuit Court of Appeals, and as District Court judge wrote the *Mille Lacs* decision which was affirmed by the U.S. Supreme Court in 1999.

In a case concerning the trust responsibility in the housing area, Judge Murphy wrote:

> The Federal trust responsibility emanates from the unique relationship between the United States and the Indians, in which the Federal Government undertook the obligations to ensure the survival of Indian tribes. It has its genesis in international law, colonial and U.S. treaty agreements, and Federal statutes, and Federal judicial decisions. It is a duty of protection which arose because of the weakness and helplessness of Indian tribes, so largely due to the course of dealings of the Federal Government with them and the treaties in which it has been promised. Its broad purposes, as revealed by a thoughtful reading of the various legal sources, is to protect and enhance the people, the property and the self-government of Indian tribes.

Continuing, Judge Murphy wrote:

> The trust relationship between the United Stats and the Indians is broad and far-reaching, ranging from protection of treaty rights to the provision of social welfare benefits, including housing. The history of the treatment of the Indians by the United States justifies this interpretation of the trust relationship and the case law and the legislative background support it.

Other Federal courts have confirmed the trust responsibility's application in the area of services. A leading Eighth Circuit case, *White* v. *Califano,* affirmed that the United States has a trust responsibility to ensure that Indians have access to health care in cases where other sources such as the States are unwilling or unable to provide it. Similarly, the Ninth Circuit, *MacNab* v. *Bowen,* held that the Indian Health Service was obligated to provide necessary health care to an indigent Indian child, and further held that if the IHS believed that the State or county had a duty to provide such care, IHS itself had to advance that claim on behalf of the Indian.

We recognize that the application of the trust responsibility in the services area is in many ways less well-defined than it is in the property cases. In *Lincoln* v. *Vigil,* the Supreme Court articulated a limiting factor, holding that the trust responsibility does not prevent a Federal agency from reallocating unrestricted funds from providing services to a sub-group of beneficiaries to the broader class of all Indians nationwide.

But at the same time, the Supreme Court and other Federal courts have repeatedly held that the trust responsibility mandates a high degree of procedural fairness and protects against the fail-

ure of Government agencies to provide Indians with services authorized by Congress. This was the holding of the court in *Morton* v. *Ruiz,* a 1974 Supreme Court decision. The principal of *Morton* v. *Ruiz,* together with the force of the self-determination policy and its protection and promotion of self-government, have established the foundation for the Federal courts' recognition that the trust responsibility includes a special duty to consult with tribes or Indians to ensure their understanding of Federal actions that may affect their rights, and to ensure Federal consideration of their concerns and objections with regard to such action.

That is the holding of *Morton* v. *Ruiz* involving the BIA. The 10th Circuit recognized the same point in *HRI* v. *EPA;* the Eighth Circuit in the *Loudner* case, to which Mr. Chambers referred; the District Court in Washington in *Midwater Trawlers Cooperative* v. *U.S. Department of Commerce.* These cases recognized that when Federal actions that would affect Indian rights are under consideration, the trust responsibility requires consultation with the tribes.

Now, in addition, in the services area, while the courts have recognized that the duty to provide services is a part of the trust responsibility, Congress has gone even further. In health, education, housing, protection of Indian children and families, cultural resources—in all of these areas, Congress has enacted statutes that expressly and specifically recognize the trust responsibility as the basis for the enactment. Even those aspects, those services administered outside the BIA such as the IHS, are subject to the trust obligation. Congress through these enactments has demonstrated not only that the trust responsibility is the source of the duty to provide services, it is also specifically directed—not that there merely be some Federal presence, but that results or outcomes be achieved.

In education, the trust responsibility was recently expressed by Congress in amending the Indian Education Act, where the Congress stated:

> It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.

> And it identified the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally-related academic needs of these children.

The same point was confirmed in the Tribally-Controlled School Grant Act and the Higher Education Tribal Grant Authorization Act. The provision of educational services and the goals set out in these acts are in fulfillment of the trust responsibility.

The same is true in health care. Indeed, in the most comprehensive measure addressing the unmet health care needs of Indian people, the Indian Health Care Improvement Act, Congress expressly stated:

> Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government's historical and unique legal relationship with and resulting responsibility to the American Indian people.

In the same act, Congress set out specific goals by which the fulfillment of the trust responsibility is to be measured, listing 61 specific health objectives, including coronary heart disease, cirrhosis,

drug-related deaths, suicides, deaths from intentional injuries, infant mortality, fetal alcohol syndrome, diabetes, and others.

More recently, in enacting the Indian Alcohol and Substance Abuse Prevention and Treatment Act, Congress made the same point. The Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members. Included in this responsibility is the treaty, statutory and historical obligation to assist Indian tribes in meeting health and social needs of their members.

So, too, in the housing area. Congress' enactment of the Native American Housing Assistance and Self-Determination Act expressly recognized that the Congress, through treaties and statutes and the general course of dealings with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes, including improving their housing conditions.

As I mentioned, the same responsibility has been recognized with regard to the care and protection of Indian children. In the Indian Child Welfare Act, Congress said:

> There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. The United States has a direct interest as trustee in protecting Indian children who are members of or eligible for membership in the Indian tribes.

More recently, the same point was underscored in the Indian Child Protection and Family Violence Prevention Act.

Congress' recognition of the trust responsibility in all of these areas leaves no doubt that the trust obligation includes the duty to provide service. It is equally clear that when Congress addresses the trust responsibility in these areas, it looks not simply to color the legislation with the flavor of the trust, but instead looks to define goals that will make a difference in the lives of Indian people. This trust responsibility, then, extends across the relationship between Indian tribes and the United States.

Chief Justice Marshall's original intention that the relationship between Indian tribes and the United States, while not that of foreign nations and the United States, would be an enduring one in which the United States would act as the tribes' trustee. And as the range of tribal interests and concerns has expanded, as the threats to tribal interests have grown, the courts have continued to recognize that the trust responsibility defines this relationship—the trust funds, the property area, the treaty rights area, yes—but also, that the trust responsibility includes the duty to consult and the duty to provide services.

And finally, it is made clear that as Indian tribes join hands with the United States in the pursuit of self-government, they do so in furtherance of that same trust responsibility.

Thank you.

[Prepared statement of Mr. Chambers and Mr. Endreson appear in appendix.]

The CHAIRMAN. Thank you very much, Mr. Endreson.

Mr. Gray.

STATEMENT OF DON GRAY, ESQUIRE, NIXON, PEABODY, LLP

Mr. GRAY. Mr. Chairman, Mr. Vice Chairman, members of the committee, it is a very great pleasure to appear before you again.

This is the second time in about 3½ years that I have had the honor of appearing before this committee.

You know that this problem is going on too long when you see quotes that you have made 3 years before that you can hardly read on charts, which means I am getting old and the problem is getting old.

It really is a pleasure to be before this committee, and it was 3 weeks ago when I had the pleasure to speak before the House Resources Committee on a similar subject. I think it is fortuitous and positive that I am able to speak after Mr. Chambers and Mr. Endreson who are acknowledged experts in the history of Indian law, and through the prism of legal precedent come to a very similar conclusion that I come to as a private trust fix practitioner, and that is that the overall basic trust standard that will ultimately be placed upon whoever or whomever solves this problem is going to be that of a commonlaw trustee, which is an extremely high standard indeed. Put as simply as it possibly can be put, it is a person acting prudently as they would with their own affairs, and that is a pretty high standard.

There have been a lot of allegations of obstruction and defalcations in this problem in the last 5 or 6 years. My own personal feeling is that most of those were deserved by the prior Administration running the Department of the Interior [DOI]. It is also my personal opinion that they are not deserved with respect to the people who are running the DOI now. That does not mean that I approve of the Secretary's BITAM plan, but it does mean that the current DOI, the flavor of the current DOI and the atmospherics and the extent of potential cooperation is so totally different than it was 3 years ago that—including the willingness of both houses of Congress—and I also believe the court and the various tribal units offer us a very unique point in time to solve this problem, which is what led me to, in my written testimony, state that I think for the first time in eight years there is a light in the forest with respect to the resolution of this problem.

For 3 years, I have testified as an outside trust expert who has been very involved in fixing historic, complex trusts with all the same problems—lost records, some stolen, some just lost, bad systems, the foolish alchemy of believing you can buy an off-the-shelf system and then put your practical problems around that system. I can remember very well about 3½ years ago sitting in a subcommittee room informally talking to the Appropriations staff, literally begging them not to appropriate the $40 million that was then a supplemental appropriation for Interior to purchase the last part of TAAMS. I do a lot of international financing and I know a lot about oil and gas law, and I know what that program is. That program could no sooner deal with fish in the Klamath or grazing lands or potato lands in Idaho or timberlands in the west than any of us could, knowing nothing about that system. That system was a total, complete failure before it was put on line, and it has never been fully put on line. That is how bad the prior Administration was.

But again, I think things have changed. But in that 3 years of testimony, I have been somewhat resolute in three issues that I want to reiterate again. And that is, there has been a total lack of

expertise. There have been complete and crippling conflict of interest. And there has been a lack of independence in the DOI.

I think that the approach and the mental atmospherics of that Department have changed dramatically. But, I do not believe that any of these problems have changed at all. If you listen to Secretary Norton's testimony on the last day of the testimony in the current contempt trial in the *Cobell* litigation, she was very clear that she was not a statistician. She was not a forensic accountant. She was not an Indian legal expert. And she certainly had not, in the time that she had been in office, been well advised by anyone internally at DOI with respect to those matters and how they bear on Indian trust reform. They don't have the expertise. They never have and they never will. And that is a critically important thing for this committee to understand.

Further, the conflicts problems, and I have to quote from my pad because I literally have trouble reading the chart up there, I said I guess 3 years ago, you cannot and should not try to operate on yourself, and that is exactly what we are asking well-intentioned BIA officials to do—to work on a problem and to solve a problem where they or their friends or their parents may have made mistakes. That is neither fair nor reasonable, and in the commercial context would never have been countenanced.

I have officiated over, I don't know, 10 to 15 very large trust fixes that have involved more money, frankly, than this, and that have gone back as long as 20 years. The first thing you do is you separate day-to-day trust functions from the fix of the trust system where it has gone wrong. That has to happen here—that separation has to happen.

As I said, I think we are in a new day, though. With all the problems that we have gone through, we have 1 moment in time to do something that is very constructive. This is a time of real crisis, real crisis, and real opportunity, and I want to try to describe what both of those are. I will start out being an optimist with the opportunity.

In my written testimony, you will see a fairly detailed description of a government-sponsored enterprise [GSE]. GSE have had a pretty good history in Washington, DC. The Washington, DC GSE that looked over the administration of a number of departments of, especially the law enforcement departments of the District of Columbia some years ago, was a special purpose government entity that was time-limited. Nobody wants to create a new government agency. But one that is time-limited and specific for a purpose, and has just exactly the right expertise can be an enormous help to a problem like this, that has been left alone too long in an incompetent agency. And I don't mean the agency itself is incompetent with respect to what they do generally, I mean with respect to a highly bolloxed-up trust they simply don't have the expertise.

There is nothing magic—I want to reiterate this—there is absolutely nothing magic about the government-sponsored enterprise form. The vice chairman did propose a couple of years ago this idea of the RTC, which I championed. I actually saw parts of draft legislation which I thought were very good ideas. It does not matter what you call this entity. What does matter a lot is what you try to do with this entity and who the constituent parties are. I would

invite you and ask you to look hard at the constituency of the GSE and the mandate that I have tried to give it to solve the trust problem.

The other thing that I will mention about this, without going into consummate detail which I did in the testimony, is that this is only a prototype. It requires and needs tribal and IIM account representative input. They have their own reasons for wanting things, and they are valid. They are the beneficiaries and they need to go over every aspect of this with a fine-tooth comb. If there is something in there they don't like, and they can validate it as not being positive for trust reform, you change it. There is nothing magic about this.

What is magic, and the only thing that is magic, is that the trust fix, not day-to-day trust administration, the trust fix comes out of the DOI and into the hands of a blue ribbon panel of commissioners and their hired professionals who have absolutely no mandate and absolutely no conflicting interest with respect to doing anything but fixing the problem, fixing the trust. I believe that fixing the trust is possible, not to perfection—there is no such thing—but fixing it 90 percent better than it is running now I think is well within the ambit of possibility in a relatively short time, given how long this problem has been outstanding.

The parameters for what I have suggested in this GSE have the following underlying philosophies. One is it is lean. What we don't need is the proliferation of bureaucracy. The problem with any government agency, and I have dealt with most of the major government agencies in my 30-year career, is that bureaucracy, like any company, is inevitable. What you don't want is a bureaucratized system. What you want are commissioners who have other jobs, but who have highly dedicated trust responsibilities to make sure this one is done correctly—who act as a board of directors—a very thin staff, maybe even just one director or executive director, and what I would say is a relatively small handful of trust professionals, which consist of lawyers, accountants, systems analysts who know how to look at a set of data and a trust cycle, in this case from revenue leasing of natural resources all the way to payment to the IIM beneficiaries, and conceptually understand how to get from one end to the other. And then and only then create systems that can get you from one end to the other, while training BIA officials and others to get you from A to B.

Anyone that thinks that this is a quick fix by a machine has really been taken in by the computer culture. This is man, woman and machine. It is a combination of training and very carefully employed technology. What the last Administration did, and I think they did it to play for time, was that they bought a system that could not work.

The other thing that I liked, obviously, about the proposal was that it included—well, it was lean in terms of money, in terms of the use of government money to get to its goal. It was fat in terms of expertise. I think you have to lever on outside professionals who have done this kind of thing before. You can't put them all on staff because you can't afford it, but you can hire them on an as-needed basis to go out and do specific tasks that are integrated with other people's tasks, and that would be the job of the executive director

or chief professional. I have seen this happen in the private sector where the pressure is just as great as it is here, because you may have as much at stake 2 years ago, with a major, major money center bank, there was a problem where they were sued by 100,000 municipal entities because of problems like this. They didn't have a lot of time to fix that problem. Within a relatively short time, they did fix it, to the satisfaction of all, and there was a global settlement.

The other aspect of this is that it involves neutral government financial experts. I am not just talking about outside forensic experts. I am talking about neutral government financial experts—a Governor of the Fed, a high-ranking official of the FDIC or the Controller of the Currency. If you don't think these people understand what trust responsibility is, they do. Because what they do for a living is monitor the entire private banking sector with respect to non-trust accounts and trust accounts, and they know the difference.

The real problem is going to be getting those people to take on this job, knowing what kind of very, very high level standard of care is going to be imposed on them. That is another issue that if we have time maybe I can refer to later.

Private sector experts are needed. I mentioned that. I believe that the commissioner board that I have suggested not only would include public officials who are highly regarded and untouchable in terms of their trustworthiness and their independence and neutrality, but also representatives of the IIM beneficiaries and the tribal units. I also think that there should be a representative of DOI.

I think there is a problem here. I think there is a problem of focus. The Senator from Washington, Senator Cantwell, made a very good point, and that is this process means nothing unless the tribal entities feel as though it has integrity, which is why I am just saying my proposal is a starting point for people to tear apart and to make additions to or anything else. You have to have representatives of Indian country not only comment on it, but in this case they would actually be—there would be a commissioner or maybe two commissioners who were representatives of that group.

And finally, I would make probably the Assistant Secretary for Indian Affairs at DOI a member of this commission. Certainly, that person is not going to run the commission. It is going to be predominated by other interests, but it does allow the by-play between the special purpose entity and the continuing trust efforts that would be going on within the BIA to be well-coordinated—it is as simple as this. Get your contesting bodies under one tent. Make them commissioners. Charge them with a fiduciary sense of duty. And make them come back to this committee and to the House Resources Committee or a select joint subcommittee on an every other month basis and account for themselves. Things would change if that accountability were set up.

The next aspect of it that I want to explain is the separation of the trust fix from ongoing administration. A number of members of tribes have expressed to me personally their fear that if you take the trust function out of BIA, you have essentially gutted BIA. I think that my colleagues today have somewhat underscored that because there is a trust aspect to the social services and other as-

pects of what BIA does. I have no intention of doing that. I think that is a very bad idea. First of all, right, wrong or indifferent, checks have got to go out. Those checks may be wrong. They may have to be audited in the future. They may have to be adjusted in some fair way in the future. But you can't just stop this process until you have a complete, beautiful, elegant, rococo fix. You have got to have the BIA do what they are doing on a daily basis, but not try to fix a program that they may have made mistakes on and they are going to try to perpetuate in an historic, rather than in a new way. That is where you run into trouble.

And the other thing, I mentioned before, is continual congressional oversight. When I said before I think that the paradigm here is off-kilter, asking the DOI to be more sensitive to tribal and IIM interests is a mistake, not because they are incapable of being sensitive to it, but in all due respect, it is passing the buck. It is not DOI's problem anymore. This is a governmental problem and every branch of government has got to cooperate in its solution. The DOI and BIA have shown time and time again that they are incapable of solving the trust fix. They cannot do it. There can't be any other compelling evidence that anyone needs to know that they can't fix this problem. You have got to have somebody else on the outside with expertise to do it. Ladies and gentlemen, the buck there stops with you and the House. This has got to be a legislative solution.

To underscore that, I want to tell you about what I think is acute timing. Sometime in March, although I am not a party to this litigation either—I read the press clippings and I read the testimony, just as all of you I am sure to do—and there is one thing that comes out loud and clear to me. That is that in the month of March, there will not only be a decision on whether Secretary Norton and Assistant Secretary McCaleb will be held in contempt, there may very well be a decision to appoint a receiver for this program. That is not the right solution. And that is not because the court has done a bad job. It is because the court is running out of options. They don't know what to do.

If you look at the testimony in the last week that has gone on, and you do nothing but highlight what the judge has said—just forget everything everybody else has said and take a look at what the judge has said—the TAAMS failure showed that this case will go on forever. The court has no idea how to handle the scope of this problem. The DOI and what it has tried to do to date shows a total breakdown.

I believe that either inadvertently or knowingly, this very smart court is asking Congress to do something. In the absence of Congress doing something, you may have a receiver appointed who does not have the power to be paid—at least in my mind, simply, I don't know how they do it—and he may not have the access to outside professionals to actually fix the problem. Whether the court has jurisdiction over continuing future modifications to the trust, as opposed to the historic trust defalcations, I don't have any idea. But that is a 6-month trial, and that is six months more we have to wait.

I would implore Congress—not BIA, not DOI, not anyone else—I would implore Congress and the native consulting bodies to come up with at least a rudimentary independent structure, whether it

is modeled after what I have put in the record or what the vice chairman has put in the record as chairman in the past. Get that out as an exposure draft, get that judicially noticed before the court is forced into a course of action which sets up a balance of power fight that is not necessary. There has got to be a way for the branches of the government to cooperate to get a solution. I think the court is inviting this body and the House to do just that. I may be wrong, but I don't think so.

I think that is really the important part of what I have to say. Whatever you do in the next legislation, which I hope will include a neutral body to try to really fix this problem, because I think this is susceptible of a fix—and that is coming from somebody who has spent most of his life doing this kind of stuff—it needs to be flexible and it needs to have continuing oversight, so that this commission, board, whatever you want to call it—RTC-type unit—is back before Congress on a consistent basis, and if there is a change that needs to be made because it is not working, have the legislation flexible enough so that by changing regulations or whatever, you can stop the part that doesn't work.

One of the problems with the 1994 Act is that it was supposed to be self-actuating. It was very well-meant, very well written, and destroyed by the DOI. And I think that more flexibility in that, in having regulatory power and things that you can do in terms of continuing oversight will keep it much more tightly linked to Congress.

I have spent too much time, and I apologize for that, but I thank you very much for the opportunity to talk to you today.

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

The CHAIRMAN. Thank you very much, Mr. Gray.

Because of the reality of time, I will be submitting most of my questions. However, I would like to ask certain general questions at this time.

This panel has suggested that the trust responsibility is not only an exacting one, but an all-encompassing one. For example, Mr. Endreson identified some of the laws enacted by the Congress that protect the right of self-governance, protect the right of sovereignty, treaty rights, the rights to health care, education, housing, and the protection of tribal lands and resources.

The Congress has gone to great lengths in legislating and authorizing and directing. For example, we have the Indian Health Care Improvement Act. We have the Indian Self-Determination and Education Assistance Act. And yet we find that Indian health is worse than many of the third world countries of this globe. In the area of Indian education, we find that there are greater numbers of drop-outs in the Indian education system than in any school system of this Nation. My question is, if it is the trust obligation of the United States to provide education, provide health services, et cetera, and where the Congress provides legislative authority, but there are no funds forthcoming, is there a cause of action on the part of the individual Indian or a tribal government to sue the United States?

Mr. ENDRESON. I think there is, Mr. Chairman. It is difficult to describe in any detail what judicial remedy would be available without a set of facts. But I think when one looks to the availabil-

ity of relief to address educational deficiencies in the general law that it is clear that courts have seen a role in providing and ensuring educational opportunities for people in this country. And when one adds to that general body of law the trust obligations and the specific statutory commitments that the Congress has made to Indian tribes in the legislation that has been enacted, I think it is clear that some form of relief would be available in circumstances in which a failure of that obligation were clear.

As a judicial matter, the cases that the courts have addressed have been cases in which extreme circumstances were present. Some years ago, in 1983, the Government proposed to close down Indian boarding schools without any notice or having plans in place that would provide for the education of the children that attended those schools. The courts stopped the BIA from closing those schools and Congress then put in place a plan for dealing with proposed closures, addressing the Bureau's failure. The same has been true in the health care area in instances where in effect the government has thrown up its hands and said "not us," the courts has said, "yes, you," the Federal Government and the trust responsibility compels it. So I think the courts have been responsive when relief has been sought in the kind of circumstances that I have described.

Now, one of the concerns that has been expressed about the existence of the trust responsibility generally, and that has been brought to bear on the services discussion, trust responsibility discussion, is the fear that the trust responsibility would set a standard that is too high, too expensive, too burdensome, would cost too much and take too much time. And I think your statement, Mr. Chairman, shows the irony, the inappropriateness, the kind of awkwardness that discussion has when in reality there is no threat of the trust responsibility standards controlling or consuming large amount of resources or setting standards that won't be attainable. The problem is at the ground level, with the failure to meet what most, perhaps all, would conceded are very minimal standards.

So it is not that the trust responsibility is too demanding. It is that the level of services has been too limited and the relief that has been available has been too limited.

The CHAIRMAN. Mr. Chambers, at the February 6 hearing before the House Resources Committee, a member of the committee asked the Secretary if tribal trust funds could be used to help defray the costs associated with the management of Indian trust funds. The Secretary replied that she found that to be an interesting idea and would give it consideration. My question is, in applying the principles of trusts as you have described it, do you believe that this would be an appropriate use of funds that are held in trust by the Government for individual Indians and tribes?

Mr. CHAMBERS. No; it certainly would not be, Chairman Inouye, and I would expect that the Secretary, as she thinks about it and reflects about it, would conclude the same thing. I suppose somebody might say that, SunTrust Bank could charge to administer a trust for my mother's estate or something like that, because the relationship between SunTrust and me or the beneficiaries of the estate would be commercial, would be arms length, would be private commercial relationships. The Federal Indian trust is nothing like

that. The *Cherokee Nation* cases make that clear and all the cases dealing with the history of the trust responsibility make that clear.

The statutes, for example, that Chief Justice Marshall analyzed in Cherokee Nation bar red transactions in Indian land, except between the United States and the Indian tribe. The reason for that is that the Supreme Court had recognized in another case in the Marshall Court, the *Johnson* v. *Macintosh* case, that Indian tribes hold title to lands. And so the treaties between the tribes and the United States were a necessary transaction for the United States to take lawful title to large parts of Indian lands and then Indians retained other lands that became their reservations. The Indians paid for the trust relationship by making those land cessions to the United States. The United States is not entitled to be paid twice, then, for administering a relationship where it protects lands reserved by the Indians, where it protects Indian property protected by those treaties, and where it protects the right of tribes to have a culture and to have a functioning, distinct political society.

So no, it is not at all like a private commercial trustee administering someone's estate, and it would be totally inappropriate, really outrageous for the United States to make a charge on Indians, a second charge after all Indians have done for the country in those and transactions in the treaties that I am speaking of.

The CHAIRMAN. Thank you.

Mr. Gray, you have indicated that expertise is nonexistent and has never been available in the Department of the Interior, or for that matter any other place in the Government. Would the nonexistence of expertise be a violation of the trust obligation of the Government of the United States?

Mr. GRAY. Yes; I think it would. I will amend my statement to a certain extent because for a while, you actually did have one individual in DOI who did have a great deal of this expertise, Mr. Homan, who simply ran out of patience with being stonewalled at everything that he did. But he was a highly qualified RTC official and he had a stellar resume in terms of private sector, both financial—we call financial money flow, as well as trust expertise. He had the expertise, and in fact if you look at his report that was discarded or attempted to be obscured by the high-level implementation plan of the prior Administration, it was in terms of, it was as though a forensic accountant were actually thinking this problem through. What he said very simply, and it makes a lot of sense to anybody who has done this before, is there is no conceptual architecture here.

This is not brain science. This is taking the functions of your trust cycle from grazing land leases to paying out Indian accounts, and there are a lot of phases in between—document custody, preservation of all kinds of things—and you just put it up on a big schematic. You know, here at the different functions. Here is how they are functioning now. Here is how they are not functioning now. And that is the way you come up with the next stage, which is the conceptual architecture of a system, and a system is both computers and people, not just a computer. It is computers and people, and how you get from one end to the other.

And he was talking like a forensic accountant. He knew exactly what he was saying, and nobody in Department of the Interior

wanted to hear anything about it. And if you look at the high-end implementation plan, it talks about those different functions as if they were little projects to be done with allocation of money to be done totally independently of each other, without any kind of connect. And if I remember correctly, out of I don't know how many hundreds of millions of dollars allocated to the overall problem, you got to the end and there was personnel training, and it was $2 million, out of hundreds of millions of dollars.

Now, I have been in banks where banks have bought computer systems that are supposed to do things a lot more difficult than this. They are supposed to unwind derivative securities, or put together derivative securities. And I have gone into trust departments where very smart trust officials have been sitting there, and I am looking at them, and they are doing the calculations on a Lotus program. And I said, why aren't you using the system? Because it doesn't work. It was an off-the-shelf. It does 80 percent of the work, but the other 20 percent—and believe me, my investors, they don't want 80 percent. My investors are Merrill Lynch and Northwest Mutual Life Insurance Company—and 80 percent ain't even close to good enough.

So I was wrong. There has been. But in order for the Government to discharge its trust function, you simply have got to get this expertise.

The CHAIRMAN. My one final question, Mr. Endreson, you said that trust includes the protection of treaty rights.

Mr. ENDRESON. Yes, Mr. Chairman.

The CHAIRMAN. A long time ago, there was a treaty between the Sioux Nation and the United States Government involving the Black Hills. The treaty was violated, and Black Hills no longer belonged to the Sioux Nation. Is that a cause of action?

Mr. ENDRESON. I believe it is, Mr. Chairman, and I think the question there that is enduring is after the *Sioux Nation* decision in the Supreme Court is what now can and should be done to bring the promise of the treaty, the meaning of the promise of that treaty to future generations of Sioux people.

The CHAIRMAN. What would you do as a lawyer?

Senator MURKOWSKI. Never ask a lawyer. The clock is going to start running. [Laughter]

Mr. ENDRESON. I think the first thing, Mr. Chairman, would be to assess where the law has put the parties today. By that I mean, examining the benefit of the courts that is reflected in the *Sioux Nation* decision, and then considering what further avenues may be available, I would suggest, by working with the Congress as one of the key avenues, and considering as well whether there are other means of bringing the promises of the treaty to bear on the question of what Congress ought to do. And I think the trust responsibility would be among the means that a lawyer would look to in those circumstances.

The CHAIRMAN. Mr. Vice Chairman.

Senator CAMPBELL. Thank you, Mr. Chairman.

As you have, I am also going to submit some of my questions for the record and would ask that the witnesses answer them for the committee.

I am going to ask two or three questions related to today, but you did mention the Black Hills, Mr. Chairman. I would remind the committee that courts have said the Lakota have every right to get the Black Hills back. It was not taken by treaty, by sale, by anything. It was just taken to use as a bombing range in World War II, as you remember.

When Senator Bradley was here, he introduced a bill to do just that. I was really interested in that bill. Unfortunately, we could not get the votes to move it. The South Dakota delegation to a man was opposed to that bill. And so sometimes what is righteous and fair can't get done here because of political constraints or partisan constraints or something else. But I just mention that in passing, that there has been some people here who recognize that land was not taken in any fair system at all and that the Lakota do have the right to get it back.

Mr. Gray, you really said a mouthful, a lot of things, and you have testified before this committee before. You just reaffirmed my suspicions with your testimony today that the Department of the Interior simply does not have the expertise—never had, never will. And really it has nothing to do with personalities, because I think there are many very goodhearted, good people there. I see Neal McCaleb sitting over here in the front row who will be testifying soon. I know him well—a man of integrity and honesty and I think a very, very fine person, as others have been in that place—Ross Swimmer, Kevin Gover, and a number of others.

I just think it has to do with the bureaucracy and government in itself—that we are not qualified to do certain things. We have a constant turnover, new people coming and going all the time. We don't have the continuity to do it, and clearly we have made some big mistakes—that $40 million we spent for the TAAMS system. In my view, we could have taken that money out and set it on fire in the middle of the street for all the good it did. Maybe it would have drawn more attention to the problem, rather than finally just discarding the whole darned system.

I don't think we are going to get it fixed within the bureaucracy, very frankly. Senator Murkowski is here with us today. As you know, I believe you testified once and in your testimony a few years ago gave us the opportunity to frame up an independent bill, an independent structure in the private sector. We didn't actually introduce that bill but simply circulated it in Indian country.

Maybe the time is now, right now to do it, after we have had a couple of more years where tribes have seen how little can actually be done within the bureaucratic system. I, for one, am just fed up with it and ready to introduce a bill to take it away from the bureaucracy and to try and reach some kind of settlement with the people who are waiting for their money.

I saw a movie not long ago, and I remember the byline—the byline in that movie was "show me the money." Judgments don't mean a hill of beans if you don't get the dough. Isn't that right? I mean, what good is a judgment if you don't get the money in a judgment.

Mr. GRAY. Absolutely nothing.

Senator CAMPBELL. Absolutely nothing. Well, I think you are right. But there are two, to my mind there are two times in our

recent history in which we have taken legislative action to try to fix some injustice that we did to a people. One of them was the Japanese-Americans of World War II. And if you remember, it has been about 10, 12 years ago now, we did pass a bill in which we tried to give them a monetary settlement—every Japanese-American. It wasn't nearly what they lost when many of them were taken and put into American camps, if you remember. But at least it was an attempt to do something right for people that had suffered an injustice on the part of the Federal Government.

There is another time, too, called the "Volcker Commission" some years back. I am sure you are familiar with that. The U.S. Government created that commission to deal with the issue of bank accounts owned by Holocaust victims and held by Swiss banks. That situation was cleaned up pretty quickly, but I think there was some similarity, and that was missing documents, and clearly a bureaucracy that could not do it.

Do either of those times in history, would they offer a model of something that we can do legislatively by introducing some legislation to rectify this with Indian people?

Mr. GRAY. I think one, yes; and one, no. I think the Japanese reparation issue was not one that was based upon or even tried to be based upon individual either pain and suffering or economic loss. It was done in a much more generic way. The Volcke Commission did attempt, to the extent they had records, to trace to individuals or families what they had lost or what had been stolen during World War II through these Swiss bank accounts.

Now, the problem with Swiss bank accounts is—this is the same problem that Congress is grappling with and that I am working on also on the New Patriot Act. It is in a sense good money in, bad money out. I mean, money came in. It got commingled, and then it accrued enormous amounts of interest, and then how do you unwind it in a way that is allocable to the known accounts that you have, and then what do you do for unknown accounts. And the one piece of learning that I would take from that, and this is very important—you will find this, I think, in the Volcke Commission records—is that there is no way, and actually there was a question submitted to me—do you believe that it is possible to reconcile the trust accounts? The answer is in total, no, because there are too many lost records. There are too many disjoinders between individual Indian claimants and the lands that they really have claims to. Even if you know what the lands are, and they are now fully producing, who does it really go to? And then you have the dissent and devise issue, which is a real big issue.

So perfection is not something that I think you are after here. I think what you are after here is when you do have the records, use them scrupulously. When you don't—and I know there has been a lot of talk about modeling and statistical analysis—and people's eyes start to glaze over when they hear those things, and figure, well, that is just some accountant or lawyer talking about some process we don't understand.

It is not that mystical. Actually, the best example I can give you, if you want to hear it, is the private sector. For many, many years when you or I or someone else, someone old enough to remember this, bought a corporate bond, they had coupons attached to them—

little tabs attached to them. And the way you got your interest—they were bearer bonds—and the way you got your interest payments every 6 months or every year was you took that thing into a bank, into a trust department, and said, "here's my coupon, now give me my money." And the only record of ownership was holding onto that bond and having that coupon in your hand.

Now, over the years that became an enormously cumbersome problem with the peripatetic nature of the world and the computerization of the world, so they changed about 20 years ago to a registry system, so that you would have a registered owner of a bond. You would have Ben Campbell, who resides at—and they would just send you out your check for interest and record it.

Well, in between those two things, many banks found that they didn't have records of the coupons before they were transmitted into registered accounts. When they had the registered accounts, they could show that checks were cut. But before that, they had lost the coupons. This goes back 20, 30, 40, 50 years. You know, big banks, big government, little coupons—zillions of them—they lost them.

Now, what do you do in a case like that? What you do is you look at either other phases of time for the same transaction and you look at how many people really didn't come in with their coupons and how many did, and you analogize that to that situation, or you look at another bond deal—some completely separate bond deal at the same contemporaneous time, and see how many people just forgot to bring in their coupons. Because these claims are brought on the basis that nobody brought in their coupons, and therefore the banks owe $200 billion worth of interest for that time, which the bank knows it doesn't owe, which plaintiffs know they don't owe, because trust departments when they got the coupons usually gave the money away. They didn't just run away with it, but they don't have records of it.

So that is when you get into this kind of statistical sampling. It is not anywhere near as—I don't know, it seems kind of mystical and haphazard, but it is not. These are the kind of things that have been going on for years. In fact, I am not privy to this because I am not privy to the litigation, but I have worked with Price Waterhouse on a number of very large fixes in the commercial sector. And Price, as you may or may not know, is the consultant, the forensic consultant to the Cobell plaintiffs. And I pretty much know what they have done to come up with the basis of the historic claim. They have used procedures that are tried and true in the private sector.

I am not a part of that litigation. I am not saying the claim is correct to the dollar. I am saying I know what kind of rigorous procedures they use. So anybody who expects perfection out of this doesn't grasp the reality of the fact that you have got rat infestation and lost records and you have to do something about that. But the something isn't just magic that you create out of your hands. It is modeling on the basis of contemporaneous other deals or other time periods in the same deal.

And that is very important in this for another reason. It is not just payment. The real problem in the historic Indian money accounts—not so much now, but historically—is that, let's face it, you

can guess that there were times when Indian lands simply were not leased at all for their resources. Of if they were, somebody pocketed the money. And this is a long time ago. I mean, we are talking about the 1920's or 1910's or something like that. I am not saying anybody in current Administrations have done that. But when you have those kind of gaps, when you have 10 years of a grazing pastures, large grazing pastures—you are talking about a huge acreage here—that have no money coming in, you have got to do some modeling of similarly situated privately owned grazing land and say, hey, if somebody were even half on the ball, they would have brought in——

Senator CAMPBELL. Well, let me tell you that anybody looking for perfection is not going to find it around here. That just happens to be the system in Washington. But the more I think about it, the more I think the longer this goes and the more attorneys we involve, the more complicated it is going to get. Sometimes I think if you get two attorneys together, you can have three fights. It gets worse, the more they get involved. And I am not trying to denigrate the legal profession.

Mr. GRAY. Senator, you have already said something about the Congress that is true. You are never going to find perfection, and you are not going to find in me a proponent of the legal profession. I think they deserve the reputation they have, to a large part. But you do have three attorneys up here——

Senator CAMPBELL. Whatever that means. [Laughter.]

Mr. GRAY. But you do have three attorneys up here with no clients, and it may be the last time you ever see anything like that. So there are some who will actually help you.

Senator CAMPBELL. I think so. But I think that you agree that what we need to do is get some checks in the hands of Indian people, and for the life of me I don't know how we are going to do that unless we reach an agreement with the people we owe the money to and do some kind of legislative relief, because I just don't think it is going to get ever cleared up within the bureaucracy.

And thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Murkowski.

STATEMENT OF HON. FRANK H. MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you very much, Mr. Chairman.

Mr. Gray, I want to thank you for your comments. Unfortunately, I did not hear the other gentlemen. I was at a hearing before the Judiciary Committee, where we have a new judge for Alaska, Judge Beistline, and his nomination hearing was taking place.

But as the chairman and ranking member know, I have for a long time preached my belief as a former banker and one who has had the responsibility of a trust department, that we have a situation here where we have been kidding ourselves for a long time. We have had two Secretaries of the Interior in a row who have been held in contempt on this matter. So it is a bipartisan failing, and the question is, are the tribal units and those that are fearful that we are winding down the BIA ready to come aboard and admit that this is not working?

I mean, Mr. Thomas, president of the Central Council of Tlingit and Haida, is with us today. He is going to be testifying. In reading over his testimony, I totally agree with a portion that states, the fatal flaw in the approach—and this is the approach back in 1994 when Congress set up the special trustees to take the steps to put forth solutions to the trust management problems—and the fatal flaw in the approach was that it left the Office of Special Trustee under the administrative authority of the Department of the Interior Secretary—Secretary Babbitt—who made it very clear, and he testified before this committee from the beginning that he did not feel that the Office of Special Trustee was necessary, nor did he support the work being performed under the authority. We had several discussions. He claimed that it would amount to basically the unraveling of the BIA's responsibility.

Now, Secretary Norton has inherited this special trustee put in place by Secretary Babbitt. The point is, the process of BIA doing it has failed for the reasons that we have identified here today. They are not set up to do it. They are good people, but this is a very complex problem that is dealt with in the private sector all the time in a proficient manner. What we have here is a problem with, again, the tribal acceptance—that we are taking something away from the BIA that they are incapable of doing and putting it in the hands of the private sector who can do it right.

For heaven sakes, a firm that takes on this responsibility, and I think the point was made by you, Mr. Gray, there might be some reluctance of the private sector to take this on because it is such a mess. On the other hand, I have a belief that the private sector will back up their efforts if they do take it up, with their reputation. They've got something to lose. So they are not going to take this lightly.

So I would hope, Mr. Chairman, that once and for all, after 21 years on this committee dealing with this problem, which didn't occur overnight. We have seen pictures or the recordkeeping. It is disastrous. It is unacceptable. It is inappropriate. To face reality, and get on with the idea of giving it to some organization or groups of organizations collectively who are experts in the area. They have proven their expertise with satisfaction to their customers, and save the Federal Government a lot of money. As the Senator from Colorado said, get the checks out where they belong and quit fooling around.

We are not trying to diminish the BIA's authority. We are just trying to get a job done that the BIA has shown that they are incapable of. If there is any question of evidence, let's look at the mess before us.

I have no questions. I am just preaching. [Laughter.]

The CHAIRMAN. Thank you very much.

I would like to thank the panel for your patience and your wisdom. We will be submitting questions. I think all members of the committee will have questions to submit. Do you believe that 30 days will be sufficient?

Mr. CHAMBERS. Certainly for us it would be, Mr. Chairman.

The CHAIRMAN. With that, I thank you very much, sir.

Mr. CHAMBERS. Yes, sir.

The CHAIRMAN. May I now call upon the next panel—the assistant secretary for Indian Affairs, Neal McCaleb; the associate deputy secretary, Department of the Interior, James Cason; the special trustee for American Indian Trust Funds, Department of the Interior, Thomas Slonaker.

Mr. Secretary, it is always good to have you before us, sir.

Mr. MCCALEB. Thank you, Mr. Chairman.

Mr. CASON. Mr. Chairman, we discussed briefly beforehand and thought I would start our testimony today, and then each of us will have comments later on when we do the testimony.

STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR

Mr. CASON. It was very interesting to listen to the first panel, and I guess somewhat depressing when you hear that the problem is insolvable and it has been here forever and there is nothing you can do about it.

I would not say that the folks in the Department are quite that pessimistic. We think there are things that can be done. What we want to do is come up today and visit with the committee regarding the major problems that we see at the moment, and some of our views on those problems, and begin a dialogue with the committee about how to address those.

I do have testimony that I would like to enter into the record. Other than that, I would just like to make a few brief comments, and then the other two gentlemen here would like to make brief comments and then we will take questions.

The CHAIRMAN. All of the prepared statements are made part of the record.

Mr. CASON. Thank you, Mr. Chairman.

In taking a look at the issues that we have before us, I think the committee in the last dialog that we just had recognized that there has been a long history of problems in trying to administer the trust on behalf of Native Americans, both tribes and individual Indians. We do have two classes of organizations that we have to deal with, that we need to keep on the table. One is tribes, and there are more formal relationships with tribes through treaty with the United States. And the other is with individual Indians.

We have some responsibilities for both. As the committee heard, there is wide-ranging responsibilities that involve many parts of the Federal Government, both the judicial branch, the congressional branch and the executive. There are several organizations in the executive that manage tribal responsibilities, and the Department of the Interior has particular responsibilities in managing tribal responsibilities. Most of those are centered with the Bureau of Indian Affairs [BIA], but there are also responsibilities located throughout the Department, with the Office of Special Trustee, the Bureau of Land Management, the Minerals Management Service and others.

One of the issues that has prompted the dialog that we are having here is the proposal made by the Department of the Interior to create a new organization to manage some of those responsibilities. It has been termed the BITAM, or the Bureau of Indian Trust Assets Management. When we were looking at the issues before

the Department about how to manage some of these responsibilities, and particularly the trust assets, and the trust assets involve basically 56 million acres of property and about $3 billion that are in accounts. We were looking at the reports that have suggested that over time, these assets had not been managed properly. In looking at all of those reports, we were trying to come up with ways to address those problems and that discussion over the period of a couple of months involving the three of us and a number of other senior management people within the Department, led to the formation of a whole set of options that we considered within the Department of the Interior.

The BITAM option, as it is called, was the option that we thought was best out of the ones that we had within the Department, to try and improve the management, integrity and security of managing Indian trust assets. The objective of that was to add profile to the issue by having another assistant secretary within the Department be responsible for those assets. It was not to undermine BIA in particular. It was to get a clear focus on the job that was there to be done, to make sure that there was an organization that had one sole purpose, and that was to ensure that the management of Indian trust assets was being done as well as possible. It was to permit us an opportunity to clarify the policies and procedures that were necessary to get that job done. And it was there to try to remedy some of the weaknesses that we have in the system within the Department.

Would it be a panacea? No. It would not have been a panacea, but it was a step and we considered it merely a step in the right direction.

We stopped our deliberations within the Department at a conceptual framework. We basically said, here is the problem, here is an organizational way to try and address it, and at that point in time started consultation with the tribes. We have had a number of tribal consultation sessions, and Mr. McCaleb is going to talk about the dialog that we have had with the tribes. We are very appreciative of the effort being made by tribal leaders to assist us in evaluating that proposal and a number of other proposals as to how best we can try to address this problem.

As far as the Department is concerned, any and all options are possible except for just the status quo, because we feel like the status quo is not appropriate. But other options to address this problem, including a number of Indian-sponsored alternatives, the alternatives talked about by Mr. Gray, the alternative talked about by Senator Campbell—you know, we will take a look at any option and in the evaluation process what we are after is what is the best way to try and address the problem.

So the Secretary and the Department are not in a position at this point to say the only option is the BITAM option. When we offered it as a conceptual framework, it appeared to be a good option, but it is not the only option.

Another problem that we are dealing with right now that is important to note is the *Cobell* litigation that the Department is involved in. It is a difficult challenge for the Department. It is consuming a tremendous amount of resources to manage our part of

this litigation. It is consuming a lot of resources with the Department of Justice.

In the *Cobell* litigation, there has been several pieces that are noteworthy. One of those is trial one. Trial one is basically prospective trust reform. That trial ended with a decision by the U.S. District Court judge circa December 1999, and was later appealed to the Court of Appeals and in most parts affirmed by the Court of Appeals. The trial involves individuals as opposed to tribes, and we all have to recognize that as we go through our processes. There is a possibility for a trial two, and the trial two would be involved principally with historic accounting.

And then we are currently involved in a contempt trial, as Senator Murkowski noted. The prior Administration was tried in contempt of court and Secretary Babbitt and Secretary Rubin were found to be in contempt of court on this issue, and our current Secretary Norton is being tried in contempt also related to issues here. The contempt trial I believe is nearing its end. I believe all the witnesses have given testimony, and it is basically up to the judge to decide what is appropriate in this case.

Also, one of the issues involved with the *Cobell* litigation is the possibility of a receiver. That is something else that is being look at, has been looked at as an option. It is a tangential option to some of the things that we have talked about this morning already. In this case, the judge has sent signals or made comments that a receiver may be possible if we don't find the right kind of an environment is being pursued within the Department.

One of the issues that is also an outcropping that we want to discuss with the committee is the possibility of historic accounting—let me re-phrase that—the task that we have to conduct a historic accounting. The judge in this case has made a determination that the Department is responsible to conduct a historical accounting. And historical accounting is generally defined as a transaction- by-transaction accounting without regard to when funds were deposited.

So one could determine that this means since 1877, we are to account for all the funds that have been deposited on behalf of Indians since that point, on a transaction-by-transaction basis. The Department is preparing, planning to do that. We have told the committee and we have told Congress in general and the court that we would supply a plan as to how we would go about doing that accounting by June 30. There is an issue related to the complexities of doing that type of accounting, the relative costs that would be involved in doing the accounting, the methodologies that would be used and the relative satisfaction that one would get from doing it, because there is a problem with missing records over time, and that the further back in time one goes, the more you are going to find that there are missing records and that other assumptions or other methods would have to be used to fill in the missing data.

Finally, there are two other small issues I would like to raise. One is fractionated interest. We do have an issue with fractionated interest on the part of the individual Indians. As generations pass, the relative level of undivided interest in properties continue to fragment to the point that they are becoming unmanageable. I have been told at this point that the BIA is now tracking these in-

terests to 26 decimal places, and that they are preparing to rewrite their computer systems to be able to track to 42 decimal places.

These are very, very small interests in property and it does complicate the management job within the Department to have to track these interests because you have to be able to identify them all in probate, record them all in title work, and you have to be able to manage the accounts that are associated with these fragmented interests and that there are some difficulties with this. They are so widespread and expanding exponentially now that we will have to come up with a broader solution than we have available.

The last item, just to put it on the table, we have also experienced here in the last three months the shut-down of most of the computer systems within the Department under a temporary restraining order issued by the judge in the *Cobell* litigation. The Department has had to disconnect from the Internet virtually all of its computers. There have been a number of impacts associated with that. The reason for shutting down the computers was because the security of the data that was in our systems was inadequate, and the judge made a determination that we should shut down the computers and do the job to go back and take a look at where individual Indian data was located within the Department, and ensure the security integrity of that data.

We are currently going through that process. At this point, we have about one-half of the computers of the Department hooked back up to the Internet and we are working on the remainder.

That is a brief overview of what we have included in our testimony, and we would be happy to answer questions once these two gentleman have had an opportunity to comment.

Thank you, Mr. Chairman.

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

The CHAIRMAN. I thank you very much, Mr. Cason.

Secretary McCaleb.

STATEMENT OF NEAL A. MCCALEB, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. MCCALEB. Thank you very much, Mr. Chairman, Mr. Vice Chairman, Senator Campbell.

I am privileged to be here this morning. I thank you for the opportunity to discuss these very far-reaching problems affecting Indian country and Indian individuals.

As Mr. Cason indicated, we had a fairly extensive and spirited debate within the Department about how to try to get our hands around this seemingly intractable problem of the effective management of the Indian trust asset in Indian country. The proposal that was agreed upon after considerable discussion and analyzation, and reaching a consensus, was the BITAM proposal. It is a conceptual proposal. It was not a detailed proposal. It embodied certain principles of central single-executive sponsor management under a new Assistant Secretary for Indian Trust Asset Management, and involved the removal from a variety of Departments, not just the BIA, but all Departments that involve trust asset management, including the BIA, BLM, MMS, and others to this new bureau.

We took the concept on the road, if you please. It was clear from the outset that we absolutely needed an extensive consultation process. And in the spirit of the Indian policy of self-determination and self-governance, we began the consultation process after due public notice on the December 13 in Albuquerque. Secretary Norton chaired that first meeting herself and spent the entire day listening to all the comments that were made. And there were probably 500 people in attendance at that particular meeting in Albuquerque.

We have since that time held seven other consultation sessions. There is some reluctance on the part of Indian country to refer to this as consultation. The term that is preferable to many of the Indian tribal leaders is "scoping" sessions. But we have held seven more of these throughout the country—in Minneapolis, Oklahoma City, Rapid City, San Diego, Anchorage, Washington, DC, and most recently in Portland, OR. These have been attended by various officials within the Department of the Interior. I personally have attended every one of them, and chaired them all except the initial one which was chaired by Secretary Norton.

We conducted these eight meetings so far. We have listened to—there has been about 2,000 people in the aggregate attending these meetings. We have heard over 50 hours of testimony and received some 10 different defined alternative proposals from tribal leaders and tribal advisory organizations. Now, there were a number of repetitive themes that emerged from the consultation process. Some of them were, there was basically unanimous opposition to the BITAM proposal as it had been presented.

Second, there was most notably concern that they had not been included, on the part of the tribal leaders, that they had not been included in the formulation of the BITAM proposal, which in my judgment was one of the underlying reasons of the out-of-hand rejection from the very start of the BITAM proposal.

Clearly, the tribes wanted to be involved and have input into these very, very important discussions affecting their lives and their futures, to which they are absolutely entitled. In that respect, they recommended, since they perceived these as scoping sessions, another alternative method of having some input into the formulation of alternative proposals by the creation of a task force. This task force was developed in the next few subsequent meetings. The composition was determined to have two members from each of the 12 regions and one alternate member, or a total of the alternates and membership of 36. They were to be selected by the tribal leaders from each one of their respective regions from which they came.

That has happened. That has been completed. And we in fact held our first complete task force meeting on February, beginning on the first, second, and third, at the National Conservation Training Center at Shepherdstown, attended by Secretary Norton, Deputy Secretary Griles, Mr. Cason, myself, Mr. Slonaker, and a variety of other of the top management in the Department of the Interior, to listen to and interact with the members of this task force, many of which by the way I have noticed are here in attendance in this room today, and most of the members of your panels three and four are members of that tribal task force.

At the meeting at Shepherdstown in the first weekend in February, the task force presented to the Secretary four of what they

thought were the most probable alternative proposals for her consideration, and also for their careful evaluation. They had developed a matrix for evaluating these different proposals, based upon criteria which they have also developed to determine which proposal or proposals are most likely to further consideration.

In my judgment, the consultation process or scoping process, whatever you want to call it, in any event it was a communications process, and it was largely a listening process for me because, as chair, I largely listened to the recommendations, the concerns of the participants from all over Indian country who came to speak and responded to questions as they were directed to me.

I believe this process and the creation of the tribally driven task force is very useful because whatever the solution is to this seemingly intractable problem, it needs to be done with the enthusiastic endorsement of Indian country, in my judgment. As indicated earlier, Mr. Chairman, in your opening remarks, the days have long since passed of the BIA and the United States Congress dictating unilaterally to the sovereign tribes of the United States what is best for them. They have demonstrated quite dramatically in the last 26 years, going on 27 years now, since the passage of the Indian Self-Determination and Self-Education Act and the subsequent titles, their ability to run their own businesses and to administer their own programs and to, in many instances, be very competitive in a market-driven economy.

So there has to be the careful listening and response to the tribal initiatives in this. And that is the process that is ongoing right now. I am very pleased that many members of the task force are in attendance here. Will this joint effort between the Department of the Interior, the tribal task force, be frictionless and without debate? Absolutely not. Will we reach some kind of a unanimous opinion on what is best? Highly unlikely. But it is a mechanism that has to be tried and used and implemented. And I am maybe the last unreconstructed optimist in this process, but I believe in the efficacy of the tribal leadership to sort out these problems with us and to help define appropriate solutions.

I would also say that the next meeting of the task force is set for March 8 and 9 in Phoenix. They have organized three subgroups to assist in the segmentation and development, including a group to work on the protocols of how the mechanisms of how this organization is going to work and interact with the Department of Interior; also to help us define future scope of services for our consultant EDS and how to utilize their service most effectively; and thirdly to evaluate very carefully all the different proposals that have been put on the table so far.

I think I will conclude my remarks at this point, and answer any questions that you may have at the appropriate time.

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

The CHAIRMAN. Thank you very much, Mr. Secretary.

Mr. Slonaker.

STATEMENT OF THOMAS SLONAKER, SPECIAL TRUSTEE FOR AMERICAN INDIAN TRUST FUNDS, OFFICE OF THE SPECIAL TRUSTEE, DEPARTMENT OF THE INTERIOR

Mr. SLONAKER. Thank you, Mr. Chairman.

The last time I appeared before you was at my confirmation hearing and you offered your condolences for my taking this job, and I must tell you at this point that I appreciated that, but it has been very interesting and challenging.

The Special Trustee's role in the Department is truly unique, and I suspect is unique throughout the Administration in the sense that it is an independent role. It is supposed to be an independent role. Some of my staff who were here when Paul Homan, the first Special Trustee was here, often joke about the Special Trustee's Containment Committee within the Department, but I think that in my time it has been apparent that the Department is willing to listen and think with me through a lot of these problems.

But it is a role going forward that I think will be more and more critical. I have spent the last 1½ years-plus when I was confirmed trying to, I suppose you would say un-peel the onion and discover what the issues really were with the sub-projects under the HLIP in the first place. And then we got to the point where I felt that we needed to bring EDS, it turned out to be EDS, but bring in a firm to really look into the three major sub-projects which are at the heart of trust reform and also trust management. And then of course with the support of the Secretary, that EDS assignment was expanded to an even greater look at the entire trust reform process. So it has been an interesting time.

Let me share with you very briefly some of my observations in terms of where I think problems are and where I think potential solutions may lay. First of all, I very much echo Mr. Endreson's comment in the first panel, distinguishing between what I call the fiduciary management and what might be called the broader trust obligations that the government has. By fiduciary management, I mean the management of the 56 million acres of land that are subject to being leased to produce income for Indian beneficiaries, both individual and tribal—the accounting for all of that, the pursuit of the leasing activity, the payment of checks and everything that goes with it. All of that activity looks like nothing more or less than a significantly sized trust department.

But there are broader trust obligations, and he articulated some of those in terms of services from the Government to the tribes, and I thought he did a good job of it. But I think it is worth dwelling on that point because in the discussions that go on, I often find confusion between the two issues. The fiduciary trust clearly is a part of the trust obligation of the Government, but may require solutions to make it work properly that don't necessary have to impact in any way the broader trust obligations of the Government.

I think the problems that I have observed are as follows. In the first place, I think the 1994 Act, with 20/20 hindsight provided the special trustee first of all with no line management capability. In the recognition of the fact that there are five separate bureaus and offices that have parts of the trust operation, you can begin to see that oversight, which is what the 1994 Act conveys to the Special Trustee, is oversight, but it is not line management, and what this takes is line management to get the job done. There is a very high lack, which has already been mentioned, severe lack of experienced trust managers within the Department of the Interior. In fact, I venture to say that those with actual private sector trust experi-

ence are relegated strictly to the Office of the Special Trustee at this point.

There is also a lack of project management capability. It is just not there in any meaningful amount to get a lot of the projects done in appropriate manner, and these are large-size projects as they were sized in the high-level implementation plan.

But regardless of what the organization looks like, regardless of whether it is outside the Department of the Interior, whether it remains part of the BIA, or whether it takes on some other configuration within the Department, what is really needed here is experienced management, clear line management, and accountability up and down the line. For example, it would not be necessary, really, to split this off from BIA at all, but it would be important to get the people who are responsible for delivering trust services to the beneficiaries, both individual and tribal beneficiaries, so that they don't have conflicting duties up and down the line. We have a lot of people on the ground, I have come to understand in the time I have been in this job, that really are doing and want to do a good job as far as their trust beneficiaries are concerned, but often they are conflicted with other responsibilities. I think it is very important that the middle management of the trust organization be carefully examined as well, because those people have to understand the trust obligation and they have to be willing and able to deliver the services.

I concur with the Secretary's concept of a single trust organization. But as I have just mentioned, where it is placed, either inside or outside the Department, I think is a little bit less important than the fact that it is a single line of authority. There is accountability up and down that line, and there is a meaningful amount of trust experience, particularly in the management level, to carry off the job.

In fact, you may remember that the 1994 Act also created an advisory board for the Special Trustee. That advisory board has, within the last couple of months, actually recommended that the trust function be put in a single organization and taken outside the Department. I am very sympathetic, as I have mentioned already, but I do think the point should be that it is a single organization with accountability.

You may wonder what I think about the role for the Special Trustee going forward. I think in some fashion there needs to be oversight with teeth that has not been there, because the Special Trustee has to provide candid and informed guidance for the Secretary. That is the mandate. But in order to get anything done, there has to be teeth in there. There have to be appropriate resources provided for OST as an oversight, and in my opinion there continues the need to have the Office of the Special Trustee in charge of the funding which takes place on trust reform projects, which is the way it has worked up to this point. I would trust and expect that it would work that way going into the future.

That is to say that anything to do with trust reform has to pass the test of good planning, good logical planning in order to get the funding which Congress has already provided through appropriations. As you probably know, my office has actually halted much

of the funding and some of the projects for the lack of good planning.

In conclusion, let me just mention a few things that I think are important going forward. I think that we get caught up in the Department, even my office gets caught up in trust improvement, trust reform. One of the things, actually two things that I think we are going to need to spend a great deal more time on and are making steps in that direction, one is we need to be assured that the Department, no matter how it is organized, is maximizing the returns on the assets we invest for the beneficiaries. I don't think I need to say much more than that because I think we are all aware that there are situations here and there in Indian country where the assets, the lease, is not being maximized for the benefit of the beneficiary.

Also in the area of trust investments, we are relegated to U.S. Government securities only, and some Federal agencies, related Federal agency securities. I worry about, for example, the Indian child who will not receive moneys until they reach a majority, with those moneys being invested strictly in government securities. We need to think about how we offset the impact of inflation over many years. So those are important tasks I think we will need to work on.

I think there is an important role for the tribes under the 628 contracts and the compacting arrangements. In fact, there is a vital role, but I think it is also important for somebody to say that there is also a very high standard of trust here, which was articulated pretty well I think in the first panel, that will apply to no matter who is involved with administering the trust.

And with that, I would like to conclude, Mr. Chairman.

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

The CHAIRMAN. Thank you very much, Mr. Trustee.

I just have a few questions, and I would like to, as I did with the other panel, submit my questions for your consideration.

Mr. Cason, as you have indicated, trust management functions are performed by other bureaus, not just BIA, but the Bureau of Land Management, Office of Surface Mining, et cetera, et cetera. If that is the case, why is the Department's request for a reprogramming of funds only proposes to ore funds allocated to BIA and the Office of the Special Trustee, and not to others?

Mr. CASON. Mr. Chairman, the initial reprogramming request was to establish the core of the new organization. The core was basically the operational portion of the Office of Special Trustee and the trust asset management portion of BIA. The Department also had intended to go agency by agency throughout the Department to evaluate all of the other organizations that contribute to trust assets management, and evaluate case by case what is the smartest thing to do in moving pieces of those into this new organization.

At the time we submitted the reprogramming proposal to establish the core, we knew we had a ways to go before we would be prepared to move the other parts effectively, but the intention was to look at all parts of the Department and consolidate where it made sense.

The CHAIRMAN. Mr. Cason, in your testimony you mentioned the *Cobell* case. In the *Cobell* case, the court found that the Depart-

ment had breached certain fiduciary duties, and in fact they cited four of them—failure to provide an accurate accounting of all money in the individual Indian money accounts, failure to retrieve and retain all information necessary to render an accurate accounting, failure to establish written policies and procedures for retaining necessary documents and information, implementing computer and business systems architecture, and fourth, failure to ensure sufficient staffing of trust management functions.

Will the Secretary's proposal address these breaches?

Mr. CASON. The organizational proposal itself does not. The organizational proposal is just how we do work, who is assigned to do work. Instead, this is basically what work needs to be done. The Secretary and the Department is aware of the four breaches, are working on the four breaches. There are individual efforts going on under the four breaches. There is some influence between the breaches and the work that has been done and the organizational proposals.

For example, Mr. Chairman, on the fourth issue of staffing for trust management functions, the Department had prepared a workforce staffing plan, but that staffing plan will be influenced as to what sort of organizational arrangement we have at the end of our consultation process. So that is basically in abeyance at the moment in large part, while we sort out what the organization is, and then we revise the staffing plan to meet the organizational expectations that we will have. So there are some influences between them, but they are not direct.

The CHAIRMAN. Are you saying that there is no expertise available at the present time?

Mr. CASON. No; I am sorry. That would not be an accurate way of looking at it. There are people throughout the Department who bring expertise into the job that we have to do. I think that there are some references here from the initial panel's experts and Mr. Slonaker, that there are particular skill types that are relatively rare within the Department, and that skill type is people that have a good resume on trust functions or fiduciary responsibilities management. That is a skill type that we would like to have more of. We don't have enough of. But there are other people that do other things like computer experts, management people, et cetera, that we do have some skill types within the Department that is useful. We just don't have enough of all of them.

The CHAIRMAN. Thank you.

And if I may ask Secretary McCaleb, Mr. Secretary, when you couple the proposal to strip all trust-related functions of your bureau, and the proposal in the President's budget request to turn all BIA-operated schools over to tribal governments and the private sector, it would appear that there is very little left for you to oversee. What do you view as the role of the Assistant Secretary to be if these proposals are implemented? This is a question that many of the tribal leaders have been asking.

Mr. MCCALEB. Well, first of all, in the education area, we already have over two-thirds of the schools that are operated under contract by local tribal school boards. I think that is a legitimate objective, just as I think it is a legitimate objective to have public schools operated by local school boards. The proposal to privatize

some schools, and it is a pilot proposal within the budget, is to try to deal with some of the very difficult schools that are our lowest achieving schools, to try to bring them up to something approaching what our education goal which is 70 percent proficiency in reading and communications and mathematic skills.

Will that work? I don't know. They are pilot programs. But the point is that the Office of Indian Education Program still has the responsibility for Indian education—its trust responsibility—just as at the State level there is usually a State Board of Education or an overall education agency responsible for all the local school boards. That is still the responsibility of the Office of Indian Education Programs reporting directly to the Assistant Secretary of the Interior.

In addition to that, of course, there are many functions that are essential for the safety, health and welfare of the community, such as public safety, law enforcement, the court systems. Economic development is clearly a very, very important role, I think, of the Assistant Secretary and the BIA, because I think we will only solve some of our social pathology that exists in Indian country is a result of eliminating the despair and hopelessness that comes from poverty. And that can only be, in my judgment, done by developing market-driven economics—self-sustaining market-driven economies. We are starting to see that develop in different tribal entities, and with great success.

Roads, which is an element of economic development because all access to the market—well, not all access—all direct access of products to the market is with roads, but also the development of the essential telecommunications process that I think is useful—no, essential to economic emergence for tribes because of their remoteness of location—is an appropriate activity. Social services clearly are still the responsibility of the BIA. Other functions, while not great, are very important, like land trust activities and tribal recognition.

We still have to build the schools and the Office of Facilities Management and Construction operates the school construction program and I think will continue to do so. We have a very ambitious school construction program. This is the third year of it, and it is a quantum—not a quantum jump, but a tripling of the investment that we have made in the replacement of outdated and in many cases unsafe school buildings. All those still remain under the purview of the Assistant Secretary of the Interior.

The CHAIRMAN. The trust relationship exists between the Government of the United States and Indian Nations and Indian individuals. However, many in Indian country look upon the BIA as the trustee. Of course, that is where they focus their concerns, their desires and their needs. Do you believe that the Secretary's plan will diminish the importance of your bureau?

Mr. MCCALEB. Well, it would clearly diminish some of the functions that are placed under the new Assistant Secretary of the Interior for the Bureau of Indian Trust Asset Management. Whether it diminishes the importance or not is a matter of debate. I happen to think that it does not diminish the importance. I happen to think, my limited experience after seven months on the job is that it is a very consuming and demanding responsibility. The reorga-

nization would let the Assistant Secretary for Indian Affairs focus on these other areas that are vital to the quality of life and the economic emergence in Indian country. I think that is very useful, and in my judgment extremely important.

The CHAIRMAN. Thank you very much, Mr. Secretary.

If I may now call upon the Trustee. If your office is provided teeth, as you indicated, and line management responsibilities and accountability, and the expertise that you need, would we need a new proposal or plan? Would you be able to carry out your functions?

Mr. SLONAKER. You mean, as an amendment to or in lieu of the 1994 Act?

The CHAIRMAN. In addition to the 1994 Act.

Mr. SLONAKER. In addition to. I don't believe so. I think the 1994 Act, to begin with, can permit me to, or as the Special Trustee to make certain that trust reform and also ongoing trust operations take place to fulfill the trust obligation. I think the secret here is to get the line management capability or something very akin to it. The Secretary, I should tell you, in the summer of last year provided the Special Trustee with the capability to issue directives, which would be used presumably only in those cases where there was no other resolution, to correct a trust situation. The terms of the order provide that the people who are affected, or the organization that is affected, has a capability of appealing that to the Secretary. If she stands behind me, which I am sure she would, after a 30-day period, it has the effect, that directive of mine has the effect of becoming, in effect, a secretarial order itself.

We have tried that, and we have not concluded whether it really works yet. It is, I must just tell you bluntly, but there is a bureaucracy that can defeat even such directives, or at least deter them. And so I am not convinced that that is the real answer. I think there has to be something stronger than that, and I don't see what that would be other than direct line authority.

So I am not sure, Mr. Chairman, that the 1994 Act has to be touched at all. But there has to be the kind of resolution that I just mentioned and I think obviously there has to be a considerable amount of planning that has to go on to do this trust reform correctly, and also to ensure, going on, that the trust obligation is carried out properly.

We have created, for example, in my Albuquerque office, an Office of Trust Risk Management, which is designed to be in effect the watchdog on making certain the trust operations are operating correctly; that the obligation is being carried out; that the maximization of income on the leases, that I mentioned before, is being carried out correctly. So there is a lot we are doing and can do a lot more of in that respect. I hope that answers your question.

The CHAIRMAN. Do you support the Secretary's plan?

Mr. SLONAKER. I support the Secretary's plan in the sense, as I mentioned before, of addressing one critical question, and that is to actually separate those who are responsible for trust administration and operations, up and down the line, into a single organization. A single organization can be outside the DOI. It could be inside DOI. It could conceivably be inside BIA. But it has to be a sin-

gle line management, undistracted from other responsibilities and with accountability up and down the line.

The CHAIRMAN. Mr. Cason and Mr. McCaleb, I presume both of you would support the Secretary's plan.

Mr. CASON. Mr. Chairman, we do support the Secretary's plan, but I would say the Secretary's plan is an option and that the Secretary and the Department are in a position that we are soliciting other options for how to better address our trust asset management responsibilities. We have received a good eight to ten proposals from the Indian community on how to do that. We are open to other proposals. We are continuing to work with the tribal leadership organization, the task force, to evaluate the proposals we have and to develop other proposals.

So while we support the Secretary's plan and we helped formulate it—this group, we helped formulate it—we did not see that as a panacea; that it was a way to address the problems that we had and that we are open to other ways on how to address those problems. What we hope out of this consultation process is that we end up with even a better proposal than that one on how to manage it. If we come up with a better one, that would be terrific.

The CHAIRMAN. So you are flexible and open to other suggestions?

Mr. CASON. Absolutely, Mr. Chairman.

The CHAIRMAN. I have two questions submitted by Senator Daschle, who could not be here. He has asked that I pose this to the panel here.

What is the status on the shut-down of the Bureau's land records information system? When will this important automated trust land ownership system come back on line for data entry by the Land Titles and Records Office?

Mr. MCCALEB. The land titles records is of course computer based, and is connected to the Internet in order to retrieve. So it has been shut down as a result of the judicially mandated disconnect. It is not one of the systems that has been brought back up yet, because our first priority is to bring the systems back on line by which we can convey checks to the IIM accountholders and other beneficiaries of the trust. But it is a high priority behind those.

The CHAIRMAN. How long will it take?

Mr. MCCALEB. That can only be determined by the judgment of the Special Master of the court. We work with him under the consent decree to determine or to satisfy him that the security measures that we have taken protect each system before we bring it back on line.

The CHAIRMAN. Mr. Secretary, what is the Department's plan for the TAAMS title sub-system that is currently in use at the BIA Billings Land Titles and Records Office? Is it your plan to deploy this automated title system at all the BIA Land Titles and Records Offices? If so, how soon and how long will it take to fully implement this automated system?

Mr. MCCALEB. I am going to let you respond to that, Jim, since you have worked a little closer with EDS. [Laughter.]

Mr. CASON. Did you see a short straw coming over here? [Laughter.]

The TAAMS system, as we talked about earlier in the testimony, was developed over time. The Department's contractor, EDS, evaluated TAAMS along with BIA data cleanup in its initial effort. Our contractor basically concluded that the TAAMS system had not been developed to be successful in the long term, and recommended that we suspend two of the three basic modules of TAAMS. The module they thought would work was title, and then they suggested we suspend work on the realty and accounting portions of TAAMS, which we have done.

The TAAMS program on title is being used in four areas of BIA, and it is being currently evaluated further for the relationship between the Legacy record system and the TAAMS system. And that over time, the expectation is that the TAAMS title portion can be used more broadly.

I don't have a specific timetable, Mr. Chairman, of how long it is going to take to do that. As I understand it, there are differences in the way that each BIA region manages its land records and that that has been part of the problem that led to the, I will say, failure of TAAMS. What the Department tried to do was take a commercial off-the-shelf system and force it onto the Bureau as a means of standardizing work. That did not really work in the end, so we ended up with a 100-percent commercial modified system.

So the issue that we have before us is to recognize that each of the regions do things slightly differently, take a look at the mechanisms of TAAMS between the current TAAMS system and the Legacy system, and see if we can make those work module by module, region by region—to do that deliberately. So I don't have a specific timeframe, but that is the basic idea about how to approach it.

The CHAIRMAN. Thank you very much.

As I indicated, the committee will be submitting questions for your consideration, and we will keep the record open for 30 days, and I hope your responses can come in before then.

Mr. CASON. We would be pleased to do so, Mr. Chairman.

The CHAIRMAN. Mr. Cason, Secretary McCaleb and Trustee Slonaker, thank you very much.

Mr. CASON. Thank you.

The CHAIRMAN. Senator Dorgan has asked that I extend his regrets that he cannot attend today's hearing because, as some of you know, he is chairing the Commerce Committee hearing on Enron's collapse. Senator Dorgan wanted to be here to introduce Chairman Tex Hall of North Dakota and to listen to the testimony of the Department of the Interior and tribal leaders.

So on behalf of Senator Dorgan, his written statement will be included in today's record.

[Prepared statement of Senator Dorgan appears in appendix.]

The CHAIRMAN. Mr. Chairman Hall, my apologies from Mr. Dorgan.

Our next panel is Tex Hall, chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, cochairman of the Tribal Leaders Task Force on Trust Reform. Is Susan Masten here also?

Mr. HALL. No, Mr. Chairman; she had recent surgery and will not be able to attend today.

The CHAIRMAN. I am sorry to hear that. I hope she is doing better.

Mr. HALL. Thank you. I will forward that on to her.

The CHAIRMAN. Chairman Hall, the floor is yours.

STATEMENT OF TEX HALL, CHAIRMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, AND CO–CHAIR, TRIBAL LEADERS TASK FORCE ON TRUST REFORM.

Mr. HALL. Thank you, Mr. Chairman.

Again, my name for the record is Tex Hall, chairman of the Three Affiliated Tribes of the Fort Berthold Reservation and also the cochairman, along with Sue Masten, of the National Tribal Leaders Task Force.

Just a couple of things I wanted to point out, Mr. Chairman, before I begin my formal presentation. I have submitted a written testimony. But in response to, and you had some very good speakers up here, but in response to Mr. Gray's testimony, obviously Mr. Gray has a great amount of expertise, but as tribes represent sovereign nations, we want to make sure that we counter what Mr. Gray has indicated about the commonlaw standards of a trust versus historical standards of a trust that go back to the 1800's.

That was reiterated by the comments from Mr. Chambers and Mr. Endreson. We agree for the most part of that historical relationship, and that trust is all-encompassing based on treaty, statutes, executive orders and so on and so forth. We want to concur with the two attorneys and want to offer that that is what we think BITAM does not address that historical trust standard. That is one of the main points that the Tribal Task Force is really opposed to on that proposal of BITAM. We feel it does not address that. So I just wanted to say that from the onset, Mr. Chairman.

In terms of the origination of the Task Force, Mr. Chairman, we really created ourselves by the tribes. The Task Force was created at a response of BITAM, as we call it. That was in Albuquerque on December 13. Tribes were very concerned and spent a good deal of 12 hours on the day before, on December 12, in anticipation for Secretary Norton coming to Albuquerque. We had just received notice on this mainly in person from Mr. Steven Griles and Assistant Secretary McCaleb at the annual NCIA convention and meeting in Spokane on November 29. So this really came as a lightning bolt to the tribes and we were very alarmed at the complete lack of consultation, the lack of regard to the beneficiaries, to the tribes, and the IIM accountholders.

As sovereign nations, of course, that is who we have jurisdiction over, is our land and our people. And we know all too well that this is important for the past, for today and for the future. And as we heard today, some people, some government employees will talk about it has taken a lot of their time. Mr. Chairman, we want to reiterate as a Task Force of tribal leaders, this is our life. This is past, this is present, and this is for the future generations. So we need to be involved and we will take as much time as necessary to make sure that a plan is drafted that is tribally leader-driven.

And so we, again back to the December 12 and December 13 meeting in anticipation with Secretary Norton, 80 tribes in Albuquerque, Mr. Chairman, by unanimous consent, and it took all of 12 hours the day before the—we call it "scoping" because we do not feel it was in compliance with Executive Order 13175, and that is

that before any kind of a change and any kind of the operational changes that are being proposed must have full and meaningful consultation.

So again, this was a lightning bolt and we spent all of the 12 hours and said we need to come up with some principles that we all agree on so the tribes are in unanimity, that we are unanimous in our position. And tribes are. And of course, the first principle, out of the seven that we developed, is that we were opposed to BITAM.

But also, I want to reiterate, Mr. Chairman, for the record that tribes do support trust reform. We know all too well our people are the ones that are going without right now. I would hope that the Department is looking at some sort of compensation, Mr. Chairman, for those people. It has been 90 days now, that basically their credit is ruined for many of our IIM accountholders and tribes. Many tribes have also had to issue their GA checks during that month of December to get the checks to the poorest of the poor. In providing those GA checks, many tribes had to do it through their 638 contracts. So my tribe, for example, we had to expend $50,000 out of our 638 contract. We are still waiting for the BIA to refund our tribe's $50,000 contribution.

It is promising to hear that some members—some of our tribal members are getting paid. I know at my tribe at Three Affiliated there is probably about 150, but of course we have a long ways to go. There are about 6,000 IIM accountholders. So there are some members being paid, but again I hope that the committee would look and work with the Department on some sort of compensation, Mr. Chairman, for those members who have basically lost their credit.

The tribes, through its Task Force in working on its principles want to go back and reiterate some of the comments not only of Mr. Chambers and Mr. Endreson, but a Professor Charles Wilkinson, in a determination that all the functions that are all trust. And we again feel BITAM is very limited, and it actually breaches that trust because it separates those trust functions.

It also does not address the breaches of the *Cobell* litigation. You will hear later on, Mr. Chairman, from—in the next panel, you will hear from a number of the tribal leaders that have spent a lot of time and diligence. Tribes are very sophisticated in this matter because they work on these issues every day. You will hear the plans that they are developing and how it encompasses all of that trust responsibility.

Mr. Chairman, the Task Force as it was working through Albuquerque, and it worked through all of the eight scoping meetings—I attended all of the eight scoping meeting—and we feel that a lot of the time was wasted by the time we got to the February 14 and the eighth scoping meeting in Portland. It was wasted because BITAM continued to be placed on the table by the Secretary.

If there is a commitment from the Secretary that she wants to work with the tribes in the Task Force in specific to come up with a plan collectively, then those eight scoping meetings would have been much more productive. In my opinion, Mr. Chairman, they were not that productive because every meeting in all eight regions continued to discuss the same proposal, and that was BITAM. And

so again, there are four more regions to go, but as long as BITAM is on the table, that will continue to be a place of and a time of opposition, and not of constructive work. And meanwhile again, as we mentioned, the work needs to happen and it is not happening because the proposal is still on the table.

It leads me to the Shepherdstown meeting, Mr. Chairman, on February 1–3. It took a great deal of effort to work with the Task Force. And the Task Force, I should say, is 36 tribal leaders made up from the 12 regions of the United States. So these are the leadership in Indian country that the tribes have elected to represent them on this Tribal Task Force. And so it was very hard, and I told this, quote-unquote, to Secretary Norton in Shepherdstown. I said:

> Good afternoon, Madam Secretary. What you have before you is 36 separate sovereign nations that are before you. This is like a tribal United Nations and it is very hard to get consensus. But the consensus we do have is trust reform, and secondly a plan must be tribally driven.

And so it was very hard to get all of the 36 tribal leaders there. For one thing, there was a lot of uncertainty; a lot of lack of confidence in Secretary Norton to really consult with tribes because it had not happened initially. And so to come to Washington, DC and to go out to a retreat in Shepherdstown so to speak, to really dialog was difficult. But we all agreed, unanimously all 36 of us, that we needed to be at the table because these are our assets, these are our people, and these are our moneys.

And so with reluctance, all 36 of us went. The other part of the reluctance was we were not able to take any staff with us. We could not take, as Mr. Gray indicated, you need systems analysts. The tribes, all of us, have systems analysts and attorneys and technical people. We were not able to bring those people. However, some of the tribes that did get a chance to present were able to get a few of their technicians with them later on, the next day on Saturday, and then finally on Sunday. But for the most part, most of us had to leave behind our technicians, and we felt that was unfair because the Department had all of their system analysts and their experts and their expertise there.

And we thought this was a collective method and a collaborative way of doing adequate consultation. And we were just disheartened by that.

So to make a long story short, Mr. Chairman, we went through the process. We heard from Charles Wilkinson. We heard from a private banker talking about common law trusts. And then we also got a chance to present our plans—our nine tribal plans. And we developed a matrix. And I thought our method of looking at the different plans was much more sophisticated because of the matrix that we developed.

For example, some of the criteria, Mr. Chairman, in our matrix we listed the nine plans and we listed criteria. And the first criteria that we listed, we said, does any of these plans protect tribal self-determination? And again, with BITAM, it does not adhere to self-determination. And there are some tribes who are doing a wonderful job of managing their own assets. In the House Resources panel, the Salt River Tribe, for example, from Phoenix, AZ, and the Salish-Kootenai from Flathead, MT are both managing their own assets and are doing quite well. BITAM does not do that. So that

is the first criteria we wanted to put in our matrix, is does it protect tribal self-determination.

Do any of these plans comply with the treaties and Federal Indian law? Third, these plans should not compromise the broad trust responsibility. Fourth, would any of these plans set trust management standards to the highest fiduciary responsibility? Would they provide for external monitoring? Would they ensure appropriate trust accounting? Would they ensure appropriate management of natural resources? And finally, would they provide for historical account balance reconciliation?

So in our matrix, we listed those in the left margin and we listed all nine, and we had a chance to present on Saturday and then on Sunday.

We were also disappointed, Mr. Chairman, that when we arrived finally on Friday night, we were told by the Secretary that she could only spend a short amount of time. We went under the premise that she was going to spend a whole weekend working with us collectively to come up with a plan, because there was such a concern from the Department because of the *Cobell* litigation that we had to get moving, we had to be working on a plan ASAP.

And so with all of that, we were very disappointed that she basically had supper with us and talked to us a little bit, made some comments about what she thought should be developed over the weekend. And we agreed with that. And part of that whole thing was to start beginning a trust relationship. The 36 members of the Tribal Task Force, we thought well, what better way than to begin a trust relationship with the trustee. And so we all agreed, let's stay and let's work through this.

Finally, she on Sunday, February 3, the Secretary came back in late afternoon around 3–3:30 p.m. somewhere thereabouts. And the tribes had an opportunity to present a shortened version of their plans, just to demonstrate to the Secretary all of the criteria, all of the standards that the tribes wanted included in that matrix. And we also indicated as a Task Force that not only will be review nine of the tribal proposals, but it is open for any other tribal proposal. But we also are including in this matrix an examination of the IIM account receivership motion that is before the judge, and also BITAM itself. So we were putting actually all of these 11 plans in the matrix and we are working toward that.

And we put a contract with the Secretary and Mr. McCaleb as Assistant Secretary. We put a contract proposal because the tribes felt that it is important that the tribes get the consent and the consultation with the entire Indian country, with all of the 569 tribes. We felt that is how important it is, because everybody is separate, everybody is sovereign, and we needed to get that consent. We wanted to have this contract, and most of this contract, Mr. Chairman, about 75 percent of it was just for travel alone. And then the other part of the contract was for dissemination of information and communication. We wanted to make sure it was tribally driven so that the tribes had control of, or at least a partnership in the agenda, and that it would not be provided by the Government, and then of course that falls under the Federal Act, and that means that it is not tribally driven. We did not want that to happen.

Unfortunately, we have not had any resolution to that contract yet. And so our next meeting on March 8 and 9, again of course the Department is scheduling that meeting and of course we know with their computer shut-down, there is a lack of information that can go out, and it is difficult and it is trying. Of course, through NCIA, we have the database that can provide exactly that.

So we left Shepherdstown on Sunday evening February 3 with fairly good thoughts, as the Secretary was starting to I think nod her head and started to think that—we started to get a feeling as a Task Force because she spoke to all of us personally and asked for comments, asked for suggestions. And I thought that we had started to get the feeling she was starting to understand her role as a trustee, and starting to understand the magnitude of the issue and how that in historical trust law that it is all-encompassing and that tribes and individual IM accountholders needed to be a part of it. And so we shook hands and left.

Forty-eight hours later in her testimony on February 6 in the House Resources Committee—I personally testified, as well as many of the tribal leadership—Jonathan Windy Boy of Council Large Land-Based Tribes; Ivan Makil, president of the Salt River Maricopa Tribe; and Fred Matt, Salish-Kootenai and others. So we thought that this was a great opportunity because we just left a very good retreat until we heard the Secretary's testimony.

Two things of the testimony were very disheartening, Mr. Chairman. Of course, one of them was the testimony, quote-unquote, said that although the tribes are developing their plans and we are working with them, she felt BITAM, her plan, was far superior. And it was disheartening after working hard as tribal leadership, first of all, to go into the meeting and then to spend 30 hours working Friday evening, Saturday and all day Sunday in a collective, collaborative manner to have the Secretary read that testimony was very disheartening. I really think it set us back even further.

And then the other part of the testimony that was disheartening, Mr. Chairman, was the part of, one of the congressmen asked her about her role, and of how in her role why she just submitted BITAM without the consultation of Indian tribes. And she said, of course, because of the *Cobell* litigation, but mainly because of her role as a manager that she felt that she needed to do that. And again, Mr. Chairman, we all know, as Indian country, and you, Mr. Chairman, I know agree that the role of the Secretary is a trustee to protect the Indian and individual Indian account lands and natural resources.

And so we think that the Secretary perhaps has confused her role in her testimony. And I have not seen her—we have not seen as a Tribal Task Force a retraction from that. And again, it has kind of put the tribes back a little bit because of the February 6 testimony. I was hoping she would testify here today, so that she could have said that in front of the committee and on the record, Mr. Chairman.

The Task Force is still open, and I appreciate the comments from Mr. Cason and Mr. McCaleb and Mr. Slonaker about they are still open and want to work with us. But I believe, Mr. Chairman, in all honesty, there is some reluctance now because of the testimony on February 6. I believe there has to be a retraction from Secretary

Norton. And I think we all make mistakes at times, and I think if it was just to say that I made a mistake; I know my role. It is the trustee and I am committed to working with the Task Force and I am committed to working with a plan collectively with you. And I think the tribes would come back to the table. It might take a lot of work to do that again, Mr. Chairman, but I think we can do that. That is the commitment of the Task Force, the National Tribal Leaders Task Force, Mr. Chairman, because I want to reiterate again this is not a part-time job for us. This is not something that we're dismayed if we work 60 hours or have to work 30 hours on a Friday and Saturday and Sunday in a retreat. This is our life, and we are settling historically back to, of course, back into the 1800's, and we are trying to settle forward once and for all.

And you will see in the next panel again, Mr. Chairman, tribes are committed. They are sophisticated. They know the historical trust law better than anybody. To go on without including the Tribal Task Force would be a major mistake.

We want to commend the committee for the stopping of the reprogramming. I know Senator Johnson was very critical in that; Senator Daschle—I have seen letters from both of them, Mr. Chairman, that had talked about the reprogramming. Before any reprogramming would go on of the $300 million that was proposed that there be adequate and meaningful consultation. And I would offer that again to you, Mr. Chairman, that that committee that action for any future.

Again, we were dismayed that the President's budget of, I think it is around $83 million, again did not include tribal consultation. In determining that budget, I really think that is a low figure, though, Mr. Chairman. I think it is much higher, but again there is really no plan that is fleshed out. We have done a lot of work and I think we are getting a lot further there, but it has got to be a collection. The Department must work with us.

We also agree that ultimately Congress is the ultimate trustee. If the Department does not want to work with us, I think it is a relationship that we want to go to Congress, and the Task Force is committed to do whatever it takes to get true and meaningful trust reform that has a tribally driven plan.

And with that, Mr. Chairman, I would be happy to answer any questions in any regard on the Task Force or otherwise.

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

The CHAIRMAN. Thank you very much, Chairman Hall.

You were here when the Associate Deputy Secretary, Mr. Cason, testified. In his testimony, he made a commitment, and I believe on behalf of the Secretary, that the Department will be open-minded and flexible, and that the BITAM proposal is one proposal on the table. Would that suffice?

Mr. HALL. That is a very good question, Mr. Chairman. I would have to honestly say there would be some reluctance on the Task Force because of the comments from the Secretary, who is Mr. Cason's boss. The Secretary's comments are on the record and she has not retracted that.

I would say in all honesty there would be some reluctance.

However, the Task Force is optimistic if there was some kind of a letter or some kind of a communication to say, I am committed

to working with the Task Force; I am committed to—and if I said that my plan is superior, I take it back and I want to work with all of the plans.

We don't want—even in our nine tribal plans—we don't want to say, this tribe's plan is better than this tribe, until we have conducted our work with the matrix, Mr. Chairman. And the same with BITAM. That is part of that matrix.

And so I would say that there is some reluctance, but we are still open as well.

The CHAIRMAN. Do you believe that you are at this moment in a negotiating posture with the Department?

Mr. HALL. For the alternative plans?

The CHAIRMAN. Yes.

Mr. HALL. When we left February 3, Shepherdstown, Mr. Chairman, we were very optimistic. When we went in, we were reluctant to cautiously optimistic. When we left we were a lot more optimistic. After February 6, it went back to I think reluctance. The Tribal Task Force is still open, but I think until that commitment from the Secretary comes, there is going to be some reluctance. I think it is important that the Secretary come back and meet with the Task Force.

I think if the Secretary was to do that either on or before March 8 and 9, which is our next scheduled Task Force meeting in Phoenix, Arizona, the tribes are ready to roll up their sleeves and work all weekend again, another 30 hours in just a little over two days, because we are going to caucus on the 7th again, because we feel that we need to devote that amount of time and we need a contract as well in order to get our technicians, to get that expertise, to be able to negotiate fully government-to-government. And so again, I think there is reluctance, but I think that in terms of the negotiations, it is kind of stalled since February 6.

But again, if the Secretary would come back—she herself I believe has to do that, Mr. Chairman. She has to come back and do it herself. I think we can take off again.

The CHAIRMAN. Chairman Hall, obviously I cannot speak for the Secretary, and I am not authorized to do so. But isn't it possible that the Secretary's presentation on February 6 was part of the negotiation? When one negotiates, you put your best foot forward, and obviously not admit weakness. Isn't that correct?

Mr. HALL. You are absolutely correct, Mr. Chairman. One of my points that I have made in my testimony is I think that her proposal breaches that trust responsibility and it is a legal question. And I think the Secretary and her staff have to go back to where it began, and that is the historical Indian trust law. We feel that if she does, she will see that her plan breaches that and it also does not address the breaches of *Cobell.* It only barely gets to where it is not even encompassing as I think the tribal plans do. And I think then she would recognize, get it off the table, and let's get all the proposals together and develop criteria and standards so we can come up with a plan collectively, or a couple of plans.

The CHAIRMAN. Mr. Cason, may I ask a question of you? Would I be correct in stating that your commitment to be open-minded and flexible is the Secretary's commitment?

Mr. CASON. That is my understanding, Mr. Chairman. We are open to all proposals, and the spectrum is very wide as to what one could suggest all the way from one end of the spectrum of we could patent all the property to the tribes and individuals and disseminate the trust fund to the rightful beneficiaries, all the way to the other end of having an organization outside the Department of the Interior where all of these functions are packaged up and sent to another organization. And proposals that we looked at were principally proposals within the Department of the Interior and how we would organize to do the job, assuming that it stayed within the Department.

So we are open to suggestion, and if there is a better proposal on how to manage these processes, we would like to have that. And hopefully, we find something that is better than BITAM. And we would very much like to be in a position where the Department and the beneficiaries, both tribes and individuals, would agree upon how we would do this job, frankly because it is a lot easier to do the job if everybody is on the same page.

So we are open and I am sure the Secretary is open. The phrasing in the hearing that Mr. Hall talks about certainly can be interpreted to be a difficulty, but I don't think it was meant to be that way. And Mr. Chairman, I think you made a good point that that is the proposal we put out. It is a proposal that we felt is an appropriate one, but it is not the only one and we are looking for other options.

The CHAIRMAN. Mr. McCaleb, can I ask a question of you? Do you concur with Mr. Cason that the commitment of open-mindedness and flexibility expresses the Secretary's commitment?

Mr. MCCALEB. Yes, Mr. Chairman; I would like the privilege of reading an excerpt from an editorial that was published yesterday in the Indian country Today authored by Secretary Norton. I am not going to read the whole thing, but I will read one short paragraph:

I am optimistic that together we can agree on a reorganization——

Meaning the Task Force.

That we can agree on a reorganization plan that will enable us to address the major longstanding issues in trust reform. These issues are not new either to American Indian communities or to Interior officials. As trustee, the Department is responsible.

The important sentence is her commitment and her optimism about reaching a reorganization plan in concert with the Task Force.

The CHAIRMAN. Thank you very much, Mr. Secretary.

Chairman Hall, would that suffice?

Mr. HALL. Mr. Chairman, I appreciate the comments. I have a question, though, and maybe they can answer.

The CHAIRMAN. Fair enough.

Mr. HALL. The EDS proposal—is the EDS proposal contracted out—further contracted out? And the reason I ask that of the Department, Mr. Chairman, is that in our meeting in Shepherdstown, the Department was contemplating an additional contract. Of course, EDS just finished a report on January 24 which was barely seen at that time. But there was another contract to implement the business model, and that was to implement a plan into the busi-

ness model. My understanding, Mr. Chairman, it was a $7.3-million contemplated contract.

We as a Task Force said now wait 1 minute now. You can't put BITAM into this business model and spend $7.3 million until we come up with a plan that we all agree on. Because the tribes, we just now are presenting our nine plans. So my question to the Department, Mr. Chairman, is have you signed a contract to continue at a $7.3-million without allowing the tribes to come up with a plan and the Department collectively?

The CHAIRMAN. Secretary McCaleb can you respond to that? Or Mr. Cason, can you respond?

Mr. CASON. Mr. Chairman, we did enter into a new contract with EDS. If I can take you back just a little bit to give context, the Special Trustee mentioned in his testimony that the Department had hired EDS to come in and take a look at the Department's status of trust reform and trust assets management. It started off with a review of the TAAMS system and the BIA data cleanup sub-project that we had. Then we expended the scope to look at all of the trust reform sub-projects that we are operating in. The EDS has given its report to the Department, and one of the recommendations of the EDS report was to evaluate the current business processes being used by BIA to support its trust responsibilities or to fulfill its trust responsibilities.

The contract that the Department entered to do that is on the order of $2.5 million, as opposed to $7 million. So I think that is just a communication problem between the parties here. It is in the order of $2.5 million, and our intention in having EDS do the business processes is to involve the Tribal Task Force representatives in that process to provide guidance to EDS as to who they should talk to in the tribal community. We have asked EDS to discuss their project with the leaders in the Tribal Task Force, as well as a number of other leaders in the Indian community.

The timeline in getting it done has not worked perfectly because we did enter the contract to get EDS working on it prior to getting a sub-team of the Task Force to take a look at the contract itself. But our intention is still basically the same—to have EDS look at the business processes and to involve tribal leaders in helping us evaluate what those business processes are, so that we know clearly what work is being done and how it is being done, and see if we can come up with better ways with our beneficiaries, the tribal leaders, in how to do the work in the future.

The CHAIRMAN. Chairman Hall, does that suffice?

Mr. HALL. Not really, Mr. Chairman, with all due respect. I think this negotiation is a one-way street. We have not talked to EDS. We have not been consulted about that, and just only at the retreat in Shepherdstown we met EDS and they gave a presentation about the January 24 final report document. But again, we talked about the new contract, the $2.5 million. It was $7.3 million that was contemplated. They must have scaled it down, Mr. Chairman, to $2.5 million. So they scaled it down only to look at the business principles. But again, no matter what, if this negotiation or consultation is a two-way street, we have not been involved and been a party to that. And we are still waiting for a contract to be able to fund the Task Force. We still haven't got an answer on

that, and that has been almost a month now. We have lost a month, and we keep I guess reading newspaper articles or hearing that we are looking at real consultation, but we are still waiting for it.

The CHAIRMAN. Would a letter from the Secretary suffice?

Mr. HALL. I think that would be very helpful, Mr. Chairman, if we had a letter from the Secretary and her commitment to fund and to work with the Task Force on coming up with a plan that is in consultation and collaboration acceptable to the tribes. I think then the tribes would—again, we would have to work hard again just like we did in Shepherdstown. There is going to be some reluctance, but I think that letter is critical for the success of the Task Force and the Secretary and her staff to continue.

The CHAIRMAN. Mr. Cason, don't you think that a letter of what you just said can be suggested by you to the Secretary?

Mr. CASON. I would be happy to make a suggestion to the Secretary that we prepare a letter back to the Tribal Task Force regarding our intentions to work with the Tribal Task Force, both on a reorganization proposal and on the EDS contract. We would be happy to do that, or I would be happy to that with the Secretary.

The CHAIRMAN. Thank you very much, Mr. Cason.

Mr. CASON. Thank you.

The CHAIRMAN. I hope that we can all get back to work again.

Mr. CASON. We would be very interested in that, Mr. Chairman.

The CHAIRMAN. Chairman Hall, I thank you very much. It was not my intention to be a mediator, but I felt that things have to move along. [Laughter.]

Mr. HALL. Thank you very much, Mr. Chairman, again for your commitment to working with Indian tribes in Indian country.

The CHAIRMAN. I will do my best, sir.

And now the final panel, the chairman of the Hoopa Valley Tribal Council, Clifford Lyle Marshall; executive board member of the Intertribal Timber Council of Portland, OR, Gary Morishima; the executive director of the United South and Eastern Tribes of Nashville, TN, James T. Martin; the president of the General Council of Tlingit and Haida Indian Tribes of Alaska, Edward K. Thomas; and the principal chief of the Osage Nation, Charles O. Tillman, Jr.

Chairman Marshall.

STATEMENT OF CLIFFORD LYLE MARSHALL, CHAIRMAN, HOOPA VALLEY TRIBAL COUNCIL

Mr. MARSHALL. Thank you, Mr. Chairman, members of the committee.

My name is Clifford Lyle Marshall, and I am the chairman of the Hoopa Valley Tribe of California. I appreciate this opportunity to testify in opposition to Secretary Norton's BITAM proposal, and request the committee persuade Secretary Norton to seriously consider alternatives to BITAM, some of which you will hear today.

Let me backup for 1 minute, because the last testimony is disconcerting to me. I have attended a number of the consultations. The consultations were called, they were published after a publication in the Federal Register, and we received this press release. My first question to anybody who is here, is has anybody seen the BITAM plan other than this 2-page press release and 1-page flow

chart? That is what the tribes have been asked to comment on in the last 3 months.

The substance of BITAM is something that we have not seen and we do not know. In the consultations that I have attended, starting in Albuquerque—excuse me, starting in Spokane, which was called the informal consultation, the National Congress of American Indians in Spokane, of which Chairman Hall is the President of, voted unanimously, with 193 tribes rejecting the BITAM proposal and asking that the Secretary withdraw it and work with the tribes to develop a new proposal. The first formal hearing was in Albuquerque—again, 80 tribes to a tribal leader testified before the Secretary in opposition to the plan and ask that she withdraw it so that we could work together to develop a trust reform proposal together. Every consultation has been the same and every tribal leader, to a man, has unanimously stood up and said:

We oppose the BITAM proposal. Will you please withdraw it so that we can start with a clean slate and begin to develop a trust reform plan.

I am fortunate today that I am being allowed to testify, but this room is full of tribal leaders. Each one of them has testified at a consultation within their region across this country, and they have stood up and said:

Withdraw the BITAM proposal so that we can sit down and work together to develop a new plan.

I cannot, as a representative of my tribe or as a representative on the Task Force or the Self-Governance Advisory Committee, nor can any member of that Task Force change the charge, the direction that their region or organization has given them. And every region has unanimously opposed BITAM. To ask us to come back and sit down and say that is an option on the table is something that I cannot do. And I don't believe that Mr. Hall or any other member of the Task Force can make that concession without going back first to the tribal leaders that have already rejected the proposal.

We implore the Senate committee—I implore on behalf of my tribe to reject the Secretary of Interior's proposal to create a new agency within the Department known as BITAM, and to stop the reprogramming and appropriation of funds for the development of this new agency.

BITAM, in my opinion, will undermine and undo 27 years of progressive Federal Indian policy that has been developed to create the opportunity for self-determination and self-governance. It circumvents the laws of Congress. In the first instance, BITAM is a plan that is not in compliance with the American Indian Trust Fund Management Reform Act of 1994. That Act was enacted, Congress passed, you are all a part of and well aware of it, that created the Office of Special Trustee to address the issues of mismanagement of trust funds. It is called the Trust Fund Management Reform Act, not the Trust Asset Management Reform Act, not the Management of All Natural Resources, All Lands on the Reservation, or All Programs.

That Act required that the Special Trustee—it still calls for it—that the Special Trustee develop a comprehensive strategic plan to be brought back to the House Committee on Natural Resources and the Senate Committee on Indian Affairs for your review and ap-

proval. That plan is supposed to be comprehensive and strategic and set forth the express duties of the Secretary of Interior on behalf of Indians. We are still waiting for that plan.

But in spite of not receiving a plan, we see an implementation of a plan that is not being presented. And we are fearful of that because we don't believe that it is in our best interest. When this plan was first proposed to us in November, before the press release came out, it was announced the same day that the press release came out in a self-governance conference on the Quinault Indian Nation in Washington State. And it was presented this way, and I appreciate that the rhetoric has changed, but it was presented this way: There is an inherent conflict between sovereignty and trust responsibility, and therefore we must reestablish trust control over all trust assets.

What did that mean, we asked. Does that mean trust funds, not trust resources? Natural resources? They said, we think it means everything.

The audience that it was being presented to were the self-governing tribes in this country that have compacted to manage trust assets. And since 1988, my tribe and the tribes that were present at that conference have managed not only adequately, but exceptionally, on limited funding and resources, in my opinion.

We can talk about the past and we can talk about the mismanagement of the Bureau. No one knows that better than the Indian Nations. But when the opportunity came in 1975, and that is 25 years of this country's history—it is a blip in time. And up until that time, the Bureau managed everything. I was barely graduated from high school at that time.

The opportunity came for tribes to reclaim their right to determine their own future and manage their own lands and develop their own economies and teach their children. And they contracted. They seized the opportunity. Many tribes did not. Many tribes did. And they have created success—not to their mismanagement. They have managed the programs. They have run the programs—the programs that were designed by the Bureau. But in 10 years time, the tribes who were being successful outgrew that. They realized that the next step was design their own programs, and that is where self-governance came from. And the tribes then entered into a negotiation and the term "government-to-government relationship" emerged. And they began to plan not only the management of reservations, but the regulation of reservations, resources, land, property, programs and people.

Those have been success stories of the last 25 years, and I believe that I am preaching to the choir because you have played such a dramatic role in seeing that progressing take place. You have helped Indian people move forward educationally, economically, governmentally in developing their lands, their resources, the governments and their programs.

This is a taking back. This is a taking back. We must manage our own resources, because the BIA is getting sued by Cobell, but this plan does not address the breaches in Cobell. There are insidious aspects to this plan that tribes are very fearful of, and that is the impact on laws that Congress has passed pertaining to the BIA. Because this won't be the BIA. It will be a new Federal agen-

cy. And so in the Indian Reorganization Act, the requirement of Indian preference of hiring of Indians who work within the Indian Office, which is the BIA, will be given preference if they are qualified. Moving it out eliminates that requirement.

The whole process of contracting and compacting under the Self–Determination Act and the self-government program is premised on Section 458—I think it is double–A—that says you can contract BIA programs under the Snyder Act, the Indian Reorganization Act, the Indian Health Service Act and other programs outside of DOI. By moving them into another agency within the Bureau, it is questionable that the tribes will still be able to contract and compact those trust functions.

And the scariest thing about this proposal is that it was proposed that it would draw a bright line between trust and non-trust functions. And the question was, what is a non-trust function? And they said well, trust is trust assets, trust resources, the money in the resources, and the land. Non-trusts are things like education, health care, social services, Indian child welfare, housing.

Well, you have heard today from learned scholars who will tell you that everything that the Bureau does is trust. And the problem in dividing this department into two—it does not create a clear line of authority. It creates two lines. And so if I want to build a house on my reservation and I have a tribal program for credit, and I have a HUD housing program, and I need to build a road, and so I need a title search. I need an appraisal. I need easements. I need right-of-ways. This proposal moves realty and appraisals to another agency. And so the difficulty is doubled in doing those projects because you have to then go through two separate agencies.

The other problem that we see with this program is the process of compacting and contracting is moved to the new agency of BIA programs. I know of no where else where that exists—where one agency contracts the programs or the functions of another agency.

Those are the things that are scary in the BITAM proposal and I cannot accept it.

However, under self-determination, those principles, those concepts—self-determination and self-governance—tribes can fix and address their own problems. You have heard today of 11 proposals. My tribe, my staff sat down, because it has always been said to the Indians, well, this is what was said to us in Albuquerque—we don't have any other proposal; we've got to go with the one we've got.

We presented new proposals. There are very many similarities in the proposals that we have presented. There is much among us that is of like mind. We see a direct line of authority that can be established within the BIA for the management of natural resources and the management of income from those resources. We believe that the management of the income from those resources can be done within a trust fund management program or OTFM.

I think the key difference that we have in our proposals is where the standards should be set for management of resources. Our greatest fear is that the standards are going to be set somewhere else. A comment was made today about leasing property. When do you lease it? If a trustee's sole interest is earning income, you lease it whenever you can. If an Indian person's interest is more than just income, then you don't always lease it whenever you can. You

don't always log a forest whenever you can for maximized profit. There are places that we say are sacred. There are places we say we don't use. There are places where we say we go to gather food, medicine. There are places where we say we have to protect for habitat.

And we set those standards for ourself, our own life, our own quality of life. We set the standards. We believe that it is our right as sovereign nations. Creating a Federal agency to set standards and then manage our resources for our benefit as a common law trust, rather than a special trust relationship within the parameters of the trust relationship with the United States and tribes takes away our authority to govern. It circumvents our jurisdiction.

We are very fearful of BITAM. We cannot allow it stay on the table as it is written. And we implore this committee, the members of this committee to ask the Secretary to withdraw it in good faith and sit down at a table in good faith and start from the beginning. We were told in Albuquerque that the train had already left the station and our only option was to jump on and go with this proposal. I am asking this committee to ask them to bring the train back to the station.

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

The CHAIRMAN. Thank you very much, Mr. Chairman.

I have been advised by staff that the panel has been asked to present your proposals.

Mr. MARSHALL. I have a really good one. I am sorry I did not have a chance to present it.

The CHAIRMAN. I would like to advise you that I have other responsibilities, and lunch is not one of them. I can forego that. But I am due at another meeting at this time, but I will just hold on for a while.

Before I proceed, may I ask a question of Mr. Cason again?

Chairman Marshall has made a charge, a rather serious one, that all they have received is a 1-page press release on BITAM. Is that correct?

Mr. MARSHALL. It is 2-pages.

The CHAIRMAN. Two pages. Is that the proposal that was presented to the Indian Nations?

Mr. CASON. Mr. Chairman, as I commented before, BITAM is no more than a conceptual framework at this point. We recognized early in the process that we needed to go through consultation and that we did not take the BITAM proposal down to specifics of what offices there would be, how we would subdivide that organization, what individuals would move into BITAM and what individuals would stay where they were in BIA or in OST. We did not do any of that. We basically just got to a conceptual framework that said, this seems like an interesting concept, a way to approach the problem, and we started consultation at the concept stage.

So it is true there isn't a lot of details on BITAM, and we did not go through the process of laying out in great specificity exactly how BITAM would work because we approached it from the standpoint that in the consultation process we would get a lot of advice on how to go through that. So there are not a lot of details about BITAM.

The CHAIRMAN. Thank you very much, Mr. Cason.

Mr. CASON. You are welcome.

The CHAIRMAN. May I now call upon Mr. Morishima.

STATEMENT OF GARY MORISHIMA, EXECUTIVE BOARD MEMBER, INTERTRIBAL TIMBER COUNCIL

Mr. MORISHIMA. Thank you, Mr. Chairman.

My name is Gary Morishima. It is my pleasure to appear before you today. I am here on behalf of the Intertribal Timber Council at the request of our President Nolan Colegrove to present our suggested approach for accountability in trust reform.

In a nutshell, three concepts lie at the core of our proposal. The first is an independent, presidentially appointed American Indian Trust Oversight Commission. The Commission would be comprised of individuals nominated by tribal governments and experts in fiscal and resource management, with ex officio representation from the Interior Department.

It would have four primary functions. The first would be to develop a strategic plan and performance standards for trust reform. The second would be to formally certify the functionality and accountability of trust fund management and reporting systems. The third function would be to evaluate issues and management performance on both topical and reservation-specific levels. And the last function would involve reporting.

The topical investigations would be selected from suggestions provided by tribal governments and individuals. Performance would be evaluated against a set of fundamental criteria for management of trust resources. Reservation-specific studies would compare management against standards and criteria that are embodied in the values that are reflected in tribally developed and departmentally approved management plans. And lastly, the reporting function provides for periodic information to be provided to the Secretary, the beneficiaries of the trust and to the Congress on the progress of trust reform.

There is ample proof that the Department of the Interior is incapable of providing adequate oversight for its own efforts as trustee. The independence of the Commission is critical to both credibility and accountability. We understand full well that legislation will be required to establish the Commission and provide the necessary powers and authorities to the Commission, while protecting the beneficiaries of the trust from public access to private and sensitive information.

The second concept involved in the Intertribal Timber Council proposal is the temporary centralization of responsibility for the development of fiscal accounting systems within the Office of the Special Trustee. A single entity must be vested with necessary authority and responsibility for implementing the strategic plan for developing and deploying fiscal management systems to ensure accountability. But once these fiscal management systems are certified by the Commission, operational responsibility would be transferred back to the BIA. The Office of the Special Trustee would then sunset as envisioned by the American Indian Trust Fund Management Reform Act of 1994.

The last concept of the ITC proposal is to retain ultimate responsibility for management of trust fund accounting, trust resource

management and the delivery of trust services to tribal communities within the BIA. It is at the BIA regional agency office level that working relationships are largely maintained between the Department of the Interior and tribal governments. This is where the unique circumstances of individual tribes, their treaties, applicable executive orders, statutes and case law are accommodated. By retaining the BIA tribal interface, transaction costs of Federal trust administration can be minimized and tribal governments will have the maximum flexibility to meet the needs of their own communities as they elect to exercise self-determination by designing and operating their own programs.

The Commission would provide continuing evaluation and oversight for both BIA and tribal programs by conducting periodic audits to ensure that performance continues to meet operational standards.

We fully appreciate that our proposal for trust reform is only one among many. Over the course of the past few weeks, several worthy ideas have come forward from the tribal community as viable alternatives to BITAM and undoubtedly more will be forthcoming in the future. But the process for addressing trust reform must not be permitted to become trivialized as an exercise to promote divisiveness within the tribal community, or as an exercise of shuffling boxes around in organization charts.

The goal of trust reform must be accountability. To do that, we must focus on requirements—the what, the why, the how and the when of trust reform, not the who.

Tribal approaches to trust reform consistently share a common characteristic that prominently distinguishes them from BITAM: The focus on maintaining legal, political relationships between tribal governments and the United States. Over the past few weeks, I have read with dismay media accounts of the contempt trial in the *Cobell* case, where Secretary Norton and Judge Lambert are seemingly lamenting in unison that the tribes just don't get it with regard to the needs of trust reform. It should come as no surprise that tribes have vehemently and adamantly opposed BITAM. Besides the consultation issue, the conceptual nature of that plan itself makes it prone to conjecture and speculation, so nobody really knows what BITAM is or what it is intended to do.

But with all due respect, I contend that it is the judge and the Secretary who fail to get it, because they seem oblivious to the important distinction that commonlaw trust duties to individuals does not encompass the full scope of trust obligations of the United States toward Indian tribes under Indian trust law. By submitting thoughtful proposals of their own, tribes have clearly demonstrated that they are not opposed to trust reform per se. They have been clamoring for it for decades. But rather, they are opposed to any form of trust reform which threatens to undermine or destroy their unique government-to-government relationships with the United States.

It is useful to remind ourselves that the Interior Department's current inability to properly administer the trust is of the Federal Government's own making. Congress and the Administration have never provided the funding necessary for the Department to fulfill its responsibilities for managing the Indian estate. Indeed, the very

origins of the accounting mess involving individual Indian money accounts lie in the passage of the Dawes Act over 100 years ago. And since the Dawes Act, the trust responsibility has been extended to both individuals and the tribes. But with each passing generation, the difficulty of managing the resources and income generated from those allotments has become increasingly worse as the number of undivided trust, fee, tribal and individual property interests has escalated. Unless and until an effective solution is found to the Indian inheritance problem, the magnitude of the challenge confronting trust reform will continue to expand exponentially.

Having worked with Indian tribes for more than 30 years, I have learned many lessons. Principal among them to be always cognizant of history and to view major initiatives such as trust reform with somewhat of a jaundiced view. It is difficult to escape the disturbing parallels between allotment and current efforts related to trust reform. I cannot help but wonder if the Administration's paternalistic attempt to impose BITAM upon tribes for their own good may become transformed into a subtle, insidious reincarnation of the Dawes Act. Through this legislation, the United States sought to dismember tribal communities by breaking up reservations and allotting lands to individuals. There is a danger that the trust responsibility owed the tribal governments may likewise become a casualty of the Interior Department's seemingly single-minded focus on applying principles of common law trust to provide proper accounting services for individuals, while ignoring tenets of Indian trust law.

Will trust reform, with its emphasis on fulfilling fiduciary obligations to individuals, prove to be the means through which the United States attempts to absolve itself of the duties and obligations owed to Indian tribes? We hope not. This disturbing specter can be readily vanquished by ensuring that Indian tribes have a substantial role in trust reform, now and in the future. Long-lasting and effective solutions to the problems confronting the BIA's administration of its trust responsibilities must be developed collaboratively with tribal beneficiaries of the trust.

The Task Force, which includes tribal and Interior participants and which has the capacity to draw upon support and outside expertise as needed, presents a rare and a valuable opportunity for methodical evaluation and reform of the Federal trust. It is vitally important that this opportunity not be squandered. The Task Force must be given the chance to do its job, allowing leadership from the tribal community and the Interior Department to work together to craft a mutually acceptable and effective approach to accomplish true trust reform.

The central message I wish to leave the committee with today is that trust reform is serious stuff. A great deal of money is involved, to be sure, but at its heart the issues go to the capacity of the United States to properly discharge its fiduciary obligations within an evolving unique government-to-government relationship with Indian tribes. Trust reform must be a commitment, akin to a covenant, to ensure accountability in the management of trust funds and in the programs that manage trust resources and provide trust services. It must be built piece by piece in accordance with a

thoughtfully developed strategic plan and measurable performance standards which are developed in concert by the Trustee and the beneficiaries of the trust.

Mr. Chairman, that concludes my testimony. Thank you for the opportunity to appear before your committee. We are pleased to be involved in the deliberations on trust reform, and we hope that we can constructively contribute to the deliberations before us.

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

The CHAIRMAN. I thank you very much, Mr. Morishima.

And now may I call upon Mr. James T. Martin.

STATEMENT OF JAMES T. MARTIN, EXECUTIVE DIRECTOR, UNITED SOUTH AND EASTERN TRIBES

Mr. JAMES T. MARTIN. Thank you, Senator Inouye.

It is a pleasure again to be before this distinguished body to provide testimony on such an important matter to Indian country.

I am an enrolled member of the Poarch Band of Creek Indians. I also serve as executive director of United South and Eastern Tribes. As such, I have been afforded the opportunity to represent my tribes on the Trust Reform Task Force.

A few minutes ago was a perfect example of why I personally wanted to come before this committee to testify this afternoon. It is vitally important that this committee, the entire Congress, the true trustee, to get involved in this situation. Call it mediation? Call it strong-arm tactics? Whatever we call it, we have got to get something done.

I have sat patiently listening to all of the speakers beforehand, and I will attempt to, out of respect for you, sir, to go directly to our proposal. Our tribes took the Secretary at her word. BITAM, if you don't like it, show us something better. I believe USET brings forward a proposal that does do it better. I believe the USET proposal addresses the concepts that are the full breaches in the *Cobell* case. Our proposal calls for minimal standards to be set to protect trust assets. I believe in setting minimum standards not only can you protect the assets, but you can work with tribes on a government-to-government relationship to maximize the asset. But you can maximize that asset in a balanced with that tribe's concerns for the environment, for sacred sites, for the future generations—not simply a monetary improvement.

One of the things that is unanimous as I have sat through the collaboration, the consultation, the scoping meetings is that the tribes, the Congress, the Department of the Interior are all committed to the fact that they know trust reform has to come about. It is simply how are we going to do it. The Secretary says take all of the trust functions and move them out of the current BIA and set up a new bureaucracy—I believe in direct contradiction to the Indian Self-Determination Act. But even the Administration, the Republican management plan for downsizing of the Federal Government, it would in a sense create a new bureaucracy. It will fundamentally change the scope as we understand the BIA to be currently today.

I believe that the functions are total trust functions—examples from the chairman and the previous speakers; that the trust functions are so interrelated at the local level, if we attempt to seg-

regate them out and put one somewhere else and one over here, both will be diminished, irreparable harm will be done to both of them.

I have submitted written testimony for the record. A lot of my written testimony reiterates the things that have already been spoken today. I then would turn our attention to what does the USET proposal provide. The USET proposal would consolidate tribal functions under an executive supervision of a Commissioner for Tribal Trust Asset Management. The Commissioner would serve in the Office of the Assistant Secretary and be guided by a tribal advisory board consisting of tribally designated representatives.

Our proposal is a proposal that would be beneficiary-driven. If you want to do it right, ask the people who it is going to affect. Let those people that it is going to affect be a part of the decision-making process of the systems, of the controls, the personnel, hardware, software, that you are going to put in place to provide assistance to those beneficiaries. That is vitally important.

The USET proposal, however, separates the duties. Through the consultation process, we have heard the Department of the Interior talk about a bright light, a dividing of the trust functions from non-trust functions. We disagree in the fact that it is a dividing of trust and non-trust functions. We believe all are trust functions. But we absolutely agree that you have to separate the duties of the individuals to make sure that a system that is in place is transparent from top to bottom; that it is above reproach; that if you apply industry standards, when any reasonable person who looks at the transactions that have occurred can say that the Secretary put into place a system that showed due diligence that the assets were protected, they were not diminished, and could be construed to be maximized based upon the agreements that would be entered into between the tribal governments and the Secretary. Those types of things would be above, though, the minimum standards that would be brought to bear all across Indian country.

The Secretary points to the EDS report as to give her instruction and the leeway to fashion the framework that has been considered to be BITAM. But nothing in the EDS report indicates that the creation of a new bureau has to come about to achieve the functions necessary they call for in the EDS. What I would pose to this committee and Indian country as a whole, take us back 20 years. BITAM was in place. But BITAM went through the same downsizing and less resources on a year-to-year basis that the current Bureau has existed for the last 20 years. Would we not be here talking about a change of BITAM to something else, and to say, put to this new structure what the EDS calls for—business principles 101.

Any organizational structure that is going to succeed has to have adequate funding. It has to have adequate human resources, and those human resources have to be experts in their fields. Any type of organizational structure, whether it be the USET proposal or any other type of hybrid proposal that is developed has to still have those fundamental premises to them. We believe in our proposal we do address those things.

With the separation of the duties—we call for the creation of a Commissioner for Indian Programs. The example the chairman

gave beforehand of the individual who wanted to build a house, build a road out to his or her house. Those functions that have to occur at the local level are so intertwined that they cannot exist independently. And it is beyond comprehension of our tribes to say that you would go out and create a new structure, a double administration to force our Indian people to go to one set of administration to look at particular items and make sure they get it checked off on, and go to a separate administration to literally do the same thing. You are talking about the same people. You are talking about the same house. You are talking about the same road, but you would be going to two separate administrations to literally get a lot of the same information.

We don't believe that has to occur. I believe that you can draw distinguished lines between the duties of all of the trust functions that exist in the current Bureau, with adequate resources given to the human and monetary aspects, that those functions can be separated; that they could function independently. And the most important thing that we call for in our proposal is the ongoing monitoring of the trust functions, the trust system from top to bottom.

We envision the Commissioner for Trust Management to employ individuals that would be on an ongoing basis, would look at the structure that would be developed under the BIA, under the Assistant Secretary. And all of the transactions from top to bottom would receive periodic review. And then they would be signed off on as being certified that they were separation of duties and no conflict of interest did occur in the transactions.

I believe our proposal calls for those types of frameworks to be able to come about. We heard testimony earlier about the independent commission. Our proposal would be a proposal that could easily be modified to bring in that independence of experts in the industry, experts within the BIA, experts from the governmental sector, from this committee or other committees of jurisdiction, to be brought to bear to set the policies, the principles that the Secretary would have to adhere to in the performance of her trust responsibility.

Our proposal calls for the extraction and setting aside of the Indian member money accounts and in setting up of an independent commission to look at those. Our tribes believe to put together the interest of the individual Indian money accounts and the interests of tribal assets is too complex; that independent commissions could be set up to review and consider the interest of those individuals and make recommendations to the structure that is put in place to manage both tribal assets as well as the individual Indian assets.

The critical part of our proposal, though, lies in the establishment of minimum standards. Our proposal does not call for the segregation of the BIA down to only the types of programs that were alluded to earlier; that it should take all trust things and separate the duties. But it could be done at the regional level.

Our Eastern Region serves almost like a super-agency. The majority of our tribes contract. Over 92 percent of the resources going to Indian tribes in our region are already contracted either by 638 contracting or self-governance. We simply do it better than the government could do it.

The most reluctance we see in the BITAM proposal is that it would throw the process of 638 and self-governance totally in reverse. There is no need for that to happen. Even the EDS report when we listened to them, their presentations, they said some of the best practices they have found thus far in trust management has been at the tribal level that has already contracted the management of the trust resources. Why then should we contemplate a proposal that would reverse those types of processes? Certainly, we should complement the process that envisions the responsibility of the beneficiaries to be a part of the decisionmaking process.

Our proposal would bring about accountability. It would bring about with the identification of a single executive, the Commissioner for Trust Management, as the single person in responsibility for the administration and carrying out the duties to protect and maximize the assets.

As I said, I have attended the consultation meetings. I have read the transcripts when I have gotten them from the other meetings. One thing is unanimous: All tribes are against BITAM. But the other thing that is unanimous is all tribes, the court, the DOI, the Congress agree that trust reform needs to come about. Therein lies the key. We talked about timing earlier, from one of the speakers. I truly believe the timing is correct right now to bring about true trust reform. And I implore this committee to get involved in the deliberation about trust reform, if nothing is monitoring it, mediation—whatever form that necessarily has to come about, so that we can go forth and develop a new organization for trust management that can be bought in by all of Indian country, by the Department of the Interior, by the Congress, and most of all by the American Indians and Alaska Natives that are out there that need the services that we are here to render to them.

I submit my testimony. I submitted my proposal in its entirety for you to review and would be open to questions.

Thank you, Mr. Chairman.

[Prepared statement of Mr. James T. Martin appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Martin.

May I now call on Mr. Thomas.

STATEMENT OF EDWARD K. THOMAS, PRESIDENT, CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

Mr. THOMAS. Thank you very much, Mr. Chairman.

My name is Ed Thomas. I am the President of the Central Council of Tlingit-Haida Indian Tribes of Alaska. Our tribe has 24,000 members. I have been the President for a little over 17 years and have managed BIA programs since 1975. I started when I was 12.

I am honored to be here in speaking to this committee, and I commend you for your effort in sticking in out with us. I realize you have a very busy schedule and I will very much summarize my comments.

But I want to point out that from my point of view and from the point of view of your first panel, that as long as these systems are broken, we are jeopardizing and we are undermining the trust relationship that this Federal Government has to the tribes and to the individual accountholders. And so as I make my comments, I hope

that my comments are not offensive to anybody. They probably could be construed that way, but it is intended to talk about the issue, and I realize that many of the tribes have put forth some proposals that they have worked very hard on. I commend them for that and I want to make it clear that I am not here to lead into a process of BIA-bashing, as we talked about 1 decade ago.

But let me make it clear that ever since I got involved in this process, which was way back in the 1990's when we were still on the Joint Task Force on BIA Reorganization. We noticed that not only was their acknowledgement of these problems and that they need to be fixed, but there was lack of willingness, delegation of authority and delegation of resources to fix the problem.

Now, our board is very fortunate that we have some very respected tribal leaders on our board. We also have three professional bankers with a lot of history in trust management. We are very much aware that commercial trust management is a lot different than the Federal trust management or Federal trust relationship to tribes.

Way back when we first started talking about this in the early 1990's, I always felt that the best approach was the approach the Federal Government used in fixing the savings and loan scandal. They set up the quasi-governmental agency, the Resolution Trust Corporation which had unlimited authority to do what was necessary to fix the problem. And when our Nation through our Congress and the President put politics aside and put the interest of our citizens first, I was very proud to see that our leadership went forth. They fixed the savings and loan scandal. They restored a lot of the money to the people who lost their life savings, and moved on. And now we are back to where we have savings and loans functioning and the banking institute is healthy, and the people have their life back in order.

We are not seeing that happening in the 1994 Act. A lot of people celebrated the 1994 Act. I almost did, but I was disappointed because it fell short of what happened in the savings and loan issue or problem. It fell short and it put us back into the Department of the Interior under a hostile Secretary. Now, people can say what they may. I can assure you that Secretary Babbitt was not in favor not only of the trust reform movement, but he was not in favor of the Office of the Special Trustee and he did everything in his power, while I was around anyway, to undermine the efforts of the Special Trustee and many of the activities that were necessary to happen within the BIA and the Department of the Interior to fix many of the problems.

Now, I realize that there are many well thought out proposals out there, and I don't want to diminish them in any way. Some of these proposals call for going as far as pulling the entire BIA out of the Department of Interior, all the way to just leaving things the way they are and let's kind of tweak things and move some boxes around.

Now, I am going to reiterate that the Special Trustee Board went on record quite recently that because of the way things were happening, they wanted to go on record again as saying we need to really take the trust asset management portion out of the Department of Interior and be very forceful about fixing those problems.

Now, on the one hand I agree with that concept, on the matter of principle and let's get the job done. On the other hand, I am leery from the point of view that maybe that is not achievable—achievable because of the lack of commitment for resources; achievable because of the political realities that we must face. And so therefore if we are not going to ever make the step of even getting into what is called BITAM, we need to talk about what is really going to happen.

Now, we say in the record or in the newspapers I read where we are talking about a project that will cost $400,000 to $500,000 dollars. Then I see the budget amendments for 2003 and they only add about $60 million. I meant to say millions, I'm sorry. I wish it was only thousands. But when we see that once again you are proposing something up here, and then you put a budget down here—that is what caused the problem in the first place—not enough resources to do the job that is being proposed.

And so I think it is important and I respectfully request this committee, let's put some reality back into what is achievable under this political climate. What will the President agree to and what will the Congress agree to? If we have proposals out there to set up the BITAM and there is no money being asked for it, then we are talking about something that is not going to happen no matter what we say. And it is just a big waste of time.

Not only is it a waste of time, but it is distracting from the orders of the day—not only the orders of the day within the Department dealing with this program, but many of us have to set aside many other important issues so that we can weigh in on this important issue. We should be talking about the indirect costs where it falls, and enhancement of tribal economies, weaknesses to the tribal welfare programs, land and trust issues. We really should be having hearings on those things.

And important to Alaska tribes, there is a very serious threat on the status and the power of Alaska tribes floating around Washington and in Juneau. We should be spending more time on that, and we certainly will.

But when it comes to this issue, I really feel it is necessary for us to talk in terms of what is achievable, and we are not going to do so by just saying, well, we have a whole bunch of concerns and we have a whole bunch of problems and it is going to take a lot of money, and then people request half or a third or a fourth of what is necessary. I don't think that is wise. I don't think that is fair to anybody. I think it is very much a distraction for me because I look at these proposals and I think some of them are great. But I don't think you are going to fund them. I have not seen that kind of appetite in this Congress or the President to fund a lot of these proposals. So I think we have to got to talk, really, on what is achievable.

Now, one of my final points I am going to make here is that people have thought or have stated that we should pull out these trust asset management functions out of the Bureau. You are stripping the trust component out of the Bureau, and I commend you for having the first panel because they most definitely put that issue to rest, that all of these programs that are available to Indian people and the tribes are there because of the Federal Government's

trust relationship to tribes and their people. And that is why, even though we do not have a trust asset management component within IHS, our needy people still get IHS services; same way with HUD.

And so I really appreciate your methodology in bringing these scholars to the table here and clarifying that issue because I, for one, feel that it is just the reverse. As long as we have this mismanagement of the absence of management of the assets of our tribes and individual Indians, as long as that is not done properly and unaccounted for, that is a breach of trust and it is weakening the relationship that we as Native Americans have with the Federal Government and our trust relationship is being compromised.

Even after saying that, however, I believe it is imperative that if you come up with a piece of legislation that endorses any alternative proposals, that there be language very specifically stating that the trust relationship that this Federal Government is not compromised by moving a box from over here to over here, one agency to another, or even formulating a quasi-governmental agency. Because I think it is important for the comfort of the tribes that when language is in legislative action that the issue of trusts is preserved and that you understand the value of those trust relationships and have language in the legislation.

In closing, I once again commend you for your time. I commend you for your interest and the leadership that you bring to this very important issue. I recommend that if you are going to have either the Special Trustee like we have it now, or you are going to do the BITAM or you are going to go along with Tim's proposal, that you have member of members of Congress appointed to those oversight boards. I realize that in your busy schedule you can't attend meetings, but I think your administrative assistant people, people who are knowledgeable about it, could represent you very well in these meetings. But without that, it just becomes, well, we can give good advice, but if they feel good 1 day, they will listen; if they don't the next, they won't.

That is just the way it has been. That is the way life is, and I don't know how to say that nice, but it really is a matter that when we debate the issues, we talk about alternatives, we talk about the wishes of the tribal people, nothing happens because they don't agree and therefore they don't have to listen because we are just advisory. An example is that when President Tex Hall was talking about the resources, it is very hard to have any of these proposals compare with even the EDS reports, the series of reports that are out there, because they don't have the technical support that either the Trustee or the BIA has. And I believe that if we are going to be honest about looking at them and we are going to work together, then EDS needs to come in and say, well, let's look at Tim's report. Let's look at the Hoopa report—any of them.

Maybe they don't want them to look at it, I don't know, but the resources need to be there to come up with a joint plan that tribes may have that lay out the principles that Tim was talking about in his testimony and others. I really feel it is critical and I think it could be very easily done, and I think we can amend the EDS report and get the money out there to help people. Maybe they want to have their own consultants, I don't know.

But we have got to come up with a strategy to get the resources to the Task Force so they can be competitive, they can get their wishes better articulated in writing. Without that, I think they are always going to be a disadvantage.

And with that, I thank you again, Mr. Chairman, and I will be happy to answer any questions, and this is the shortest speech any Tlingit has ever given.

Thank you.

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

The CHAIRMAN. Thank you very much, President Thomas

Chief Tillman.

STATEMENT OF WILLIAM MARTIN, FIRST VICE PRESIDENT, CENTRAL COUNCIL, TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA; AND TREASURER, INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

Mr. WILLIAM MARTIN. Thank you, Mr. Chairman.

ITMA is pleased to be given the opportunity to testify today. However, Chief Tillman was not able to make it, and with your permission, I will offer the highlights of our testimony.

Mr. Chairman, members of the committee, my name is William Martin. I am the elected First Vice President of the Central Council, Tlingit and Haida Indian Tribes of Alaska. I am also serving as the Secretary-Treasurer to the Intertribal Trust Fund Monitoring Association. Accompanying me here today are some of our board members, Richard Wilnett, chairman of the Turtle Mountain Chippewa; Charles Jackson of the Confederate Tribes of Warm Springs; Mark Fox, council member for Three Affiliated Tribes; Paul Neiman of the Oneida Wisconsin. Also accompanying us is ITMA Technical Consultant David Harrison.

Mr. Chairman, ITMA is a 12-year-old tribal organization comprised of the 53 federally recognized tribes which are virtually interested in continuing efforts to reform the administration of the Indian trust estate of the Federal Government. We believe strongly that the current attention focused on reorganization of functions within the Department of the Interior is premature and not likely to result in meaningful reform unless more fundamental underlying values and issues are first addressed.

Arcana has uncovered some things the Department has never acknowledged as an example of vest and failures. We think no reform will work as long as there is a culture of secrecy around these failures. Hopefully, Secretary Norton's new reporting of failures as well as successes will represent a turnaround.

We fear that the Department of Justice, however, will prevent this kind of full disclosure that we need.

I would like to address two or three important points in the limited time today. First, with respect to the competing reorganization plans, we think focus on reorganization distracts from the policies being implemented without being examined. We believe reform should happen in a way that clarifies and enhances the Federal Government's trust responsibility and liabilities, and not diminish it.

We believe the focus on reorganization is premature without determining duties to be performed, including oversight of the De-

partment's trust duties by Congress or an independent body. The Department resists this approach. It appears Justice does not want to acknowledge any specific duties either.

With respect to EDS engagement by the Interior, we think benchmarking against industry standards is an illusory exercise designed to report that the Department's trust standards are impossibly high. We think any benchmarking must include analysis of corporate culture regarding mistakes and losses.

No system is perfect. There are going to be mistakes and failures. How these are handled will determine the success of any trust reform. To date, this remains the biggest single failure and made it impossible for previous Administrations to admit mistakes with TAAMS. So far, it makes it impossible for this Administration to acknowledge mistakes in the reorganization plan.

Finally, with respect to charging fees for administering the Indian trusts, this trust was paid for along ago by tribes in treaties, of land cessations and promises of peace. Any fee by the government that cannot be avoided is really a tax, no matter what you call it.

We have no say in our choice of provider of trust services. We cannot take our business elsewhere. To impose a Government fee is to tax it. The Congress should repeal the existing authority for the Secretary to impose such a fee. It has been used arbitrarily and capriciously. The Government should not be collecting for its own account until it demonstrates it can collect appropriately for our trust account.

ITMA suggests that this committee exercise its oversight authority to forestall widespread reorganization of trust functions until the trust duties to be performed by any organization are well understood by those charged with both their performance and their oversight, as well as those rights and properties of the estate.

ITMA suggests that the Congress should act swiftly to pass legislation tolling the statute of limitations on claims arising from the administration on Indian trust estate until such time as Congress has convincing evidence that the beneficiaries of this trust have not been denied in good faith, a fair hearing and full disclosure demanded by a trustee generally.

ITMA suggests that Congress should act swiftly to repeal the current statutory authority of the Secretary unilaterally to collect fees to cover the costs of administering to Indian trusts, at least until such time as the Congress is satisfied that the trust is being honestly, prudently and competently administered.

ITMA respectfully requests this committee to urge the strongest possible terms that any benchmarking of current trust practices by the Department of the Interior be rejected. The Department should require the property, identify its legal obligations as the trustee arising out of existing treaty, executive order, statutes, case law and contractual documents authorized under the authorities such as grazing, mining leases, et cetera.

The Department should be required to also include a review of the Department's current practices regarding losses, mistakes, errors and omissions, thefts and other defalcations, and disclosure of material facts.

While the private trust industry might provide useful models after the relevant legal duties are identified, ITMA submits that the most modern, efficient and competent regime of trust administration known to man will fail by its business culture. It is characterized by the determination to hide losses, cover up theft and bury mistakes in buzz words and blizzard of promises.

In conclusion, ITMA takes no pride or pleasure in expressing such dissatisfaction with our government agencies. It is our government, too. We continue to have faith that those in charge of it will step forward to restore the faith and the honesty of what Thomas Jefferson once called the last best hope of mankind on Earth. Toward that end, we earnestly seek the diligence of this committee in continuing to champion the goal. We stand ready to provide whatever additional information the committee might request of us.

Thank you for your consideration.

[Prepared statement of William Martin appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Martin.

As chairman of this committee, it should be noted that I am part of the Government of the United States. And I hope that all of you would believe me when I say that I take my responsibilities and my trust obligations to Indian country very seriously.

As chairman of this committee, let me assure you that this committee will not consider any proposal that is not the product of open and free negotiation and consultation. I will be conferring with the Secretary of the Interior. I have met her several times. She is a good woman and I am certain her heart is in the right place. I hope that all of you will take this role responsibly, those of you on the Task Force, because the time is now. If we don't resolve this now, it will be another 10 years. And I have no idea who will be sitting here 10 years from now.

So with that, I thank all of you for your patience, for your testimony, and for your suggestions. And we will be do our part, I can assure you of that.

With that, the record will be open for 30 days if you want to submit addendum or corrections, please feel free to do so, and I invite all tribal leaders if they have statements they wish to have placed in the record, it will be done. I have a request from the Secretary, Mr. McCaleb that the statement of Secretary Norton be made part of the record, an article entitled "American Indian Trust Reform: The Challenge to Consensus." Without objection, that statement is made part of the record.

[Referenced document appears in appendix.]

The CHAIRMAN. With that, the hearing is adjourned.

[Whereupon at 1:18 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, SENATE COMMITTEE ON INDIAN AFFAIRS

Good morning and thank you Mr. Chairman for convening this important hearing. Unfortunately, all who have chaired this committee at some point must dedicate enormous time and effort in trying to reform the Indian Trust Fund Management systems.

You have done it in the past, Chairman Inouye, I did it for 5 years and now it's your turn once again. It's beyond frustrating for me and for the Indian beneficiaries as well.

Let me start off by saying that this issue is clearly a problem of historic proportions: It is not Secretary Norton's creation. When I chaired this committee I acknowledged the same fact to Secretary Babbitt.

Nonetheless, what Congress passed in 1994 to reform this system was enacted over the objections of the last Secretary of the Interior. My own opinion is that despite the 1994 Act and the vigorous involvement and encouragement of this committee, the trust reform strategy of the last Administration was to litigate, lurch from hearing to hearing by putting on a brave face and a dog and pony show, and do everything they could to make sure the Federal funding spigot didn't get turned off.

That strategy, as we all know and surely must recognize today, not only didn't work, Mr. Chairman but has in fact led us directly to where we are today.

Mr. Chairman, this reads like a bad soap opera: We have had several bills signed into law; documents lost, contaminated and shredded; Federal lawsuits filed; senior department officials resign and being held in contempt by a Federal judge; and countless hours of legislative and oversight hearings. Just 2 weeks ago we passed out of committee legislation designed to discourage more litigation and encourage the tribes and the Department to negotiate settlements which I believe is the much better option for all parties.

Having said that, we stand at a cross-roads here—a historic moment where I think if we recognize and admit that the litigation has served its purpose, but ultimately these issues should be, and I think will be, resolved here in Congress through a settlement bill.

Frankly, this committee—and the chairman and I—have done, are doing, and will continue to do everything we can to bring fair and equitable resolution to these issues but it requires some healthy, honest and open debate and one that may not have been held before.

Unlike many who have criticized her proposal, I believe the Secretary should be lauded, not criticized, for making a proposal to reform the way the United States handles Indian money and Indian assets.

There are tribal proposals as well and we'll hear a little about them today too.

Some fundamental realities we all need to acknowledge are:

No. 1. The status quo is unacceptable: It's unacceptable to the Secretary, to the tribes, to the court and to this committee.

No. 2. Right to the present day, the current system is not meeting the standards of performance that it should be—that's why I proposed an independent "Indian Trust Corporation" in February 2000.

No. 3. Whether the answer lies in the Secretary's idea, in receivership, in the trust corporation or in any other form, I firmly believe we should analyze them without passion or prejudice and get in place a system that brings justice to Indians which, after all, is what this should be all about.

In closing, let me say something about "Consultation". When the Secretary informed me of her proposal to reform the trust, I encouraged her and the Department to consult early and often with the tribes.

Three months later, close to 10 consultation meetings have taken place. The Secretary herself attended the first meeting in Albuquerque. Nonetheless, Secretary Norton is being criticized for not conducting more consultations.

In 1 year, this Secretary and high-level Department officials have met and consulted with the tribes more often on Indian Trust Reform issues that the past Administration did in 8 years. That—ladies and gentlemen—is a fact.

I do hope, Mr. Chairman, that with this hearing the committee can spark the kind of healthy and constructive dialog that is so needed at this point in time.

With that, I ask unanimous consent that my formal statement be included in the record along with some additional materials.

Thank you Mr. Chairman.

TRUST FUNDS TIME-LINE

Acronyms

AITFMRA—American Indian Trust Fund Management Reform Act, P.L. 103–412 (October 25, 1994)

DoI—Department of Interior

GAO—General Accounting Office

SCIA—Senate Committee on Indian Affairs

Important Events

September 8, 1982, "Major Improvements Needed in the BIA" Accounting System," (GAO/AFMD–82–71).

January 11, 1984, Price Waterhouse, "In-Depth Review of the Indian Trust Funds for the Bureau of Indian Affairs, Task V Recommendations." (Discussed in April 22, 1992 report "Misplaced Trust" from House Committee on Government Operations at the text accompanying footnote #53.)

April 15, 1987, BIA publishes Request for Information for transferring Indian trust fund management to the private sector. More than 100 responses were received.

December 27, 1987, Supplemental Appropriations Act, P.L. 100–202 and P.L. 100–446, September 27, 1988, include a directive preventing the BIA from transferring trust accounts to a private institution until they are reconciled.

October 26, 1989, Secretary Lujan, issues Secretarial Order 3137, Establishment of the Office of Trust Funds Management, BIA.

May 11, 1990, Arthur Andersen & Co., "Tribal and Individual Indian Monies Trust Funds, Report of Independent Auditors," Financial Statements as of September 30, 1989 and 1988.

July 2, 1990, Secretary Lujan, issues an amendment to Sec. Order 3137; material to be included in the Departmental Manual by January 1, 1991.

November 5, 1990, Interior Appropriations. Act, P.L. 101–512 tolls statute of limitations until reconciliation ordered by Committee is scheduled to be completed. The Act also requires independent certification that reconciliation results are the most complete reconciliation possible.

April 11, 1991, "Bureau of Indian Affairs Efforts to Reconcile and Audit the Indian Trust Funds," (GAO/T–AFMD–91–2).

May 20, 1991, "Bureau of Indian Affairs Efforts to Reconcile and Audit the Indian Trust Funds," (GAO/T–AFMD–91–6).

April 2, 1992, "Financial Management: BIA Has Made Limited Progress in Reconciling Indian Trust Funds and Developing a Strategic Plan," (GAO/AFMD–92–69).

April 22, 1992, House Government Operations Committee approves and adopts a report from its Subcommittee on Environment, Energy, and Natural Resources: "Misplaced Trust: The Bureau of Indian Affairs Mismanagement of the Indian Trust Fund," H.Rep. 102–499.

July 2, 1992, SCIA oversight hearing, S. Hrg. 102–856, on land fractionation and BIA financial management with the GAO as the principal witness testifying on its reports: "Profile of Land Ownership on 12 Reservations," (GAO/RCED–92–96BR)

February 1992, and "Problems Affecting BIA Financial Management," (GAO/T-AFMD–92–12) July 2, 1992 ("The bulk of problems are internal to BIA "things such as poorly designed accounting systems, weak internal control, and trained staff.").

August 12, 1992, SCIA oversight hearing, S. Hrg. 102–939, on Indian Trust Fund Management, S. Hrg. 102–939. Financial Management; BIA Has Made Little Progress in Reconciling Trust Accounts and Developing a Strategic Plan, (GAO/AFMD–92–38) June 1992. ("The unreconciled accounts are only a symptom and not a cause of BIA's trust fund financial management problems.")

June 22, 1993, SCIA hearing, S. Hrg. 103–225, on S. 925 Native American Trust Fund Accounting and Management Reform Act of 1993, (companion bill to Representative Synar's bill, H.R. 1846).

September 22, 1994, "Financial Management: Focused Leadership and Comprehensive Planning Can Improve Interior's Management of Indian Trust Funds," (GAO/AMD–94–185). ("Interior continues to develop piecemeal management improvement plans that do not provide the comprehensive approach to correcting fundamental problems in the way Interior agencies carry out their trust fund functions.")

October 25, 1994, President signs American Indian Trust Fund Management Reform Act of 1994, (AITFMRA) P.L. 103–412.

March 8, 1995, GAO Testimony; "Indian Trust Funds Cannot Be Reconciled" (GAO/AIMD-T–95–94) (Before the House Committee on Appropriations).

September 13, 1995, SCIA hearing, S. Hrg. 104–340, on nomination of Paul Homan to be Special Trustee.

September 29, 1995, GAO Letter Report, draft legislative proposal on reconciliation and settlement of tribal trust funds (GAO/AIMD/OGC–95–237R).

February 9, 1996, Secretary Babbitt issues Secretarial Order 3197, Establishment of the Office of Special Trustee and Transfer of Trust Funds Mgt. Functions from the BIA (Order terminates on October 1, 1997).

June 10, 1996, *Cobell* v. *Babbitt* filed in the U.S. District Court for the District of Colombia, referred to Judge Royce C. Lamberth.

June 11, 1996 SCIA Hearing, 104–514, Indian Trust Funds 1995, the primary witness is the GAO, which presented testimony on its report: "BIA's Tribal Trust Fund Account Reconciliation Results," (May 3, 1996, GAO/AIMD–96–63) ("[B]ecause [the] BIA's report package did not explain or describe the numerous changes in the reconciliation scope and methodologies or the procedures that were not performed, the limitations of the reconciliation were not evident.").

January 1997, Senator Campbell assumes chairmanship of SCIA.

February 4, 1997, Judge Lamberth certifies the named plaintiffs in *Cobell* v. *Babbitt* as representative of a class consisting of all resent and former IIM account holders.

April 1997, Special Trustee submits his proposed Strategic Plan, as required by AITFMRA.

May 21, 1997, Sec. Babbitt writes letter stating that the proposed Strategic Plan "fails to meet the objectives of the AITFMRA."

May 23, 1997, GAO, Letter Report, "Tribal Account Holders" Responses to Reconciliation Results" (GAO/AIMD–97–102R).

July 28, 1997, SCIA holds hearing S. Hrg., 105–295, on Special Trustee's Strategic Plan, Special Trustee Paul Homan testifies.

August 22, 1997, Sec. Babbitt issues memorandum on Trust Improvement Project Definition: "Notwithstanding my reservations about certain aspects about certain aspects of his Plan, selected trust systems improvements and data cleanup efforts in the Plan can and should proceed as soon as possible within the organizational structure of the Department." Secretary Babbitt calls for the creation of a "high level implementation plan."

November 13, 1997, DoI issues press release on a proposal for the settlement of tribal accounting claims against the United States.

April 16, 1998, DoI submits Settlement Proposal for tribal trust funds to Congress. Introduced at the end of the month by Congressman Miller (by request) as H.R. 3782.

July 22, 1998, SCIA hearing, S. Hrg. 105–815, on H.R. 3782, To Compensate Certain Indian Tribes for Known Errors in Their Tribal Trust Fund Accounts, to Establish a Process for Settling Other Disputes Regarding Tribal Trust Fund Accounts, and for Other Purposes. (The proposal was roundly criticized by Indian tribes and others for "tilting the playing field" in favor of the United States and effectively, if unintentionally, preventing Indian tribes from asserting certain claims.)

May 5, 1998, Judge Lamberth issues a discovery and scheduling order.

July 31, 1998 High Level Implementation Plan issued.

November 5, 1998 *Cobell* v. *Babbitt,* 30 F. Supp.2d 24 (D.D.C. 1998) ruling denying Interior's motion for summary judgment, etc. and refusal to impose a statistical sampling upon the case as a means of providing an accounting.

December 18, 1998, *Cobell* v. *Babbitt,* order to show cause why Sec. Babbitt should not be held in contempt.

January 5, 1999, Secretary Babbitt issues Secretarial Order No. 3208, Reorganization of the Office of the Special Trustee.

January 7, 1999, Special Trustee Paul Homan resigns.

January 28, 1999 Secretary's Office provides defense of Order No. 3208 and status report on High Level Implementation Plan February 1999, GAO provides draft report entitled: "Interior Lacks Assurance that Trust Improvement Plan will be Effective," issued as a final report in April 1999 (GAO/AIMD–99–53).

February 22, 1999, *Cobell* v. *Babbitt,* (1999 WL 101636) Judge Lamberth issues order finding Secretaries Babbitt and Rubin and Assistant Secretary Gover in contempt.

March 3, 1999 SCIA holds a joint hearing with Senate Energy and Natural Resources Committee on Secretarial Order No. 3208, S. Hrg. 106–12. Secretary Babbitt is principal witness. With respect to the contempt citation, Secretary Babbitt stated: "[L]et me just say we apologize to the court for the Government's failures in this litigation."

March 25, 1999, Senator Murkowski introduces S. 739 (to direct the Secretary of the Interior to contract with qualified financial institutions for the investment of certain trust funds) with Senator Campbell as an original cosponsor. (At the request of the bill's sponsors, the Inspector General sought to determine whether Departmental communications constituted illegal lobbying after published reports indicating such lobbying may have ocurred.)

April 3, 1999, SCIA holds hearing on BIA Capacity and Mission, S. Hrg. 106–79.

April 1999 "Interior Lacks Assurance that Trust Improvement Plan Will Be Effective," (GAO/AMD–99–53).

June 7, 1999, *Cobell* v. *Babbitt,* 52 F.Supp.2d 211 (D.D.C. 1999) Judge Lamberth rules on Defendant's motions for summary judgment.

June 25, 1999, Secretary Babbitt "unveils" TAAMS at Billings, Montana.

June and July 1999, Bench trial in *Cobell* (Phase I) case. According to the Court Monitor's second report, at this trial: "Without question, the Federal Government indicated that trust reform was underway and TAAMS was the framework and infrastructure for effecting trust reform."

July 14, 1999, Joint Hearing SCIA/Senate Committee on Energy and Natural Resources, Trust Fund Reform, S. Hrg. 106–146. "Indian Trust Funds: Interior Lacks Assurance That Trust Plan Will be Effective," (GAO/AIMD–99–53). (GAO report: "Until Interior develops an information systems architecture addressing all of its management functions, it can not (sic.) ensure that its information systems will not be duplicative or incompatible or will optimally support its needs across all business areas.") (Don Gray, Esq. "You can not and should not try to operate on yourself, and that is exactly what we're asking well-intentioned BIA officials to do-to work on a problem and to solve a problem where they or their friends . . . may have made mistakes. That is neither fair not reasonable and in the commercial context would never be countenanced.")

September 8, 1999, According to records revealed to the Court Monitor, a high level meeting was held within the Department concerning TAAMS ("Discuss current TAAMS status and agree on Departmental Policy Position.") Meeting attended by Secretary Babbitt's Chief-of-Staff Ann Shields, Kevin Gover, Daryl White, John Berry, Bob Lamb, and Dom Nessi. (This meeting and the failure to inform either Judge Lamberth or Congress about TAAMS implementation problems are addressed extensively in the Court Monitor's Second Report dated August 9, 2001.)

September 22, 1999, SCIA hearing, Trust Management Reform Act, hearing on S. 1587 (Amending the American Indian Trust Fund Management Reform Act of 1994 to establish within the Department of the Interior an Office of Special Trustee for Data Cleanup and Internal Control) and S. 1589 (Establishing a Indian Trust Fund Reform Commission). According to Secretary Babbitt: "Senator [Murkowski], if you go to Billings, Montana today you will see the TAAMS system running in parallel with the old system."

November 18, 1999, Interior Appropriations Conference report language limits deployment of TAAMS: until and unless the Secretary, "advise[s] the Committees on Appropriations that, based on the Secretary's review and analysis, such systems meet TAAMS contract requirements and user requirements."

December 21, 1999, *Cobell* v. *Babbitt,* 91 F. Supp. 1 (D.D.C. 1999), decision of Judge Lamberth based on June/July bench trial. The court rules that the Government had a duty to (1) provide an accounting of funds held in IIM trust; (2) create

written plans for collection and retention of IIM trust documents, computer and business systems architecture, and staffing of trust management functions; (3) delay was a breach of trust.

February 8, 2000, Chairman Campbell sends copies of an draft bill entitled Indian Trust Resolution Corporation Act to all Indian tribes.

February 29, 2000, DoI issues second High Level Implementation Plan March 22, 2000, SCIA hearing on the nomination of Thomas Slonaker to be Special Trustee.

March 30, 2000, DoI issues its draft Secretarial Order concerning "trust principles".

April 3, 2000, BIA publishes notice of request for Comments on the Settlement of IIM claims.

April 12, 2000, Chairman and Vice Chairman of SCIA and Chairman of Energy and Natural Resources write to ask the Department to reconsider its draft "trust principles." Confirmation of Special Trustee is blocked over draft "trust principles."

April 28, 2000, Secretarial Order on Trust Principles is issued after it is modified to meet most concerns. Senate confirms Tom Slonaker as Special Trustee.

June 22, 2000, SCIA hearing on draft bill Indian Trust Resolution Corporation Act.

July 14, 2000, DoI proposes regulations concerning the leasing and grazing of trust lands and the management of IIM funds and probate (65 FR 43874).

September 22, 2000 Chairman Campbell and Vice Chairman Inouye and 16 other Senators write to Secretary and ask him not to proceed to finalize most of the July 14, 2000 draft regulations.

September 29, 2000, Interior Appropriations Conference Report, H. Rep. 106–914 on H.R. 4578 (FY "01 Interior Approps.) "[W]hile approving the request to begin an IIM sampling approach, the managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results."

December 1, 2000, plaintiffs in *Cobell* v. *Babbitt* file motion to re-open trial I. They assert that the Government presented false and misleading evidence to support its claim that trust reform was underway.

December 29, 2000, Secretary Babbitt issues Memorandum to proceed with statistical sampling.

January 20, 2001, over the September 22, 2000 objections, the DoI finalizes draft July 14, 2000 regulations. (Regulations are allowed to go into effect by Bush Administration.)

February 23, 2001, U.S. Court of Appeals for the D.C. Circuit issues opinion in *Cobell* v. *Norton,* 2001 WL 17299 (D.C. Cir.). The decision affirms Judge Lamberth's ruling that the plaintiffs may proceed with their suit against the United States for breach of trust arising out of the government's failure to manage its trust activities. The panel also rules that the Government's duty to account does not arise out of the AITFMRA of 1994.

February 23, 2001, Dom Nessi writes two memorandum raising concerns about the DoI's project for both Trust Reform and Data Cleanup.

February 27, 2001, Secretary Norton issues Memorandum on statistical sampling.

February 28, 2001, Secretary Norton appears before SCIA, announces decision on statistical sampling.

April 16, 2001 Judge Lamberth appoints Joseph S. Kieffer, III as Court Monitor.

July 10, 2001, Secretary Norton issues Secretarial Orders creating Office of Trust Reform and Historical Accounting (Sec. Order 3231) and augmenting the authority of the Special Trustee (Sec. Order 3232).

July 11, 2001, Court Monitor issues his first report on Historical Accounting.

August 9, 2001, Court Monitor issues his second report on TAAMS. This report confirms that the Department misled Congress and the court with respect to trust reform efforts.

November 12, 2001 EDS submits DoI Trust Reform: Interim Report and Roadmap for TAAMS and BIA Data Cleanup November 20, 2001 Office of Indian Trust Transition (OITT) through Secretary Order 3235.

January 16, 2002, DoI submits Status Report #8.

January 17, 2002 First Meeting of Tribal Leaders Task Force January 24, 2002, EDS publishes DoI Trust Reform: Final Report and Roadmap

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PREPARED STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Mr. Chairman, I want to thank you for convening this hearing on the Department of the Interior's management—or perhaps mismanagement would be a better term—

of Indian trust funds. As my colleagues know, the United States has a fiduciary responsibility to uphold with respect to the 225,000 individual Indian money accounts and 315 tribal accounts that it holds in trust for Native Americans. Unfortunately, as has been well documented, the Departments of the Interior and Treasury cannot properly account for billions of dollars in Indian trust fund accounts.

Clearly, the Federal Government simply must do a better job of upholding its trust responsibilities to Native Americans. In an attempt to live up to the Federal Government's obligations, Interior Secretary Gale Norton proposed to reorganize some of the trust assets management responsibilities of her Department. I can understand why Secretary Norton might feel a dramatic reorganization is warranted, but, as I have expressed to her in a letter, I have concerns about such a reorganization.

First and foremost, I am concerned that a proposal with such important ramifications was put forward without consultation with tribes and their members. I appreciate that the Department has subsequently conducted a series of regional consultation meetings with tribes, but more meaningful discussion needs to occur. Tribal leaders, the Administration and Congress should work together to make substantive reforms in the trust asset management process. To that end, I am pleased that we are having this hearing today and will be receiving testimony from Interior Department officials and tribal leaders. I especially want to acknowledge the leadership and contribution of North Dakota tribal Chairman Tex Hall, who is the president of the National Congress of American Indians and cochair of the Tribal Leaders Task Force on Trust Reform.

Mr. Chairman, thank you again for calling this hearing, and I look forward to reading the testimony of the many witnesses.

PREPARED STATEMENT OF HON CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Thank you, Mr. Chairman. Let me begin thanking the committee for holding this hearing to discuss Indian Trust Management. Throughout my time in Congress and as a member of this committee, I have been involved with efforts to remedy the existing problems with the current management system. It continues to be my hope that we can develop a dependable system.

As we are all aware, the *Cobell* v. *Norton* litigation has prompted an intense reevaluation of our Government's trust responsibility. Consequently, Secretary Norton has put forth a proposal to restructure the Bureau of Indian Affairs, thereby creating a new agency solely charged with managing Indian trust accounts. This new agency has been referred to as the Bureau of Indian Trust Asset Management [BITAM]. I understand this proposal has been met with opposition throughout areas in Indian country. I also understand the tribes' frustration with the Department's consultation process. However, I strongly believe that we must not lose focus in our efforts to resolve this long-standing problem and move forward to establish an accountable system of trust management.

The Department of the Interior is not the only agency to bear the burden of finding a solution or addressing the problem. Each branch of our Government continues to shape the future outcome of Indian trust management. The history of mismanagement must be eradicated and replaced with a renewed commitment to providing a fair, accountable system. I look forward to working with my colleagues as we proceed in this difficult task.

Thank you, Mr. Chairman, I look forward to hearing from our witnesses.

PREPARED STATEMENT OF SUSAN M. WILLIAMS, ATTORNEY, ALBUQUERQUE, NM

Mr. Chairman and members of the committee, my name is Susan M. Williams. I am an attorney in Albuquerque, NM. I represent Indian tribal governments throughout the country and have broad experience in matters relating to the U.S. Government's trust responsibility to Indian tribes and individual Indian people. Through many years of experience, I have acquired a wide-ranging understanding of the Federal Government's attempts to fulfill its trust duties through the day-to-day operations of the Department of the Interior [Department] and, particularly, the Bureau of Indian Affairs [BIA].

I am pleased to present a written statement to this distinguished body regarding the Department's management of Indian trust resources and Secretary Norton's current proposal to transfer management of those resources out of the BIA and into a new Bureau of Indian Trust Asset Management [BITAM]. I submit this testimony on behalf of two Arizona Indian tribes, the Hualapai Nation and the Yavapai-Apache Nation of the Camp Verde Reservation.

Notwithstanding the problems inherent in the Department's present system of Indian trust asset management, the Secretary's plan to reorganize the Department in an effort to eliminate the problems is a bad idea that will not work. Financial account management and natural resource management are linked inextricably. The Secretary's plan, however, does not address critical issues related to natural resource management. Rather, the plan focuses exclusively on financial account management issues raised by the *Cobell* litigation.

Natural resource management, in contrast, includes the actual day-to-day oversight and protection of the land, forests, water, and other resources held in trust by the United States for Indian tribes and individual Indians. The Federal Government holds approximately 11 million acres in trust or restricted status for individual Indians and 45 million acres for tribes. The BIA and, in certain circumstances, the Bureau of Land Management [BLM] and the Minerals Management Service [MMS], have management responsibility for these resources. Those responsibilities include, among other activities, the leasing and valuation of trust lands, the maintenance of land ownership records, forest management, fire suppression, and the collection and verification of oil, gas, and other mineral royalty payments. The Secretary's plan does not address the substance of, or propose improvements to, these critical natural resource management functions.

The Secretary's proposal also ignores the unique position that the BIA occupies in the context of the Federal Government's relations with the Indian tribes. To Indian people, the BIA is synonymous with the trust responsibility, and for good reason: There is little, if anything, in which the Bureau is engaged that is not connected to our government's fulfillment of its trust duty to Indian people. Indeed, the Secretary's reorganization plan is controversial because it proposes to take away from the BIA natural resource trust asset management responsibilities without articulating a valid set of reasons for doing so.

Trust reform will not be complete until all the agencies within the Department responsible for either financial account management or natural resource management are in compliance with relevant laws and the Federal trust responsibility to Indian tribes. At the core of the problem with the proposed reorganization is Secretary Norton's failure to address (or at least articulate) how both the management of natural resources performed by BIA (as well as the BLM and the MMS) and the financial account management operations performed by the Office of the Special Trustee [OST] and Office of Trust Funds Management [OTFM] will be improved substantively by merely moving those functions to the new BITAM. In addition, such a move, which is both drastic and costly, fails to address how tribal trust beneficiaries will continue their participation in trust management as contemplated by the American Indian Trust Fund Management Reform Act, the Indian Self-Determination and Education Assistance Act, and other Federal laws that authorize tribes to manage their own trust resources.

Instead of BITAM, we recommend that the Congress and the Secretary undertake trust reform as follows:

A. *Organization—New Deputy Secretary and a Unified Chain of Command.*

We urge the Congress to authorize and establish within the Department a new Deputy Secretary position reporting directly to the Secretary. This new Deputy Secretary would direct a unified chain of command and would possess line authority over all of the Department's trust responsibilities for natural resource management and financial account management regardless of the location of those functions within the Department's various bureaus and agencies. Specifically, the new Deputy Secretary would have authority to direct all trust functions in the BIA, BLM, MMS, OST, OTFM, and the Office of Hearings and Appeals, including the duty to establish policies, procedures, systems, and practices that comply with the Secretary's trust responsibility to individual Indians and Indian tribes.[1] For the non-trust functions of the BLM and the MMS, the existing Deputy Secretary of the Interior and the Assistant Secretary for Land and Minerals Management, as well as the respective agency directors, would retain direct authority. The new Deputy Secretary also should have the authority to hire a small staff of additional, highly qualified trust, management, and organization professionals to design and oversee trust reform. This approach would allow the financial account management reforms in progress at OTFM to continue, but would add additional oversight, direction, and accountability for that reform process as well as implement necessary reform measures related to the natural resources held in trust for Indian tribes. In other words, the new Deputy Secretary would direct the implementation of all necessary reforms and

[1] This trust duty is discussed later in this statement.

would provide a clear line of authority and accountability for reform efforts and ongoing operations.

To ensure that the new Deputy Secretary has the necessary qualifications of trust experience and organizational and management leadership, and to ensure that meaningful reform continues between changes in Administrations, the Congress should provide that the President appoints the new Deputy Secretary, with the advice and consent of the Senate, for a fixed term of 6 years. There is ample precedent for statutorily fixed terms of office for officials who occupy high levels of trust and responsibility in the Federal Government.[2] The tribes should have substantial input into this selection process during Senate confirmation of the appointment, and the Congress should establish in law standards for removal of an appointee during a term of office, similar to the standards established for the Comptroller General of the United States.[3]

B. *Standards of Performance—The Trust Responsibility.*

The trust responsibility for Indian trust asset and trust funds management is well established in the legal decisions. A legally enforceable trust obligation is owed by the United States to the individual Indian and tribal trust beneficiaries based on treaties, agreements, and statutes. The Congress has broad authority over Indian affairs, but its actions must be "tied rationally to the fulfillment of the Congress" unique obligation toward the Indians." *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974). The trust responsibility is more than just following requirements in statutes and regulations but imposes common law fiduciary standards on executive branch management of Indian trust resources and trust funds similar to duties imposed on private trustees. *United States* v. *Mitchell,* 263 U.S. 206, 225 (1983) ("Mitchell II") (the "undisputed existence of a general trust relationship between the United States and the Indian People" is well established). That fiduciary standard has been described as an obligation to act in the "best interests" of the Indian beneficiary. *Jicarilla Apache Tribe* v. *Supron Energy Corp.,* 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J. concurring in part and dissenting in part), adopted as majority opinion as modified en banc, 782 F.2d 855 (10th Cir. 1986), cert. denied, 479 U.S. 970 (1986) (holding that the Secretary's duties in the mineral leasing context are not limited to compliance with administrative laws and regulations, but are subject to the "more stringent duties demanded of a fiduciary;" when faced with a decision for which there are several "reasonable" choices, the Secretary must select the one that best serves the Indians" interests). Lower courts have applied these common law trust principles to the government's management of Indian trust assets. In other contexts, it has been stated that the "most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. . . to administer the trust solely in the interest of the beneficiaries." *Pegram* v. *Herdrich,* 530 U.S. 211, 224 (2000) (quoting 2A A. Scott and W. Fratcher, Trusts at 311 (4th ed. 1987)).

The commonlaw fiduciary standard has been modified in two respects when the government deals with Indians. First, the United States may represent interests conflicting with the tribal trust interests, but the United States may be liable for money damages for failure to protect the "best interests" of the Indian trust beneficiaries in such circumstances. *Nevada* v. *United States,* 463 U.S. 110 (1983) ("mere existence of a formal "conflict of interest" does not deprive the United States of authority to represent Indians. . . . If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it.") (Brennan, J., concurring). Second, under existing law, tribal trust beneficiaries have a right to manage their own tribal trust resources. The American Indian Trust Fund Management Reform Act of 1994 gives Indian tribes the opportunity to manage tribal trust funds currently held in trust by the United States. *See* 25 U.S.C. secs. 4021–4029. In the event a tribe chooses to manage its own funds, the United States" trust responsibility respecting those funds ceases once the funds are withdrawn from the government's accounts. *Id.* sec. 4022(c). Similarly, the National Indian Forest Resources Management Act and the American Indian Agricultural Resource Management Act provide Indian tribes the opportunity to participate in the management of their forest and agricultural lands and resources, respectively, through the self-determination contracting and self-governance compacting provisions of the Indian Self-Determination and Education Assistance Act. *See* 25 U.S.C. secs. 3104 (forest lands and resources); 3711 (agricultural lands and resources). Unlike the situation under the Trust Fund Management Reform Act, ac-

[2] See, e.g., 28 U.S.C.A. sec. 532, note (term of office of the Director of the Federal Bureau of Investigation is 10 years); 31 U.S.C. sec. 703 (the Comptroller General of the United States is appointed by the President for a term of 15 years); 12 U.S.C. sec. 241 (the President appoints members of the Board of Governors of the Federal Reserve System for terms of 14 years).

[3] See 31 U.S.C. sec. 703.

tive tribal participation in trust resources management under both the Forest Resources Management Act and the Agricultural Resource Management Act does not diminish in any way the United States" trust responsibility toward those resources. *Id.* secs. 3102 and 3120 (Forest Resources Management Act); 3702 and 3742 (Agricultural Resource Management Act).

C. *Process—Full Evaluation of Trust Management Activities.*

Before the Secretary is permitted to move ahead with her current proposal to reorganize the Department's management of natural resource trust assets and trust funds management, or any such proposal, for that matter, Congress should require the Department to engage in a detailed, "ground up" examination of the way the Department currently manages Indian trust assets. The Department should first commission an outside, independent program compliance audit of all of Interior's trust management activities. Indeed, the Department's trust functions should undergo such an audit periodically in order to ensure that all standards and controls are implemented and operating as effectively as possible and in accordance with relevant requirements and standards. We are unaware if the trust management programs of the BIA, BLM, or MMS have ever been subjected to such an audit. These agencies" management of trust resources must undergo a systematic critique to gauge the relative strengths and weaknesses of the operations and to suggest means for improvement. That the agencies" operations may never have undergone an independent program compliance audit is nothing short of extraordinary and may go a long way toward explaining why the inadequacies in the management of Indian trust resources have never seriously been addressed. In contrast, since passage of the 1994 Reform Act, the OTFM periodically undergoes such audits.

There are good reasons to think that the outstanding issues related to financial account management can be responsibly addressed by the existing OTFM. After the passage of the American Indian Trust Fund Management Reform Act of 1994, the trust account management duties of the Department were removed from the BIA and placed under the supervision of the Special Trustee for American Indians ("Special Trustee"). Since that time, great strides have been made in the management of both IIM and tribal trust accounts. A key reason for the progress appears to be the methodology employed by the OST and the OTFM to implement necessary changes into the trust account management system. A concerted effort has been made to build from the ground up: first, to understand the duties and responsibilities inherent in the management of Indian trust accounts; second, to identify the functions and tasks that must be undertaken to satisfy those trust duties and responsibilities; third, to develop uniform standards by which those functions and tasks are to be undertaken; and finally, to procure commercial, off-the-shelf systems necessary to successfully perform the requisite duties, at the same time providing that internal controls are in place to ensure the integrity of operations.

Notwithstanding the great strides that the Special Trustee and OTFM have made in the management of the IIM and tribal trust accounts, there remains a tremendous amount of work to do. To ensure the successful completion of that work, the OTFM should be permitted to continue along its current path of reform, subject to the authority of the proposed new Deputy Secretary and contingent on the results of the outside audit and a comprehensive evaluation as proposed below.

The "ground up" examination of trust operations mentioned above should build upon the completed audit of existing operations and follow the steps briefly outlined earlier concerning the operations of the Special Trustee and OTFM, specifically:

1. *Duties and responsibilities.* Before any trust reform proceeds, we must have a clear understanding of the goals of such reform, both in terms of financial account management and natural resource asset management. This would involve development of a specific mandate of precisely what the Federal trust responsibility requires with regard to the management of financial accounts and natural resources such as land, water, minerals, and forests. The mandate necessarily would require a review of the relevant treaties, statutes, regulations, policy and guidance documents, and court decisions. We discussed earlier the general trust duty established in the applicable court decisions. We note one previous attempt to catalog the Department's trust responsibilities: Interior Solicitor Leo Krulitz's letter of November 21, 1978, to Assistant Attorney General James W. Moorman, concerning the case of *United States* v. *Maine.* In that letter, Solicitor Krulitz set out the Department's view of the United States" trust obligation with respect to Indian property interests. [4]

2. *Functions and tasks.* The Department must develop a comprehensive catalog of the activities in which the Department must be engaged in order to fulfill the

[4] See also Secretarial Order 3225, "Principles for the Discharge of the Secretary's Trust Responsibility," issued by former Interior Secretary Babbitt on April 28, 2000.

trust responsibility mandated above. This effort should benefit from the results of the completed audit critiquing how well current activities are being performed.

3. *Develop uniform standards.* Any trust reform plan must include an explanation of how natural resource asset management and trust funds management will be administered in accordance with trust principles. To that end, the Department must develop, refine, and articulate uniform standards by which both financial account management and natural resource asset management activities are to be undertaken and measured.

4. *Implement necessary systems.* The next step would be for the Department to implement operational and accounting policies and procedures, based on the uniform standards according to which the necessary functions and tasks are to be performed. Such systems must include internal controls to ensure the quality of operations.

5. *Integration of Tribal Self-Determination in Trust Assets Management.*

In the context of the existing trust management regime, as detailed above, an emphasis has been placed on ensuring that Indian tribes, consistent with the principles of self-determination, can manage, if they so choose, their own trust assets. These self-determination opportunities must be permitted to continue. Accordingly, great care should be exercised to integrate the program and policy principles of the Trust Fund Management Reform Act, the Forest Resources Management Act, and the Agricultural Resource Act into the revamped trust management structure, and to expand the concept of trustee/beneficiary comanagement to all appropriate areas of trust management.

D. *Conclusion—Responsible and Cost-Effective Trust Reform.*

The trust reform proposal outlined above is efficient as it does not require the costly expenditures to transfer and realign agencies and agency functions. The proposal is effective because it establishes a clear line of authority over all Interior trust management activities with a highly qualified person to direct the organizational and operational performance reforms needed to meet the United States" trust responsibility to Indians. And, finally, by maintaining the BIA and the OTFM intact (albeit under the new Deputy Secretary's ultimate authority over trust functions), the proposal continues the strong partnership established by the tribes and the Department consistent with the principles of self-determination and self-governance.

Thank you for this opportunity to express the views of the Hualapai Nation and the Yavapai-Apache Nation of the Camp Verde Reservation.

PREPARED STATEMENT OF THOMAS N. SLONAKER, SPECIAL TRUSTEE FOR AMERICAN INDIANS

Mr. Chairman, as the Special Trustee for American Indians, I am pleased to have this opportunity to discuss with the committee issues pertaining to the reform of the trust responsibility within the Department of the Interior.

It has been 22 years since the Office of Management and Budget first identified the financial management of Indian trust assets as a high-risk liability to the United States. It has been approximately 8 years since the enactment of the American Indian Trust Fund Management Reform Act, which clarified some of the existing trust responsibilities of the Secretary. That act established the Office of the Special Trustee for American Indians and required the Department to bring about the "more effective management of, and accountability for, the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians. . . " In August 1997, in response to the comprehensive strategic plan required by the Act to be prepared by the Special Trustee "for all phases of the trust management business cycle," the Secretary authorized that "selected, trust systems improvements and data cleanup efforts. . . should proceed as soon as possible." I was confirmed by the Senate as the Special Trustee 21 months ago. During that time I have reached several conclusions that I would like to share with you regarding the capability of the Government to manage appropriately the Indian trust assets it holds as trustee for specific Indian beneficiaries, comprised of some 300 tribes and nearly 300,000 individuals.

Trust reform, as well as the ongoing delivery of trust services to these individual and tribal beneficiaries, has reached a point where radical measures need to be undertaken now. Specifically, the Department's discharge of its trust responsibilities, as it is now organized, is inadequate to the demands placed upon it.

The primary problems are as follows. First, there is the need for a clear understanding of the Government's trust obligation to the beneficiaries. Second, there is a great need for experienced trust management, and, finally, there is the need to ensure accountability by those responsible for delivering trust services.

It is self evident that the nature and scope of the Federal Government's trust obligations in the area of Indian affairs is complex and reflects a history dating to the establishment of the Federal Government. The American Indian Trust Fund Management Reform Act of 1994 addresses itself to a discreet part of those Federal obligations: The physical assets the Government holds or controls as the trustee for Indian tribes and individual Indians. Similar to a private sector trustee, the Department is responsible for identifiable assets, in this instance primarily land and investable cash, and is required to manage those assets, make fiducially responsible investment decisions, account for the income: Produced and report fully to the beneficiaries about its stewardship of these Indian trust assets. Like every other trustee, the Government trustee is required to know at every moment what assets are held in trust, how those assets are invested and managed and to whom the proceeds of that management belong and are to be paid. The Reform Act has erased any doubt that those basic trust duties are Federal trust duties.

Today the Department cannot perform its trust duties at the level required by the Reform Act. Trust reform to date has not achieved an acceptable level of success, and, indeed, to speak of trust reform is misleading. The implementation of selected trust systems and data cleanup efforts is only the prelude to trust reform. It is the acquisition of the basic tools to do what needs to be done. It is selecting and buying the plow. Cutting the furrows lies far ahead. Actual trust reform must be accomplished. By properly serving the best interests of these Indian beneficiaries, the trustee—the Government—protects itself from the high risk of liability that OMB spoke to in 1980.

The problems that trouble the Department are management problems. The lack of management capability is signaled by the evident need for senior managers with experience in delivering trust services and operating trust systems in the private sector. Additionally, there is a critical need for senior level, project management skills applicable to large trust operations projects. The execution of those Federal fiduciary obligations must be rationalized.

The lack of accountability refers to the need to have all staff that are charged with trust responsibilities perform as directed by informed and responsible senior managers.

Until a clearer understanding of the trust obligation, better management, and more accountability are in place regardless of what the trust organization looks like, it will be difficult for the Government to come into compliance with the 1994 Reform Act.

I concur with the Secretary's concept of a single organizational unit responsible for the management of the Indian trust assets. That organization has the potential of addressing the accountability concerns by placing one executive, responsible to the Secretary, in charge of the delivery of the appropriate, required trust services to tribes and individual Indians. I believe a single organization with its own chain of command, that is one not diluted by intersecting other Departmental chains of command, can work better than the present organization. The devil, however, is in the details, and the new organization must have the best trust executive direction and actually hold people accountable. I also believe that the trust organization needs to be separated from other activities of the Bureau of Indian Affairs and placed on its own footing.

At its last meeting on December 7, 2002, the Special Trustee's Advisory Board, a Board required to be created by the 1994 Reform Act, adopted a formal proposal that the entire Indian asset trust function be removed from Interior and lodged in a self contained organization to be created by Congress. This proposal is an initiative of the Board, and it is based in large part on the Department's inability over the many years to identify and cure its management problems. It is a suggestion that has merit.

On the other hand, I disagree with those who suggest that once the trust organization is "fixed" that it be returned to its present organizational locations. I believe that organizations are not well motivated to make necessary changes if they know that 1 day they will return to their previous owner.

I also want to comment on the role of the Special Trustee. I believe that the Special Trustee must have the opportunity to provide candid and informed guidance directly to the Secretary as she seeks the more effective management of the trust responsibilities under her control. The Office of the Special Trustee (OST) will continue to focus on its oversight responsibilities. Therefore, OST must be provided appropriate resources and pursue every opportunity to ensure that trust reform is carried out effectively and efficiently.

Last July, the Secretary authorized the Special Trustee to issue written directives requiring the adoption of appropriate changes in existing policies that hinder trust reform. Although such directives may be overruled by the Secretary on appeal, the

authority to issue such directives can prove to be a valuable tool. However, it is not as effective as active direct line authority over those in the Department who implement trust policies and practices. Also, I am concerned about the inherent conflicts that can arise between our responsibility to individual Indian beneficiaries and our need to consult with tribes on matters affecting Indians in general.

Currently, the Office of the Special Trustee receives appropriations for trust reform activities, no matter where in Interior the reform project is managed. OST then initiates the funding of projects when and if adequate plans and management appear to be satisfactory. In some instances, we have found it necessary to interrupt funding when expected project success is not being achieved. This allocation procedure has proven helpful to the trust reform process and has given the Special Trustee a useful and independent voice in the Department's implementation of trust reform. The procedure is consistent with OST's oversight responsibilities under the 1994 Reform Act. It is important to achieving lasting trust reform and should continue to be a part of the reform effort We speak about organizing for trust reform within the Department, but it is important to recognize that today there are ongoing trust functions that require attention. For example, we need to review with the Congress the restrictions that now apply to the investment of trust cash concern here is the ability to offset inflation for those beneficiary trust funds that are expected to remain with the trustee for a matter of years. One example of this is the investment of cash for the benefit of a young Indian until such time that it may be distributed upon reaching their majority age.

I also believe that it is critical to trust reform to confirm that Indian trust land assets are earning a competitive market rate of royalty or lease income. This is the Trustee's obligation on behalf of the beneficiaries, tribal or individuals. We have created in OST a risk management unit which, when fully operational, will help assure the Secretary that the assets are properly managed.

Finally, let me comment on the notion advanced by some parties these days that the administration of the Government's trust can be split into two seemingly separate organizations, one for individual Indians and one for the tribes. I understand that litigation issues prompted this alternative. It is highly impractical in my opinion, however, to split administratively and operationally those trust responsibilities that have virtually identical characteristics of accounting, beneficiary reporting, land management (sometimes overlapping), investment management, and tribal distributions to individuals. Its only result would be to create two similar organizations that would be at odds with each other.

In conclusion, Mr. Chairman, proper trust reform can be put in place with the right leadership, the right trust skills, and accountability up and down the chain of command.

Thank you for this opportunity to be with you.

PREPARED STATEMENT OF VINCENT ARMENTA, CHAIRMAN, SANTA YNEZ BAND OF CHUMASH INDIANS

Chairman Inouye, Vice Chairman Campbell and members of the committee, thank you for holding this oversight hearing on the Department of the Interior's management of Indian trust funds and for the opportunity to provide you with my testimony on behalf of the Santa Ynez Band of Chumash Indians. We appreciate the efforts of Congress, especially the Senate Committee on Indian Affairs, to identify, analyze, address and evaluate the continuing needs throughout Indian country.

The Santa Ynez Band of Chumash Indians has 161 members, many of whom reside on the Santa Ynez Reservation, located in Santa Barbara County in Southern California. The Santa Ynez Reservation is a mere 128 acres and consists of a long and narrow parcel which is mostly in creek bed areas. The composition, terrain and absence of other natural resources on our reservation have not afforded the Santa Ynez Band or our individual members with lease, royalty, or other resource income that is managed by the Department of the Interior in tribal trust accounts and Individual Indian Money [IIM] accounts. However, the proposed reorganization of the Bureau of Indian Affairs [BIA], creation of the Bureau of Indian Trust Assets Management [BITAM], and transfer of BIA trust management to BITAM causes us great concern because it appears that the proposed BITAM would manage more than the tribal trust accounts and IIM accounts and would impact our trust programs and activities.

As referenced above, the composition and terrain of our reservation have presented us with many challenges, have limited our ability to provide housing and other governmental services for our members, and have also limited our ability to take advantage of diverse economic development opportunities. Tourism and agri-

culture continue as the primary industries in the surrounding communities and members of the Santa Ynez Band are actively considering ways to participate more fully and equitably in the region's development as well as contribute to its prosperity. Despite the many challenges we face, the Santa Ynez Band has developed tribal housing through HLJD programs, including NAHASDA, provides health care at the Santa Ynez Tribal Health Clinic through 638-compacting, established the Santa Ynez Chumash Environmental Office through the EPA's General Assistance Progran, provides higher education scholarships to our members, and developed the Chumash Casino. This is just the beginning as we have many long-neglected unmet needs to address.

While we strive to develop our governmental infrastructure and achieve financial independence, we look to the Federal Government as a partner and resource. Our future as a self-governing sovereign Indian nation requires our mutual commitments to a strong government-to-government relationship. We look to Congress, the Administration and the courts to reaffirm the Federal Government's commitment as we, the Santa Ynez Band of Chumash Indians, reaffirm our commitment to work with you.

Concerns with the Department of the Interior's Proposed Trust Management Reorganization

The proposed trust management reorganization has caused great concern throughout Indian country. This is due in large part to the vague and inconsistent language that has been used and the lack of clarity regarding the scope of the Secretary of the Interior's proposal. We have received reports that Interior officials have declined to respond to many direct questions and have said that they will wait until the conclusion of the consultation/scoping meetings before issuing any written responses or clarifications. While we certainly appreciate and support Interior conducting more meetings throughout Indian country, we believe that we would all derive great benefit from Interior's clarification which tribes have sought from the very first meeting. With better information, tribes and Congress would have the information with which to assess exactly what the impacts of the Secretary of the Interior's proposal would be.

Though we oppose the BITAM proposal, we emphatically support the need for trust reform as the current systems and programs fail to meet our cumulative and growing unmet needs. Furthermore, the greater distribution of trust responsibilities throughout the various departments and agencies demand a clearer and more focused direction and strong leadership that must originate from the one agency seen as "the" agency that should do this—the Bureau of Indian Affairs.

Secretary of the Interior Gale Norton says that the Bureau of Indian Trust Assets Management [BITAM] proposal was quickly announced and advanced due to the proceedings of the *Cobell* litigation which focuses on the Department's mismanagement of IIM accounts only. However, we have received reports that the plaintiffs in the *Cobell* litigation reject the BITAM proposal as it fails to address the concerns of the litigation. Tribal leaders from throughout Indian country have emphatically rejected Secretary Norton's proposal. Thus, we do not understand Secretary Norton's continuing push for the plan. With the limited information that we have at this point, we can only speculate that the BITAM proposal is intended to erode and potentially eliminate the BIA.

It appears that the Bureau of Indian Trust Assets Management proposal would affect the existing structures, programs, services, and trust obligations, duties, and responsibilities of the Federal Government. The Draft Organizational Chart for the BITAM proposal, dated November 14, 2001, shows that the proposed reorganization will affect self-governance, 638-compacting, contracting and direct service tribes in a variety of ways. However, we have received reports that changes to that Draft Organizational Chart have already been considered and that some activities and functions will remain with the BIA.

Secretary Norton has said that the creation of a new Bureau with another Assistant Secretary to oversee trust reform and trust assets management will free up Assistant Secretary McCaleb to concentrate on the other programs within the Bureau of Indian Affairs to improve the delivery of services. The Santa Ynez Band would like to know exactly which programs will remain with the Bureau of Indian Affairs, what will remain of the BIA's organizational structure, and what the BIA's plans are for improving the delivery of their services. We view this as being very critical because we see this move to "reorganize" as an erosion of the BIA rather than a reinforcement of the BIA. We would like, to see a clear plan and vision for the future Bureau of Indian Affairs from Secretary Norton and Assistant Secretary McCaleb.

Everyone involved—tribes, individual Indians, Congress, the Department of the Interior, the courts—would benefit from clarification regarding what Interior intends the scope of "trust assets" and "trust funds" as used in its proposal to mean. Tribes are especially concerned about what is being excluded and whether the exclusion of any assets, funds, programs or services from the "trust" umbrella is an indication of a change in the administration's view of its trust obligations, duties and responsibilities. Funds flowing from the Federal Government and through Federal programs may be viewed as "trust" funds as they are in furtherance of the trust responsibilities of the Federal Government and in furtherance of the trust policy of the Federal government to promote the self-determination and self-governance of our Indian nations. The Draft Organizational Chart would support this view.

When Interior characterizes or categorizes trust v. non-trust functions, it appears as though Interior is redefining its trust obligations, duties and responsibilities. However, if Interior intends to separate its fiscal management of trust moneys only, and this is the only distinction Interior intends, then it should clarify that. Some Interior officials have said that BITAM is intended solely as a fiscal management reorganization. These same officials do not believe that BITAM will, nor should, affect natural resources management, land into trust applications and other BIA functions that are better informed at the regional and field office levels. We are concerned with the characterization of such natural resources as "non-trust" assets by an Interior official, though we assume that a very narrow definition of "trust" was intended. We would appreciate a clarification with regard to the above concerns.

We hope that Secretary Norton and Assistant Secretary McCaleb are willing and able to provide direct responses soon. We are otherwise concerned that the lack of clarity is intentional and intended to veil purposes that can only be adverse to our interests.

Concerns With General Distribution of Trust Responsibilities and Lack of Leadership

We have great concern over the distribution of program management outside of the Bureau of Indian Affairs, whether that is indeed the intent or the unintended, though foreseeable, result. We are already grappling with the efforts of Departments outside of Interior who are relatively new to administering Indian programs and are for the first time responsible for effecting the implementation of Federal trust obligations, duties and responsibilities. While Interior has not been as effective as Indian country deserves, it causes us great concern to have to work with new and much less knowledgeable, experienced, or committed departments of the Federal Government.

Secretary Norton, in her testimony before the House Resources Committee on February 6, 2002, entitled "Native American Trust Issues and Ongoing Challenges, stated one of the Department of the Interior's trust management challenges is that "Trust responsibilities are spread throughout the Department. Thus, trust leadership is diffuse." We strongly agree with that statement and do not understand why Secretary Norton proposes to keep Interior's trust responsibilities spread across two different bureaus. Further, the proposal would require creating many completely new positions within the Department that will be staffed by individuals who can not have any experience fulfilling the duties required by those positions. Beyond the serious questions raised by this lack of experience, the net increase in the personnel costs of trust administration, we fear, will run into many millions, if not tens of millions, of dollars. Given the lack of clarity in the Secretary's proposal, and the already staggering amount of other unmet needs throughout Indian Country, the proposal does not satisfy the Secretary's fiduciary obligation to ensure that monies set aside for the benefit of individual Indians and Indian tribes is used wisely. We cannot repair one breach by creating another. The alternative proposals offered by various Indian nations and inter-tribal organizations suggest the focused management and leadership Secretary Norton seeks.

The Federal Government's trust responsibilities are spread throughout various departments beyond the Department of the Interior, including the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Agriculture, the Environmental Protection Agency, and the Department of Justice. Some of these departments have looked to the Department of the Interior and the Bureau of Indian Affairs for their trust leadership and have found them woefully lacking. We also understand that programs and services remaining under the Bureau of Indian Affairs will remain under close scrutiny and that any failure of the Bureau of Indian Affairs to meet certain minimum performance standards will result in that program being shifted to another department. It is critical that we reinforce and dramatically improve the Bureau of Indian Affairs.

Thank you Chairman Inouye, Vice Chairman Campbell and members of the committee for this opportunity to provide testimony on behalf of the Santa Ynez Band

of Chumash Indians. If you have any questions or wish to discuss our concerns and interests and how we might work together to address them please do not hesitate to contact us. Thank you.

PREPARED STATEMENT OF CHRIS DEVERS, CHAIRMAN, PAUMA-YUIMA BAND OF MISSION INDIANS

Chairman Inouye, Vice Chairman Campbell and members of the committee, thank you for keeping the record open for the committee's oversight hearing on the Department of the Interior's management of Indian trust funds and for the opportunity to provide you with written testimony on behalf of the Pauma-Yuima Band of Mission Indians. We appreciate the efforts of Congress; especially the Senate Committee on Indian Affairs, to identify, analyze, address and evaluate the continuing needs throughout Indian country.

The Pauma-Yuima Band of Mission Indians has 200 members, a majority of whom reside on the Pauma and Yuima Indian Reservations, located in northern San Diego County in Southern California. The Pauma and Yuima Indian Reservations consists of approximately 5,800 acres most of which is on Palomar Mountain, an important tribal and cultural resource which we continue to strive to protect and preserve, leaving approximately 275 acres for housing, governmental services, and economic development. All of the reservation lands are held in trust for the Pauma-Yuima Band. While our members do not have Individual Indian Money [IIM] accounts, the tribe has significant settlement funds held in trust and managed by the Department of the Interior. The proposed reorganization of the Bureau of Indian Affairs [BIA], creation of the Bureau of Indian Trust Assets Management [BITAM], and transfer of BIA trust management to BITAM causes us great concern because it appears that the proposed BITAM would manage our tribal trust accounts as well as impact our trust programs and activities. We are especially concerned that the issues and concerns of small tribes with precious limited resources may be once again overlooked.

We have overcome many challenges, though there are also many that remain. As mentioned above, the composition, terrain and location of our Reservations have presented us with many challenges, have limited our ability to provide housing and other governmental services for our members, and.have also limited our ability to take advantage of diverse economic development opportunities.

Agriculture continues as the primary industry in the surrounding community. The tribe has developed and maintained orange and avocado groves. However, during some years, the cost of picking the fruit and getting them to the market have exceeded the price that we could obtain for the fruit. The tribe and our members continue to actively consider different ways in which we may participate more fully and equitably in the region's development as well as contribute to its prosperity.

Despite the many challenges we face, the Pauma-Yuima Band has developed tribal housing through HUD programs, including NAHASDA, provides health care as a part of the Indian Health Council consortium, established the Pauma Natural Resources Department through grove income and the EPA's General Assistance Program and other EPA grants, provides after-school care and educational services, and developed Casino Pauma in 2001—We are hopeful that Casino Pauma will generate income that will enable us to provide additional services to our members and community as we have many long-neglected unmet needs to address.

While we strive to develop our governmental infrastructure and achieve financial independence, we look to the Federal Government as a partner and resource. Our future as a self-governing sovereign Indian nation requires our mutual commitments to a strong government-to-government relationship. We look to Congress, the Administration and the courts to reaffirm the Federal Government's commitment as we, the Pauma-Yuima Band of Mission Indians, reaffirm our commitment to work with you.

Concerns with the Department of the Interior's Proposed Trust Management Reorganization

The proposed trust management reorganization has caused great concern throughout Indian country. This is due in large part to the vague and inconsistent language that has been used and the lack of clarity regarding the scope of the Secretary of the Interior's proposal. We have received reports that Interior officials have declined to respond to many direct questions and have said that they will wait until the conclusion of the consultation/scoping meetings before issuing any written responses or clarifications. While we certainly appreciate and support Interior conducting more meetings throughout Indian country, we believe that we would all derive great benefit from Interior's clarification which tribes have sought from the

very first meeting. With better information, tribes and Congress would have the information with which to assess exactly what the impacts of the Secretary of the Interior's proposal would be.

Though we oppose the BITAM proposal, we emphatically support the need for trust reform as the current systems and programs fail to meet our cumulative and growing unmet needs. Furthermore, the greater distribution of trust responsibilities throughout the various departments and agencies demand a clearer and more focused direction and strong leadership that must originate from the one agency seen as "the" agency that should do this—the Bureau of Indian Affairs.

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It appears that the Bureau of Indian Trust Assets Management proposal would affect the existing structures, programs, services, and trust obligations, duties, and responsibilities of the Federal Government. The Draft Organizational Chart for the BITAM proposal, dated November 14, 2001, shows that the proposed reorganization will affect self-governance, 638-compacting, contracting and direct service tribes in a variety of ways. However, we have received reports that changes to that Draft Organizational Chart have already been considered and that some activities and functions will remain with the BIA.

Secretary Norton has said that the creation of a new Bureau with another Assistant Secretary to oversee trust reform and trust assets management will free up Assistant Secretary McCaleb to concentrate on the other programs within the Bureau of Indian Affairs to improve the delivery of services. The Pauma Band would like to know exactly which programs will remain with the Bureau of Indian Affairs, what will remain of the BIA's organizational, structure, and what the BIA's plans are for improving the delivery of their services. We view this as being very critical because we see this move to "reorganize" as an erosion of the BIA rather than a reinforcement of the BIA. We would like to see a clear plan and vision for the future Bureau of Indian Affairs from Secretary Norton and Assistant Secretary McCaleb.

Everyone involved—tribes, individual Indians, Congress, the Department of the Interior, the courts—would benefit from clarification regarding what Interior intends the scope of "trust assets" and "trust funds" as used in its proposal to mean. Tribes are especially concerned about what is being excluded and whether the exclusion of any assets, funds, programs or services from the "trust" umbrella is an indication of a change in the administration's view of its trust obligations, duties and responsibilities. Funds flowing from the Federal Government and through Federal programs may be viewed as "trust" funds as they are in furtherance of the trust responsibilities of the Federal Government and in furtherance of the trust policy of the Federal Government to promote the self-determination and self-governance of our Indian nations. The Draft Organizational Chart would support this view.

When Interior characterizes or categorizes trust v. non-trust functions, it appears as though Interior is redefining its trust obligations, duties and responsibilities. However, if Interior intends to separate its fiscal management of trust moneys only, and this is the only distinction Interior intends, then it should clarify that. Some Interior officials have said that BITAM is intended solely as a fiscal management reorganization. These same officials do not believe that BITAM will, nor should, affect natural resources management, land into trust applications and other BIA functions that are better informed at the regional and field office levels. We are concerned with the characterization of such natural resources as "nontrust" assets by an Interior official, though we assume that a very narrow definition of "trust" was intended. We would appreciate a clarification with regard to the above concerns.

We hope that Secretary Norton and Assistant Secretary McCaleb are willing and able to provide direct responses soon. We are otherwise concerned that the lack of clarity is intentional and intended to veil purposes that can only be adverse to our interests.

Concerns With General Distribution of Trust Responsibilities and Lack of Leadership

We have great concern over the distribution of program management outside of the Bureau of Indian Affairs, whether that is indeed the intent or the unintended,

though foreseeable, result. We are already grappling with the efforts of Departments outside of Interior who are relatively new to administering Indian programs and are for the first time responsible for effecting the implementation of Federal trust obligations, duties and responsibilities. While Interior has not been as effective as Indian country deserves, it causes us great concern to have to work with new and much less knowledgeable, experienced, or committed departments of the Federal Government.

Secretary Norton, in her testimony before the House Resources Committee on February 6, 2002, entitled "Native American Trust Issues and Ongoing Challenges, stated one of the Department of the Interior's trust management challenges is that "Trust responsibilities are spread throughout the Department. Thus, trust leadership is diffuse." We strongly agree with that statement and do not understand why Secretary Norton proposes to keep Interior's trust responsibilities spread across two different bureaus. Further, the proposal would require creating many completely new positions within the Department that will be staffed by individuals who can not have any experience fulfilling the duties required by those positions. Beyond the serious questions raised by this lack of experience, the net increase in the personnel costs of trust administration, we fear, will run into many millions, if not tens of millions, of dollars. Given the lack of clarity in the Secretary's proposal, and the already staggering amount of other unmet needs throughout Indian country, the proposal does not satisfy the Secretary's fiduciary obligation to ensure that moneys set aside for the benefit of individual Indians and Indian tribes is used wisely. We cannot repair one breach by creating another. The alternative proposals offered by various Indian nations and inter-tribal organizations suggest the focused management and leadership Secretary Norton seeks.

The Federal Government's trust responsibilities are spread throughout various departments beyond the Department of the Interior, including the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Agriculture, the Environmental Protection Agency, and the Department of Justice. Some of these departments have looked to the Department of the Interior and the Bureau of Indian Affairs for their trust leadership and have found them woefully lacking. We also understand that programs and services remaining under the Bureau of Indian Affairs will remain under close scrutiny and that any failure of the Bureau of Indian Affairs to meet certain minimum performance standards will result in that program being shifted to another department. It is critical that we reinforce and dramatically improve the Bureau of Indian Affairs.

Thank you Chairman Inouye, Vice Chairman Campbell and members of the committee for this opportunity to provide testimony on behalf of the Pauma Band of Mission. If you have any questions or wish to discuss our concerns and interests and how we might work together to address them, please do not hesitate to contact us. Thank you.

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SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY

Oversight Hearing on the Management of Indian Trust Funds
Before the Senate Committee on Indian Affairs

Tuesday, February 26, 2002

Chairman Inouye, Vice Chairman Campbell, and Members of the Committee, we are honored to appear before you in response to the Committee's invitation to discuss the origins of the United States' trust responsibility, how it has been interpreted by the courts and Congress over the past two centuries, and its scope and extent both historically and today. As you know, we are partners in the law firm of Sonosky, Chambers, Sachse, Endreson and Perry, 1250 Eye Street, Suite 1000, Washington, D.C. 20005. We appear here today, however, at the Committee's request, not on behalf of any tribal client.

The Committee has called this hearing at an important time. The federal court in the *Cobell* litigation is actively considering a broad range of questions concerning the Interior Department's past conduct with respect to the management of individual Indian trust funds. In addition, in large measure as a response to pressure from the *Cobell* litigation, the Department has proposed to address trust management for the future through a fundamental reorganization of Indian affairs, calling for the creation of a new agency ("BITAM"), and splitting "trust" functions (as defined by the Department) from other Indian operations within the Bureau of Indian Affairs. Tribes nationwide have expressed considerable opposition to the BITAM proposal, and we expect the Committee to be hearing from tribal leaders in this regard at this hearing.

We share the Tribes' concerns about the BITAM proposal. However, our testimony today focuses on one basic fundamental issue – the federal trust responsibility. As our testimony shows, the BITAM proposal as advanced by the Department is based on significant misconceptions about the trust responsibility. We also submit that the lack of detailed information provided by the Department regarding the proposal means that any possibility that the proposal might meet the trust responsibility is, at best, wholly speculative. Given the government's duties under the trust responsibility, we suggest that this is not an acceptable posture for the Government to proceed with its proposal.

More specifically, we discuss the origins and scope of the United States' vital and historic trust responsibility to demonstrate the following concepts:

1. Since a primary purpose of the trust relationship has always been the protection of tribes as distinct political entities, the trust responsibility and tribal self-government are complementary and not, as the Department apparently contends, in conflict with one another;

2. The common law standards of a private fiduciary apply to federal agencies which control trust funds and property of Indian tribes. This has long been the settled law, decades before the *Cobell* litigation.

3. The trust responsibility is not limited to the protection of Indian rights, resources, funds and property but extends to all special services provided to Indians.

Accordingly, we conclude that the Department's proposal is based on a set of mistaken views about the trust responsibility, and that it does not provide this Committee or the Tribes with any measure of information from which to determine whether it could begin to address the requirements of the trust responsibility. We believe that these are very serious concerns, and that the BITAM proposal must be evaluated in a manner that ensures that the trust responsibility, as developed by the courts and Congress, will continue to be vital doctrine for the benefit and protection of tribes and Indian people – not relegated to some new and lesser role.

1. First judicial formulation of the trust responsibility

As the United States Supreme Court has stated, the "undisputed existence of a general trust relationship between the United States and the Indian People," is well established. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"). The

trust responsibility doctrine was originally expounded by the Supreme Court and spans nearly two centuries of Supreme Court jurisprudence.[1] It has also been repeatedly recognized by Congress, and has been the explicit basis of most modern Congressional statutes concerning Indians.

The Marshall Court first formulated the trust responsibility doctrine nearly 170 years ago in the two Cherokee cases, both of which involved the question of whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Nation by federal treaties. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that it lacked original jurisdiction over a suit filed by the Nation to enjoin enforcement of the state statutes because the Nation was not a "foreign state" within the meaning of that term in Article III of the Constitution. In *Cherokee Nation*, Chief Justice John Marshall described the Federal-Indian relationship as "perhaps unlike that of any other two people in existence" and "marked by peculiar and cardinal distinctions which exist nowhere else." *Id.* at 16. The Court agreed with the Cherokee Nation's contention that it was a "state" in the sense of being "a distinct political society . . . capable of managing its own affairs and governing itself." *Id.* But it held that Indian tribes were not "foreign states," but rather were subject to the protection of the United States and might "more correctly, perhaps, be denominated domestic dependent nations." *Id.* at 17. Chief Justice Marshall concluded that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* Thus, recognition of tribes' sovereign status forms a cornerstone of the trust relationship, which in turn obligates the United States to protect Tribe' rights as sovereigns.

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[1] *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Fellows v. Blacksmith*, 60 U.S. (19 How) 366 (1857); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 654-55 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300-05 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Nice*, 241 U.S. 591 (1916); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946); *United States v. Mason*, 412 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974); *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980); *Nevada v. United States*, 463 U.S. 110, 142 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

In the second Cherokee case, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court invalidated the Georgia statutes because the treaties with the Cherokees and the Federal Trade and Intercourse Acts[2] protected tribal communities as "having territorial boundaries, within which their authority [of self-government] is exclusive. . . ." *Id.* at 557. Chief Justice Marshall in *Worcester* meticulously analyzed the treaties with the Cherokee and emphasized that their right "to all the lands within those [territorial] boundaries . . . is not only acknowledged but guaranteed by the United States." *Id.* at 557. The trusteeship reflected in *Cherokee Nation* appears to have been implied from this guarantee, for there was no express language in any treaties specifically recognizing a trust. The Court also analyzed the Trade and Intercourse Acts - which protected Indian land occupancy - as providing an additional source for the immunity of the Cherokees from state jurisdiction and, implicitly, for the trust relationship itself.

Worcester is significant for an additional reason. In *Cherokee Nation*, Justices Johnson and Baldwin had concurred in the dismissal of the case because, they reasoned, the Cherokee Nation was not a "state at all." The two concurring Justices analogized the tribe to a conquered domain, which had not territorial rights save at the pleasure of the conqueror. Justice Johnson considered the Nation a sort of tenant-by-sufferance on the lands secured by the treaties, from which it could be dispossessed at will. *Cherokee Nation,* 30 U.S. at 27.

In *Worcester*, Chief Justice Marshall took considerable pains to refute this conception. He did this by a detailed analysis of the treaties themselves, showing that they confirm the right of self-government in the Nation. The specific holding of the Cherokee cases was that federal power over Indian affairs was exclusive vis-a-vis the states. In modern terms, state power was preempted. Chief Justice Marshall showed this was the intent of the framers of the Constitution by contrasting the constitutional provisions dealing with Indians with comparable ones in the Articles of Confederation it replaced. But the analysis of the Court went beyond the holding, establishing that tribes are sovereign under federal law and formulating the trust relationship as imposing an obligation on the United States to protect the governmental and other rights of the tribes from the broad and exclusive federal power over Indian affairs, as well as from state legislation. It is true, of course, that the Court in *Cherokee Nation* analogized the relationship to a guardianship. But the Court was clearly expounding a concept intended to govern the tribes' relationship with the United States for as long as the United States has, under the Constitution, power

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[2] Act of July 22, 1790, 1 Stat. 137, 139; Act of May 19, 1796, §12, 1 Stat. 469, 472; Act of March 3, 1799, § 2, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143, *codified* at 25 U.S.C. § § 177.

in Indian affairs which makes the tribes comparatively vulnerable to the exercise of that power. Thus, the guardian-ward analogy speaks to the breadth of federal power in the federal structure and the constant peril to which that power potentially subjects tribes. In these landmark opinions, the Court set out the principles that govern the United States' governmental relationships with Indian tribes, and avoided the two alternatives before it – recognizing the tribes as foreign nations, or as entities without any legal protection for their rights.

The treaties and federal statutes Chief Justice Marshall relied upon in the Cherokee cases also recognized that tribes possessed a kind of legal title to those lands habitually possessed and occupied by them.[3] Consequently, treaties and agreements were necessary to accomplish the extinguishment of that title and the opening of Indian lands to non-Indian settlement. Accordingly, the treaties were a legally required transaction, contract, or bargain. The ensuing trust relationship was a significant part of the consideration for that bargain offered by the United States. By these treaties and agreements, the Indians commonly reserved their governmental authority and part of aboriginal land base which was guaranteed to them by the United States.[4] By administrative practice and later by statute, the title to this land was held in trust by the United States for the benefit of the Indians. The Indians later came to be recognized as holding full beneficial ownership to the retained lands and the equitable title to them.

The Cherokee cases demonstrate, however, that the trust relationship is not limited to property rights. Those cases did not involve trust funds or property, but governmental authority. They involved the right of the Cherokee Nation – protected by federal laws and treaties – to function as a self-governing entity, free from the jurisdiction of the State of Georgia over the Nation or its members. It is undeniable that the Cherokee Nation in the 1820s and 1830s was "a distinct political society" in fact as well as law. It had a written Constitution, elected legislature, tribal courts, schools, an established military and had developed a written language with a much higher adult literacy rate than any State of the Union at the time. The trust responsibility articulated in the Cherokee cases protects tribes' inherent sovereign status as a right reserved in the treaties, and is not premised on any concept that tribes are functionally incompetent to manage their affairs.

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[3] *Johnson v. McIntosh*, 21 U.S. at 568; *see also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-46 (1941).

[4] *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) ("treaty was not a grant of rights to the Indians, but a grant of rights from them, - a reservation of those [rights] not granted").

In this basic way, the modern Indian self-determination policy that has been the basis of bipartisan federal policy since President Nixon's 1970 Message to Congress is solidly bottomed on the trust responsibility historically articulated by the Marshall court. The two are complementary, not incompatible, and it contradicts the basic purpose of the trust relationship to think of the trust responsibility and tribal self-government as in conflict - for the latter is a prime purpose of the former. Congress has also made this abundantly clear in a number of modern statutes, as we discuss below in Parts 4 and 5.

2. Cases discussing the trust responsibility as a basis for Congressional power over Indians.

When the Court next discussed the Federal trust responsibility in the late nineteenth century, it conceived it as of an extra-constitutional source of federal power, apart from the express powers in the Constitution. In *Kagama v. United States*, 118 U.S. 375, 377-78 (1886), the Court considered the constitutionality of the Major Crimes Act, 23 Stat. 362, 385 (1885), 18 U.S.C. § 1153, enacted by Congress in 1885 to apply to all Indian reservations. Prior to that date, federal criminal law did not extend to Indians committing crimes against other Indians in Indian country. Kagama, an Indian arrested and prosecuted under the Major Crimes Act for murdering another Indian on the Hoopa Valley Reservation in California, challenged the constitutionality of the statute. The Supreme Court agreed with his contention that Article I, Section 3, Clause 8–which confers upon Congress the express power "to regulate Commerce with the Indian Tribes" – did not authorize enforcement of a federal criminal code on Indian reservations. But the Court nonetheless sustained the constitutionality of the statute by relying on the government's fiduciary relationship to the Indians. The Court in *Kagama* fixed the "resemblance" perceived by Marshall in *Cherokee Nation* into a mirror image by holding that "these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power." *Kagama,* 118 U.S. at 383-84.

An important difference between Marshall's decisions and *Kagama* was the reliance of the Court in *Kagama* upon the guardianship as a justification for federal power rather than a source of judicially enforceable duties and a limitation on federal power. *Kagama* does not recognize unlimited power in Congress, but subsequent cases found that Congress has a rather extensive power over Indians. Statutes granting easements and leases over Indians lands without tribal consent were sustained in the decades following *Kagama*, as was the constitutionality of statutes like the Trade and Intercourse Acts which prevented sale of Indian property without approval by the Secretary of the Interior. *Cherokee Nation v. Southern Kansas Ry. Co.,* 135 U.S. 641 (1890); *Cherokee Nation v. Hitchcock,* 187

U.S. 294 (1902). The basis for these decisions was the Court's conception of the trust responsibility – that the Indians were "in a condition of pupilage or dependency, and subject to the paramount authority of the United States" as guardian. *Cherokee Nation,* 187 U.S. at 305.

Probably the most extreme case of this period in terms of federal power was *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902), which declared that Congress had a "plenary" power deriving from the guardianship to manage Indian property. *Id.* at 565. *Lone Wolf* concerned a statute which allotted tribally owned reservation lands to individual Kiowas and Comanches, and authorized the sale of unallotted lands on the reservation to non-Indians. The Indians sued to enjoin enforcement of the allotment statute because it conflicted with terms of their 1867 treaty that expressly prohibited any cession of reservation lands without consent of three-quarters of the tribal members. This consent admittedly had not been obtained. The Supreme Court held that "as with treaties made with foreign nations . . . the legislative power might pass laws in conflict with treaties made with the Indians." *Lone Wolf*, 187 U.S. at 566. The Court stated that the treaty could not operate "to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and . . . deprive Congress, in a possible emergency . . . of all power to act, if the assent of the Indians could not be obtained." *Id.* at 564. The Court in *Lone Wolf* declined to review whether Congress had acted consistently with its trust responsibility, and presumed that Congress had acted "in perfect good faith in the dealings with the Indians." *Id.* at 568; *see also Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902).

Modern cases have, however, rejected the notion that congressional enactments concerning Indians are immune from judicial review. In *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85-86 (1977), the Supreme Court expressly rejected an argument that there could be no judicial review of statutes affecting Indians, and stated instead that the legislation must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," quoting its earlier decision in *Morton v. Mancari*, 417 U.S. 535, 555 (1974). The teaching of these cases is that the trust responsibility provides the constitutional standard of review for all legislation in the field of Indian affairs. The question is whether the legislation is rationally related to the trust responsibility. By using the trust responsibility as the standard, the Court has made clear that the trust responsibility applies to all legislation in the field of Indian affairs. Thus, whenever Congress acts in the field of Indian affairs, it does so as trustee, and its actions are subject to review under the trust responsibility standard.

Accordingly, the "exclusive" Congressional power recognized in the Cherokee cases and "plenary" power of Congress as elucidated in turn-of-the-century cases like *Kagama* and *Lone Wolf* is neither absolute nor unreviewable. To be valid, enactments must be tied rationally to the trust obligations. Consequently, even Congress' broad power to manage Indian relations is constrained by the trust responsibility.

Modern cases have also recognized the trust responsibility as a lens through which federal statutes should be interpreted as they impact tribes. Thus, general federal laws which have a direct impact on Indian treaty and other federal rights have been held not to apply to tribes or Indians or abrogate their rights unless Congress specifically states that intention. *E.g., EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) (Age Discrimination in Employment Act ("ADEA") does not apply to the tribal housing authority); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1292 (11th Cir. 2001) (Rehabilitation Act does not abrogate tribal immunity to subject it to actions brought under Act); *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1130-1134 (11th Cir. 1999) (Americans with Disabilities Act does not waive tribal immunity from suit); *EEOC v. Fond du Lac Heavy Equip. & Const. Co., Inc.,* 986 F.2d 246 (8th Cir. 1993) (ADEA does not apply to tribal enterprise because it would affect the "tribe's specific right of self-government"); *EEOC v. Cherokee Nation,* 871 F.2d 938 (10th Cir. 1989) (holding that ADEA does not apply to Nation when it would interfere with its treaty right to self-government). Similarly, an act of Congress will not be construed to extinguish Indian property rights unless that intent is clearly and plainly expressed. *Dion*, 476 U.S. at 738-40; *Menominee Tribe*, 391 U.S. at 412-13; *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941). In addition, because of the trust responsibility, it is well settled that statutes affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (canon of construction "rooted in the unique trust relationship between the United States and the Indians"); *County of Yakima v. Confederated Tribes of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

It is clear that the trust responsibility also imposes legal duties on federal agencies separate and apart from any express provisions of a treaty, statute, executive order or regulation. An important case so holding is *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), where the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, "would not be an exercise of guardianship, but an act of confiscation." *Lane,* 249 U.S. at 113. The lands in *Lane* were not protected by any treaty, and there was no claim that the

Secretary's proposed disposition of them violated any treaty or statute. Shortly after *Lane*, in *Cramer v. United States*, 261 U.S. 219 (1923), the Court voided a federal land patent that had conveyed - 19 years previously – lands occupied by Indians to a railway. The Indians' occupancy of the lands was not protected by any treaty, executive order or statute, but the Court placed heavy emphasis on the trust responsibility and national policy protecting Indian occupancy as a basis for relief.[5] This responsibility meant that the officials involved had no statutory authority to convey the lands.[6]

Similarly, in *United States v. Creek Nation*, 295 U.S. 103 (1935), the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their

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[5] The Court observed:

> unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy . . . .

261 U.S. at 227 (citations omitted).

> To hold that . . . they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.
>
> The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.

Id. at 229.

[6] *See Cramer,* 261 U.S. at 232-35. Prior to *Cramer* and *Lane*, in a case involving a claim under a special jurisdictional statute authorizing an action to be brought in the Court of Claims, the Supreme Court held that the United States had acted "clearly in violation of the trust" by opening a reservation to settlement under the general land laws of the United States, and observed:

> That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolutions, unlike the legislation sustained in [*Cherokee Nation v. Hitchcock*] . . . were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert . . . an unqualified power of disposal over the [Indian] lands as the absolute property of the government.

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 510-11 (1913) (citation omitted). An accounting to the ward, in the form of payment of monetary damages, was required. *See also Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358 (1937).

reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court bottomed its decision on the federal trust doctrine:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions.

295 U.S. at 109-10 (emphasis added). More recent lower court cases have similarly enforced fiduciary obligations against executive officials apart from any treaty or statutory limitations. *E.g.*, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 970 (1986) (holding Secretary's fiduciary duties in mineral lease administration exceed requirements in Department's regulations); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100-01 (8th Cir. 1989) (holding BIA and IHS have a trust responsibility to clean up hazardous open dumps on Indian reservation despite lack of specific statutory language in Resource Conservation and Recovery Act).

3. Standards applicable to the United States in administering Indian trust property

In the course of recent discussions on trust management reform, a question has been raised about whether the Court in the *Cobell* litigation is holding the United States to a new, different or higher standard than previously applied to the Government with regard to its administration of Indian trust property and trust funds. This is reflected in the Secretary of the Interior's recent testimony before the House Committee on Resources, which included a section titled "Changing Standard of Trust Management." There, the Secretary stated that:

> [T]he Department's longstanding approach to trust management has been to manage the program as a government trustee, not a private trustee. Today, judicial interpretation of our trust responsibilities is moving us toward a private trust model.

Oversight Hearing on Legislative Proposals Related to the Management of Indian Tribal Trust Fund Accounts Before the House Comm. on Resources, 107th Cong., 2nd Sess. (Feb. 7, 2002) (statement of Gale A. Norton, Secretary of the Interior).

The standard being applied by the courts in their recent decisions regarding the obligations of the Government as a trustee, including the decisions in the *Cobell* litigation, is not new or different. To the contrary, the standard being applied by the courts, including in *Cobell*, reflects application of long-standing and well-settled law.

The Supreme Court has made clear that in administering Indian trust money or trust property, the United States is a trustee, subject to the fiduciary duties attendant to a trust relationship. *Mitchell II*, 463 U.S. at 225; *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942). The Government's trust obligations arise whenever the United States exercises control over, or management of, the trust property or trust money of Indian tribes and individual Indians. As the Supreme Court stated in *Mitchell II*:

> "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."

463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980)).

The principles applied by the Court in *Mitchell II* find their roots in the court's earlier decisions – *Lane v. Pueblo of Santa Rosa, Cramer v. United States,* and *United Sates v. Creek Nation, supra*. While the court in these earlier decisions, did not specify precisely what "limitations" do "inhere to such a guardianship," *Creek Nation,* 295 U.S. at 109-10, subsequent cases have consistently defined the standard applicable to the United States, in its capacity as trustee for Indian trust funds and natural resources, by applying the common law standards that govern private trusts and trustees. Sixty years ago, the Supreme Court looked to the common law of trusts when it decided *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942). The Court there held that the conduct of the United States, as trustee for the Indians should "be judged by the most exacting fiduciary standards. 'Not honesty alone, but the punctilio of an honor the most sensitive.'"

Id. at 297 & n.12 (quoting Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)).

The Supreme Court has continued to rely on the common law of trusts to define the United States' trust obligations to Indians. In *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938), the Court explained that "[a]s transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe." In *United States v. Mason*, 412 U.S. 391, 398 (1973), the Court relied on A. Scott, *Trusts* (3d Ed. 1967) for standards governing United States as trustee, stating that the Government's duty is "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." In *Mitchell II*, the Court looked to the *Restatement (Second) of Trusts*, §§ 205-212 (1959), to find that all common law elements of a trust relationship are present with regard to Government's obligations to Indians. 463 U.S. at 226. And following common law trust principles, the Court held that a breach of trust renders the trustee liable in damages. *Id.* at 226 (citing *Restatement (Second) of the Law of Trusts*, §§ 205-212 (1959); G. Bogert, *The Law of Trusts and Trustees*, § 862 (2d Ed. 1965); 3 A. Scott, *The Law of Trusts*, § 205 (3d Ed. 1967)).

For six decades, the lower federal courts have done the same. In *Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 10, 19-20 (1944), the Court of Claims found it to be "settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee," citing *Seminole*, and testing the Government's handling of the Indians' funds "by the standards applicable to a trustee." *Accord, Menominee Tribe of Indians v. United States*, 102 Ct. Cl. 555, 562 (1945) (same). In *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975), the Court of Claims looked to the *Restatement of Trusts* to define the United States' duties concerning investment of Indian trust funds, and held that as trustee, the Government was obligated: to promptly place trust funds at interest, to maximize trust income by prudent investment, and "to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested." *Accord Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (finding "[i]t is well established that conduct of the Government as a trustee is measured by the same standards applicable to private trustees" and relying on the *Restatement (Second) of Trusts* to hold that the United States as trustee is, *inter alia*, "under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary," to account to the beneficiary for any profit arising out of the administration of the trust, and "to use reasonable care and skill to make the trust property productive").

Many other cases have applied the same common law trust principles to the government's administration of Indian trust land and natural resources. In *Coast Indian Community v. United States*, 550 F.2d 639, 652, 653 n.43 (Ct. Cl. 1977), the Court held that "[t]he United States, when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards," and looked to A. Scott, *Trusts* (3d Ed. 1967) to define standards applicable to United States in leasing land for Indians. The courts have also consistently rejected arguments that the government's conduct in its administration of the trust, can be tested simply by a standard of reasonableness, but have required that the government meet the higher standards applicable to private trustees. In *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 991 (Ct. Cl. 1980), the Court rejected the Government's argument that no fiduciary obligation exists unless there is an express provision of a treaty, agreement, executive order or statute creating such a trust relationship. In *Duncan v. United States*, 667 F.2d 36, 42-43, 45 (Ct. Cl. 1981), the court rejected an argument that Congress must spell out specifically all trust duties of the Government as trustee, finding that the creation of the trust sufficient to establish trust obligations. The court held that "the standard of duty for the United States as trustee for Indians is not mere 'reasonableness,' but the highest of fiduciary standards." *See also Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (*en banc), cert. denied*, 479 U.S. 970 (1986) (adopting the dissenting opinion at 728 F.2d 1555, 1563 (10th Cir. 1984) (holding Secretary's duties in mineral lease administration are *not* limited to complying with administrative law and regulations, but are subject to "the more stringent standards demanded of a fiduciary;" thus when Secretary is faced with a decision on mineral lease management for which there is more than one "reasonable" choice, the Secretary is required to select the alternative that best serves the Indians' interests)); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986) ("Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries") (citing *Mitchell II; Seminole)* (third citation omitted); *Loudner v. United States,* 108 F.3d 896, 901 (8th Cir. 1997) (relying on G.G. and G.T. Bogert, *The Law of Trusts and Trustees*, for standard defining the Government's duty to provide adequate notice to Indian trust beneficiaries); *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 586 (9th Cir. 1990) ("[t]he same trust principles that govern private fiduciaries determine the scope of FERC's obligations to the [Indian] Community") (citation omitted); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100-01 (8th Cir. 1989) (holding that BIA and IHS have a trust responsibility to clean up hazardous open dumps on Indian reservations despite lack of specific statutory language in Resource Conservation and Recovery Act); *Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393, 1399 (8th Cir. 1987) (Secretary has duty to actively

seek the best use of reservation funds); *White Mountain Apache Tribe of Arizona v. United States*, 20 Cl. Ct. 371, 380 (1990) (BIA "'obligation to maximize the trust income by prudent investment'") (citation omitted).

The law has also been long established that, as trustee, the United States has an affirmative obligation to make full and proper accounting of the trust funds and resources in its control, and to keep clear and accurate records. The government's duty to account is not new. *See Sioux Tribe of Indians v. United States*, 64 F. Supp. 312, 331 (Ct. Cl. 1946) (finding that the United States "is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting"); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1248 (N.D. Cal. 1973) (the Government's trust duties include the obligation to account; and the duty to render satisfactory accountings "is a continuing duty"); *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336, 435 (1986) (citing G. Bogert, *Law of Trusts and Trustees*, § 962 (2d rev. ed. 1978) for duty to account); *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 448 (1992) (duty to account).

The trust responsibility in addition imposes a strict duty of loyalty on federal agencies. The "most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. . . . to administer the trust solely in the interest of the beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (quoting 2A A. Scott & W. Fratcher, *Trusts*, § 170, at 311 (4th ed. 1987)); *Accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); Restatement (Second) of Trusts § 170 (1959); George G. Bogert and George T. Bogert, *Law of Trusts and Trustees*, § 543, at 217-19 (2d rev. ed. 1993). That duty of loyalty has been applied to the United States in its dealings with Indians. In *Navajo Tribe v. United States*, 364 F.2d 320, 322-24 (Ct. Cl. 1966), for example, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium-bearing noncombustible gas which it had no desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau then developed and produced the helium under the terms of the assigned federal lease instead of negotiating a new, more remunerative lease for the Tribe. The Court of Claims held this to violate the trust responsibility, and analogized these facts to the case of a "fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." *Id.* at 324. This means that federal agencies must administer their own programs and activities in a manner that avoids adverse impacts on Indian rights.

These well-settled common law trusteeship principles have been applied by the Court in *Cobell*, and in other more recent trust litigation.[7] The court of appeals in *Cobell* defined the standard applicable to the United States with regard to administration of the IIM accounts by relying on the Supreme Court's decision in *Mitchell II*. The court stated:

> "A fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds)."

Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (quoting *Mitchell II*, 463 U.S. at 225). The court further found, as did the Supreme Court in *Mitchell II*, that "[t]his rule operates as a presumption," and that a trust relationship arises "'where the Federal Government takes on or has control or supervision over tribal monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund or a trust or fiduciary connection.'" *Id.* (quoting *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987)). The court of appeals also explained – consistent with the analysis applied by other courts – that while relevant statutes and treaties will define the contours of the Government's trust obligations, "[t]his does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its responsibilities." *Id.* at 1099. Rather, "[t]he general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through . . . the general trust law." *Id.* at 1101. Relying on these principles, the court of appeals then rejected the government's contention that the government's obligations with regard to the trust funds of individual Indians was limited only to the express terms of the 1994 Trust Fund Management Reform Act. The court carefully examined the text of the Act, concluding that by it Congress "reaffirmed and clarified preexisting duties" but did not create them. *Id.* at 1100. The Court found that the Act "sought to remedy the government's long-standing failure to discharge its trust obligations; it did not define and limit the extent of appellants' obligations" but instead listed some of the means by which those duties may be discharged. *Id.* at 1100-01.

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[7] *E.g. Navajo Tribe v. United States*, 263 F.3d 1325 (Fed. Cir. 2001); *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) (relying on Scott and Bogert for trust law principles); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377-82 (Fed. Cir. 2001) (applying Restatement of Trusts).

Applying those principles to the evidence before the district court, the court of appeals affirmed the district court's ruling that the United States had failed to timely implement trust reforms required by the 1994 Act. The court further affirmed the district court's conclusion that the United States was also required – by both the terms of the 1994 Trust Fund Management Reform Act and common law trust principles – to provide the IIM beneficiaries with a complete historical accounting of their funds. *Id.* at 1102, 1103. The court of appeals, like the district court, left the precise form that such accounting should take for further proceedings.

Finally, the court of appeals affirmed the district court's order requiring the government to provide periodic reports on its efforts to implement the reforms required by the 1994 Act and its progress in providing the required accountings. The court found such oversight wholly justified given the historic failure of the Government to implement the necessary reforms, and its malfeasance in the continued destruction and loss of information necessary to conduct an historical accounting. The rulings are entirely consistent with the well-established trust principles that have historically been applied to the Government's administration of trust property and funds.

4. The scope of the trust responsibility extends not just to property but to federal services provided to Indians

The Interior Department's current reorganization plan purports to separate "trust" functions – which would be handled by a new agency (BITAM) – from other Indian functions such as provision of services – which would remain in the BIA. The fallacy in this proferred justification for the reorganization is that Indian services *are* part of the federal trust responsibility. Put simply, the Interior Department and other federal agencies administer special services for Indians precisely because there is a trust responsibility to do so. This is shown both by case law and dozens of statutes enacted by Congress.

A number of cases have held the United States has a trust responsibility to provide services to tribes and Indians. A leading case is *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978), holding that the United States has a trust responsibility to ensure that Indians have access to health care in cases where other sources – such as the state – were unwilling or unable to provide such care. The court rejected the Government's argument that the trust responsibility, standing alone, cannot serve as an adequate legal basis for the relief sought by the Indians. As the court stated:

> When the Congress legislates for Indians only, something more than a statutory entitlement is involved.

> Congress is acting upon the premise that a special relationship is involved, and is acting to meet the obligation inherent in that relationship.

Id. at 557. The Court of Appeals in *White* affirmed, adopting the findings and reasoning of the district court.

Similarly, in *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987), the Ninth Circuit held that the Indian Health Service was obligated to provide the necessary health care to an indigent Indian child, and if IHS believed that the state or county had a duty, it was incumbent on IHS to advance that claim against the other government on behalf of the Indian. The court analyzed the issue by considering the requirements of the applicable federal statutes as well as the trust responsibility, stating:

> When the interests of Indians are involved, we must explore congressional intent from a special vantage point: "[O]ur government has an overriding duty of fairness when dealing with Indians, one founded upon a relationship of trust for the benefits of these . . . dependent and sometimes exploited people."

Id. at 791-92 (citation omitted). The court then applied these principles to its analysis of the obligations imposed by the Snyder Act and the Indian Health Care Improvement Act. The court concluded that by these statutes, Congress intended IHS to be the provider of last resort with ultimate responsibility to meet Indian health needs if alternative sources were not available.

We recognize that the application of trusteeship standards in cases involving the provision of federal services is less well defined than in property cases. In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court articulated a limiting factor in holding that the trust responsibility does not prevent a federal agency from reallocating unrestricted funds from providing services to "a subgroup of beneficiaries to . . . the broader class of all Indians nationwide." *Id.* at 195. At the same time, the Supreme Court and other federal courts have held the trust responsibility mandates a high degree of procedural fairness and protects against the failure of government agencies to provide Indians with services authorized by Congress. For example, in *Morton v. Ruiz,* 415 U.S. 199 (1974), the Supreme Court held that tribal members living near their reservation could not be excluded from receiving BIA general assistance funds under the Snyder Act and other appropriation acts. In this case, the BIA's internal manual stated that eligibility procedures

were to be published in accordance with the Administrative Procedures Act (APA). *Id.* at 233-34. However, the eligibility requirements which limited general assistance benefits to those tribal members living on a reservation were never published. The Court found that [t]he overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions," *id.* at 236 (citation omitted), concluding that "[t]he denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.* (citations omitted).

Applying these same principles, the courts have held that the trust responsibility includes a special duty to consult with tribes or Indians to ensure their understanding of federal actions that may affect their rights and to ensure federal consideration of their concerns and objections with regard to such actions. *E.g., HRI, Inc. v. EPA,* 198 F.3d 1224, 1245 (10th Cir. 2000) ("in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies") (quoting *Felix S. Cohen's Handbook of Federal Indian Law* 225 (1982)); *Loudner v. United States,* 108 F.3d 896, 903 (8th Cir. 1997) (a tribe's lineal descendants were not time-barred from claiming a share of a 1972 distribution of an Indian Claims Commission judgment because "the distribution scheme adopted by the Secretary was contrary to his *common-law trust obligations* and that the deadline cannot serve to bar plaintiffs' claims to the fund") (emphasis added); *Midwest Trawlers Cooperative v. U.S. Dep't of Commerce,* 139 F. Supp. 2d 1136, 1145-46 (W.D. Wash. 2000) (Consultation grounded in the trust relationship); *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119 (9th Cir. 1989) (Navajo-Hopi Relocation Commission has a trust responsibility to provide correct advice to applicants); *see also Meyers v. Board of Education of San Juan School District*, 905 F. Supp. 1544 (D. Utah 1995) (United States has a trust obligation to meet the education needs of Navajo children); *St. Paul InterTribal Housing Board v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983) (Department of Housing and Urban Development (HUD) has trust obligation to provide federal housing funds to off-reservation Indians).

While many of these cases focus on congressional legislation which in one fashion other another implemented the federal trust obligations, the courts' analysis of the rights, interests and obligations under such statutes is clearly informed by the overall trust relationship between the United States and Indian people. For example, in *St. Paul InterTribal Housing Board v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983), the court – in evaluating the Government's obligations to fund housing for urban Indians – examined

the origin and basis of the trust doctrine. Quoting from the Final Report of the American Indian Policy Review Commission (1977), the court stated that:

> The Federal trust responsibility emanates from the unique relationship between the United States and the Indians in which the Federal Government undertook the obligations to insure the survival of Indian tribes. It has its genesis in international law, colonial and U.S. treaties, agreements federal statutes and Federal judicial decisions. It is a "duty of protection" which arose because of the "weakness and helplessness" of Indian tribes "so largely due to the course of dealings of the Federal Government with them and the treaties in which it has been promised. . . . "Its broad purposes, as revealed by a thoughtful reading of the various legal sources, is to protect and enhance the people, the property, and the self-government of Indian tribes."

564 F. Supp. at 1413-14 (quoting Vol I., American Indian Policy Review Commission, Final Report, at 126) (submitted to Congress May 17, 1977)). Based on that history, the court found that:

> The trust relationship between the United States and the Indians is broad and far-reaching, ranging from protection of treaty rights to the provision of social welfare benefits, including housing. The history of the treatment of Indians by the United States justifies this interpretation of the trust relationship, and the case law and legislative background support it.

Id. at 1413.

While much of our discussion to this point has focused on judicial expressions of the trust responsibility, Congress has likewise repeatedly reaffirmed its adherence to the trust responsibility and has expressly relied upon the trust responsibility as the foundation for a broad range of enactments regarding tribes and Indians. These enactments confirm that the trust responsibility is at the heart of the federal relationship with tribes and Indians – both with respect to the management of trust money and assets and with respect to the other critical services and rights that are provided and protected by the federal government. Indeed, Congress has provided that essentially every service and activity of the BIA for

the benefit of Indians and tribes is grounded in the trust responsibility. Accordingly, any effort to take all "trust" functions out of the BIA, and leave within the BIA only functions that are not "trust," is based on a misconception about the scope of the trust responsibility.

Of course, where Congress has enacted modern statutes regarding the management of trust funds or trust resources, it has also made direct references to the trust responsibility.[8] But in a like manner, Congressional enactments concerning other aspects of Indian affairs make the same point – that they also are rooted in the trust responsibility.

For example, the federal government's trust responsibility for Indian education was recently expressed by Congress in the following language, amending the Indian Education Act:

> It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The Federal Government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally related academic needs of these children.

No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, § 701 (2002); *see also* Tribally Controlled School Grant Act, 25 U.S.C. § 2502(b) (expressing "the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy for education which will deter further perpetuation of Federal bureaucratic domination of programs"); Higher Education Tribal Grant Authorization Act, 25 U.S.C.

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[8] *E.g.*, American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701 ("the United States has a trust responsibility to protect, conserve, utilize and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); National Indian Forest Resource Management Act, 25 U.S.C. § 3101(2) ("the United States has a trust responsibility toward Indian forest lands"); American Indian Trust Fund Management Reform Act, 25 U.S.C. § 4041(3) (describing the purposes of the Act as "to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians" regarding trust fund management).

§ 3302(7) (BIA program for postsecondary education grants: "these services are part of the Federal Government's continuing trust responsibility to provide education services to American Indian and Alaska Natives"). The federal trust responsibility thus clearly extends to Indian education.

Similarly, with respect to the federal provision of health care for Indian people, Congress has recurrently acted pursuant to the trust responsibility. In the Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2401(1) and (2), which provides mechanisms for coordinating federal programs to address the terrible problem of Indian alcohol and drug abuse, Congress found that:

> the Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members,
>
> included in this responsibility is the treaty, statutory, and historical obligation to assist Indian tribes in meeting health and social needs of their members.

Id. More broadly, Congress has provided that the trust responsibility is the cornerstone of the Indian Health Care Improvement Act, the most comprehensive measure addressing the unmet health needs of Indian people nationwide, 25 U.S.C. § 1601(a):

> Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.

Id. In the same Act, Congress provided specific goals by which the fulfillment of the trust responsibility was to be measured. This was stated generally in the following terms:

> The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to assure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.

Id. § 1602(a).

Beyond that, Congress has required that federal efforts to improve Indian health be measured by the attainment with regard to sixty-one specific health objectives, including coronary heart disease, cirrhosis deaths, drug-related deaths, suicide, deaths from intentional injuries, infant mortality, fetal alcohol syndrome, diabetes and others. *Id.* § 1602(b). This example shows that the trust responsibility is the basis for all federal Indian policy – even those aspects administered outside the BIA, such as the Indian health care provided by the IHS. It also demonstrates that federal policy as defined by the trust responsibility calls for progress in Indian country that is measured by results – as Congress specifically intends that there be not merely some federal presence and resources devoted to the area of Indian health care, but that the federal role lead to actual improvements in the health status of Indian people.

The trust responsibility is also the foundation for Indian housing services. When Congress recently enacted the Native American Housing Assistance and Self-Determination Act to establish a block grant program to fund tribal housing programs, it included these findings:

> there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique federal responsibility to Indian people;
>
> the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;
>
> the Congress, through treaties, statutes and the general course of dealings with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.

Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101(2)-(4).

Congress has likewise recognized that the trust responsibility extends to programs for the protection of Indian families and the preservation of Indian culture and traditions. For example, in the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, Congress found:

> that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.

Id. § 1901(2), (3). ICWA, which provides a federal jurisdictional framework for Indian child custody decisions, underscores the trust responsibility to protect the integrity of Indian families, as well as to protect the sovereign authority of tribes to make child custody decisions regarding their children.

Similarly, the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201, *et seq.*, establishes reporting procedures for incidents of child abuse, requires character investigations for personnel working with Indian children, and establishes a vital grant program. 25 U.S.C. §§ 3203, 3207, 3208. In this Act, Congress again specifically relied upon the trust responsibility of the United States to address this problem. 25 U.S.C. § 3201(a)(1)(F) ("the United States has a direct interest, as trustee, in protecting Indian children").

Congress has also acted pursuant to the trust responsibility to protect significant aspects of Indian culture from harm. Examples include the Native American Languages Act, 25 U.S.C. §§ 2901, *et seq.*, and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, *et seq.* In each of these statutes, Congress specifically acknowledged the federal responsibility to address these matters, which are essential to cultural continuity of Indian people. 25 U.S.C. § 2901(1) ("the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages"); 25 U.S.C. § 3010 (NAGPRA's legal framework for the ownership and repatriation of Native American human remains and funerary and cultural

objects "reflects the unique relationship between the Federal Government and Indian tribes").

The trust responsibility also forms the foundation for federal statutes assisting tribes in developing viable and productive reservation economies. As Congress noted in enacting the Indian Gaming Regulatory Act, "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). Similarly, the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§ 4301, *et seq.*, established an Office of Native American Business Development in the Department of Commerce, authorized creation of a program to promote exports and trade by Indian tribes, and required a demonstration project for Indian tourism. 25 U.S.C. §§ 4303, 4304, 4305. As Congress specifically provided in this measure:

> Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws . . . .
>
> the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination and economic self-sufficiency among Indian tribes;
>
> the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to–
>
> > encourage investment from outside sources that do not originate with the tribes; and
> >
> > facilitate economic ventures with outside entities that are not tribal entities.

25 U.S.C. § 4301(5), (6), (9); *see also* Indian Tribal Regulatory Reform and Business Development Act of 2000, 25 U.S.C. § 4301 note (Establishing a Regulatory Reform and Business Development on Indian Lands Authority to identify obstacles to economic growth in Indian country; the United States has an "obligation" to "facilitate economic development on Indian lands").

5. The trust responsibility is the foundation of the modern Self-Determination policy and does not conflict with it

Finally, Congress has recognized that the trust responsibility is the foundation for federal efforts to assist tribes in strengthening tribal governments. For example, in enacting the Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. §§ 3651, *et seq.*, providing for various grants for training and assistance for enhancing tribal justice systems, Congress stated that its intent was "to carry out the responsibility of the United States to Indian tribes and members of Indian tribes by ensuring access to quality technical and legal assistance" and to "strengthen and improve the capacity of tribal court systems that address civil and criminal causes of action under the jurisdiction of Indian tribes." 25 U.S.C. § 3652 (1), (2). More broadly, Congress has expressly provided that the Self-Determination policy itself is a manifestation of the trust responsibility. As Congress declared in enacting the landmark Indian Self-Determination Act:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian Self-Determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b); *see also* Tribal Self-Governance Amendments of 2000, 25 U.S.C.§ 458 aaa note, § 3(c) (the Congressional policy "to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals" underlies the Self-Governance program).

In short, Congress in a broad range of enactments has recognized that the federal government has a trust responsibility to tribes and Indians, based on treaties, statutes and a longstanding course of dealings, and that the modern policy of Self-Determination seeks

to further that trust responsibility by enabling tribes to meet the needs of their people through the exercise of their own sovereign governmental authority. The trust responsibility as specifically addressed by Congress includes health, housing, education, cultural preservation, economic development and the protection of tribal governmental authority. Based on the framework defined by Congress, it can only be concluded that all aspects of the BIA arise from the trust responsibility, and that any effort to suggest that certain BIA programs are somehow not trust programs is fundamentally inconsistent with the controlling understanding recurrently expressed by Congress.

Conclusion

We again thank the Committee for inviting to us to discuss the history, origins and scope of the vital trust responsibility of the United States to Indians, which we firmly believe must continue to be the centerpiece and guide for federal Indian policy. We would be delighted to answer any questions the Committee may have.

TESTIMONY OF
DONALD T. GRAY
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING
INDIAN TRUST FUND MANAGEMENT

FEBRUARY 26, 2002

My name is Donald Gray. I have testified as an expert previously before this Committee, and I appreciate the opportunity to do so again. I have also recently testified before the House Resources Committee on the same topic. I bring what I hope is a helpful and fresh independent perspective to the Indian Trust reform effort at a time when I believe real change is possible.

I am a partner in the law firm of Nixon Peabody LLP. For 26 years I have specialized in working with institutional trustees and other financial institutions in establishing, administering, reconciling and rehabilitating long-term complex trusts and other money flow arrangements involving billions of dollars of managed assets. Simply put, my business is largely devoted to "fixing" broken trusts in the private sector. The clients of Nixon Peabody's Trust and Financial Rehabilitation Group, which I helped found, include some of the largest money-center banks in the world. I am also an international logistics and shipping expert, and in this area am well-known to the Alaska and Hawaii Congressional delegations as well as all government agencies with jurisdiction in the area.

When I testified previously in July of 1999, the atmosphere for potential change was very different, and not nearly as positive as I believe it is today. Yet, because there has been so little progress in the intervening time on trust reform, much of my prior testimony, especially concerning the precise methods and architecture for true trust rehabilitation in the IIM accounts, remains relevant. Therefore I re-submit that testimony, with minor updating revisions, as Exhibit A hereto.

In short, after following this process for many years and reading all relevant DOI, GAO, outside expert reports and court transcripts, and while I do not claim any panacea for one of this nation's most vexing problems, I believe for the first time there is a light in the forest. There is hope for a truly viable IIM trust fix.

I summarize the reasons for that belief, and the organizational methodology I believe to be essential to the trust fix below:

1. **The Need for an Independent Body.** What has been missing since the passage of the American Indian Trust Fund Management Reform Act of 1994 is the essential trust fix expertise within the DOI, with the exception of Mr. Homan, whose efforts were consistently thwarted by DOI officials. The other irreconcilable obstacles to trust reform have been the

flagrant conflicts-of-interest within the BIA in attempting to fix a broken system it has helped to perpetuate. My conclusion, and the only conclusion I believe a private sector expert can come to, is that the fix must be under the auspicious of a body independent of the DOI and the BIA. The issues of lack of expertise, crippling conflicts-of-interest and the need for an independent body for the required trust fix are discussed in detail in Exhibit A. My suggestions for the form such an independent body should take – a time-limited, government-sponsored entity ("GSE") – and its Congressional mandate, are set forth below.

2. The Continuing Role of the DOI and the BIA. Before continuing to outline an alternative structure, I want to be clear about the positive role the DOI and the BIA can play in this process. With the exception of the highest-ranking DOI officials of the previous Administration, I do not believe any DOI or BIA employee has deliberately bogged down the process, obfuscated with respect to critical records, or intentionally wasted vast sums on computer systems that were ill-conceived and did not work. There is still a very important job for these BIA officials and employees to do.

The key here is to separate the trust "fix" problem from the day-to-day administration of trust funds. The BIA still needs to perform the basic collection and trust allocation and payment functions as best they can, while trust fixes are developed by the independent body and made a part of the existing trust function over time. However, the BIA employees can no longer be put in the impossible position of attempting to fix a system they and their parents have helped to create and perpetuate, especially since they lack the specific expertise to effect the fix.

In addition to day-to-day administration, such BIA employees would be available to the independent body suggested below, since they possess valuable information about past and present asset management and trust payment procedures. Their input is critical, especially in a case like this where some records have been lost or destroyed. As fixes are developed by the independent body, these employees would be essential in putting them into effect. The law changes required to establish the independent body must permit the full and open participation of these employees in the fix process, as mandated by the independent body, and must protect these employees from internal retribution and/or legal actions for good faith mistakes made in the past.

The interaction of the independent body and its professionals with the BIA trust employees in the fix process also offers a unique training opportunity for the BIA personnel involved. The BIA would learn the new system and proper trust functions from the best experts in the field. Such training can be used by the BIA employees in the years to come within the BIA, in connection with the IIM accounts or other similar trust functions in which the BIA is involved, or in the private sector, as they choose.

3. Inter-Branch Governmental Cooperation. The reason I believe there is hope for a true trust fix now has to do with what I perceive to be the posture of the major participants at this point. Most importantly, both houses of Congress appear willing to take dramatic action on a non-partisan basis. That did not appear to be the case three years ago.

Also, despite the characterization of the current DOI officials in the *Cobell* litigation and the press, it does not appear to me that they (unlike Mr. Babbitt and his top aides) are bent on obstruction, nor dead-set against external, independent assistance in reaching a trust fix. Respectfully, Secretary Norton's internal reorganization plan, although well-intentioned, will not work, and pouring another $200 million into that reorganization rather than a fix by real experts is a very great mistake. This is the only sound conclusion that I can reach after watching the waste of hundreds of millions of dollars over the past eight years on internal reorganization and inept systems, and assessing the lack of proper DOI expertise that Secretary Norton apparently admitted recently in her testimony in the *Cobell* litigation. Again, without the proper expertise, lack of conflicts-of-interest, and independence, an internal reorganization will do nothing. But the DOI's participation in an independent body structure, like the one outlined below, through Mr. McCaleb or another reform-minded DOI official, is essential.

Finally, there is the court. I cannot imagine that anyone would take the position that the heroic efforts of Ms. Cobell, and the tenacity of Judge Lamberth and his assistants, have not been an essential ingredient in shining light on, and narrowing the issues concerning the historic trust defalcations. But, as a purely practical matter, a court-appointed receiver does not appear to be the best answer as to future trust reform. For instance, how will that receiver be paid? How will proper trust fix experts be made available to the receiver? Will that receiver obtain the proper, timely and essential input and cooperation of the BIA officials and employees currently engaged in the trust administration function? As to these matters, I would hope the court and Congress would both seek to find a way to cooperate on the establishment of an independent body charged with that fix.

4. The Independent Body. I believe the best vehicle for effecting a viable trust fix is the creation of a GSE, with a mandate and structure as outlined below. However, except for the independence of this entity, which is essential, there is nothing magic about any part of the following structure. I would invite the Committee, and all interested parties, to suggest structural alternatives if they can be shown to better reach a trust fix in a timely fashion.

a. The GSE would have three levels of participants. This structure would be very lean, and would leverage on outside professionals on an "as-needed" basis.

At the top, all trust fix policies and procedures would be the ultimate responsibility of a "blue ribbon" board of Commissioners drawn from specific public and private sector sources. At least two Commissioners would ideally be acting officials in federal financial institution agencies or bodies, specifically a Governor of the Federal Reserve, a senior official of the Office of Comptroller of the Currency or the Federal Deposit Insurance Corporation. These agencies have a great deal of trust and related financial expertise, as well as regulatory oversight responsibility for the private banking sector. There should also be a representative of the IIM beneficiaries who is viewed in Indian County as financially sophisticated and completely trustworthy. In addition, given the extent of cooperation required between the GSE and the DOI (including the Special Trustee and the BIA), the board should include a high-ranking DOI official acceptable to the other Commissioners and Indian County. The Assistant Secretary for Indian Affairs would, in my judgment, be a likely candidate for this position.

Finally, if the mandate of the GSE were broad enough to include Tribal trust issues, a representative approved by the various Tribal organizations should be a Commissioner.

The Commissioners would meet regularly, and should be paid for their time and expenses, but with recognition that they are serving as a very active board of directors, who have primary jobs and responsibility elsewhere. The Commissioners would have the direct and continuing oversight of the Senate Committee on Indian Affairs and the House Resources Committee.

The next level of the GSE would be an Executive Director ("ED"), with as lean a support staff as possible. This person should have "hands on" trust or other financial fix expertise, such as a former RTC official. The ED would manage professionals, be the liaison between such professionals and the Commissioners on all aspects of reform (*e.g.*, document and records custody and control, identifying and maintaining critical data elements, developing a schematic diagram and design architecture for all aspects of the assets/trust systems, developing and implementing a systems design), be responsible for liaison with BIA trust administrators, and be a "plain language" interpreter for the oversight committees on what will be at times complex procedures employed by the professionals.

The last element would be trust professionals who work constantly in detailed trust accounting and reconciliation, cash flows, investments, control procedures, computer system analysts and implementators. This would include legal trust fix experts, trust administrators, forensic accountants and computer specialists, all of whom have worked on trust reformation and fixes in the past. It would be impossible, and economically prohibitive, to have all such specialists on staff. They may, for periods, be used intensively, but only on an "as-needed" basis. Ideally, there would be a lead professional who would help the ED choose and coordinate the efforts of all other professionals to avoid overlap and promote efficiency.

b. The mandate of the GSE would be to design and implement a viable trust accounting and reporting system inclusive of the entire cycle, from resource leasing to IMM account-holder payments. The GSE would have authority to implement new systems and procedures, if possible on a progressive, partial basis. The GSE would have authority over BIA trust administrators for implementing the fixes and training BIA employees and officials as to proper implementation and maintenance.

c. The GSE would be time-limited. It is suggested that a initial life of five years would be adequate, with authority in Congress to extend this sunset provision, if necessary.

d. Ideally, the GSE would be able to coordinate its efforts with any trust professionals used by the *Cobell* court, or by the parties litigant therein, in accomplishing an accounting or reaching a settlement on past trust practices. As explained in Exhibit A, reconciliations, modeling and findings regarding past practice and mistakes are usually part and parcel of any future trust fix because the latter gleans so much information on proper (and improper) trust accounting from the former. Also, having worked with the plaintiffs' accounting professional on other significant large, historic trust and similar financial fixes, their input, if possible, into designing a suitable program for the future is almost indispensable.

In conclusion, it is ironic and telling that just such an GSE was recommended by Special Trustee Homan in his report (contested by then DOI officials) after several years of frustration in attempting to accomplish an IIM trust fix within the DOI.

EXHIBIT A

TESTIMONY OF
DONALD T. GRAY
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING
INDIAN TRUST FUND MANAGEMENT

FEBRUARY 26, 2002

My name is Donald Gray. I am a partner with the law firm of Nixon Peabody LLP in San Francisco. For 26 years, I have specialized in matters concerning commercial trust and institutional fiduciaries. I appreciate the opportunity to testify before you, and to bring what I hope is a helpful and fresh perspective to the Indian Trust Fund reform effort.

For many years, my practice - and the practice of Nixon Peabody's Trust and Financial Rehabilitation Group (the "Group") - centers on trust fixes for major money-center financial institutions. Although the Group's experience is predominately in the commercial sphere, we have also been involved in trusts that touch both the public and private sectors. For example, in the mid-1980's, I authored the series of master and subsidiary trust agreements implementing the settlement between the United States Department of Commerce and the Native American corporations representing the Pribilof Islands of Alaska. Those trusts helped form the basis of the Islands' new economy, as it emerged from more than a century of U.S. Government oversight.

I was pleased to accept Chairman Inouye's invitation to testify on Indian trust funds management by the Department of the Interior (DOI). I believe I bring a perspective which, except for the significant efforts of Mr. Homan during his tenure as Special Trustee, seems to be completely lacking in the current process. That is, the perspective of an independent person or group with significant private sector trust and financial institutions expertise. The key concepts here, and throughout my comments are "independence" and "expertise."

INTRODUCTION

The problems facing Indian Trust Fund reform are admittedly multi-faceted. Understandably, there are micro-economic, institutional, political, cultural and emotional concerns involving the DOI and the American Indian people, which have and will continue to manifest themselves throughout the process. I am not an expert on Indian affairs, nor on the intricate workings of the governmental agencies with responsibilities in these areas. I am a trust lawyer. But after significant research, I have reached the inescapable conclusion that the Indian Trust Fund reform effort cries out for the kind of detached, independent expertise that exists among professional trust administrators, accountants, lawyers and other professionals in

the private sector. These are persons who have spent most of their careers dealing with trust problems comparable to those addressed in the GAO Report No. B-280950.

I reach this conclusion because the Indian Trust Fund problems are, first and foremost, financial trust problems based on issues frequently encountered by private sector trust institutions, such as inadequate policies and procedures and poorly planned systems conversions resulting in ineffective recordkeeping. It appears to me that, if the Indian Trust Fund problems are to be effectively dealt with, the resolution process needs to be removed from the vestiges of 150 years of U.S. Government/American Indian relations, with solutions fashioned primarily through the prism of historic structures and viewpoints. In my view, effective reforms will never be accomplished until the fiduciary and financial reporting aspects of Indian Trust Fund management is separated from the DOI's other role in overseeing the social and economic development and political concerns inherent in the U.S. Government/American Indian relationship. These latter concerns, which are an important aspect of the DOI's mission, and the persons responsible for such matters, must, in my opinion, be separated completely from the management of the Indian Trust Funds with the latter function placed in the hands of persons with commercial and financial trust expertise who can identify and implement the systems and resources essential to real trust reform. I am convinced that without such independence and expertise, the affected American Indian people will be deprived of the same high level of money and asset-management services, as well as legal protections, that are available to every citizen of the United States, who puts his or her financial affairs in the hands of another.

THE GAO REPORT

The GAO extensively studied one aspect of the DOI's High Level Implementation Plan (HLP) – the planning and acquisition of a new trust asset and accounting management system (TAAMS). The GAO concluded that the DOI had not developed an overall information systems architecture for the entire business cycle of the trust funds functions – including land ownership and appraisal, utilization and income management, trust fund accounting, investment, custody and records control, and disbursements. Without this architecture, there can be no assurances that isolated systems purportedly providing one function will interact and interconnect properly with systems developed for all other important trust functions. The GAO also found that the DOI, by purchasing the TAAMS off-the-shelf software, had not done enough to assure that all aspects of asset management data (involving complex oil and gas, timber, crop, fishing and other asset pricing, leasing and money flow information) would be accommodated.

The DOI acquired TAAMS, at a reported cost of $60 million, without regard to the GAO's warnings of the need for overall information systems architecture in correspondence with the DOI in 1997 concerning the Special Trustee's Strategic Plan issued in compliance with the American Indian Trust Fund Management Trust Reform Act of 1994 (the "1994 Act"), and in its general guidelines on systems architecture development issued in 1992. The DOI also seemed to ignore the highly integrated approach for trust fund clean-up, rehabilitation and implementation recommended by the Special Trustee in his April 1997 Strategic Plan issued in

compliance with the 1994 Act. Similarly, the DOI appears to have overlooked the specific directives of that statute (the governing document for all trust reform) to accomplish all aspects of reform in an integrated, coordinated and properly interactive process. The DOI also seems not to have heeded the advice of Macro International Inc., consultants to the Office of Special Trustee (OST), which found in 1997, after significant research into the personnel and training deficiencies of the DOI's reform effort, that any implementation of a technologies infrastructure to solve the manifold trust problems first required the foundation of well thought-out practices and procedures relating to overall integrated reforms that would assure a comprehensive output consistent with commercial standards. In other words, without accurate data collection and input, no software system, even the most sophisticated, can achieve the required objective of providing accurate financial reporting.

As an outside trust expert, I must question why the DOI staff would apparently ignore the GAO, a highly qualified finance expert, former Special Trustee Homan, outside consultants, and finally, the governing statute, by purchasing an off-the-shelf system, at enormous expense, without any clear assurance that it will be integratable with other key aspects of trust reform, or even that it will be able to process all data variables inherent in the vast array of Indian Trust Fund assets. One theory is that that such an extraordinary action is a symptom of a larger problem. The symptom, which I have seen in the commercial context, is the almost frantic attempt, when existing procedures fail, to grasp for a quick fix, even if the fix merely creates the appearance of a solution.

As explained below, any asset management system must be extremely agile and have the ability for constant modification to accommodate all the data variables inherent in the IIM assets. I believe it has been convincingly demonstrated that the TAAMS system is a failure in this regard and there are serious questions as to the compatibility of the system with other systems, or its consistency with an overall architecture, which does not yet exist.

The larger, and much more fundamental problem, is that the DOI and its internal Bureaus are encumbered by serious conflicts-of-interest, although not of their own making. It is highly probable that such extreme conflicts-of-interest will inevitably drive the DOI, its captive OST, and the Bureau of Indian Affairs (BIA) to actions that are not directed solely at rehabilitating and correcting accounting for all trust assets properly creditable to the Individual Indian Monies (IIM) accounts, the only true goal of the 1994 Act. The very essence of trustee status and integrity, and of fiduciary responsibility, is the absence of conflict-of-interest.

WHAT IS SYSTEMS ARCHITECTURE?

If I may be permitted a small digression, I suspect that some of the Committee members may be a bit confused with the overly technical jargon used by the DOI, the GAO and, admittedly, trust professionals like me. It may be helpful to decipher what "systems architecture" means, at least to me.

When professional trust experts approach the original set-up or historic reconciliation of a complex income asset/money flow/investment trust, they first start with a comprehensive

listing of all possible data input, incorporated into a conceptual diagram of how that data must flow through each and every phase of the trust accounting system (appraisal, leasing, accounts receivable, accounts payable, any special cash flow allocations like reserves, posting to proper accounts, investment accounting, account ownership records and disbursements). In addition, assessments are made of the personnel expertise needed to keep track of, analyze and control all such information. Finally, there is a narrative conceptualization of how information/technology (*i.e.*, computer) systems can facilitate the above processes as well as an identification of so-called "inflection points," where one technical system's data is downloaded to people for analysis and re-uploaded to other systems, or where two technical systems can and should interface to transmit critical data. This process must be substantially complete before any one automated system is specified or purchased.

Put another way, seasoned trust professionals in the commercial context first apply simple common sense to the problem. This sounds obvious and easy, but it is far from it. In a trust rehabilitation context, this foundational process involves what we call in the industry "scrubbing." That is, the architects of a workable system must roll up their sleeves, review thousands of potential data input variations (past and future), conceptually design how trust data flows through a multi-phase system, perform calculations on trust data and explain what people should do, and what computer hardware and software should do, to implement the system.

This is some of the hardest work in professional trust management and requires expertise in all facets of commercial trust accounting and, typically, legal interpretation of trust instruments and governing laws. First and foremost, administrators must resist the sometimes inexorable urge to look at computer systems as panaceas for any complex problem. Computer systems do not think. Hopefully, they are designed by people who do think, and who are intimately familiar with processes and calculations which are being automated. They gain this knowledge by working intimately with such a multi-disciplinary trust team for countless hours. After flowcharting the desired processes or calculations, they write or procure a software program (or package of programs) embodying them. If the software is designed and programmed well, a computer system can then perform such processes and calculations in bulk and at great speed.

Also, computer systems do not self-correct and expand themselves to create new capabilities for handling information/data with which they were not designed to cope. I have seen highly sophisticated trust and asset management commercial systems that do a splendid job with 90% of complex data or analysis, but utterly fail to accommodate, or be modified to accommodate, 10% of the required data or analysis. Unfortunately, 90% correctness for millions or billions of dollars of managed assets does not sit well with investors and other beneficiaries.

Although seemingly reasonable to the lay person, the former DOI Secretary's comments concerning the selection of a 'near enough' off-the-shelf asset management system, by selecting a system developed not for the IIM trust reform, but for an "analog" problem, is a bit frightening to a trust professional.

As the GAO report indicates, instead of the "intricate and complex coordination process" of all facets of the reform effort called for by the former Special Trustee in his Strategic Plan, the DOI's HLP leaves the IIM effort with a disjointed, potentially non-integratable mishmash of project initiatives, and the occasional "big splash" computer system for one element of the task that may work only for highly selective data. But the current trust reform effort, as evidenced by the DOI's HLP, contains features far more troublesome than a potential functionally deficient, or non-integratable TAAMS product.

INDEPENDENCE, EXPERTISE AND AN INTEGRATED APPROACH

Although both the HLP and the Special Trustee's Strategic Plan admittedly contain similar, and undeniably necessary, tasks essential to account clean-up, reform and new systems building (including data clean-up, records retention and proper custody, workable trust accounting and asset management procedures, investment, accounts and land title, appraisal and probate clean-up), these are no more than static descriptions of jobs to be performed on a coordinated basis. What is of ultimate importance is the philosophy, mission goal and the resulting and overriding "how" to attack all these deficient areas. Respectfully, while the former Secretary plucked out independent projects that are undeniably important to trust reform, he specifically and dramatically gutted the Special Trustee's Strategic Plan of its two essential cornerstones for such an overriding mission and goal - independence and expertise. Without these elements, which create both a reform environment and give it its essential tools, meaningful trust reform will not occur.

The Special Trustee's Strategic Plan, in its first two pages, could not have been clearer on this all-important "how." First, with some courage, Mr. Homan called for a completely independent and neutral body, a Government Sponsored Enterprise ("GSE"), to take over the trust rehabilitation process, under the supervision of government agencies expert in commercial finance and modern trust procedures. He continually cites the ongoing conflict within the DOI in failing to separate its special trust reform fiduciary goals from its general responsibilities in education, housing, law enforcement and a multitude of other welfare programs and other American Indian services provided by the DOI and its Bureaus. In short, Mr. Homan concluded that, in the competition for the limited funds appropriated to the DOI, when a choice must be made between a department's general responsibilities and trust fund reform, the latter program would inevitably suffer.

What is also obvious from the HLP's allocation of responsibility for its 13-category, piecemeal approach to reform, is that there is at least an unconscious attempt to employ the other internal Bureaus of the DOI, especially the BIA, in these processes, regardless of a proven lack of expertise, since only two of the projects are reserved to the OST. This foreshadows two very negative results. First, it displays a lack of appreciation for the expertise, and long-term training required for trust rehabilitation and administration, and suggests that involving these internal DOI Bureaus is of greater importance than solving the trust fund problems. The DOI's loyalty to one of its Bureaus, the BIA, is laudable, but completely inappropriate in the IIM trust reform process. Second, the misguided piecemeal methodology of the HLP permits agency employees, no matter how much they may wish to act

in good faith, to attempt to solve the trust fund problems by purchasing an expensive new software system, creating the impression that by do doing they are attempting to obscure past mistakes with an easy, but ineffective fix. This is not intended to be an indictment of such personnel, it is simply a recognition that human beings, no matter how fair-minded and well-intentioned, should never be asked single-handedly, in isolation and without expert advice to rehabilitate a process which has gone seriously awry during their historic involvement in the process.

For a commercial trust practitioner, deeply involved in the activities of bank trust departments, and a veteran of dealing with the Office of the Comptroller of the Currency (OCC), and other federal agencies, state banking authorities, accountants and rating agencies in connection with audits of trust and fiscal agency procedures, the equally apparent inability of the DOI staff to appreciate the level of expertise required for the rehabilitation and modernization of a trust problem as vast as the IIM accounts issues is surprising to me. I cannot put this any more clearly than former Special Trustee Homan did in his Strategic Plan, and I fully concur with his conclusions. Regarding the lack of trust managerial resources within the DOI, and the BIA specifically, Mr. Homan states:

> Managers and staff of the BIA have virtually *no effective knowledge or practical experience* with the type of *trust management* policies, procedures, systems and *best practices* which are so effective, efficient and *prevalent in private sector trust departments and companies*. The BIA area and field office managers do not have the background, the training, the experience, the financial and trust qualifications and skills, necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. Thus, and through no fault of their own, and *even assuming financial resources were made available, they are not capable of managing effectively the Federal Government's trust management activities on a par with* that provided by *private sector institutions* to their customers. . . " [emphasis added]

If your or my bank or trust company were to handle our assets with completely unqualified personnel, in a manner that can be described metaphorically as a "shoe box" approach to accounting, we would be in court, or at the steps of the OCC or other appropriate regulator the next morning. That was one of the great lessons of the financial institution crises of the 1980's.

The independent contractors, Macro International Inc., Larson Slade Associates, LLC and Arrowhead Technologies, in cooperation with project resource firms (such as Riggs Bank, NationsBank and State Street Bank and Trust) echoed Mr. Homan's conclusions after hundreds of DOI personnel interviews. Their goal was, in part, to identify any gaps between the current Indian trust systems and trust departments in the commercial sector. These consultants concluded in 1997 that the accepted legal and procedural standards of fiduciary responsibility to manage trust assets and accurately report on their status to beneficiaries were not being met. Without properly trained personnel, and without a "single-point management responsibility"

like a GSE, the current system falls far short of commercial trust standards. What is needed, these consultants found, is a single trust organization, with complete control over both resource and financial assets utilizing tried and true commercial applications. Finally, they concluded that all of these tasks will fail to improve the Indian Trust Fund reform process unless an effective and efficient staff is able to carry out the tasks.

A quick look at previous DOI budgets demonstrates with clarity the Agency's historic opinion of these expert findings. Although these numbers have since been inflated, the previous Administration's HLP, for combined fiscal years 1999 and 2000, called for a budget for computer software "systems" of $51.1 million. For the same years, this budget for "training" is a meager $7 million, and even that relates solely to on-the-job training for BIA officials (which the consultants found generally ineffective) rather than for the hiring of experienced commercial trust administrative staff. So much for expertise.

With the growing complexity of investment vehicles, asset-backed securitizations and their correspondingly complex cash flows (not unlike the IIM accounts), modern trust administration requires a level of financial and technical expertise that was unheard of twenty years ago. What once required a few accounting courses and on-the-job bond payment training, now frequently requires advanced degrees in money management, fiduciary standards and laws, complex cash flow analysis techniques (called "analytics" or "modeling"), dexterity on PC-based spreadsheet and database systems, a complete understanding of permitted investments, overnight "float" investments, special cash accounting systems and the use of complex computer programs. Even with this training, and with the constant support of expert supervisors, tax specialists, accountants and attorneys, it takes years to develop the intuitive expertise to perform proper trust accounting. To my knowledge, not one person from the commercial sector with such a background is presently on the staff of the DOI.

Again, I must ask why the DOI has completely ignored the critical need for such independence (*i.e.*, lack of conflicts-of-interest) and expertise. One might guess that this answer would be the very "special" nature of U.S. Government/American Indian relations, and the ultra-sensitivity the BIA and the other DOI Bureaus bring to this special problem. But from the outside this rather looks more than suspiciously like institutional self-perpetuation, obfuscation of past mistakes, and at worst, the kind of paternalism that should have gone with the wind many years ago.

A PROFESSIONAL TRUST APPROACH

How would a team of commercial trust experts approach a problem like IIM reform, and how does the DOI's course of action compare to such a commercial approach?

Although admittedly a long time in the making, commercial trust entities have tackled efforts just as daunting as the IIM problem, especially when they have inherited active asset trusts which have been mismanaged.

An overview of a typical step-by-step approach to a major "fiduciary fix" of a private sector trust organization follows:

Step 1. **Assemble a Team.**

The first step is to assemble a team consisting of highly experienced trust professionals, accountants who specialize in detail analysis of trust accounts, cash flows, investments and control procedures, legal experts knowledgeable about the governing law, documents and the practical general industry practices, and computer systems analysts, specifically trained to translate conceptual architecture developed by the other team members into software systems requirements. We are not talking about hundreds or even dozens of people. Although they may all require expert staff assistance, at the core, we are talking about four to six trained professionals. I and my colleagues in the industry have worked successfully with many such teams.

Step 2. **Assure the Project Team's Independence.**

The next step is to establish the absolute independence of the project team. As I have mentioned to many interested people on the Hill during the past three years, establishing independence for the team responsible for either fixing a broken trust, or creating an entirely new trust system for a complex array of assets, money flows and beneficiary variables, is essential. That team would initially meet with personnel historically involved in the trust, or trust asset process. Those people will be separated and protected in the trust fix process. By this I mean that there will be the immediate recognition that those involved in a historic process where mistakes have been made, whether or not they personally have made them, are exactly the wrong people, at least at the initial phases, to be actively engaged in rehabilitation or designing replacement systems. The natural urge of all of us is to mitigate, gloss over and in extreme cases, hide past mistakes, and that urge can frequently take precedence over sound reform efforts. And yet these people, in this case DOI personnel, must be protected. Their institutional historic knowledge of problems, where data is to be found, what external pressures have been brought to bear at the expense of proper functioning, and a multitude of other essential information, resides in the memories of these people. If they are told that they will not be fired or otherwise punished for human errors and mistakes (short of criminal self-dealing, which I doubt is a serious concern here), they can be of tremendous help. But if they are left alone to fashion all reforms, they are being required to do the impossible – protect themselves and their families while being asked to single-mindedly protect the interest of IIM beneficiaries. Again, all efforts, at all levels, must be employed to eliminate such fatal conflicts-of-interest.

Step 3. **Establish Document Custody and Control.**

The next step of the team is to establish the strictest document custody and security measures possible. Every piece of historic data that is contaminated or disappears diminishes the integrity of any reconstruction effort, and eliminates data variables, and potential problems that may likely recur, and therefore should be collected, solved and input into a system that can

accommodate all data variables and similar problems in the future. Past reports by the Department of Justice and the Special Master in the class action litigation regarding BIA document destruction and general substandard condition of trust record maintenance make this step an obvious priority.

Step 4. Identify Data Elements.

Next, the data elements relevant to all phases of the trust business cycle must be identified, whether relating to land records/ownership, asset management or trust accounting functions of proper crediting, investment and disbursement. Further, an analysis of how that data has, and may change over time is critical. Systems, especially automated systems, do not usually adapt well to data changes. Significant experience, knowledge and creativity in the ever-changing nature of land resource exploitation, investment parameters and ownership variables are required at this stage.

Step 5. Develop a Schematic Diagram.

Then comes the hardest part, the development of a narrative, logical but highly complex non-automated schematic diagram (which could cover the walls of this hearing room), demonstrating how all collected data must move, interface, inter-relate and be re-analyzed, recalculated and otherwise re-assessed to assure that all functions of a highly integrated lease-to-beneficiary disbursement system will, at least conceptually, work. For lack of a better term, this is the conceptual model, or overall architecture of any complex trust problem. In the end, if an experienced commercial trust administrator, with the aid of only an HP or a simple PC-based spreadsheet system, cannot track financial data from lease billing to beneficiary disbursement, throughout all the intervening trust business functions, then all the elaborate personnel task forces and isolated pieces of systems software, no matter how sophisticated, will be worthless. All the functional elements of the business cycle must be analyzed simultaneously and interactively at this conceptual architecture phase, or hundreds of millions of dollars in "magical fix" systems will be purchased, and ultimately wasted.

Step 6. Design Architecture.

Next, experienced trust systems analysts, capable of fully comprehending the conceptual architecture, and fully knowledgeable about the universe of commercial off-the-shelf (COTS) trust accounting systems and custom applications providers, can begin to design an interactive systems architecture to accommodate all functions. This does not mean such an expert independently develops separate, or fully integrated software components. What is does emphatically mean is that one person, or a group of extraordinary trained people, is fully cognizant of both the overall goals and the intricate conceptual plan based on actual data and the universe of automated solutions that might be brought to bear to facilitate the conceptual design. Then, and only then, are requirements developed, and systems pre-tested and finally purchased, and then only with extensive warranties, retrofitting and modification undertakings and extensive service, support and back-up packages.

Step 7. Recruit Permanent Trust Administration Staff.

Automated systems are only as good as data input performed by skilled trust administrators. Further, if multiple automated systems are used, such administrators must constantly monitor whether the systems are correctly interfacing and exchanging information, since this is an area of frequent difficulty given the ever-expanding universe of data variables and money calculations which flow through those systems. This requires knowledge of the basic functions these systems perform. Data variables, and sometimes simple automated systems breakdowns (or "crashes"), or failures due to viruses, require trust administrators to constantly test the validity of systems calculations, usually by "shadow" calculations mimicking the essential tasks of any automated systems, performed on single stand-alone spreadsheet PC systems. This is painstaking work, and requires significant experience.

I have read the Special Trustee's Strategic Plan, the HLP, the GAO report referred to above and countless preceding GAO reports, hundreds of pages of court transcripts and Congressional testimony, outside consultants reports, and press releases and studies of the DOI and its internal Bureaus. And yet, I am far from an expert on all IIM reforms to date. However, I respectfully ask the DOI, the former Special Trustee, the Advisory Board established by the 1994 Act, the members of this Committee - what kind of a report card would you give to the DOI during the past few years based upon the above model of a well-thought-out, rehabilitation approach?

The following hypothetical, admittedly from a different but similar context, may help to put the current state of affairs in perspective. After growing up through the New York City public school system in the 1950's and 1960's, this hypothetical has meaning to me, and hopefully to others present.

Suppose a blue-ribbon group of local merchants, professionals and workers in an inner-city environment decided to establish a multi-faceted urban redevelopment project, aimed at dramatically improving the lives of the low income majority living in the area. The group engages the help of health professionals to set up clinics, educational professionals to establish remedial programs and vocational education to augment a perpetually underfunded public school system, artists and musicians to establish creative centers as counters to drugs and crime and off-duty police to assure an atmosphere of security rather than fear. Assume the group also sets out to develop an investment and asset management program to help the populace invest their hard-earned savings, budget their household funds to maximize the best life style, and to manage income-producing property that belongs to individuals or civic associations. Suppose this group over time, through successes, attracted local, state, federal and private non-profit funding to facilitate its programs.

Now, assume five solid years of demonstrable success. The streets are safer, drug use among the young is down, educational achievement and job retention is higher, and health benefits have reached homes never reached before. But also assume that the organizing group, simply due to lack of time and resources, neglected the asset management and investment functions with respect to potentially millions of dollars of poor people's money. Records were

literally kept in shoe boxes, or lost, pending the engagement of financial professionals, or deposits in regulated financial institutions, that the group always intended to do, or to make, but simply failed to do given the enormity of the task it had undertaken. The result is millions of dollars of unrecoverable losses for citizens, and no adequate program in-place to manage the assets or invest the money, assuming the group even knows or can locate current balances.

As a citizen, or a state regulator, what would you do? Would you, out of anger and frustration, seek to punish the individuals who had formed the redevelopment project, or end the project itself? I doubt it. But would any sane person, in their wildest dreams, allow the control persons, who are now heavily conflicted and who lack any financial expertise, to continue to manage the assets and money out of the shoe boxes, and to spend fabulous amounts of other people's money to buy computer systems, with grand but empty promises to solve all problems? I do not believe so. Any responsible person would take what money they could find and deposit it in a bank, and transfer what assets they could find to a bank trust department. Then, under proper regulatory guidance, true experts would be employed to reconstruct proper balances, probably on a modeled test case basis given the paucity of records, and true reform would begin.

Why should the American Indian beneficiaries of the IIM accounts be treated with any less reasonableness and fairness?

CONCLUSIONS AND RECOMMENDATIONS

The leaders of the DOI and the BIA, and the rank and file of those entities in Washington and in the field, no matter how well-intentioned, are seriously conflicted in the process of Indian Trust Fund Reform. If fiduciary integrity means anything, it means the absence of such conflicts-of-interest posed by concerns of job security, political survival, institutional longevity and self-protection against blame for historic errors. People of good faith can argue about the meaning of the prudent investor rule, or other high fiduciary standards of care. But after a professional lifetime of attempting to reconcile textbook standards of care for trustees with real work capabilities of human beings like you and me, I (along with many courts, bank regulators and the Federal Securities Acts) have concluded that professional fiduciaries must, at the very minimum, be trained in state-of-the-art money management, completely free from conflicts-of-interest, and must treat the assets of others in their care as though they were the personal assets of the trustee, his or her spouse, and children. When the former Secretary of the Interior chose to backburner Mr. Homan's concerns about trust standards of care, along with the Special Trustee's concerns about independence and expert staffing, in the HLP, it became clear that the only governing standard would simply be the best the DOI/BIA could do, hampered as they are by a void of necessary expertise and in the face of serious conflicts. This is not a fiduciary standard. This is capitulation to the *status quo*, with a correct accounting for the IIM accounts at best only a secondary or tertiary concern.

I strongly believe that the only viable answer to the present trust reform problems is the creation of a neutral body, independent of the DOI, with both public and private support and

input. The GSE suggested by the former Special Trustee Homan in his Strategic Plan is one such vehicle. The Indian Trust Management Reform Authority recommended by the Chairman of the Intertribal Monitoring Association on Indian Trust Funds could also serve such a purpose.

Ideally, such an independent body would be sponsored by, or have some connection with a banking or other financially sophisticated federal regulatory or quasi-governmental body. Obvious candidates would include the OCC or, perhaps, one of the federally sponsored entities, such as Ginnie Mae or Freddie Mac (or its related entity, the Federal Housing Finance Board), which are intimately familiar with complex active asset/cash flow trusts. It is also essential, in my mind, that oversight be retained by this Committee as well as the Senate Committees on Indian Affairs and the Energy and National Resources Committee.

The structure of the neutral body need not be complex. In its simplest form, it would be administered by a financially sophisticated person with experience dealing with inter-governmental agency issues. In addition to government financial input, such an entity must have the ability to engage trust experts from the private sector, representing the disciplines referred to above in connection with a proper commercial approach to solving the IIM trust problems. It is my belief that such an entity would be able to obtain the services of highly qualified trust administrators, accountants, lawyers and systems experts who would be willing to work on this problem. Believe it or not, there are many people in the private sector who understand how important this problem is, and would be willing to devote extraordinary effort to help forge a real solution.

The budget for such an enterprise could be a fraction of the DOI's expected Indian Trust Fund reform requests. Its mission would be to develop the critical conceptual and systems architecture described above, and called for by the GAO, in order to assure that future spending is actually aimed at viable solutions. No input would be ignored. The cognizant Congressional Committees, the GAO and the DOI/BIA would be consulted on an ongoing basis. The entity should be task specific, and should have a sunset timeline coordinated with trust reform progress, although some viable means of continuing trust supervision, or progressive privatization, would be required. Such a small, well-controlled, highly dedicated and expert group, if given the cooperation of the DOI, could not only accelerate implementation of a properly integrated trust function for the entire IIM business cycle, but would also go a long way to relieve the unhealthy pressure that has built up around the historic approach to this problem.

A few years ago, the head of the BIA cited a concern about potential independence for the IIM trust function that is very telling. He voiced a serious concern that wresting this problem from the BIA might spell the end of that Bureau as a viable governmental body. Although his concern has nothing to do with the Trust Reform Act's primary purpose of assuring IIM trust reform for the Indian beneficiaries, one can certainly be sympathetic with a concern that hundreds of people, many of whom are American Indians, may not have viable work in the future. But I would respectfully suggest that the kind of neutral body I and others are recommending might present an opportunity of a lifetime for many American Indians,

within and outside the BIA. With the tremendous growth of retirement assets and the use of complex trust structures as investment vehicles, this country needs more qualified trust administrators. Given the increasingly high qualifications required for such professionals in the private sector, many move on quickly to other financial positions, such as investment banking. The staff of any neutral body would constantly be interfacing with many of the BIA staff who are currently working on the problem, and who would continue to do so in cooperation with the neutral body. The opportunities for real, commercial level trust administration training is obvious. Whether an affected BIA staff person chose to use such training in government service, or in working with Indian-owned independent banks or any independent bank or trust company, his or her prospects for the future could be far brighter than continuing to work on any single-purpose project.

The most important observation I can make, as a dispassionate outside professional, is for all major players in this process - including the DOI, the American Indian groups, the U.S. Congress and the Federal courts, to take advantage of the opportunities inherent in the present state of affairs.

This problem has been a long time in the making. The present staff of the DOI did not make the problem, and, in fact, have made some valiant efforts to solve it. But the DOI has already lost control of the process. This is because the historical accounting, reconstruction and rehabilitation of the IIM accounts is currently in the hands of the Federal courts, and will be played out in some kind of court-mandated accounting, a receivership or a consensual settlement process, in each case requiring outside trust professionals to determine how history is to be reasonably reconstructed. I can state with some assurance that in a trust problem of this magnitude, the validity of the systems designed to take care of future trust and asset accounting will depend in large part on what is learned in that historic accounting and reconstruction process, even if that process is accomplished largely on a sample modeling basis. Simply put, most if not all of the variables involved in complex asset leasing and accounting, in beneficiary succession and in custody problems have already presented themselves in the protracted history of the IIM accounts. Those data variables are the building blocks for any future systems or procedural architecture. The intricacies of leasing potato land in Idaho, as opposed to oil and gas deposits in Oklahoma, and what has gone wrong in the respective accounts payable/accounts receivable histories of such leasing, is vital information for any new asset management system.

What I am suggesting is that the two processes - historic accounting/reconstruction and future systems development are irrevocably linked. The experts of any independent body charged with future asset and trust accounting design, unless they are to duplicate effort, must talk with the experts involved in the reconstruction process. Ideally, at some point those processes should be combined. But the point is that one portion of the "fix" process, historical accounting, is already in the hands of a neutral body, the court. It makes little sense, then, since both aspects of the fix must be irrevocably linked, to leave the largely derivative portion, new systems, to a governmental agency, steeped in the knowledge of Indian welfare, but devoid of any trust expertise and heavily conflicted. This makes even less sense since the

entity currently working on the future systems fix, the DOI, is in a legally adversarial posture in the current Federal court proceedings where the historical fix is being played out.

When the recommended independent body is formed, serious consideration should be given to combining any court-mandated accounting or receivership reconstruction effort with new systems development tasks of that neutral body.

Politics and institutional self-preservation aside, it is time for the DOI to let go, to the extent it has not already been forced to do so by the pending class action litigation.

I would also hope that all those involved, given the nature of the interests of the American Indian beneficiaries at stake, would take a strictly non-partisan approach to the trust reform process.

Finally, and briefly, I would like to remark on past published statements reportedly made by DOI officials in defense of their various reform efforts. Purported statements branding constructive critics of the DOI's efforts as "anti-Indian" are very regrettable. So are suggestions that anyone opposing the DOI/BIA reform effort, and the proposed additional funding for that process, are simply motivated by a desire to keep money from the Indians.

As a seasoned business lawyer, I am unfortunately inured to even this kind of name calling. People say unfortunate things when they are on the defensive. If these labels are put on me because of my testimony, so be it.

NIXON PEABODY LLP
ATTORNEYS AT LAW

THE NIXON PEABODY TRUST
AND
FINANCIAL REHABILITATION GROUP

PRACTICAL LEGAL SOLUTIONS
AND
RISK MANAGEMENT
FOR
THE FINANCIAL SERVICES INDUSTRY

February 2002

THE FIRM

Nixon Peabody LLP is one of the largest law firms in the United States, with approximately 600 attorneys working in 13 offices coast to coast, including Washington, D. C., New York City, Boston, and San Francisco. We offer a multitude of corporate and financial services specialties, among which The Trust and Financial Rehabilitation Group (the "Group"), is the only nationally-recognized law firm practice group ***in the country*** dedicated to resolving problems involving complex cash flows. In particular, we advise financial industry participants in the detection, diagnosis, and correction of administrative systems and accounting errors in trusts, securities and securitization transactions and account deposits, and withdrawals involving these flows. The Group advises many of the leading financial institutions in the world in developing practical solutions to problems arising from the complex interactions of financial market expectations, contractual obligations, and regulatory requirements in multi-participant transactional environments, as well as those issues that arise from internal audits, due diligence, and reviews. When needed, the Group draws on the expertise of the Firm's white-collar criminal law team, as well as its expertise in matters relating to privacy issues, and economic and trade restrictions. We also work closely with financial professionals throughout the industry, including most of the major accounting, consulting, and investment banking firms, along with smaller firms who specialize in this area.

The Group benefits from the global reach and resources of the Firm and our clientele hails from across the United States and around the world, including the European Community — particularly France, Germany and Scandinavia — the United Kingdom, Japan, China, and Southeast Asia. As a practice group and as a Firm, we pride ourselves on direct access to the key partners in our clients' businesses, our ability to respond without delay to their requests, and our history of working closely with professional and governmental organizations to produce timely, practical results for our clients that solve their problems and often exceed their expectations.

THE NIXON PEABODY TRUST AND FINANCIAL REHABILITATION GROUP

We are a cross-disciplinary practice group that consists of attorneys specializing in bank regulatory, securities, trusts, transactional, bankruptcy, international, jurisdictional, white-collar criminal, and litigation issues affecting complex financial transactions and financial institution money flows. We are unique for our depth and the degree of specialization we can offer. For example, we have assisted world money-center banks in their fiduciary, structured finance, securitization, and asset-servicing departments; regional and community financial institutions administering trusts with complex income producing assets, pensions and ESOP trusts; mortgage and other asset-servicing businesses; and government trusts experiencing problems in asset-management, allocation, and distribution. We have assisted clients in defending

governmental and private actions regarding fund flows, commingled assets, escheatment, proper fund allocations to non-nominee trust owners, and a wide variety of enforcement matters. We also maintain an expertise in advising entities in connection with proposed international transactions to ensure that they do not violate economic and trade sanctions that are based on U.S. foreign policy and national security goals and that target certain foreign countries, terrorism sponsoring organizations, and international narcotics traffickers.

REPRESENTATIVE FINANCIAL INSTITUTION CLIENTS OF THE FIRM

The following list is representative of financial institutions that are clients of the Firm. We provide a broad array of legal services to these clients, utilizing the services of other practice specialties where needed, as well as those of the Group.

- Bank of America
- Bankers Trust Company/Deutsche Bank
- The Bank of New York
- J.P. Morgan/Chase & Cos.
- United States Trust Company of New York
- Wilmington Trust Company
- Wells Fargo Bank
- The Fuji Bank, Limited
- BNP Paribas
- Mitsubishi Bank, Ltd.
- Merrill Lynch

REPRESENTATIVE MATTERS OF THE GROUP

Brief examples follow of actual matters in which the Group has engaged. In broad categories, they are:

1. Rehabilitation of problem trusts, cash flow mechanisms, and accounts;

2. Compliance reviews and corrective advice regarding financial systems and controls;

3. Default administration;

4. White-collar criminal defense and internal investigations; and

5. Designing and negotiating special purpose trusts and assisting clients in developing or refining related administrative systems and controls.

1. REHABILITATION OF PROBLEM TRUSTS, CASH FLOW MECHANISMS AND ACCOUNTS

Our specialty is the detection, diagnosis, and resolution of problems arising from the administration of complex fiscal agency and servicing functions performed by bank trust departments and some non-bank entities, including problems arising from intricate cash flow, investment, asset management and escheatment issues. These transactions include REMICs, CMOs, and other asset-backed transactions, as well as multi-participant pooling transactions and traditional municipal financings. The Group is intimately familiar with all aspects of bank trust operations, including most of the major software packages used for trust and bond accounting. We have also worked on many of the most difficult issues of origin, transfer, and withdrawal from a myriad of accounts administered by banks for depositors. Specifically, the Group has concentrated on issues of "good money in, bad money out," an analogue to reverse money-laundering, which requires using complex technical forensic approaches to sort out. The Group also works closely with accounting and systems management professionals in utilizing database and other computer technologies to diagnose and fix complex financial systems management problems.

REPRESENTATIVE TRANSACTIONS

- The Group has acted as trust counsel to one of the nation's largest financial institutions for more than 15 years. A recent case demonstrates the approach the Group takes and the results it can deliver. The case involved municipal bond funds held by the institution as paying agent, in particular accounting records and claims totaling in the tens of billions of dollars asserted on behalf of more than one thousand governmental agencies and authorities. It presented numerous cutting-edge issues related to trust accounting, money flows, unclaimed property, and government false claim statutes. In the process of settling this very large matter in the client's favor, we collaborated with teams from two major accounting firms, along with outside economic and statistical consultants, to develop state-of-the-art methods for tracking and verifying money flows which had been historically processed through numerous individual systems and internal bank accounts and control mechanisms.

- The Group also represented a major money-center bank with respect to the reconciliation of a pair of pooled municipal financings involving 30 hospitals and more than $400 million in multi-rate bond issuances involving a complex "Dutch Auction" vehicle. This transaction was inherited from the portfolio of a predecessor bank after a decade of questionable administrative and systems practices. In the case as presented, various transactional participants had made conflicting claims regarding the "right way" to interpret and administer the relevant contracts. After several months of attempting to reconcile these assertions and facing lawsuits and investigations by various public agencies, the Group members, working in conjunction with client systems personnel and a team

from Ernst & Young LLP, created a legal synopsis of all the relevant contract terms. The team, then, remodeled the entire transaction from day one and dollar one, recalculating the amounts that were payable to and from every transaction participant over the life of each transaction. This required an exhaustive legal interpretive effort and a painstaking systems redesign procedure. The end result was so soundly reasoned and documented that all participants concurred — even those who actually had to refund considerable amounts of money previously received in error — that on the basis of the legal methodology and the computational procedures used to derive the settlement amounts, they would resolve all disputes.

2. COMPLIANCE AND CONTROL REVIEWS

The Group has worked for several of the nation's largest financial institutions and asset-servicing businesses in conducting compliance reviews of personnel and technology administrative systems and cash-control and account systems. In these matters, we worked to assure compliance with governing account, bond and asset-securitization contracts, as well as to ensure that administrative systems were compatible with bank cash-control systems and with the law. This work extended to the statutory, contractual, and practical aspects of fund investments and transfers and entailed all aspects of fund transfers and permitted investment issues.

REPRESENTATIVE TRANSACTIONS

- The Group conducted an extensive compliance review and payment-recalculation project with respect to the municipal revenue bond business of a major money-center bank's trust department. The review entailed the analysis of payment practices and procedures among several merged institutions for thousands of bond issuances and hundreds of billions of dollars in processed payments that had occurred over the course of a decade. The Group worked in conjunction with two major accounting firms to create a legal and financial procedure whereby each payment stream would be remodeled and recalculated and, where appropriate, corrections would be implemented. More than 100 legal and accounting professionals were involved in the project. In addition to our work resulting in the disclosure to hundreds of market participants that certain large payments and calculations had been made in error, the remedial measures the Group prescribed were so effective that no litigation resulted.

- The Group has conducted compliance reviews of administrative and payment controls in connection with the ongoing operation, purchase and sale of a number of financial institutions' trust and asset servicing businesses and corrected account deposit and withdrawal procedures. We reviewed relevant transaction documents and account records, and conducted interviews of relevant line and management personnel to determine whether controls were functioning in the "real life" production environment. These reviews have resulted in significant systems,

account deposits, withdrawals, ownership identification, control redesign projects, and other appropriate risk management responses, including interactions with appropriate regulatory authorities.

3. DEFAULT ADMINISTRATION

The Group has played a pioneering role in counseling trustee financial institutions to take a proactive role in default, workout, and insolvency situations, particularly in the context of securitization transactions where servicer failures may jeopardize the value of billions of dollars of assets. These situations demand that experienced trust, bank regulatory, securities, bankruptcy, and litigation attorneys work closely with financial professionals in scrutinizing insolvent servicers' processing and occasional commingling of billions of dollars of cash flows. In addition, they require that we keep client institutions up-to-date on appropriate legal strategies to preserve asset values, verify proper account balances, and prevent misallocation of funds.

REPRESENTATIVE INSOLVENCY PROCEEDINGS

- *Commissioner v. Executive Life Insurance Company*
- *In re COLO.COM*
- *In re United Companies, et al.*
- *In re L.A. Gear*
- *In re MAI Systems, Inc.*
- *In re Barry's Jewelers*
- *In re Siliconix, Inc*
- *In re Los Medanos Hospital District*
- *In re Commonwealth Mortgage*
- *In re Lomas Mortgage USA*

4. WHITE-COLLAR CRIMINAL DEFENSE AND INTERNAL INVESTIGATIONS

The White-Collar Criminal Defense division of the Group has ten partners permanently dedicated to every aspect of white-collar crime. By its very nature, this division has developed close ties with law enforcement authorities, especially at the federal level. Of most importance is the Group's international and domestic money-laundering and funds-flow experience.

REPRESENTATIVE TRANSACTIONS

- The White-Collar Crime Division specializes in financial institutions fraud, foreign corrupt practices and espionage, immigration fraud, tax evasion, computer crimes, bribery, false claims acts, and government contracting fraud and abuse. Through hundreds of cases, the division has become thoroughly familiar with the governmental investigation process. We have worked with companies to re-

establish and maintain compliance through internal processes and controls and with targets, subjects and witnesses in grand jury, Congressional and Special Prosecutor investigations. The division is also expert in all subpoena, search warrant, and information disclosure procedures.

- In the context of examining both domestic and foreign financial institutions and trusts in connection with tracking terrorist money flows, the division's knowledge of domestic and foreign criminal law and investigation procedures is an invaluable adjunct to the actual methodologies of tracking funds. The value of this combination of systems and control money tracing expertise and criminal investigatory techniques became obvious in the last few years during the Panamanian trust and banking reforms.

- One of the Group's litigation attorneys served as the prosecutor for the Southern District in New York in the 1993 World Trade Center bombing case, and another member of the Group has served as a Delaware State Banking Commissioner.

- The Group also has specific relevant experience in special investigations. These investigations include examining bank loan portfolios to detect nominee and alter ego loans made in violation of federal and state banking regulations, examining bank directors' and officers' financial affairs between and among various banking institutions, as well as examining insider conduct contributing to illegal check-kiting. We also have relevant experience representing banks in parallel federal civil and criminal RICO actions with allegations, including bank fraud, wire fraud, mail fraud, extortion and money laundering, and in matters in which banks are victims of illegal check-kiting schemes.

5. SPECIAL PURPOSE TRUSTS

For many years, the Group, and its constituent members, have specialized in creating special purpose trusts as the most effective mechanism for facilitating financial transactions at the intersection of private and governmental interests.

REPRESENTATIVE TRANSACTIONS

- In the mid-1970s, Firm's attorneys helped pioneer the special trust and pooling and servicing documents for private mortgage securities transactions, previously the sole province of governmental entities such as GNMA and FNMA. The Group has, from that time to the present, worked with J.P. Morgan/Chase (and its predecessor institutions, Chemical Bank and Manufacturers Hanover Trust), Bank of America, Bankers Trust Company/Deutsche Bank, and many other financial institutions in devising and improving the governing documents and procedures for mortgage-backed pass-throughs, CMOs, REMICS, and other complex securitization vehicles involving billions of dollars of cash flows. Such transactions have grown to include credit card receivables, auto loans, and many

other consumer paper instruments in collective transactions, often amounting to billions of dollars in a single issuance.

- The Group worked with the Department of Commerce in a divestiture of its economic and regulatory oversight of interests involving several tribal units located on strategic Alaskan Islands. This required that the Group create a complex series of trusts to accomplish the divestiture and set up procedures for investment and economic growth withdrawals, constituting the economic infrastructure for the Native Corporations involved.

- The Group has also worked on a *pro bono* basis with both the U. S. Senate Committees on Indian Affairs and Energy and the House Resources Committee in an attempt to reform and rehabilitate both tribal and individual Indian money accounts, admittedly mismanaged by the Department of the Interior for many decades. In that process, we have proffered conceptual architecture for a new money-in and money-out system, and commented on reform legislation and the purchase of additional "off-the-shelf" systems by the Bureau of Indian Affairs.

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Testimony of
Jim Cason
Associate Deputy Secretary of the Interior
and
Neal A. McCaleb
Assistant Secretary for Indian Affairs
before the Committee on Indian Affairs
United States Senate
February 26, 2002

Native American Trust Issues and Ongoing Challenges

Introduction

Thank you, Mr. Chairman and Members of the Committee, for inviting the Department to testify at this hearing on the Native American Trust program being administered by the Department of the Interior, including the key elements of trust reform and trust asset management. The problems relating to trust asset management that we are working to solve have been over a century in the making.

Background

Current Holdings -- An understanding of where the Department is now with regard to managing Indian trust assets requires a recognition of the complex issues we have inherited. Trust asset management involves approximately 11 million acres held in trust or in restricted status for individual Indians and nearly 45 million acres held in trust for the Tribes, a combined area the size of Maine, Massachusetts, Vermont, New

Hampshire, Connecticut, Rhode Island, Delaware, Maryland, and the District of Columbia. This land produces income from more than 100,000 active leases for 350,000 individual Indian owners and 315 Tribal owners. Leasing and sales revenues of approximately $300 million per year are distributed to more than 225,000 open Individual Indian Money (IIM) accounts and revenue of approximately $800 million per year is distributed to the 1,400 Tribal accounts.

Trust Functions in Interior -- Indian trust asset management involves many agencies and offices within the Department, including the Bureau of Indian Affairs, the Office of the Special Trustee for American Indians, the Minerals Management Service, the Bureau of Land Management, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, the National Park Service, and the Office of Surface Mining.

For example, the Bureau of Indian Affairs is responsible for the leasing of trust lands, keeping tract of land ownership, lease obligations, and appeals. The Office of the Special Trustee focuses on the management of the actual trust accounts. The Minerals Management Service handles royalty collection and the verification of those payments. The Bureau of Land Management does the official surveys of Indian trust land and tracks the status of actual lease operations on the land.

In short, these agencies must hire, train and retain personnel that:

1. Lease trust lands;

2. Conduct surveys across millions of acres to ensure leases are properly administered;
3. Keep records of leases held by hundreds of thousands of owners;
4. Record differing types of income from differing leases;
5. Review transactions within individual accounts;
6. Identify Indian heirs through complex probate proceedings;
7. Preserve trust records dating back a hundred years; and
8. Ensure the security of complex computer software housing much of this information.

This is not a simple responsibility, and there have been years of debate and litigation over how it should be carried out.

History of the General Allotment Act -- One of the most difficult aspects of trust management is the management of the individual Indian money accounts. In 1887, Congress passed the General Allotment Act, which basically allocated tribal lands to individual members of tribes 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. The intention was to turn Native Americans into private landowners and accelerate their assimilation into an agricultural society. Most Indians, however, retained their traditional ways and chose not to become assimilated into the non-Indian society. Congress extended the 25-year trust period, but finally, by the 1930s, it was

widely accepted that the General Allotment Act had failed. In 1934, Congress, through the first Indian Reorganization Act, stopped the further allotment of tribal lands.

Interests in these allotted lands started to "fractionate" as interests divided among the heirs of the original allottees, expanding exponentially with each new generation. There are now an estimated 1.4 million fractional interests of 2% or less involving 58,000 tracts of individually owned trust and restricted lands. The Department is bound by its trust obligations to account for each owner's interest, regardless of size. Even though these accounts today might generate less than one cent in revenue each year, each must be managed, without the assessment of any management fees, with the same diligence that applies to all accounts. In contrast, in a commercial setting, these small accounts would be eliminated because of the assessment of routine management fees.

Prior Review By Congress -- Over the past 100 years, Congress has reviewed the issue of Indian trust asset management many times. In 1934, the Commissioner of Indian Affairs warned 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." The bill ultimately led to the Act of June 18,

1934 which attempted to resolve the problems related to fractionation, but as we now know did not.

In 1992, the House Committee on Government Operations filed a report entitled "Misplaced Trust: the Bureau of Indian Affairs' Management of the Indian Trust Fund." That report listed the many failures of the Bureau of Indian Affairs to manage properly Indian trust funds. It pointed out that GAO audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 had found fault with management of the system. The report notes that Arthur Andersen & Co. 1988 and 1989 financial audits stated that "some of these weaknesses are so pervasive and fundamental as to render the accounting systems unreliable."

The House Report cites an exchange between Chairman Mike Synar and then Interior Inspector General James Richards in which Mr. Richards states:

> "I think the Bureau of Indian Affairs will not change until there is some political consensus in that it must change. It is the favorite * * * target of everyone who is shocked by ineptitude and its insensitivity. Yet when we try to restructure it either from a Congressional sense or from an Executive sense, there are always naysayers and there never develops a political sense for positive change."

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

Arthur Andersen stated that 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 Committee report states in reaction to that:

> "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 which Congress has made several attempts to correct. 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 then 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.

In many ways, the problems and potential solutions remain the same as they did when this report was published.

Current Challenges in Trust Management

As you can see, the problems we are currently facing are not new ones. First, the Department is not well structured to focus on its trust duties. Trust responsibilities are spread throughout the Department. Thus, trust leadership is diffuse. The Bureau of Indian Affairs (BIA) itself has a long history of decentralized management. Each of the 12 BIA Regional offices and 85 BIA agency offices has developed policies and

procedures that are unique to its region and to the Tribes and individuals it serves. As a result, the BIA often does not have clear and unified policies and procedures relating to trust management.

Second, the planning systems related to trust are inadequate. The American Indian Trust Fund Management Reform Act of 1994 (the 1994 Trust Reform Act) required the development of a comprehensive strategic plan for all phases of the trust management business cycle that would ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with that Act. The court in *Eloise Pepion Cobell, et al. v. Gale A. Norton, et al.* (the *Cobell* litigation), also required information on the Department's plan for remedying problems identified by the court. These two responsibilities evolved into the development of the original High-Level Implementation Plan (HLIP) dated July 1, 1998. The HLIP was revised and updated on February 29, 2000. However, the Eighth Quarterly Report that the Department submitted to the Court on January 16, 2002 states:

> "As described in prior submissions to the Court, the Department now views the High Level Implementation Plan (HLIP), by which trust management reform progress was measured and reported to the Court, to be obsolete. As reflected in the introduction, HLIP milestones have become increasingly disconnected from the overall objectives of trust reform. The HLIP is now outdated. Many of its identified activities have

> been designated as being completed; however, little material progress is evident. More fundamentally, the HLIP does not reflect an adequately coordinated and comprehensive view of the trust reform process. A continuing re-examination of ongoing trust reform is needed along with clarification of trust asset management objectives."

Third, the Department's longstanding approach to trust management has been to manage the program as a government trustee, not a private trustee. Today, judicial interpretation of our trust responsibilities is moving us toward a private trust model. The Department agrees that our trust duty requires a better way of managing than has been done in the past. The current structure of the Department is not suitable for carrying out the expectations of the tribes, the Congress, or the courts. To meet this level of expectation will require more funding and resources than have been historically provided to the Department.

Fourth, the Trust Asset and Accounting Management System software known as TAAMS, which the Department had hoped would go a long way to solving trust problems, has yet to achieve many of its objectives. Interior began developing TAAMS in 1998 from an off-the-shelf program, intending for it to be a comprehensive, integrated, automated national system for title and trust resource activities. Using this software, Interior employees would record key information about land ownership, leases, accounts receivable income, and so forth. In November 2001, the

Department's contractor, Electronic Data Systems (EDS), found that the current land title portion of TAAMS provides useful capabilities, but recommended deferring any further effort on the realty and accounting portions.

In addition, Departmental information technology security measures associated with Indian trust data lack integrity and are not adequate to protect trust data or to comply with Office of Management and Budget requirements. In fact, on December 5, the court ordered the Department to disconnect all computers from the Internet that housed or provided access to Indian trust data. The Department then disconnected nearly all of its computer systems from the Internet because they are interconnected.

Finally, the challenges related to fractionated interests in allotted land continue. These interests expand exponentially with each new generation to the point where now we have single pieces of property with ownership interests that are less than .000002 of the whole interest.

The Cobell Litigation -- On June 10, 1996, five plaintiffs filed suit against the Departments of Treasury and Interior, alleging breach of trust with respect to the United States' handling of individual Indian money (IIM) accounts. The Court in this action bifurcated the issues for trial. In the first trial, in December 1999, the Court ruled that the Department was in breach of four trust duties. The Court declared, among other things, that the 1994 Trust Reform Act requires: (1) Interior and Treasury to provide

plaintiffs an accurate accounting of all money in their individual Indian money trust without regard to when the funds were deposited; and (2) retrieval and retention of all information concerning the trust necessary to render an accurate accounting. The Court also ordered Interior to file a revised High-Level Implementation Plan (HLIP) to remedy these breaches. This decision was affirmed by the D.C. Circuit Court of Appeals on February 23, 2001. The second trial, dealing with historical accounting has not yet been scheduled.

Most recently, on November 28, 2001, the Court issued an order to show cause why civil contempt should not lie against Secretary Norton and Assistant Secretary McCaleb, in their official capacities, on four counts:

- Failure to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project.

- Committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000 until January 2001.

- Committing a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999.

- Committing a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Cleanup.

On December 5, 2001, the Court ordered the Department to disconnect from the Internet all of the Department's computer systems that house or provide access to Indian trust data. This was followed on December 6, 2001, by a supplemental order to show cause why Secretary Norton and Assistant Secretary McCaleb should not be held in civil contempt, in their official capacities, for issues related to computer security of IIM trust data. The contempt trial has been underway since December 10, 2001.

Tackling the Problems

To address the difficult challenges of trust reform, a number of actions have been initiated in the last year.

Strengthening Departmental Management -- A high priority for the Secretary has been to identify and recruit seasoned managers who can objectively assess the facts and problems and propose practical solutions so that we fulfill our fiduciary duties to account for the trust assets of Native Americans. The Secretary's trust management team started coming on board July 4, 2001, with the most recent member joining the Department on November 26, 2001. The team is engaged in a day-to-day decision

process related to trust reform and trust asset management. Those that have worked with the new team can attest to their extraordinary work ethic, management experience, seasoned leadership and creativity in undertaking complicated tasks. (See Appendix A)

Developing a New Trust Management Strategic Plan -- As discussed above, the "High-Level Implementation Plan" (HLIP), developed by the Department in 1998, has received considerable criticism. We are now working to create a plan to guide future Departmental activities that will provide an integrated, goal-focused approach to managing trust assets. This new plan will reflect a beneficiary approach to trust management and service delivery. Objectives will include maintaining comprehensive, up-to-date and accurate land and natural resource ownership records, and developing a robust accounting system to manage financial accounts and transactions. An integral aspect of the plan will be the development of a workforce plan, and associated activities, to attract and maintain a qualified, effective workforce.

Creating a New Office of Historical Accounting -- To better coordinate all activities relating to historical accounting, on July 10, 2001, the Secretary created the Office of Historical Trust Accounting (OHTA) within the Bureau of Indian Affairs. OHTA's assignment was further guided by Congressional instructions given in the Conference Report on the Department's fiscal year 2001 appropriations bill which stated the following:

> "...the managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results. This plan must be provided to the House and Senate Committees on Appropriations prior to commencing a full sampling project. Finally, the determination of the use of funds for sampling or any other approach for reconciling a historical IIM accounting must be done within the limits of funds made available by the Congress for such purposes."

The Department will deliver a Comprehensive Plan to Congress to outline the full range of historical accounting activities and to provide a foundation for Congress to evaluate the Department's funding requests. OHTA has already released its *"Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts"* and *"Report Identifying Preliminary Work for the Historical Accounting."*

We have requested a $9 million increase in our FY 2003 Budget for this historical accounting, but as discussed earlier, when a full reconciliation of all accounts is undertaken considerably more money would be required. In responding to the court's requirement that we do a complete historical accounting of each account by conducting a full audit, transaction by transaction, we will face challenges that will pose great difficulty and will be very expensive. Without such an accounting, the plaintiffs in the ongoing litigation will continue to assert, as they have in the press, that they are owed

$60 billion to $100 billion. A comprehensive historical accounting is likely to cost hundreds of millions of dollars, and still may not be viewed as entirely satisfactory because of gaps in existing records.

Proposing a Departmental Reorganization of Trust Management -- Reformation of the Department's trust responsibilities was, of course, mandated by Congress in the 1994 Trust Reform Act. In its 1999 opinion, the District Court in *Cobell* declared that the Department had breached certain duties found in the Act. The Department has heard from many sources -- e.g., the Special Trustee, EDS, the Court Monitor, and through budget reviews -- that one of the fundamental barriers to trust reform is the disorganized scattering of trust functions throughout the Department. In August 2001, during our formulation of the FY 2003 budget, various proposals and issues were identified concerning the trust asset management roles of the BIA, the Office of Special Trustee for American Indians (OST), and other Departmental entities carrying out trust functions.

An internal working group developed a number of organizational options ranging from maintaining the status quo to privatizing functions to realigning all trust and associated personnel into a separate organization under a new Assistant Secretary within the Department. While this internal review was underway, Electronic Data Systems (EDS) was undertaking an independent, expert evaluation. On November 12, 2001, EDS presented its report "DOI Trust Reform Interim Report and Roadmap for TAAMS and

BIA Data Cleanup: Highlights and Concerns" in which it called for a "single, accountable, trust reform executive sponsor."

The Secretary decided to propose the formation of an organizational unit called the Bureau of Indian Trust Asset Management (BITAM). This option envisioned the consolidation of most trust reform and trust asset management functions located throughout the Department into a new bureau that would report to a new Assistant Secretary. The new Assistant Secretary would have authority and responsibility for trust reform efforts and for continuing Indian trust asset management. The proposal was reviewed by EDS and received a supportive endorsement. This option was proposed because it would consolidate trust asset management, establish a clearly focused organization, provide additional senior management attention to this high priority program and retain the program within the Department to facilitate coordination with the Native American community. Under this proposal, BIA would focus on its other core functions and programs such as providing tribal services, helping tribes with economic development, and education. The Department is carrying out consultation on this option, as will be discussed below.

On November 20, 2001, the Secretary issued an order to establish the Office of Indian Trust Transition (OITT) within the Office of the Secretary and shortly thereafter appointed Ross Swimmer to be the Director of the OITT. The OITT is currently charged with developing the strategic plan to replace the HLIP, and organizing the Department's efforts to implement that strategic plan.

Fulfilling our Obligations to Consult with Tribes -- We are currently consulting with Tribes to involve them in the process of attempting to reorganize the Department's trust asset management responsibilities. To date, Tribes have expressed their dissatisfaction with the consultation process and with Interior's reorganization proposal.

The Department has held a series of consultation meetings. The first was in Albuquerque, New Mexico on December 13, 2001. Eight additional consultation meetings in different locations have been held. The meetings have been very well attended.

The Department and the Tribes have formed a Joint Task Force to review the numerous proposals for trust reform that have been submitted in response to the BITAM proposal forwarded by the Department. In addition to reviewing all proposals, the Task Force is assisting the Department in its review of current practices.

The Task Force had an initial meeting in Shepherdstown, West Virginia, on February 1-3, 2002. The Task Force began its review of proposals at this meeting and also formed three subgroups, each of which are tasked with addressing specific issues. The subgroups have been tasked with developing a protocol for the conduct of the Task Force, developing a scope of work for a contractor who is consulting on Trust Reform, and in depth review of proposals submitted to the Task Force.

The Task Force is scheduled to meet again on March 7-10, 2002, in Phoenix, Arizona. While an agenda has not been agreed upon yet by the Task Force members, we expect the Task Force to continue its review of proposals, adopt a protocol, and set a schedule for future meetings.

It is our hope that ultimately the Task Force will provide advice and recommendations for Trust Reform to the Secretary that will significantly improve the management of Indian trust assets.

Reconnecting Departmental Computers to the Internet -- On December 5, 2001, as part of the ongoing *Cobell v. Norton* proceedings, the Court ordered the Department to disconnect from the Internet all of the computer systems that house or provide access to Indian trust data. The order came at the request of plaintiffs and was based on a report the Special Master for the Court had prepared on the security weaknesses of information technology security involving individual Indian trust data. The Department is committed to complying strictly with the orders of the Court. Computer systems were completely shut down where the Department was not able to verify complete, immediate termination of access to individual Indian trust data.

On December 17, 2001, the Court entered a consent order proposed by the Department, over the objections of the plaintiffs. It establishes a process that allows the Department to resume operations of some computer systems after providing the

Special Master assurances that problems he identified have been addressed and that security meets a certain standard. The December 17 consent order is the only mechanism under which the Department may utilize some systems or reconnect them to the Internet. The Department prioritized its requests under the Consent Order to seek first the Special Master's concurrence to operate the information technology systems required to make payments to individual Indians.

To date, we have received concurrence to permit Internet service to the United States Geological Survey, the Office of Surface Mining, Reclamation and Enforcement, the National Park Service and the Bureau of Land Management, along with a few isolated computers located at the National Interagency Fire Center and the Department of the Interior Law Enforcement Watch Office. We will continue to work with the Special Master to expedite the resumption of the many public service programs which depend upon reconnection to the Internet.

The Department has taken initial steps to prepare a long-term strategic plan to improve the security of individual Indian trust data. The Department intends to bring relevant individual Indian trust information technology systems into compliance with the applicable standards outlined in OMB Circular A-130.

We expect that the core of the dedicated network can be installed during fiscal year 2002, with the anticipated phase-in and shift of data from other systems expected to

take approximately three years. The overall cost estimate could be $65 -70 million. The final estimate will be determined as we develop a capital asset plan.

Areas Where Interior Needs Help From Congress

These actions are only the beginning of a long, intensive effort that will be required of the Administration, Congress, and the Courts. Significant work needs to be done.

FY 2003 Budget -- The President released his fiscal year 2003 budget this week and it includes the Secretary's recommendation for $83.6 million in spending increases for trust management and accounting. Increased spending for improved trust management is one of the major initiatives of the Department's proposed FY 2003 budget.

Trust Management Expectations -- As mentioned above, the courts expect the Department to deliver trust services based on a very high standard. Congress must recognize that meeting these expectations will require significantly more funding and resources. The courts first look to Congress for its expression of intent as to how the trust program should be managed. Congress must make clear what it envisions the responsibility of the Secretary to be, and provide the resources necessary to carry out those responsibilities, while recognizing the other financial responsibilities and mandates of the Bureau of Indian Affairs and the Department as a whole.

Land Fractionation -- The last Congress enacted the Indian Land Consolidation Act Amendments of 2000 in order to prevent further fractionation of trust allotments made to Indians and to consolidate fractional interests and ownership of those interests into usable parcels. As we begin to implement ILCA, we may find that additional incentives are needed to expedite the consolidation of these interests.

Conclusion

In conclusion:

- Indian trust asset management responsibility is a very high priority for the Department.

- The Department needs to establish an organizational structure that facilitates trust reform and trust asset management.

- The Department needs to establish an ongoing effective consultation mechanism with tribes.

- The Department must improve the computer support and security to ensure the integrity of Indian trust data.

- The Department is being challenged by litigation which requires significant changes in how the trust is managed.

- It appears that substantial resources will be required to meet the growing expectations of the tribes, the courts, and Congress.

- The tribes, Interior, and the Congress have to reconcile the competing principles associated with trust responsibility and self-determination.

This concludes the Department's testimony, Mr. Chairman. Thank you again for inviting us to testify today. We would be happy to answer any questions the Committee may have.

Appendix

The Senior Management Team

- J. Steven Griles, Deputy Secretary and Chief Operating Officer of the Department of Interior, who was confirmed on July 17, 2001. Prior to his appointment as Deputy Secretary, Mr. Griles had eighteen years of senior management experience at the Department of Interior and with the Commonwealth of Virginia. This service included directing national programs for the management of public lands, mineral resources and collection of royalties from federal mineral leases.

- Neal McCaleb took office as the Assistant Secretary for Indian Affairs on July 4, 2001. Mr. McCaleb is a member of the Chickasaw tribe of Oklahoma and the former chairman of the Chickasaw National Bank. He is also a civil engineer by profession who served as the Secretary of Transportation for the State of Oklahoma. Mr. McCaleb was also a member of the President's Commission on Indian Reservation Economies and has served eight years in the Oklahoma State Legislature.

- William Myers, the Solicitor of the Department of the Interior, took office on July 23, 2001. Mr. Myers is a former Assistant to the United States Attorney General, Deputy General Counsel at the Department of Energy, and has been in private practice with the law firm of Holland & Hart.

- James Cason, Associate Deputy Secretary, began his service with the Department on August 13, 2001 and serves as the principal manager of the Office of the Deputy Secretary. Mr. Cason has 11 years of federal experience managing complex public lands, agriculture, and mineral programs, including service as the Acting Assistant Secretary for Lands and Minerals Management. He also has seven years experience as the Vice President for Risk Management of an international technology company. He is currently overseeing a range of trust management projects, including analysis and development of the Department's security systems for our computer and data networks.

- Ross Swimmer, appointed as Director of the Office of Indian Trust Transition on November 26, 2001, is a former Assistant Secretary for Indian Affairs. Mr. Swimmer is also the former General Counsel and Principal Chief of the Cherokee Nation of Oklahoma. In addition, he has served as president of the First National Bank of Tahlequah, Oklahoma and Chairman of the First State Bank in Hulbert, Oklahoma. He was most recently the President and CEO of Cherokee Nation Industries, and of counsel to the law firm of Hall, Estill, Hartwick, Gable, Golden and Nelson, PC.

- Wayne Smith, appointed Deputy Assistant Secretary for Indian Affairs on October 23, 2001. Mr. Smith is the former Chief Counsel to the California Assembly Republican Caucus and served as Chief of Staff for the California Attorney General.

- Phil Hogen, the new Associate Solicitor for the Division of Indian Affairs at the Department, took office on October 25, 2001. Mr. Hogen is an enrolled member of the Oglala Sioux tribe of South Dakota and served as the former United States Attorney for South Dakota. He has also been the Director of the Office of American Indian Trust, and Vice Chairman of the National Indian Gaming Commission.

- Bert Edwards, the director of the Office of Historical Trust Accounting (OHTA), took office on July 10, 2001, when OHTA was created by Secretarial order. The OHTA is charged with planning, organizing and executing the historical accounting of Individual Indian Money (IIM) accounts. Mr. Edwards served three years as the Chief Financial Officer for the Department of State, where he oversaw financial, accounting and budgeting operations for a $4 billion budget, 25,000 worldwide employees and 260 embassies and consulates in 130 countries. Prior to that, Mr. Edwards had 24 years experience as an audit partner for Arthur Andersen LLP.

- Bill Roselius, who became IT Systems Consultant for Indian Affairs on September 11, 2001. Mr. Roselius has a 42-year career in information technology, working for the Oklahoma Department of Transportation, a number of hardware and software computer firms and major corporations including IBM and Chromalloy.

United States Senate
Committee on Indian Affairs

Oversight Hearing on the Management of Indian Trust Funds

Testimony of Tex G. Hall
President, National Congress of American Indians

February 26, 2002

Mr. Chairman, members of the Committee, Tribal leaders and members of the public: thank you for the opportunity to provide testimony to you today on issues that Indian Tribes and Nations believe are of critical importance throughout Indian country. My name is Tex Hall, and I am providing testimony on behalf of the National Congress of American Indians, the oldest and largest organization representing Indian Tribes and individual Indians, founded in 1944 and representing more than 200 Tribes. I am also the Chairman of the Mandan, Hidatsa and Arikara Nation (the Three Affiliated Tribes), a Nation with an area of approximately 1500 square miles located along the Missouri River in northwest North Dakota.

I am also one of two Co-Chairs of the Tribal Leaders Trust Reform Task Force recently created by Tribes in response to the proposal to create a Bureau of Indian Trust Assets Management (BITAM) put forward by the Department of Interior in their November 14, 2001 filing with the U.S. District Court for the District of Columbia in the case of ***Cobell v. Norton, et al***. My testimony today is intended to discuss what the Task Force has accomplished to date, what it hopes to accomplish, what it needs to accomplish its goals, and finally, I want to discuss the role, in general terms, that Congress may yet have to play in accomplishing true trust asset management reform for Indian tribes and individual Tribal members.

Summary

1. **Tribes throughout the United States are unanimously opposed to the creation of a separate Bureau of Indian Trust Assets Management (BITAM) within the Department of Interior and have strongly urged the Department to withdraw the proposal for creation of BITAM made to the court in the case of *Cobell v. Norton* now pending in U.S. District Court for the District of Columbia. Tribes believe that the proposal of DOI as filed with the Court goes far beyond what was necessary to comply with previous Court orders and that it contradicts the Indian Self Determination Act, including the provisions of that Act for self-governance, and that it violates Congressional intent in passing the American Indian Trust Fund Management Reform Act of 1994. Tribes further have requested that Congress take such steps as are necessary to prevent the BITAM from being created by, among other things, preventing the reprogramming of funds to the creation or planning for BITAM.**

2. **Tribes are in the process, through a 36 member Task Force selected by the Tribes, of developing alternative mechanisms for ensuring effective reform of trust asset management that will carry out the mandates of the American Indian Trust Fund**

Management Reform Act of 1994 without the need for a separate Bureau within the Department. Subcommittees on various issues have been appointed, alternative proposals are being discussed and analyzed, and common points of agreement and unifying principles among these alternatives are being identified as part of the process for developing an alternative to the BITAM proposal. The next full meeting of the Task Force is March 7-9, 2002.

3. **Tribes who are members of the Task Force remain concerned that DOI, based on recent public statements of the Secretary of Interior, does not yet appear ready to work constructively with Tribes and the Tribal Task Force to create an alternative mechanism for trust asset management reform that will meet the objectives of the Tribes, the Department of Interior, and the *Cobell* court. Without fully appreciating the amount of effort put forth by the Tribes and their staff or the degree of cooperation between the U.S. government and the Tribes needed to make trust reform efforts permanent and effective for Tribes and Tribal members, the Secretary has stated that the BITAM plan is superior to anything she has seen so far, and that she considers herself a "manager" in the trust reform effort, rather than the trustee working on our behalf. Tribes would welcome a full commitment by DOI to work with the Task Force to develop an alternative to BITAM without prejudging the efforts of the Task Force up to this point, a commitment that should include all necessary funding for the operation of the Task Force.**

4. **Tribes recognize that in order to ensure that necessary trust asset management reforms are carried out by the Department, legislation may need to be enacted by Congress that among other things, may provide for the establishment of trust standards and provide for a permanent oversight mechanism to ensure compliance by the Department with those standards.**

5. **Tribes urge the Congress to appropriate adequate funds to address the issues of trust management and accounting in Indian Country. We believe that funding for tribal land repurchase programs should be seriously considered by Congress as a cost effective solution that will decrease the problems and costs related to fractionation of land title.**

6. **Tribes remain highly concerned about the slow progress by the Department in installing necessary security systems on the networked computers the DOI uses for accounting for the assets of Tribal members contained in Individual Indian Money (IIM) accounts. We understand that some checks have begun to be processed, but a great deal of work remains to be done while individual tribal members are suffering because income from their assets upon which they depend for everyday needs has not been paid to them since early December.**

Background

This Nation's Indian Tribes have a special and unique relationship with the United States. The relationship is one rooted in the history and rooted in the sovereign nature of the federally

recognized Indian Tribes, which all possess inherent sovereignty over their own affairs and are recognized as separate, sovereign governments by the United States through treaties and various other forms of Federal recognition. How this relationship is to be recognized and handled has been formally recognized by the President of the United States in Executive Order 13175, outlining how the executive departments of the United States government should interact with the Tribes on the basis of a "government-to-government" relationship.

Because of the great sacrifice that the Indian tribes have made to the United States of much of their homelands, by conquest, taking, or by ceding those lands through treaties and otherwise to the United States, the United States has become a trustee of much of the lands and assets that have been set aside for the tribes. See, e.g., Memorandum Opinion, ***Cobell v. Babbitt***, Civil No. 96-1285, District Court for the District of Columbia, December 21, 1999 and the affirmance of that opinion by the Court of Appeals for the District of Columbia, February 23, 2000 for a more complete outline of the origin of the trust responsibility of the United States.

The trust responsibility of the United States to the Indian tribes within its borders is carried out on the basis of the statutory mandates of Congress, often guided by opinions of the courts of the United States. In 1994, Congress explicitly recognized these fundamental trust obligations, and also recognized the government's failure to adequately carry out its trust responsibility to Indian tribes by passage of the "American Indian Trust Fund Management Reform Act of 1994", P.L. 103-412 (the "Act"). That Act stated in Title I, Section 101 that the Department of Interior needed to act to carry out its responsibilities for discharging its trust responsibilities in an affirmative fashion, and described the functions the Secretary must carry out as follows:

"(d) The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

(1) Providing adequate systems for accounting for and reporting trust fund balances.
(2) Providing adequate controls over receipts and disbursements.
(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.
(4) Determining accurate cash balances.
(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.
(6) Establishing consistent, written policies and procedures
for trust fund management and accounting.
(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.
(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands."

The Act further created an Office of Special Trustee (OST) whose job it was to develop a plan for the establishment or reform of all necessary systems for Indian trust fund management, and to ensure that these reforms were in fact carried out by the Secretary of the Department of Interior (DOI, or the "Department") who in general has been given by Congress the responsibility to manage assets held in trust by the United States for the benefit of Indian tribes and individuals. The Congress, since 1994, has held many hearings regarding the progress made by the OST and by DOI, and has appropriated considerable sums to ensure that the necessary reforms have been carried out.

Nevertheless, at least in the case of individual Indians, efforts were seen to be inadequate and against the backdrop of the American Indian Trust Fund Management Reform Act of 1994, litigation was filed in 1996 in the U.S. District Court for the District of Columbia by a group of individuals representing the class of all those persons who have rights to Individual Indian Money (IIM) accounts. Their complaint against the Department of Interior sought, among other things, an accounting of their assets and affirmative relief against the Department to ensure the Department's compliance with the Act. This case is known now as ***Cobell v. Norton***, Civil No. 96-1285, still pending in the U.S. District Court for the District of Columbia.

The Court in ***Cobell*** has issued a series of rulings and orders, and has appointed a special Court Monitor who is required to report back to the court the progress the Department has made in carrying out its trust reform responsibilities, particularly in relation to the IIM accounts which is the focus of the ***Cobell*** plaintiffs' complaint. In recent months, the Court Monitor has issued several reports highly critical of the failure of the Department to complete the required reform efforts and has cited the Department for issuing to the Court false and misleading reports about its progress in making necessary reforms to the trust management systems.

Because of these reports, the plaintiffs in ***Cobell*** have argued to the court that the performance of the Department in carrying out the orders of the Court, which incorporate the requirements of the American Indian Trust Fund Reform Act, and which have identified specific breaches of the trust responsibility, is grossly inadequate and that a receiver should be appointed to oversee trust reform efforts concerning the IIM accounts that are the subject of the litigation. The plaintiffs have also sought to have the Secretary of Interior and several other officials, and their attorneys, held in contempt of court for making false statements to the court about the progress of trust management reform, among other things.

On November 14, 2001, attorneys from the Department of Justice (DOJ) filed on behalf of DOI a response to the Order of the District Court for the District of Columbia in the ***Cobell*** case to show cause why the Secretary of Interior and others should not be held in contempt of court for failing to comply with the Court's previous Orders. The Court had particularly wanted to know why the Secretary had failed to comply with the Court's order of December 21, 1999 which required, among other things, that the Department carry out its High Level Implementation Plan (HLIP) as the Department had previously promised to the Court it would do in its filings with the Court, and which also identified four specific breaches of the trust responsibility that should be corrected by DOI with the assistance of the Office of Special Trustee and the Department of the Treasury, which handles distribution of earnings from trust assets to the individual Tribal member beneficiaries.

The response outlined a planned division of the functions of the Bureau of Indian Affairs (BIA), with a new Bureau to be created called "Bureau of Indian Trust Assets Management" (BITAM) to be headed by a new, as yet unnamed, Assistant Secretary of the Interior. The new Bureau would be in charge of the all trust asset management functions of DOI now handled by the BIA and would eventually handle those trust functions of the Office of Trust Funds Management (OTFM), as well, including management of Tribal trust assets, despite the fact that Federally recognized Indian tribes are not parties to the ***Cobell*** litigation and the fact that the Court does

not have the subject of Tribal trust assets before it. Exactly what constitutes "trust management functions" was not defined in the response presented to the Court and to the Tribes.

The DOI response as filed on November 14, 2001 with the ***Cobell*** court has vast implications for the provision of all trust services to Tribes and their members. ***Yet, this response was filed without any notice to the affected Indian tribes, as required by EO 13175.*** Instead, DOI indicated shortly after filing its response with the ***Cobell*** court that it was beginning to conduct "consultations" with the affected Indian tribes to get their reaction to the reorganization.

In the DOJ filing, the reorganization was not presented as a proposal. It was presented as something that the Department would be implementing as soon as possible. DOI indicated that it already had appointed someone to head a "Trust Transition Office", namely Ross Swimmer, a former Assistant Secretary for Indian Affairs who served in the Reagan Administration. In other materials filed with Congress, DOI indicated that it would have to reprogram as much as $200 million for FY 2002 in order to effectuate the transfer of the trust asset management functions to the new BITAM. It did not indicate that it needed any additional funds in order to carry out the reorganization.

As the reason for its reorganization effort and the creation of the BITAM, the noticed filed by with the court by DOI cited a recent report from a consultant firm, EDS, that DOI had hired to analyze its progress on implementing the HLIP. However, nothing in the EDS report had indicated that forming a new BITAM was necessary, and nothing in the Court's previous orders had indicated that forming a new agency was necessary.

Position of NCAI Concerning the Reorganization

At its Annual Meeting on November 25-30, 2001, in Spokane, Washington, NCAI passed unanimously the attached Resolution, No. SPO-01-006, which opposed the reorganization plan proposed by the Secretary on several fundamental grounds: 1) That the Secretary of Interior has made the reorganization plan without adequate consultation with the affected Indian tribes, in violation of EO 13175; and 2) That the reorganization raised many questions that troubled Tribal leaders, including whether it was authorized by law; whether it was in compliance with Court orders, whether the proposal would do anything to help manage trust assets better, the effect it would have on tribes who contract or compact for trust functions, and whether it would end up reducing the services provided by the BIA to Tribes.

Beginning on December 13, 2001, in Albuquerque, New Mexico, the Secretary of Interior began a series of meetings with Tribal leaders from throughout the United States. Her meetings, called "consultations" in the Notice published in the Federal Register were to be conducted according to a published schedule and were to allow Tribal leaders to comment on the reorganization plan, but these meetings were only to be held in selected regions of the United States, and did not include meetings in all of the BIA Regions affected by the reorganization. To date, there have been meetings, which the Assistant Secretary for Indian Affairs, Neal McCaleb, has publicly called "scoping" meetings, a term Tribal leaders believe is more consistent with EO 13175, in Albuquerque, NM(12-13-01); Oklahoma City, OK (1-3-02);Rapid City, SD (1-10-02); San

Diego, CA (1-17-02); Anchorage, AK, (1-23-02), Washington, D.C. (2-1-02), and Portland, OR, (2-14-02).

At every meeting to date, Tribal leaders have been unanimous in their opposition to the BITAM and the Department's plan as presented to the Court. Tribal leaders protested the lack of consultation, the effect the proposal would have on provision of trust services of the BIA, the illegality of the proposal, the failure of the plan to request more funds for its implementation, the failure of the Department to provide for security in its computer programs and its slow response in fixing the problem, the possible affect the changes would have on tribes that compacted or contracted for trust services, the failure of the plan to provide for historical accounting of trust assets as required by the American Indian Trust Fund Management Reform Act, the weakening of the BIA as a result of taking trust asset management from it, the waste of time represented by such a far-reaching reorganization without establishing substantive mechanisms for reform of trust asset management, the failure of the plan to address real conflicts of interest among agencies providing some of the trust asset management and accounting functions, and the fact that the plan went far beyond what is required of the Department by the ***Cobell*** litigation, among other things.

In Albuquerque, the Tribal leaders developed a position paper outlining the basic principles that should govern any trust asset management reform effort. These principles have guided tribes as they have testified at the various "scoping" meetings that have been held so far. The principles include: 1) opposition to BITAM for the reasons stated above; 2) requiring the Department to engage in true consultation on a government-to-government basis pursuant to EO 13175; 3) ensuring that there are adequate resources to carry out trust reform; 4) establishing a mechanism for determining historical account balances; 5) doing no harm to established self-determination and self-governance programs for management of trust assets; 6) providing Tribes the flexibility to assist the Department to manage trust resources consistent and develop different systems consistent with each Tribe's unique resources and circumstances in such areas as grazing, timber, oil and gas, commercial real estate, agriculture, fisheries and hunting and fishing; 7) recognition of the need for trust assets to be managed in a way that protects and allows the continuance of each tribe's unique culture on a long term basis, consistent with Tribal control of the use and development of their lands, including recognizing a strong role for enforcement or leases by the Department.

Development of a Tribal Task Force on Trust Reform

During the initial "scoping" meeting in Albuquerque on December 13, 2001, and continuing at each of the scoping meetings thereafter, Tribal leaders have developed a Tribal Leader's Trust Asset Management Reform Task Force, composed of 2 representatives and one alternate from each of the 12 BIA Regions in the United States. Each of the Regions have now submitted names to the Task Force.

At the invitation of the Department of Interior, the Task Force held its first formal meeting over the weekend of February 1-4, 2002 at DOI's National Fish and Wildlife Conservation Training Center in Shepherdstown, West Virginia. The Task Force has elected from its members two co-chairs, including myself, Tex G. Hall, and Susan Masten, Chairperson of the Yurok Tribe in California. The Task Force also has developed a draft protocol of its operations

The Task Force is committed to work in a deliberative manner, taking such time as is necessary to create an alternative approach to trust reform to the BITAM developed by DOI and has requested that the Department accept the plan developed by the Task Force instead of the BITAM. The Secretary of Interior stated at the meeting in Shepherdstown that the Department is interested in considering the proposal developed by the Task Force.

However, in her testimony to the House Resources Committee on February 6, 2002, the Secretary stated that she was convinced that the DOI BITAM proposal was superior to any of the Tribal proposals she had seen at Shepherdstown. Again in testimony to the U.S. District Court on February 13, 2002, and in a colloquy with the Court, the Secretary repeated her claim that the BITAM proposal was the only one that met the objectives of the High Level Implementation Plan and that satisfied the suggestions of the EDS report, and further went on to say that the Tribes are for whatever reason supporting reform of a dysfunctional BIA, and that they do not understand that the trust asset management must be separated from other functions of the BIA.

Unfortunately, the Secretary does not appear to either have taken the time to understand the Tribal proposals, or simply does not understand the fundamental changes needed for trust asset management reform to take place, or perhaps she is just getting bad advice. Tribes fully understand that for true trust reform to take place, the process of accounting for income from trust assets must be separated from trust asset management activities, that there must be a mechanism to ensure that proper standards of trust asset management are being applied, consistent with the cultural values and other needs of the Tribes and their members, and that appropriate safeguards exist to account for all trust income. Most of the Tribal proposals recognize these fundamental principles and provide for such the separation of asset management from the regulation and oversight of trust income accounting, yet, curiously, the BITAM proposal leaves out a mechanism for oversight of trust income accounting or development of overall standards for trust asset management.

Already the Task Force has under consideration nine separate proposals for trust asset management reform as outlined by various Indian Tribes and organizations. Three of these proposals will be discussed later in this hearing. As more proposals are received, further refinements will be made. Among the common themes of these proposals are: 1) keeping all trust management functions within the Bureau of Indian Affairs; 2) creating an independent commission or other regulatory mechanism to develop trust asset management standards, ensure compliance with those standards, and ensure compliance with proper trust income accounting procedures; 3) ensuring complete and full consultation on a government-to-government basis on issues affecting Tribes and their members; and 4) recognition and protection of Tribal sovereignty and the ability of Tribes to manage their affairs and their resources.

The Task Force has now appointed a subcommittee to review the various proposals. They met for the first time on Sunday, February 24, 2002. I am confident that the Task Force will develop a final proposal that meets the trust management needs of all Tribes, while at the same time satisfying the requirements of the ***Cobell*** court and other court decisions regarding the responsibility of the United States for trust asset management for Indian tribes and their members; the American Indian Trust Fund Management Reform Act of 1994, and the various

trust asset management obligations imposed on the United States by Treaties and statutes as illuminated by the common law principles of trust management.

Task Force members are aware of the need to communicate effectively their work product to all Federally recognized Indian Tribes, and to have their meetings open to all Tribes and their advisors so that the maximum input and ideas from Tribes may be received. They also certainly expect that Task Force meetings will be held in the various Regions of the United States to make their deliberations as accessible as possible. They expect that their work will be long and difficult, and that all Tribes will have to work hard to build consensus among them for a final proposal to be acceptable to the Department of Interior, to the Courts, to Congress, and finally, and most importantly, to all of their members.

The Task Force members are well aware of the great responsibility thrust upon them. They have spoken candidly to Secretary Norton at the meeting in Shepherdstown, West Virginia this past weekend about their desire to see a Department of Interior that consults on a government-to-government basis, that takes their concerns seriously, that fully funds trust asset management reform, that will implement meaningful trust reform, withdraw the BITAM plan, that will honor the Treaties and that will respect their sovereignty.

The Task Force also expects and needs financial assistance from the Department of Interior to carry out its duties. So far, although promised, the kind of technical and other assistance needed has not materialized in a comprehensive way. This only serves to discourage Task Force members, many of whom have to make considerable personal sacrifice to attend meetings and participate in conference calls or subcommittee meetings. We have estimated that the cost of the Task Force and hiring the necessary technical expertise to complete its task will be less than $500,000, a modest amount compared with the more than $613 million spent on trust reform from 1994 to date.

Tribes understand and appreciate fully the need to work with the Department of Interior so that meaningful trust reform can take place that satisfies everyone's needs. But in order to do that, the Department must be committed to work with Tribes in a respectful way, on a government-to-government basis. The agenda for such a relationship cannot be only what the Department would like, it must conform to the needs and wishes of the Tribes and their members for which it is a trustee.

Congressional Assistance

There are a number of steps Congress can take to assist the Department of Interior and the various Indian Tribes in this Nation achieve real trust asset management reform.

1. Congress should ensure that no funds are reprogrammed during FY 2002 for the BITAM proposal and that for FY 2003, all funds aimed at trust asset management reform remain within the Bureau of Indian Affairs and the Office of the Special Trustee.

This is critical because DOI has already notified Congress of it intent to reprogram funds to implement the BITAM plan. Tribes are unanimously opposed to the BITAM proposal and know it will not work because it so radically changes the way services are provided to Tribes. There is

no reason to spend money on a planned reorganization that does not serve the interests of the affected Indian Tribes.

Congress should also make it clear to the DOI that it would prefer that their BITAM proposal be withdrawn and that a new alternative acceptable to Tribes be developed. DOI has committed to making the Task Force process work, but that must include an adequate commitment to ensure the opportunity for participation in the process by all Tribes, through regular communication, a sufficient number of meetings and sufficient resources devoted to this effort for it to meet all of the Task Force objectives.

2. Congress should be prepared to assist Tribes to develop meaningful legislation that will likely, among other things, establish enforceable trust asset management standards that allow the needs of all Tribes to be met consistent with each Tribe's unique resources; that will establish a mechanism for oversight of compliance with the standards; and that will provide a structure for trust asset management that balances the needs of Tribes to be involved with trust asset management with the overall trust asset management responsibilities of the United States.

Tribes, including the Tribes represented on the Tribal Leaders Trust Reform Task Force, are working hard to develop a proposal, or perhaps proposals, that will provide a superior alternative to the BITAM plan already advanced by the Department. Exactly what is to be contained in that proposal is not yet clear, but almost certainly the proposal will have a legislative component to it to ensure that the Department will enact meaningful trust asset management reform. The elements of such legislation may include the establishment of trust asset management standards and an independent commission or other mechanism to ensure compliance with those standards. This legislation must also respect the individual and unique needs of each Tribe, consistent with the ability of Tribes and their members to manage their own assets and affairs through such things as self-governance compacts and self-determination contracts. Finally, the legislation must recognize the need for meaningful government-to-government consultation as the legislation is implemented by the Department.

The Computer Shut-Down Problem

Just after DOI announced its BITAM plan by filing it with the ***Cobell*** court on November 14, 2001, the Court Monitor in the ***Cobell*** case issued a scathing report concerning computer systems security issues. The report indicated that DOI's computer systems could be breached, or "hacked", and that records of trust asset management, including the financial records of IIM account holders, could be altered by "hackers" relatively easily.

The Court issued an order that required the Department to fix the security problem on its computers before using the system again. The Court subsequently allowed the Department, on application to the Court Monitor, to use its computer systems for the purpose of issuing checks to IIM account holders representing the proceeds of their trust assets as managed by the BIA, but that process has only begun to get started. For example, I have still not received the checks due me from leases of my trust lands.

This situation is totally unacceptable to the Tribes and their members. While we are aware and appreciate that DOI officials are working very hard to fix this problem which was many years in the making, we also know that prior to the special effort of the Court Monitor to "hack" the system, checks had been sent out using the computer accounting system for IIM accounts for a number of years without significant incident. The processing of trust income checks must not be delayed again. We urge Congress to devote such resources as are necessary to make sure the problem is completely fixed and to ensure that the IIM account holders receive the funds they are owed, including interest, as soon as humanly possible. After 90 days of inaction by the Department, I believe that those who did not receive their income from their trust property are owed additional compensation for the delay that in some cases has cost them their credit rating, caused considerable anguish and serious personal and financial hardship.

Summary

NCAI fully supports the implementation of meaningful trust asset management reform. In rejecting the BITAM approach NCAI and its members Tribes, and indeed, Tribes nationally, are not rejecting the effort needed to make trust reform to happen. NCAI's leaders look forward to working with the Department of Interior to develop a true alternative to the BITAM proposal that meets the needs of all Tribes, is acceptable to all Tribes, and which will truly bring about the many needed changes to the Department of Interior for trust asset management reform.

We also pledge to Congress to ensure that in every way possible for us, Tribes and their leaders will be made aware of the trust asset management reform process as it goes forward. The only way a proposal for trust reform can be implemented is for it to receive broad support from Indian country.

We also urge the Congress to assist us as we develop our alternative proposal the BITAM approach, especially as we more fully develop any legislation that will be needed to fully implement the proposal. We believe that this year very well could be the year that true trust reform is put into place and this issue can begin to be brought to closure. Cooperation of the Department with the Tribes is key to this effort. We cannot do it alone; we need a Department that is respectful of our needs and our agenda. Masehgedataz (Thank you).

Hoopa Valley Tribal Council

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HOOPA VALLEY TRIBE
Regular meetings on 1st & 3rd Thursdays of each Month

TESTIMONY
of
Clifford Lyle Marshall, Chairman
Submitted on behalf of
The Hoopa Valley Tribe of California

Good Morning, Mr. Chairman and members of the Committee. I am Clifford Lyle Marshall, Chairman of the Hoopa Valley Tribe of California. I appreciate the opportunity to testify in opposition to Secretary Norton's BITAM proposal and to request that the Committee persuade Secretary Norton to seriously consider alternatives to BITAM, some of which you will hear today.

The Hoopa Valley Tribe of California implores the Senate Committee on Indian Affairs and Congress to reject the Secretary of Interior's proposal to create a new federal agency within the Department to be known as the Bureau of Indian Trust Asset Management, or BITAM, and to stop the reprogramming of appropriated federal funds to this proposed interdepartmental restructuring. The Secretary's proposed restructuring, if implemented, will undermine and undo twenty seven years of progressive Federal Indian policy, and thwart the intent of Congress by circumventing the laws of Congress pertaining to Indian self determination and self governance. The Hoopa Valley Tribe also requests that Congress act to stop the Secretary's administrative implementation of this plan without Congressional review or approval, as required in the American Indian Trust Fund Management Reform Act of 1994, Pub.L. 103-412.

The Secretary of Interior's assertion that dividing the Bureau of Indian Affairs into two Indian agencies is necessary because of the *Cobell* case is not supported by the orders of the *Cobell* case. Specifically, the Secretary's proposal does not address the four breaches of trust identified in the *Cobell* litigation. The Court identified four (4) breaches of trust. These four breaches are:

1. The Secretary has no written plan to gather missing data;
2. The Secretary has no written plan for the retention of Individual Indian Money (IIM) trust documents;
3. The Secretary has no written architectural plan; and
4. The Secretary has no plan addressing the staffing of trust functions.

Supposedly to address these breaches of trust, the Secretary presented to the tribes and the Court a two page press release with an attached flow chart outlining the creation of BITAM. The purpose of BITAM, as stated by the Assistant Secretary of Indian Affairs and the Special Trustee at the Self Governance Conference at Ocean Shores, Washington, on November 14, 2001, *is to re-establish trust control over all Indian trust assets and to draw a bright line between trust and non-trust functions.* The press release proposal coupled with the stated purpose of BITAM does not address in any measurable

way the four breaches found in the *Cobell* litigation, or explain why these breaches cannot be addressed by the current BIA structure. Moreover, this proposed plan far exceeds the intent of Congress who established the Office of Special Trustee to address the breaches in *Cobell*.

Under the American Indian Trust Fund Management Reform Act of 1994[1], the Office of Special Trustee was established to prepare, *after consultation with Indian Tribes and appropriate Indian organizations*, and submit a "*comprehensive strategic plan* for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians."[2] To date the Office of Special Trustee has not presented a comprehensive strategic plan to the House or Senate Committees for review and has instead announced at the House Committee hearing on February 6, 2002 that the Special Trustee and the Secretary were working together to develop a plan for trust reform which they intend to implement administratively through reprogramming. The Act, however, requires the presentation of such a plan to the House and Senate Committees prior to implementation. To date neither the Office of Special Trustee nor the Secretary has submitted a "comprehensive strategic plan" after consultation with the Indian tribes or for review by Congress.

In spite of the fact that there has never been a presentation of any comprehensive written plan, the Secretary called for formal consultations on a plan in the Federal Register and has held to date eight (8) formal consultations[3] on the Secretary's proposal. The tribal leadership has had to glean from the two page concept paper and accompanying graph what BITAM is supposed to be. After doing so, the tribal leadership from across the country, in every formal consultation, has expressed near unanimous, if not total, opposition to the Secretary's proposal. But in spite of this, the Secretary refuses to withdraw it and is committed to it's implementation. As no written plan was actually presented for formal consultation, Congress should not accept the notion the tribes have actually formally consulted on a plan for trust reform.

The BITAM proposal has many insidious aspects to it that have not been expressed to the tribal nations or to the Congress by the Secretary or the Office of Special Trustee. The question must be asked, if it does not address the four breaches of trust found in the *Cobell* case, what is it's purpose? What has not been represented is that by moving trust functions out of the BIA to another agency, legal obligations and trust duties imposed by treaty and statute on programs under the BIA will be eliminated.

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[1] The American Indian Trust Fund Management Reform Act of 1994, P.L. 103-412, codified as amended, 25 U.S.C. § 4001 et seq. (1994).

[2] P.L. 103-412, § 303(a), emphasis added.

[3] Deputy Secretary Steven Griles referred to the presentation of the Department's proposal at the National Convention of the National Congress of American Indians (NCAI) as an informal consultation. Following the presentation of the proposal one hundred ninety three (193) tribal delegations voted unanimously to reject the proposal and to request that the Secretary of Interior withdraw it.

federal laws, however, recognize tribes as having the same jurisdictional authority as states in regard to the regulation of the environment, including the right to adopt standards higher than those set by federal law. Loss of federal funding for resource management will substantially weaken tribal regulation of reservation lands and resources. This shift in policy, to reassume management of trust resources offends the very notions of sovereignty and self determination.

Moreover, a question not being addressed is what will happen to what remains of the BIA? How will the BIA be restructured and to what extent will the BIA continue to provide for those trust obligations to maintenance of Indian education programs Indian Health care programs, Indian Housing programs, Indian Child Welfare and other social services established by statute? Distressing to tribes is the Department of Interior's assertion that these programs remaining within the BIA are non-trust functions. The trust relationship, however, encompasses all BIA programs and all programs established by Congress to further the strengthening of tribal government are trust obligations.

By separating integral functions of the BIA, how will trust functions such as housing, roads maintenance, and community infrastructure development occur when trust functions necessary for implementation of such programs are moved to a new agency. For example, to build a road or a house (or to get financing to build a house) there must be an appraisal of the property, a title search, and the establishment of easements and right of ways. How is this to be accomplished when housing, credit, and roads are functions left within the BIA and realty and appraisals are moved to BITAM? Rather than streamlining a system, the BITAM proposal will require that tribes must deal with two separate bureaucracies to accomplish what they are currently doing through one.

This raises the issue of cost. How much will it cost to establish a new federal agency with a separate administration? The Secretary's original proposal called for the reprogramming of two hundred million dollars ($200,000,000.) from BIA funding. Obviously, the cost of a new federal agency will far exceed this amount. However, the tribes must assume that this amount of funding will come from the funds appropriated by Congress for Indian programs within the BIA. The proposal, if implemented will cripple an already under funded agency by siphoning away much needed funding for reservation communities and will not provide adequate funding to address the four breaches in *Cobell*.[8] Moreover, the cost of reassuming trust management of natural resources from tribes that have assumed resource management will be substantial and failure to adequately fund such management has the potential of constituting breach of trust.

Most distressing to the Hoopa Valley Tribe and other Self Governance Tribes is the elimination of direct negotiation of annual funding agreements. Currently, these negotiations are conducted with the Office of Self Governance whose office is directly under the Secretary of the Interior. Under the BITAM proposal negotiation of BIA Self Governance annual funding agreements (AFA's) within the same office as 93-638 contracts and under new levels of bureaucracy, a situation that the Self Governance

[8] Eloise Cobell testified before the House Committee that it would cost approximately ten billion dollars to reconcile the IIM accounts.

All programs moved to BITAM will no longer be required to give *Indian preference* in hiring as required by the BIA under the Indian Reorganization Act.[4] Indian preference in hiring will be eliminated from all programs deemed to be trust functions under the Secretary's proposal and moved to BITAM. Such a shift in policy will have a devastating impact to reservation economies and employment of Indian people within reservation based programs. This attempt to eliminate Indian preference is mirrored in the Office of Special Trustee's proposal, under the assertion that trust asset management must be conducted by qualified persons. Indian preference, however, rests first on the requirement that the Secretary establish qualifications that Indians must meet to before being given preference.[5] The assumption that the Secretary cannot find Indians with sufficient qualification to manage reservation resources or trust assets is an affront to the many tribes who currently manage their tribal lands and resources with qualified Indians under Self Determination Act contracts and Self Governance compacts[6].

The Secretary's proposal calls for the transfer of programs currently contractible under the Indian Self Determination Act to BITAM. Programs to be transferred include all programs involving trust property including realty, appraisals[7], and resource management such as forestry and fire protection, and mineral and oil and gas management. It is unclear whether fisheries related programs and water resources programs will be included in the transfer, but as they are considered trust assets it is assumed that they must be included in the transfer of all trust functions to BITAM. By transferring these programs out of the BIA, the statutory requirement that the BIA contract these programs to tribes under the Indian Self Determination Act, or compact under the Tribal Self Governance program are essentially eliminated. In general, all laws that establish legal requirements imposed upon BIA programs will not apply to programs moved to BITAM. Should this proposal be implemented, it is presumable that tribes will lose program funding, employment, and indirect cost monies essential to the stability of tribal governments.

More importantly, the tribes will lose their authority to manage their own lands and resources, to set their own standards for the protection of those lands as it pertains to their quality of life, and assert their respective jurisdictions over their territories. The Secretary's proposal far exceeds Congress intent of the American Indian Trust Fund Management Reform Act. Management of trust accounts is not the same as, nor does it require management of trust resources. Here, the Secretary proposal asserts trust responsibility to the detriment of tribal jurisdiction. Tribes must comply with all federal laws pertaining to management of federal lands including, but not limited to the Environmental protection Act, the Clean Water Act, and the Clean Air Act. These

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[4] See, Indian Reorganization Act, 25 U.S.C. § 472 (1934) (qualified Indians have preference to appointment to positions within the Indian Office, i.e., BIA).

[5] Such preference has been held constitutional because it is based on the political status of the individual as a member of a tribe that has a unique political relationship with the United States, and is not based on race. See, *Morton v. Mancari* 417 U.S. 535 (1974).

[6] See 25 U.S.C. § 458aa, et seq (Tribal Self Governance Program).

[7] Notices have already been issued to move employees who conduct property appraisals under the Office of Special Trustee.

Program was intended to eliminate. Moreover, this is the only situation, to my knowledge in which one agency within the Department of the Interior will have the authority to contract programs within another agency. Under the BITAM proposal, contracting of BIA programs will be negotiated and entered into through BITAM.

Like other tribes around the Nation, Hoopa has undertaken our Self-Governance responsibilities very seriously. Today, under the authority of our Self-Governance agreement, the Tribe has leveraged our limited BIA funds for trust programs into a three-to-one benefit that helps both us and the United States to manage our trust assets. Clearly, the BIA's funding levels are inadequate to ensure that proper management of trust resources is being carried out. Under Self-Governance, we have sought out new tribal and non-tribal funding sources that have resulted in a three fold increase to BIA trust programs in both funding levels as well as allowing us to acquire a higher level of technical expertise for our programs. Obviously, this increased financial and technical support at the reservation level can only result in providing better benefits and services to our Tribe, individual Indians on allotted lands, as well as helping the United States to fulfill its trust obligations to us. Just as obvious, since none of our funds will be available for implementation of BITAM, the Secretary's proposal will result in less services and benefits to Indian Country, not more. The benefits of Self-Governance and Self-Determination, which can be documented over and over again across Indian Country, simply cannot be accomplished without the flexibility and local tribal control that has been provided under these Acts. As part of my testimony today, I have submitted an alternative proposal to BITAM that we believe will address trust reform matters in a more substantive and appropriate manner.

In conclusion, creating a new federal agency will not resolve the four breaches found in *Cobell,* and will not benefit the Indian nations. Congress should review the actions taken by the Office of Special Trustee in the absence of a comprehensive strategic plan as required under the American Indian Trust Fund Management Reform Act. The Hoopa Valley Tribe requests that the Senate Committee stop the implementation of the BITAM proposal and the reprogramming of BIA trust functions and compel the Department of the Interior to expend the much needed funding within the BIA for the purposes Congress intended. Finally, the Hoopa Valley Tribe asks that Congress address the matter of mismanagement of individual Indian money accounts and offer settlement negotiations so that this matter can be finally resolved and not languish for years within a legal proceeding.

Again, I appreciate the opportunity to offer my testimony today on this important matter. I will be glad to address any questions that you may have.

TRIBAL TRUST REFORM PROPOSAL
Submitted by the Hoopa Valley Tribe

BACKGROUND.

The origin of what is now referred to as "federal trust responsibility" to Indian tribes began when the United States assumed the position of Great Britain and the original colonies, and the Federal government asserted its exclusive authority under the Constitution to negotiate and enter into treaties and agreements with sovereign Indian nations. Those treaties and agreements accomplished a number of key goals, including: 1) allowing for the transfer of billions of dollars worth of assets, rights and territories to the United States, 2) guaranteeing a number of programs and services to tribes in exchange for lands and rights ceded, and 3) providing for the preservation of inherent tribal self-governing powers. The Federal trust responsibilities to individual Indians began with the enactment of the General Allotment (Dawes) Act in 1887 which provided Indians with individual trust assets (land allotment) and income from those assets. In the past century, many laws and court cases further defined trust responsibilities, including clarifying management standards and agreeing to pay liabilities when those standards are breached. Moreover, laws and court precedent have clarified tribal inherent sovereignty, and exclusive tribal jurisdictional authority over their respective territories.

Though the notion of sovereignty and trust responsibility are now often characterized as inherently in conflict by those who for whatever reason choose to ignore the historical development of the relationship, the notion of trust responsibility has been the justification for the United States authority over Indian people and Indian lands for the past two hundred years. It is this legal and political framework that recognizes the rights of tribes and the trust duties of the United States that mandates that tribes and the Federal Government conduct their affairs in a government-to-government like fashion. Many federal officials today, however, do not seem to understand or possibly appreciate the fact that treaties and agreements are like two party contracts, between tribes and the Federal Government, with enforceable terms. And today, after more than two centuries, the Federal Government still struggles to define what these responsibilities really consist of.

When Congress passes laws that authorize the sale, use or disposition of resources being held by the United States for the benefit of a tribe or individual Indians, they also impose management responsibilities on the agency that carries out that function. For example, when the BIA forestry branch sells tribal or allotment timber, they must incorporate land management practices that will ensure that the tribe's or Indian's lands remain productive. This requirement is what creates the federal forest management standards that apply to tribal and Indian timberlands. Similar standards have been developed for land leasing, grazing permits, water uses, roads, etc. Likewise, when a Federal agency is charged by law with the responsibility to "manage" tribal and Indian money accounts derived from the sale or use of resources (or from breach of trust lawsuits and the like), then the Federal Government is responsible for carrying out the prudent management requirements of those accounts. When applying standards to "trust responsibility", the courts have defined the United States' responsibilities as being similar to "how a prudent person would manage their own resources". Basically, this means that if the BIA or another agency, or their employees would not in their course of doing business destroy, diminish the value of or otherwise improperly use their

own assets, then neither should they do so with tribal or individual Indian resources and funds that they are charged with overseeing.

Interior Secretary Norton recently announced a proposal to reform the manner in which the Department of the Interior manages trust assets that are being held for the benefit of individual Indians and Indian tribes. The Secretary's proposal reportedly calls for the establishment of a new Assistant Secretary for Trust Assets Management and the transfer of all activities presently being managed by the BIA to this new bureau. Obviously, undertaking the process of developing a new bureau within any Federal agency will be expensive, time consuming, difficult to staff. Further, this "carving out" of trust related functions from the existing BIA offices may prove to be a quite complex undertaking that in the end will cause more harm than good. Other less drastic and dramatic options should be considered that will accomplish the same level, if not more, of the intended objectives outlined for the trust reorganization proposal. The Hoopa Valley Tribe believes that true trust reform of management of trust resources can only be accomplished through negotiated agreements between the tribes themselves and the Bureau of Indian Affairs acting as trustee. The Hoopa Valley Tribe recommends in the first instance that these agreements first be negotiated at the regional level where the tribes and assets are and where the asset management decisions are made annually. The Hoopa Valley Tribe of California offers this proposal for trust management reform.

BITAM - WHAT IS IT? - SCENARIOS A & B - APPENDIX 1.

In November, 2001, Secretary Norton proposed a plan to create a new Bureau of Indian Trust Asset Management (BITAM). The proposal is reported to be an effort to transfer all trust related functions presently being carried out by the BIA to the new BITAM agency. Since the announcement of the BITAM proposal, Tribal leaders have also been asked to comment on the plan, which is yet to be defined or explained, drafted or disseminated in any form, or with any level of detail. Without anything to analyze, input on the BITAM proposal seems fruitless. However, in an effort to provide constructive analysis of the proposed concept, Appendix 1 attached hereto contains Scenarios A and B of what BITAM could be. Each scenario also contains an impact analysis of the concepts outlined therein. These scenarios also provide a baseline from which other alternatives can be analyzed.

INDIAN TRUST VS. COMMON TRUST.

Since development of the Trust Management Improvement Project, an issue at the heart of the trust reform effort has been how to establish a process that integrates both the common law trust duties of financial management with the unique and fundamental principles Indian trust law. Within the arena of management of Indian affairs today, both common law and Indian trust law principles are critical and necessary parts of successful implementation of any trust reform plan. Under common law standards, courts have ruled that the United States must manage trust assets and financial accounts in a prudent manner as if an official were to be managing their own assets and accounts. This is an essential and fundamental part of the United States' management of tribal and individual financial accounts. Obviously, the United States should be held liable if it mismanages tribal and individual Indian trust accounts in a manner that is not consistent with general banking industry standards.

When dealing with the management of tribal and individual Indian trust asset management involving land and natural resources, the emphasis on management must naturally shift to employing the fundamental principles of Indian trust law that recognizes that tribes have a fundamental role to play in the management and development of those resources. Under these Indian trust law principles, tribal and individual Indians must be an integral part of both setting standards and carrying out the management activities related to their trust resource assets. In fact, without such direct involvement, the legal and political framework of tribal self-government and the United States/Tribal government-to-government relationship is rendered meaningless. It has been consistently upheld in case law and Congressional and Administration policy that one of the most fundamentally important principles of tribal self-government is that tribes have the inherent right to exercise authority to plan and administer activities related to their territorial jurisdiction, including being directly involved with the management of their trust resources. A similar vested interest is possessed by individual Indians who owner trust lands that were acquired under the General Allotment Act.

Any trust reform effort of the United States must necessarily integrate the principles of both common law and Indian trust law if it is to be successful. The United States is responsible for the management of funds derived from tribal and individual trust resources and deposited into Federal trust accounts. Tribes, however, have the fundamental right to assert their jurisdiction and authority over the use and development of their lands and resources held in trust for their benefit by the United States. Anything less will result in reversing more than 200 years of laws, policies and principles upon which the United States/Tribal government-to-government relationship is based.

PART I
TRUST REFORM PROPOSAL

IMPROVEMENTS IN TRIBAL/FEDERAL RELATIONS AND TRUST ASSET MANAGEMENT UNDER SELF-GOVERNANCE AND SELF-DETERMINATION.

The Indian Self-Determination Act was enacted because of tribal dissatisfaction of the Federal Government's management of Indian affairs, Indian lands, and Indian programs. After decades of Bureau of Indian Affairs (BIA) disregard of tribal concerns regarding the management of their treaty-protected properties, resources, and other Indian programs, Congress enacted the first Indian Self-Determination and Education Assistance Act in 1974. The Act was designed to establish legal contracting obligations on Federal agencies charged with carrying out Indian functions, to contract with interested tribal governments, and to transfer the responsibility to tribes to carry out those functions. The Act also allowed tribal governments to plan, prioritize and administer many of the programs to which their members were the intended beneficiaries. Throughout the years, the provisions contained in the Act have been expanded and today most Indian programs of the BIA and IHS are being carried out by tribes under Self-Determination Act contracts. In effect, the Indian Self-Determination Act has been the forefront and the foundation of federal trust reform efforts and has been demonstrated to be possibly the most cost effective and efficient means for the Federal Government to carry out functions that benefit Indians. Most importantly, the focus of the Act was to strengthen tribal governments.

The Self-Determination Act amendment of 1988 have resulted in broad Tribal assumption of trust-related programs from the BIA in the last decade. One of the most fundamental reasons for these

assumptions of the federal programs was to design a process whereby the Tribes could assume and carry out trust related activities with the greatest degree of flexibility at the reservation level while, at the same time, the Federal Government could effectively carry out its fiduciary trust obligations to tribes and individual Indians required under treaties, agreements, statutes and regulations.

Under these agreements, tribes have become integral parts of the federal system to fulfilling the United States' fiduciary and legal obligations. It is most unlikely that any federal trust reform effort effecting tribal communities and tribal lands will ever be successful unless it fully incorporates the philosophies and ideals and needs of the Tribes and individual Indians themselves, the true intended beneficiaries of the Federal/Indian relationship. Anything less that full integration of Self-Determination objectives in trust reform will simply not be consistent with the government-to-government relationship between Indian tribes and the United States, upon which the trust responsibilities are based. In short, the Norton proposal to reassume trust control of tribal assets under a new agency is a move away from the trust reform principles of the Self Determination Act.

TRIBAL/FEDERAL AGENCY STRUCTURE.

A key element of the Self-Governance Act is the ability of tribes to negotiate with Federal agencies for the transfer of all non-Inherent Federal Functions through inter-governmental agreements. This provision has served as a very useful means for tribes and Federal agencies to establish positive working relationships at both the reservation and agency levels. Under Self-Governance, many tribes have assumed broad trust and not-trust functions, which in turn has transferred most of the program administrative functions to tribal governments. In other cases, tribes have agreed to leave functions to be carried out by the BIA agency office. In all cases, Self-Governance has created a method for tribes and federal agencies to establish meaningful working relationships involving management of trust resources and other programs, including the ability for tribes to negotiate at what administrative level that the various federally-retained functions will be carried out.

Necessary elements of the Federal/Tribal working relationship includes developing agreements on how trust transactions are processed, the types of supporting records that will be required to complete a trust transaction, how a trust activity will be monitored, and how annual trust evaluations will be carried out. Since Self-Governance was implemented in 1990, not a single unresolved trust problem within any trust programs assumed by a Self-Governance tribe has been identified. Further, the number of breach of trust complaints against the United States by Self-Governance tribes and those of individual Indians that associated with Self-Governance tribes has been significantly reduced since Self-Governance was initiated in 1990.

The ability of Federal agencies and tribes to resolve longstanding trust management concerns has been significantly strengthened under the Tribal Self-Governance Act. In addition, even though tribes have assumed responsibilities for trust programs at a lower funding level that was even utilized by the BIA when they administered the trust program, Self-Governance has demonstrated the dedicated commitment of tribes to address difficult and complex trust issues using the Act's authority to consolidate, redesign, and prioritize program activities to address the needs and concerns of the true beneficiaries of the trust functions at the reservation level. Moving the Office Self-Governance from direct line authority to the Assistant Secretary of Indian Affairs to a subordinate office in another agency violated the spirit and intent of the Tribal Self-Governance Act.

TRUST MANAGEMENT STANDARDS.

There can be no "one size fits all" approach to management of trust assets for all tribes Nation wide because each tribe will have different treaty and trust obligations and other issues and concerns or trust obligations unique to themselves that must be addressed in carrying out trust transactions. For example, Douglas Fir tree log may have a lower monetary value on one reservation because a tribe has a sawmill and has chosen to recover a higher return on sales after processing (and create employment), while another tribe may not and seeks only the highest monetary return on the logs being sold. Another example may be that a tribe may allow the use of tribal lands for land leases to members for virtually no monetary return while still requiring nonmembers to pay fair market commercial value for a lease. Each of these trust transactions can create a federally-managed trust account which has a specific monetary return based on a tribally-defined "beneficial use" for each trust asset. Attempting to come up with the "best" management program for all tribes precludes each tribe from deciding for themselves how to best utilize their resources for their own benefit.

Each tribe and BIA should be able to develop agreements at the regional level whereby the management standards for trust assets can accommodate both the requirements of 25 C.F.R. or other appropriate Federal statutes and regulations. As a result, each tribe, as beneficiary of the trust relationship can work with the BIA to develop trust management standards on a resource-by-resource basis that can also be used in approving trust transactions. In cases where tribal management standards have not been developed, a tribe and BIA will continue to utilize applicable federal standards for trust transactions. In the event of a potential conflict between tribal and federal trust management standards, the tribe and BIA would meet to develop mutually-acceptable methods for resolving the conflict. In areas where ongoing statutory and regulatory concerns may be required, such as compliance with the Endangered Species Act and Clean Water Act, both tribes and the BIA would work to develop mutually-acceptable management standards that are applicable to each effected trust transaction.

TRUST RECORD KEEPING.

Under the Self Determination and Self-Governance Acts, tribes carry out many governmental functions in addition to those that are required for BIA trust transactions. Tribes also carry out non-trust, tribal exclusive functions as well. Thus, all records developed by a tribe that are not needed for BIA approval of a trust transaction are the property of the Tribe. However, all documents developed and submitted by the Tribe for BIA approval of a trust transaction become the property of the BIA and recorded on the title, as appropriate. It is the responsibility of the BIA to ensure that all records necessary to approve and monitor a trust transaction are secured and maintained by the BIA. Under this arrangement, the Tribe is free to develop internal centralized files for BIA and non-BIA activities, and provide the BIA with the necessary records to ensure its trust obligations to the tribe and individual Indians are carried out. The responsibility to approve all trust transactions is maintained with the BIA, as required under federal law.

TRUST FINANCIAL ACCOUNTING.

Tribes and the BIA continue to work cooperatively with the Office of Trust Funds Management (OTFM) in the financial accounting of all trust transactions, however, it is necessary for OTFM expand its activities to include program experts who will provide oversight in the programmatic accounting of all trust accounts. It will be the responsibility of OTFM to work with the BIA and appropriate tribes to ensure that all necessary documents are provided to assure the proper accountability of trust transactions.

There is a need for OTFM, the BIA and tribes, to develop procedures to ensure that proper and efficient management of trust transactions and their resultant trust financial accounts are reconcilable. These procedures could be developed during the typical negotiations between the Tribe and BIA. For example, if a tribe contracts or compacts an OTFM activity, then that tribe would be required to develop and maintain the required internal procedures and checks and balances that are required in its Self-Governance agreement. Monitoring of this requirement can be incorporated into the annual trust evaluation process required under the appropriate title through which funding is derived.

SUMMARY.

Many factors have led to the situation that the Federal Government finds itself in today in the *Cobell* litigation, many of which stem from the inherent problems that exist solely within the confines of its own infrastructure. Simply moving the same or similar functions from one office to another, or from one agency to another, will not accomplish either short term or long term trust reform. Moreover, agency shuffling will not utilize one of the greatest tools necessary to guarantee success, which is establishing vested interests in the activity to be performed. It has been"tribal vested interest" that has driven Self Determination and Self-Governance and, though different in many respects, both have become successful and effective in addressing longstanding problems that the Federal Government has experienced in managing Indian programs for over 200 years. Likewise, Tribal Self-Governance is the fuel that is necessary to make trust reform both successful and effective in the future.

PART II
TRUST REFORM PROPOSAL
IMPLEMENTATION AND ORGANIZATION PLAN

PARAMETER OF TRUST REFORM.

Among other factors, trust reform must address the following parameter:

A. FOUR *COBELL* BREACHES.

The Court has identified the following four breaches of the Courts Orders, as described by the BIA Regional Director: Reorganization Advisory Group (Memorandum of 12-12-01)

1. The Secretary has no written plan to gather missing data;
2. The Secretary has no written plan for the retention of IIM trust documents;
3. The secretary has no written architecture plan; and
4. The Secretary has no written plan addressing the staffing of trust functions.

B. INTERIOR AGENCIES INVOLVED IN TRUST REFORM AND THEIR PURPOSE.

The following are brief descriptions of Interior agencies that are involved in trust reform and their purposes:

1. Office of Special Trustee. The Office of Special Trustee (OST) was established under Title III of P.L. 103-412, the American Indian Trust Fund Management Reform Act of 1994. Under Section 302 (c) of the Act, OST is designed as a temporary agency that is to be phased out after the components of trust reform are developed and implemented. Under the Act, OST is to provide oversight and coordination of trust reform activities which are being carried out by the Bureau of Indian Affairs, Bureau of Land Management and Mineral Management Services.

2. Bureau of Indian Affairs. The BIA is one of the primary agencies of the Federal Government that is empowered to specifically carry out the United States' trust obligations to Indian tribes and individual Indians, which includes those associated with both trust resources and other legal obligations. The BIA, through Regional, Agency and Sub-Agency offices work with Indian tribes and individual Indians to implement the United States obligations that are protected by treaties, Executive orders and federal statutes.

3. Office of Self-Governance. The Office of Self-Governance is charged with implementation of the Tribal Self-Governance Act, P.L.103-413, the Tribal Self-Governance Act, as amended. The OSG typically functions in an oversight role ov er Tribal/Federal Self-Governance negotiations and is responsible for implemented Self-Governance agreements once the are completed.

C. AUTHORITY OF P.L. 103-412 TO RESTRUCTURE THE BIA.

Questions have arisen about whether implementation of federal trust reform measures require the creation of a new trust agency within the Federal Government. This Implementation and Organization Plan is based in part on provisions contained in P.L. 103-412 that specifically provides that improvements are to be made in the systems of the Bureau of Indian Affairs and other Interior agencies. Relevant parts of the Act relating to improvements in the BIA trust-related systems are as follows:

Sec. 202(a)	...held in trust by the United States and managed by the Secretary through the Bureau [of Indian Affairs].
Sec. 202(b)	...the Director of Office of Trust Funds Management within the Bureau [of Indian Affairs].
Sec.301(2)	...and that reforms of policies, practices, procedures and systems of the Bureau [of Indian Affairs]...
Sec.303(a)(2)(A)	Identification of all reform to the policies, procedures, practices, and systems of the Department, the Bureau [of Indian Affairs]...
Sec. 303(b)(1)	The Special Trustee shall oversee all reform efforts within the Bureau [of Indian Affairs]...
Sec. 303(b)(2)(A)	...trust accounts to ensure that the Bureau [of Indian Affairs]...
Sec. 303(b)(2)(B)	The Special Trustee shall ensure that the Bureau [of Indian Affairs]...
Sec. 303(b)(2)(C)	The Special Trustee shall ensure that the Bureau [of Indian Affairs]...
Sec. 303 (c)(1)(A)	...the policies, procedures, practices, and systems of the Bureau [of Indian Affairs]...
Sec. 303 (c)(2)	The Special Trustee shall ensure that the Bureau [of Indian Affairs]...
Sec. 303 (c)(3)	...and that they are adequate to support the trust funds investment needs of the Bureau [of Indian Affairs].
Sec. 303 (c)(4)(A)	...the land records system of the Bureau [of Indian Affairs]...
Sec. 303 (c)(4)(B)	...interface with the appropriate asset management and accounting systems of the Bureau [of Indian Affairs]...
Sec. 303 (c)(4)(B)(i)	...and disburse to the Bureau [of Indian Affairs]...
Sec. 303 (c)(4)(B)(ii)	...the Bureau of Land Management and the Bureau [of Indian Affairs]...
Sec. 303 (c)(5)(A)	...with the advice of program managers of each office within the Bureau of Indian Affairs...

Sec. 303 (d)	...and in implementing reforms to Department, Bureau [of Indian Affairs]...
Sec. 303 (f)	...each year on the progress of the Department, Bureau [of Indian Affairs]...

TRUST PROPOSAL ORGANIZATIONAL STRUCTURE.

Attached are two proposed organizational structures to implement trust reform within the BIA and other Interior Agencies that is based on the legal framework outlined in P.L. 103-412. Chart A describes the general organizational structure of the BIA and OST and Chart B describes the Central Office Division of Trust Accounting. The trust reform functional components of the organization are briefly outlined as follows:

Office of Special Trustee. The Office of Special Trustee is provided oversight capability, which is to be phased out once trust reform is successfully completed. In addition, responsibility for oversight of implementation of the *Cobell* Court's four breaches has been assigned to OST.

Assistant Secretary-Indian Affairs/Central Office. The Assistant Secretary-Indian Affairs is also assigned responsibility of implementing the *Cobell* Court's four breaches. A Division of Trust Accounting (see separate chart) is incorporated as a subordinate office of the Assistant Secretary-Indian Affairs so that direct oversight and control can be assured over this new Division.

Regional/Agency Offices. Within each Regional Office, a new Deputy Director of Trust management is established whose responsibilities include implementation of trust reform at the Regional, Agency and Sub-Agency levels, as well as responsibility to implement the four *Cobell* Court breaches. As has been carried out by the Pacific Regional Office for decades, the Regional Office Appraisal functions are under the direct control and oversight of the Deputy Director of Trust Management. This structure will ensure that the integrity of the Appraisal Office is maintained by segregating their functions from those of Real Estate Services. Also as contemplated in P.L. 103-412, the Division of Trust Accounting (possibly a Regional Office counterpart to OTFM) is made part of the responsibilities of the Deputy Director of Trust Management. This structure will ensure that proper and timely accounting and reconciliation of trust functions and trust accounts takes is maintained.

Another important part of the proposed organizational structure if the ability to coordinate, through the Regional Director, the functions of both the Deputy Director of Indian Programs with those of the Deputy Director of Trust Management. The objective of this structure is to streamline the administrative functions of both offices so that important BIA services, such as economic development and road maintenance and construction, each of which must necessarily be coordinated to be successful, has the greatest opportunity of providing the intended benefits to Indian Country.

SINGLE ADMINISTRATIVE OFFICIAL RESPONSIBLE FOR TRUST REFORM.

In its critique of trust reform, EDS stated that significant problems have been encountered in both developing the trust reform measures and implementing them because there has not been a single authority within the Department of the Interior charged with trust management reform. While this has been a problem within the BIA for years, it has been compounded with the creation of the Office of Special Trustee (OST) under P.L. 103-412 (1994). Since then, trust reform efforts appear to have in effect been divided between two warring camps, BIA and OST. Likewise, the Norton plan proposes to bifurcate the BIA into two separate agencies dividing program functions that are integral in nature. (An example would be separating realty and appraisals from roads and housing programs; both programs needing appraisals, property evaluation, surveying, title searches for easements, rights of way, water and power, etc.) The perplexing question here is, how does creating two agencies to manage Indian affairs meet the EDS recommendation for a single line of authority for trust reform? This is exacerbated with the OST who is charged with developing a plan for the discharge of Secretary's trust responsibilities, to oversee and ensure implementation of all reform efforts, and to monitor and reconcile tribal and individual Indian money trust accounts. Rather than ending up with a single authority charged with trust reform, under the BITAM, the tribes will end up with three alienated bureaus.

This proposal addresses the establishment of a single authority within the BIA, consistent with the provisions of P.L. 103-412 by creating a clear and simple line of authority from the Secretary of the Interior, through the Assistant Secretary of Indian Affairs, the BIA Regional Directors and to the Deputy Regional Director for Trust Management. The Deputy Regional Director for Trust management is directly responsible for the actions of all Regional, Agency and Sub-agency personnel. Under this streamlined structure, an understandable process is established whereby each progressive line of authority can monitor and evaluate the actions of their subordinate official (See attached organizational charts).

MECHANISM TO ESTABLISH TRUST VALUATION STANDARDS.

Important events always lead up to the filing of breach of trust cases against the United States by Indian tribes and individual Indians. Also, systems such as TAAMS and federal trust record keeping systems are less useful if they do not also contain information that helps all parties concerned to understand the reasons why various components were included, or not included in a specific trust transaction. Again, many of these "unknowns" can result in a breach of trust claim against the United States.

To address this situation, the Department of the Interior, through the BIA Regional Office structure, should develop a process that includes tribes and individuals in the development of formal management standards for each respective trust asset and money account. This appears to be an overlooked recommendation of the EDS report that states, "the key to assuring the support of stakeholders is to invite and encourage their participation in activities that affect the direction and priority of reform initiatives," and should be involved in establishing trust management objectives. This process should begin by producing an inventory of all trust assets and accounts that would need to be managed under these standards. Then, each BIA Regional office would be charged with the

responsibility to negotiate with each tribe and individual Indian owner to establish formal management standards for those resources and assets, consistent with federal law.

For areas where the BIA and Tribe/individual Indian do not develop formal management standards, the BIA shall only process a trust transaction under the control of an "Informed Decision Process" (IDP). The IDP would consist of a checklist of required questions that must be affirmatively answered before the BIA can proceed with completing a trust transaction. The questions would include such things as, was the owner informed of the resource value, does the owner agree with the values included in the trust transaction and were any difference explained, were they provided copies of support documentation (appraisals, timber cruises, gas and oil estimates, market values, etc). The IDP documentation will be made part of the BIA decision making process for the trust transaction. Timeframes and funding will need to be provided to the BIA and tribes/individual Indians to complete this process.

RECONCILIATION OF TRUST ACCOUNTS.

Questions continue to be raised regarding how the United States will reconcile the trust accounts held by the Federal Government with the trust transaction that crated the account, then ultimately reach agreement with the tribe or individual owner(s) of the account.

To address this, the Department of the Interior should sponsor legislation that would allow an individual tribe or Indian account holder to select an option for conducting an accounting. These options could include:

b. A transaction-by-transaction accounting;
c. A random accounting of selected accounts; or
d. A process for selecting existing accounting information.

Each option have specific timeframes and costs assigned. Under the accounting process, the BIA and tribe/individual Indian could negotiate how the accounting process would be completed, including the option for tribes to contract/compact that function.

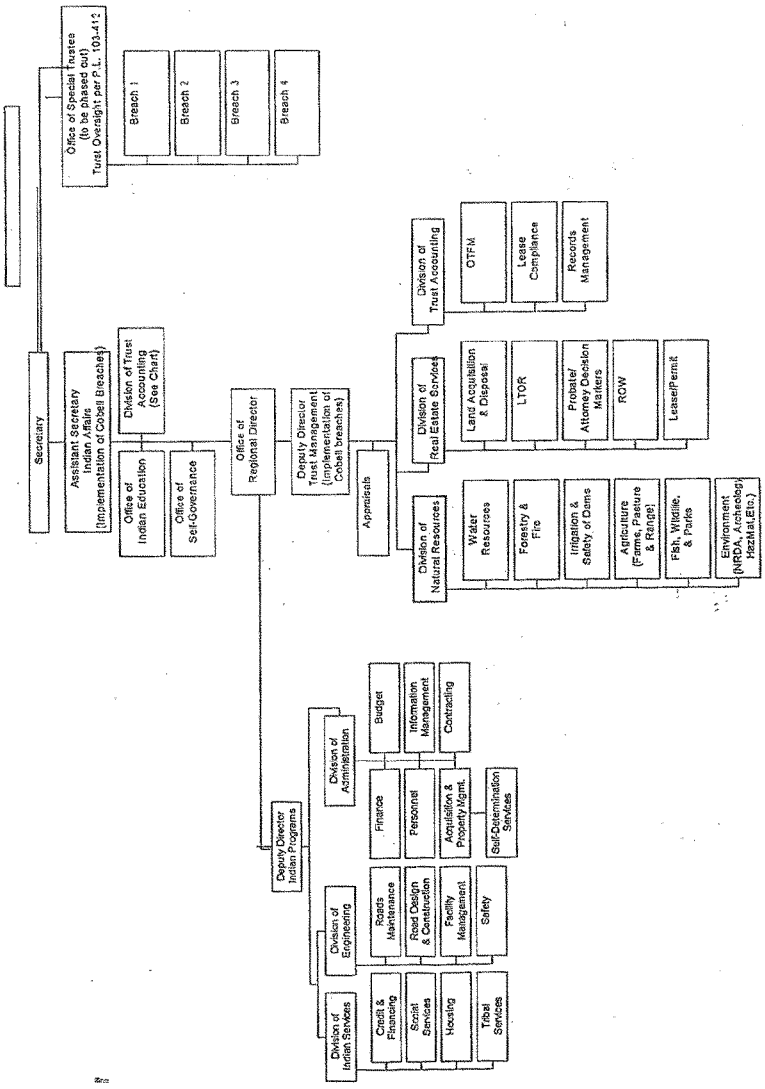
Once the accounting is completed, either the Federal Government or tribe/individual Indian could contest the accounting results in a forum established for that purpose.

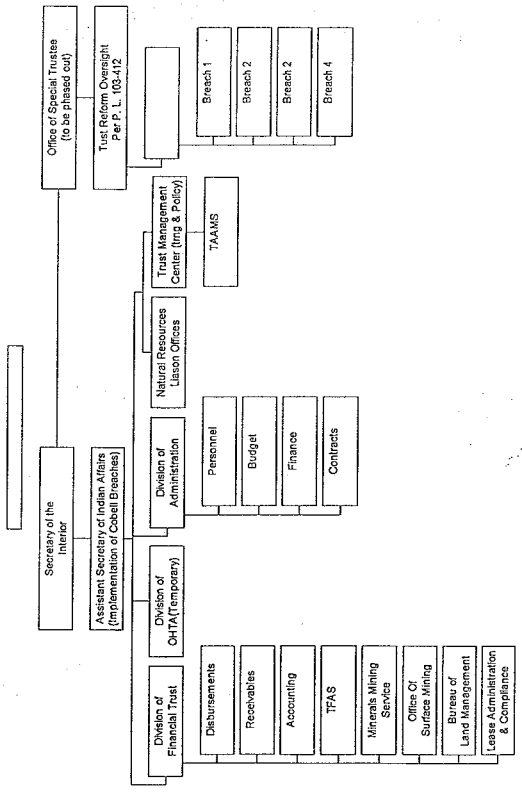
PROS AND CONS OF PROPOSAL.

Pros - More timely and less expensive to implement
Has broad support among Tribal and the BIA
Doesn't require federal employee union or GSA involvement to implement
Is consistent with both the Trust Reform Act and Tribal Self-Governance/Self-Determination
Facilitates resolution of potential conflicts between Tribal and Federal trust asset management standards which led to *Cobell* and other breach of trust cases
Responds to the *Cobell* Court issues in a timely manner

Does not require a second restructuring plan for BIA retained function that would follow BITAM implementation
Integrates Tribal and BIA directly into Federal trust reform efforts

Cons - Does not address perceptions that BIA cannot do the job
Requires legislation to implement *Cobell* related reconciliation issues
Will require re-integration of OST functions back into BIA structure
Reconciliation process would require added work to resolve Federal/Tribal/individual Indian reconciliation related issues


Secretary
Office of Special Trustee
(to be phased out)
Trust Oversight per P.L. 103-412
Breach 1
Breach 2
Breach 3
Breach 4
Assistant Secretary
Indian Affairs
(Implementation of Cobell Breaches)
Division of Trust
Accounting
(See Chart)
Office of
Indian Education
Office of
Self-Governance
Office of
Regional Director
Deputy Director
Trust Management
(Implementation of
Cobell breaches)
Appraisals
Division of
Trust Accounting
OTFM
Lease
Compliance
Records
Management
Division of
Real Estate Services
Land Acquisition
& Disposal
LTOR
Probate/
Attorney Decision
Matters
ROW
Lease/Permit
Division of
Natural Resources
Water
Resources
Forestry &
Fire
Irrigation &
Safety of Dams
Agriculture
(Farms, Pasture
& Range)
Fish, Wildlife,
& Parks
Environment
(NRDA, Archeology
Hazmat,Etc.)
Deputy Director
Indian Programs
Division of
Administration
Budget
Information
Management
Contracting
Finance
Personnel
Acquisition &
Property Mgmt.
Self-Determination
Services
Division of
Engineering
Roads
Maintenance
Road Design
& Construction
Facility
Management
Safety
Division of
Indian Services
Credit &
Financing
Social
Services
Housing
Tribal
Services


Office of Special Trustee (to be phased out)
Trust Reform Oversight Per P. L. 103-412
Secretary of the Interior
Assistant Secretary of Indian Affairs (Implementation of Cobell Breaches)
Division of Administration
Natural Resources Liason Offices
Trust Management Center (trng & Policy)
TAAMS
Personnel
Budget
Finance
Contracts
Division of OHTA(Temporary)
Division of Financial Trust
Disbursements
Receivables
Accounting
TFAS
Minerals Mining Service
Office Of Surface Mining
Bureau of Land Management
Lease Administration & Compliance
Breach 1
Breach 2
Breach 2
Breach 4

APPENDIX NO. 1

BITAM - WHAT IS IT? - SCENARIOS A & B.

In November, 2001, Secretary Norton proposed a plan to create a new Bureau of Indian Trust Asset Management (BITAM). The proposal is reported to be an effort to transfer all trust related functions presently being carried out by the BIA to the new BITAM agency. Since the announcement of the BITAM proposal, Tribal leaders have also been asked to comment of the plan, which is yet to be defined or explained with any level of detail. Without anything to analyze, input on the BITAM proposal seems fruitless. Therefore, in an effort to provide constructive analysis of the concept, Appendix 1 attached hereto contains Scenarios A and B of what BITAM could be. Each scenario also contains an impact analysis of the concepts outlined therein. These scenarios also provide a baseline proposal from which alternatives can be analyzed

BITAM ORGANIZATION - SCENARIO A

Assumption.

1. That the BIA consists of approximately 50% trust asset related activities and 50% other programs.

2. That all trust-related staff of the BIA personnel of the Central, Regional, Agency, and Field Offices will be physically relocated and reassigned to BITAM.

3. That there will be established a comparable (mirror) structure under BITAM as existed under the BIA.

Implementation Impacts.

1. Employee related impacts- Existing BIA trust related employees would need to be offered a job at the BITAM office at a different location. For employees who choose not be relocate, there would have to be severance pay provided. For each BIA employee who did not relocate, a new employee would have to be hired and trained. This scenario would entail working with the federal employee union and effected employees to implement. All administrative manuals of the BIA would need to be revised.

2. Facilities and equipment impacts: Before the BITAM could be implemented, the General Services Administration would need to negotiate and enter into a facilities agreement for the Agency. At least 2 options could be involved, including:

   a Establishing BITAM offices in each pervious BIA location. This concept would entail "duplicating" the BIA offices and staff in each of the separate Central, Regional, Agency and Subagency locations. In addition to office space negotiations and agreement, this concept would require that office equipment and other support functions also be relocated and/or purchased.. Also, there would be a need to remove all trust related files, records and manuals from the BIA to be relocated to the new BITAM offices; or

   b. Consolidate BITAM offices in locations different from the BIA offices. This concept would probably require all of the activities identified in "a" above, but would also require significant additional consultation with tribes and BIA employees regarding where and how to select the locations for the new BITAM consolidated offices.

Implementation Timeframes Impacts.

Scenario A will likely take the longest amount of time and will be the most costly to implement. This scenario will likely take more that a year, even under the best of circumstances, to implement (assuming that tribes and the Congress give up their objections to BITAM). Given the pressures of the *Cobell* Court for Secretary Norton and Assistant Secretary McCaleb to get something done, this scenario will not meet the needs of DOI.

BITAM ORGANIZATION - SCENARIO B

Assumption.

1. That the BIA consists of approximately 50% trust asset related activities and 50% other Indian programs.

2. That all trust-related staff of the BIA personnel of the Central, Regional, Agency, and Field Offices will be retained in the existing BIA offices but reassigned to BITAM.

3. That there will be established a comparable (mirror) structure under BITAM as existed under the BIA.

Implementation Impacts.

4. Employee related impacts- Existing BIA trust related employees would need to be offered a job in the BITAM offices. For employees who choose not be reassigned, there would have to be severance pay provided. For each BIA employee who did not agree to be reassigned, a new employee would have to be hired and trained. This scenario would entail working with the federal employee union and effected employees to implement. Additionally, it is conceivable that each of the Central, Regional, Agency and Subagency offices will need to hire separate BITAM department heads, regional directors, agency superintendents and subagency directors in order to effect a "separation" of BIA functions from those of BITAM. One must assume that this action must be undertaken in each of the 12 Regional, 58 Agency, 1 Subagency, 28 Field Station and 3 Irrigation Project Offices, which would probably require around 125 new federal positions.

5. Facilities and equipment impacts: Under Scenario B, it is assumed that the same BIA offices will be utilized for BITAM, however, it is probable that some equipment that is presently being shared within BIA offices will have to be replaced in order to physically separate the different agency functions. All existing administrative manuals of the BIA would need to be revised to separate the trust-related functions from the BIA. Supervision of BIA vs. BITAM personnel would be interesting because "co-mingled staff" would be working for completely different agencies. At least conceptually, there may have to be "green" doors and lines on the floor for BITAM personnel and "red" door and lines on the floor for other Indian program staff. Also, there would be a need to move all trust related files, records and manuals from the BIA to the new BITAM offices.

Implementation Timeframes Impacts.

Scenario B will be easier to implement that Scenario A, but is still required hiring a significant number of new BITAM and other support needs. Because of the increased implementation costs, it is unlikely that this concept can be implemented in less than a year. In both Scenarios A and B, the most limiting factor that will negatively impact the implementation schedule will be finding personnel who are familiar with Indian trust and related requirements. The difficulties in implementing Scenario B is also likely to strain the patience of the *Cobell* Court.

**TESTIMONY OF THE INTERTRIBAL TIMBER COUNCIL
REGARDING NATIVE AMERICAN TRUST REFORM
WITHIN THE U.S. DEPARTMENT OF THE INTERIOR
PRESENTED FEBRUARY 26, 2002
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS**

Mr. Chairman, members of the Committee, it is my pleasure to appear before you today. My name is Gary S. Morishima. I am here on behalf of the Intertribal Timber Council (ITC) at the request of our President, Nolan Colegrove, Sr. I have served as a Technical Advisor in natural resource management to the Quinault Indian Nation for over thirty years and as a member of the ITC Executive Board since its inception some 27 years ago. I have also been recently appointed as ITC's designated advisor to the Tribal-Interior Trust Reform Task Force (Task Force).

The central message I wish to bring to the Committee is that trust reform is serious stuff. A great deal of money is involved, but at its heart, trust reform goes to the capacity of the United States to properly discharge its fiduciary obligations as trustee for the Indian estate within an evolving, unique government-to-government relationship between Indian tribes and the United States.

We must not permit the debate about trust reform to become trivialized as an exercise of shuffling around boxes in an organization chart. Trust reform must be a commitment, akin to a covenant, to establish accountability in the management of trust funds and in the programs that manage trust resources and provide trust services throughout Indian country. Trust reform must be built, piece-by-piece, in accordance with a thoughtfully developed strategic plan and measurable performance standards which are developed in concert by the trustee and the beneficiaries of the trust.

We are convinced that Indian beneficiaries must have a substantive role in trust reform, now and in the future. Long-lasting and effective solutions to the problems confronting the BIA's administration of its trust responsibilities must be developed collaboratively with the tribal beneficiaries of the trust. The Task Force, which includes tribal and Interior participants, and which has the capacity to draw upon support and outside assistance as needed, presents a rare, and valuable opportunity for methodical evaluation and reform of the federal trust. It is vitally important to the future of Indian country that this opportunity not be squandered.

I would like to share with the Committee a few thoughts and perspectives that may differ significantly from those presented by the other witnesses at this hearing. Our views reflect the lessons learned from nearly three decades of experience in working to improve the management of some of the most important trust resources in Indian country, forests.

The ITC is a nation-wide consortium of over 70 Indian Tribes and Alaska Native Corporations which is devoted to improving the management of natural resources of importance to Native American communities. The 17 million acres of Indian forestland held and managed in trust are a primary renewable natural resource for Indian tribes and individual allottees. This resource is of extreme economic value to tribal communities, both from the standpoint of the millions of dollars in annual income generated from the harvest of forest products and the thousands of jobs it supports, but also because it protects soils and water, produces foods and medicines, materials for housing and artistic expression, habitat for fish and wildlife, and provides opportunities for recreation and

spiritual sanctuaries. Since Indian forests affect tribal communities in so many ways, it is critical that they be managed in accordance with tribal values and needs. Those to whom we entrust the management of our forests, must bear a profound moral and fiduciary obligation to protect the interests of both the present and future generations.

Mr. Chairman, I wish to bring to this hearing the perspective of a tribal organization that has been dedicated to improving the management, utilization, and preservation of this trust resource for over 27 years. Our organization was founded in response to increasing concerns regarding the management of Indian forests by the Bureau of Indian Affairs (BIA). It was born in the muck of conflict and controversy, not unlike that we see surrounding these hearings today – the lack of tribal consultation, timber sales at below fair market value, management practices that paid little heed to tribal values and responded less to concerns for impacts on fish, wildlife, and water. In managing Indian forests, the BIA was following the ultimate model of paternalism, doing what it thought was best for Indians regardless of the views of the beneficiaries of the trust.

To be sure, we did more than our share of complaining and breast beating about the failure of the BIA to fulfill its trust responsibilities and fiduciary obligations. But, Mr. Chairman, we chose a different path to try to shape our collective future. For nearly three decades, the ITC has worked collaboratively in partnership with the BIA, private industry, and academia to explore issues and identify practical strategies and initiatives to promote social, economic and ecological values while protecting and utilizing forests, soil, water, and wildlife. In our view, the wisdom of pursuing this type of collaborative approach has been amply demonstrated. It has made a huge difference in improving accountability for the management of Indian forests. We believe that forestry is by far and away the best resource management program within the BIA because of tribal involvement. Management is not perfect by any means, but it has changed substantially to better meet financial and social needs of tribal communities. Today, many tribal governments are operating their own forestry programs and working relationships between the BIA as trustee and Indian beneficiaries of the trust have improved dramatically. This is because the ITC, the BIA, and others who have joined us in partnership kept the focus on the issues, jointly identifying problems and jointly crafting solutions.

One of the principal initiatives that we successfully undertook was the development of an extremely important piece of legislation. It was the ITC's pleasure to work with this Committee and the U.S. Congress in the consideration and enactment of the National Indian Forest Resources Management Act (NIFRMA), now Title III of Public Law 101-630, signed into law November 28, 1990. NIFRMA affirmed the trust responsibility of the United States and codified management requirements while providing for increased involvement of tribal governments in operating their own forestry programs and development of a professional cadre for management of Indian natural resources.

The ITC Executive Board, and indeed, all our members, have been watching, and to one degree or another participating in, the Interior Department's initiative, announced November 14, 2001, to pursue trust reform, primarily through restructuring (BITAM). For a host of reasons, the ITC Board determined that while BITAM would not effectuate trust reform, the active and high-level attention directed at trust reform issues represented an important opportunity for positive change.

I previously cited NIFRMA because Section 312 requires a comprehensive, independent assessment of the management of Indian forests to be completed every ten years. The

first such assessment, conducted by a blue-ribbon team of forestry professionals and referred to as IFMAT 1, was completed in November, 1993 and distributed to Congress, the Interior Department, and the tribes. Today, with so much attention focused on trust reform, the IFMAT report, and its findings and recommendations ring more true than ever. The IFMAT panel identified strengths and weaknesses of Indian forest management at the national level in its report, and also provided specific observations and recommendations to improve management at the individual reservations visited during its investigations. But it was the Major Recommendation of the report that came immediately to mind when news of Interior's BITAM proposal surfaced: *"redefine the U.S. government's role in discharging its trust responsibility"*. IFMAT concluded that *"BIA forestry should be reorganized to separate technical assistance from trust oversight. The BIA should retain technical assistance, but trust oversight should be delegated to an independent commission."*

Convinced that independent oversight is an essential element for effectuating meaningful reform, the ITC Board developed and distributed a proposal entitled *"Accountability in Trust Reform – A Conceptual Outline for Consideration by the Trust Reform Task Force"* (attached) for consideration by the Task Force.

In a nutshell, three elements lie at the core of the ITC proposal:

1. An independent, Presidentially appointed American Indian Trust Oversight Commission. The Commission would be comprised of individuals nominated by tribal governments and experts in fiscal and resource management, with ex-officio representation from the Interior Department. The Commission would be responsible for formally certifying the functionality and accountability of trust fund management and reporting systems, and evaluating issues and management performance on both topical and reservation-specific levels. Certification would be required whether those functions are performed by the BIA or Indian tribes as they increasingly exercise self-determination. Once certification occurs, periodic audits would be conducted to ensure that performance continues to meet operational standards.

   Topical investigations would be selected from suggestions provided by tribal governments and individuals. Performance would be evaluated against a set of fundamental criteria for management of trust resources. Reservation-specific studies would examine management performance against standards and criteria that are embodied in tribally developed and Departmentally-approved management plans.

   The independence of the Commission is critical to both credibility and accountability. Legislation may be required to provide necessary powers and authorities while protecting the beneficiaries of the trust from public access to private and sensitive information.

2. Responsibility for the development of fiscal accounting systems would be centralized within the Office of the Special Trustee as provided in Section 303(b) of the American Indian Trust Fund Management Reform Act of 1994 (TRA). While the TRA limits the responsibility of that office to the preparation of a plan to be submitted to Congress, we are concerned that the development and

implementation will be attempted in a piecemeal fashion. A single entity must be vested with necessary authority and responsibility for developing and deploying fiscal management systems to ensure accountability. Once the functionality of these fiscal management systems is certified, operational responsibility would be transferred to the BIA and the Office of the Special Trustee would sunset as envisioned by Section 302(c) of the TRA.

3. The BIA would retain ultimate responsibility for management of trust fund accounting, trust resource management, and the delivery of trust services to tribal communities. This will maximize potential flexibility and efficiency available to tribal governments as they elect to exercise self-determination by designing and operating their own programs. The Commission would provide continuing evaluation and oversight of both BIA and tribal programs with respect to the performance of trust responsibilities.

In offering our proposal, we fully appreciate that it is only one among many. Over the course of the past few weeks, several worthy proposals have come forward from the tribal community as alternatives to BITAM and undoubtedly, more will be forthcoming in the future. We are concerned that the focus of trust reform efforts may be limited to the selection of preferred organizational structures among competing alternatives. Should that happen, a grave disservice would be done to Indian country because trust reform would focus on the means, the "who," rather than where it belongs – on requirements, the "what, why, how, and when" of trust reform.

Mr. Chairman, in our view, trust reform must not be locked into the tyranny of shifting organization charts. It must be approached with sound information, careful insight, and a clear vision of what can and must be accomplished. It must not be rushed to any predetermined or prepackaged conclusion. Unfortunately, that is exactly what appears to be taking place. Interior's BITAM proposal is clearly a hasty response to the developments in the Cobell trust fund case, and the Task Force is feeling pressured by Interior's determination to unveil some "reform" before the Court reaches an adverse determination in Cobell and calls for the removal of the IIM accounts to an outside receiver. As a result, the Task Force is being pressed to reach a quick decision on how to change the organizational structure for trust management. But change, and particularly hasty change, does not equate to reform.

Trust reform must respond to a diverse set of requirements. When a natural resource trust asset is converted to money, and that money is then handled by the Interior Department, the Department must abide by a form of financial commercial or common law trust. However, trust reform must also reflect responsibilities toward Indian tribes. Tribal governments are sovereigns, yet their scope and powers are described in the context of a political relationship with the Congress and the Executive, and within a legal framework subject to on-going definition by the federal courts. Interior as trustee must reflect this unique government-to-government relationship, fostering and honoring tribal sovereign authority while also functioning as a trustee. In some aspects, and particularly with regard to land and natural resources, this trust is a flexible arrangement. Within an overarching requirement to protect and preserve the resource for the benefit of its owners, the trust must reflect the fact that those benefits take many forms, that Indian tribes and individuals live on and enjoy the benefits derived from the land subject to the trust, and that a myriad of day-to-day management decisions rest with the beneficiary. The federal trust must accommodate tribal self-determination, in which tribes assume an increasing role in

directly managing their own affairs. This will require the federal trust to phase from directly managing the Indian trust estate to more of an audit and oversight function.

The Interior Department must understand and reconcile these diverse responsibilities. The Department is continually challenged to work to fulfill its duties as trustee within an environment fraught with conflicts of interest. These conflicts arise in a variety of ways. They exist when the goals and desires of the Department's other agencies are at odds with the mission of the BIA, for instance, when protecting a tribal water right from a competing interest in the Bureau of Reclamation. Conflicts can be more subtle, such as the allocation of financial resources within the Department's budget, or in trying to maximize income to individual allottees while respecting tribal sovereign rights and authorities to constrain the latitude of management actions that can adversely affect communal resources like fish and wildlife. Because of these inherent conflicts, the trustee should not and cannot be relied upon to provide credible oversight for itself.

When considering the subject of trust reform, these varied aspects of the trust must be recognized and understood. Some of the proposals that have been advanced fail in this regard. Certain interests involved in the trust reform process have been steadfast in advocating for the removal of the responsibility for managing trust funds and resources from the BIA. The Courts and Congress have become increasingly frustrated with the seeming inability of the Department of the Interior to rectify admitted deficiencies in its fiscal management systems. Concerns raised by individual Indians in the Cobell litigation have increased awareness of deeply-rooted problems in the administration of the trust by the BIA. Removing responsibility for trust fund management from the BIA may serve the interests of a few individuals and perhaps it may be useful to consider an amendment to the TRA to provide individuals with the capacity to transfer responsibility for administering their trust fund account to an outside trustee as an option similar to that provided to tribes under Section 202. However, even though the BIA may have a fiduciary responsibility to properly account for the funds held for individual Indians, the very nature of the trust responsibility of the United States must be principally concerned with fulfilling treaty, statutory, moral, and other obligations toward tribal governments. We believe that the transfer of responsibility for trust fund and trust resource management to an entity outside the BIA would be foolhardy and ill-advised. Such an action would undermine the very basis of the unique legal-political-economic relationships between the United States and tribal governments.

We must retain our focus on accountability in order to effectuate trust reform. The Task Force must be given the opportunity to do its job, allowing leadership from the tribal community and the Interior Department to work together to craft a mutually acceptable and effective approach to accomplish trust reform. A common, comprehensive understanding of requirements and objectives will be needed to move the process forward. Attached to my testimony is an outline that attempts to separate requirements into categories of trust fund management, trust resource management, organizational objectives, principles, characteristics, and mechanisms to achieve them. I believe that such a structured approach would provide a solid and necessary foundation for moving forward on meaningful trust reform.

True trust reform cannot be accomplished overnight. It must be approached in a comprehensive and cohesive fashion, with care and diligence. And it must incorporate measures to ensure accountability over time.

Mr. Chairman, that concludes my testimony. Thank you for the opportunity to appear before your Committee. The ITC is pleased to be involved in the deliberations of trust reform by leadership within the tribal community and the Department of the Interior. We hope our proposal and our contributions as technical support to the Task Force will help shape the course and eventual result of trust reform for the ultimate benefit of all of Indian country.

Attachments:

Accountability in Trust Reform
Functional Requirements for Trust Reform

Intertribal Timber Council
1112 NE 21st Ave
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Ph: (503) 282-4296, Fax: (503) 282-1274

Accountability in Trust Reform
A Conceptual Outline for Consideration by the Trust Reform Task Force

Synopsis of proposal: Establish an Independent American Indian Trust Oversight Commission to certify the functionality of financial accounting systems and evaluate the management of the resources that comprise the tribal estate. Establish an organizational structure within the Department of the Interior which: (1) separates development of financial management systems from responsibilities for daily operations; (2) maintains working relationships between tribes and the BIA; and (3) recognizes the increasing involvement of tribal governments in operating their own programs.

The Commission would be appointed by the President, operate outside the Department of the Interior, and include members nominated by tribal governments as well as subject area expertise. The Commission would be responsible for:

- Certifying that financial management systems are fully operational; and
- Evaluating the performance of tribal and BIA programs in managing both the trust fund accounts and the resources that constitute the trust corpus.

Under the proposed organizational structure,

- Responsibility for day-to-day management to ensure that trust standards are being met would rest with the Bureau of Indian Affairs;
- Responsibility for the development of the financial accounting systems would fall under the authority of the Office of the Special Trustee. Once the Commission certifies that financial accounting systems are fully operational, responsibility for day-to-day management would be transferred to the BIA.

What is the Intertribal Timber Council?

The Intertribal Timber Council (ITC) is a nation-wide consortium of Indian Tribes, Alaska Native Corporations, and individuals dedicated to improving the management of natural resources of importance to Native American communities. The ITC works cooperatively with the Bureau of Indian Affairs, private industry, and academia to explore issues and identify practical strategies and initiatives to promote social, economic and ecological values while protecting and utilizing forests, soil, water, and wildlife. The members of the ITC currently include over 70 tribal governments and Alaskan Native Corporations.

For further information regarding this proposal, please contact ITC's advisor to the Trust Reform Task Force:

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ACCOUNTABILITY IN TRUST REFORM

ITC's Proposed Alternative to BITAM
Submitted for Consideration by the Trust Reform Task Force

BACKGROUND:

In mid-November 2001, Secretary Norton announced a plan to create a new Bureau of Indian Trust Asset Management (BITAM) within the Department of the Interior (DoI). BITAM would have responsibility for both for managing the funds held in various trust accounts and the resources that generate income for Indian beneficiaries. The Plan was crafted in response to increasing legal and political pressure flowing from the Cobell litigation. Tribes have almost universally criticized the Secretary's Plan because of its lack of substantive detail and her failure to engage in meaningful tribal consultation.

BIA Regional Directors have also expressed serious concerns with the BITAM Plan announced by Secretary Norton (see January 8, 2002 memo from the Northwest Regional Director of the BIA). An Advisory Group of BIA Regional Directors concluded that:

> *"The BIA is at its core a land managing agency. Thus, removing all of the BIA's resource management responsibilities would be the equivalent of removing administration of the public domain from the Bureau of Land Management, or removing administration of the National Parks from the National Park Service, or removing administration of the National Forests from the Forest Service. *** Completely eliminating the BIA's responsibility for the management of natural resources would essentially eliminate the BIA at the operational level (i.e., Regions and Agencies) since there is simply insufficient manpower to split the BIA into two new stand alone organizations. In many cases once the trust functions are removed from the Regions or Agencies there would be essentially no 'BIA' organization left behind."*

This Advisory Group then crafted an alternative to Secretary Norton's proposal that would transfer all responsibility for functions that directly relate to the administration of cash assets to an Assistant Secretary for BITAM while leaving the BIA's existing line authority to manage programs and functions which primarily concern government-to-government relationships intact.

At the core, both the Secretary's and the Regional Directors plans appear to represent little more than a shuffling of boxes on a paper organizational chart. Secretary Norton and Assistant Secretary Neal McCaleb are currently on trial in the Cobell Court for contempt stemming from allegations that they have provided misleading information regarding efforts to correct deficiencies in the BIA's accounting systems. A substantial part of the testimony involved in the case centers around the failure to institute adequate controls to ensure that necessary reforms were being made. It is clear that both Secretary Norton's and the Regional Director's Plans fail to address the key issue: *How can the Secretary of the Interior, the Courts, and the beneficiaries of the trust be assured that operations of the Department are organized and operated so as to ensure that fiduciary obligations of the United States will be met?*

MANAGING THE INDIAN ESTATE

EDS was contracted by the Office of the Special Trustee to evaluate progress on various aspects of DoI's efforts relating to trust reform. EDS's first report, entitled "Interim Report on TAAMS and BIA Data Cleanup", dated Nov. 12, 2001 (EDS1) describes the task of managing the Indian trust estate as follows:

"extensive and varied nature of the DOI land and trust fund management responsibilities. This includes some 56 million acres of Indian trust lands and approximately 110,000 surface and mineral leases on these trust lands. OST (Office of the Special Trustee, ed.) *has the responsibility for managing the trust funds or revenue that flow from Indian trust assets. OST maintains approximately 1,400 Tribal trust accounts for 315 Tribal entities and about 285,000 Individual Indian Monies (IIM) accounts. Each year over $800 million passes through the Tribal trust fund accounts and over $300 million passes through the IIM accounts.*

This workload exists against a backdrop of differing and at times complex situations related to land ownership, treaty obligations, lease agreements, state and federal laws, and other factors. Further, the BIA has had a 130-year history of decentralized program execution, meaning that roles, business procedures and even terminology vary among the 12 regions and their field offices." EDS1, p9.

The second report issued by EDS, "Report on Trust Reform, Observations and Recommendations", dated Dec. 6, 2001 (EDS2), further describes the complexities and constraints of managing Indian assets held in trust by the United States:

"These complexities need to be considered in performing the fiduciary responsibilities mandated of a Trust. Some examples of the complexities that apply to Indian Trust but not to commercial Trust are listed below:

- *The Trust is unique in the size of land under management, titling and probate requirements, and the sovereignty of the beneficiary community.*
- *The US Government formed the Trust by mandate instead of the Trust being formed by the beneficiaries or their ancestors.*
- *The cultural heritage associated with the land held in Trust is sometimes more valuable than the monetary worth.*
- *Trust agreements or Trust documents do not exist for each tribal account or each Individual Indian Monies (IIM) Account, which in a commercial Trust would provide specific guidance in management of the Trust assets.*
- *A large number of small accounts, below the threshold normally managed in the commercial Trust environment, exist within the Indian Trust. In some cases, the value of a Trust account may be less than the cost of its administration.*
- *The Indian Trust does not charge for services and there is no mandate to make a profit.*
- *By law, the Trust is limited to investments in Government or Government–backed Securities." EDS2, p 5.*

EDS PRINCIPLES FOR TRUST REFORM

Within this context, EDS2 describes the primary tasks confronting trust reform efforts in terms of the following principles:

*"1. **Fulfill Fiduciary and Legal Responsibilities***
The primary focus of Trust Reform is to fulfill the fiduciary and legal responsibilities defined by law. These fiduciary responsibilities as outlined in the Trust Reform Act include;

- *Properly account for and manage Indian Trust Fund assets.*
- *Prepare accurate and timely reports to account holders which identify source, type, and status of funds, beginning balance, gains and loses, receipts and disbursements, and ending balance.*
- *Maintaining complete, accurate, and timely data regarding the ownership and lease of Indian lands.*

In addition to the responsibilities outlined in the Trust Reform Act, the DOI must also fulfill the fiduciary imperatives outlined in the general standard of prudent investment;

- *The trustee is under a duty to the beneficiaries to invest and manage the funds of the Trust as a prudent investor.*
- *The trustee must exercise reasonable care, skill and caution, and apply it to investments in the context of the Trust portfolio and as a part of an overall investment strategy.*
- *The trustee must adhere to the fundamental fiduciary duties of loyalty and impartiality*

2. Ensure the integrity of Trust business processes and data

A principle goal of Trust Reform is to ensure the integrity of Trust business processes and data. All stakeholders must have confidence that the Department is capable of meeting its responsibility to establish and maintain a complete, accurate accounting of Trust assets, the ownership and financial interest in those assets, the use of Trust lands and the income and distributions resulting from that use. This accounting requires the definition and deployment of consistent, reliable business processes that can rely on complete, accurate data.

3. Create an Accountable Organization that Communicates Reform Progress

In order to achieve Reform objectives, the Department must establish accountability throughout all organizations contributing to reform. Combining responsibility can only do this and authority for Reform-related activities in individuals at all levels in the organization.

The future state organization must be simplified in terms of lines of authority. The workflows and communication from one group to another must be less complicated. The Trust functions and services should be managed by objectives with specific performance metrics to measure the effort, resources and time that will be required to achieve Reform-related objectives. The Department must also be able to consistently predict and communicate the impact that performance shortfalls, or surpluses, will have on related activities.

The stakeholders must be involved in establishing those objectives and corresponding metrics. Employees must be well trained in Trust concepts. Adequate staffing to perform Trust responsibilities must be in place.

4. Increase Stakeholder Ownership and Support

The key to assuring the support of stakeholders is to invite and encourage their participation in activities that affect the direction and priority of Reform initiatives. Incorporating the objectives of Regional, Agency and Tribal leaders – and other representatives of the Native American beneficiaries – will increase their support for those initiatives and foster a sense of ownership in Trust Reform efforts.

5. Provide Reliable Consistent Business Services

In order to successfully deliver reform; the DOI needs to define and adopt business services that are consistent to the greatest extent appropriate while continuing to consider the tribal needs and the ramifications of local statutes. Stanardizing common processes is required across all regions." EDS2, p12.

SELF-DETERMINATION & SELF-GOVERNANCE COMPACTING:

These principles must be implemented in the unique legal-political environment that characterizes tribal-federal relations. The DoI "Status Report to the Court Number Eight", dated Jan. 16, 2002 (8th Status Report), describes the context for trust reform as follows:

> *"A major objective of the Department is blending private trust standards with the guiding principle that tribes have a government-to-government relationship with the United States.*
>
> *The Indian Self-Determination and Education Assistance Act of 1975 (the "Act") allows the tribes to contract Trust functions. The Act contemplated that "the Federal Bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs." Section 203, Pub. L. 103-413. On the other hand, Congress specifically affirmed that the Federal Government's trust relationship and obligation will remain. Pursuant to the Constitution, Congress alone has the authority to define or alter the Trust relationship.*
>
> *The Department believes that the government's Trust responsibility and tribal sovereignty are positive, complimentary forces. Even so, the Federal government has an overriding duty as trustee to formulate reasonable improvements in and standards for ensuring the proper discharge of the Department's fiduciary Trust functions. The need to achieve a responsive and efficient discharge of the trust responsibility while balancing the Department's commitment to administering the government-to-government relationship with Indian tribes by supporting tribal sovereignty, tribal self-governance and tribal self-determination, as expressed by Congress is a tremendous challenge. It is thus necessary to consider the unique relationship between the Tribes and the Federal Government as the Department proceeds with trust reform and the reorganization process and the adoption of appropriate policies and procedures that address the sometimes competing principles."* 8th Status Report, p19.

PROBLEMS EXPERIENCED BY THE DoI

The 8th Status Report contains several observations of high level personnel within the DoI with respect to the experience to date with trust reform efforts:

<u>The Special Trustee</u>

> *"Overall progress on trust reform cannot be assured or confirmed, however, because of the apparent inadequate planning and execution to date of some subprojects and other important remedies for Indian trust."* p14.

<u>The Director, Office of Indian Trust Transition</u>

> *"...subproject managers were willing to state certain progress was made but when challenged could not always defend their position. ...*
>
> *It is very alarming to read and hear reports of progress being made and, in some instances, projects completed without having this work fit into an overall context of trust management. It is apparent that some projects could be completed or "under control" yet not add substantively to the requirements of a person receiving income from assets held in trust for them. ...*

It is obvious also that trust asset management for individual Indians is spread throughout DOI and even indirectly to other agencies of the federal government, such as the Department of the Treasury. There are many instances where work is being done by one agency or bureau and is simply "thrown over the fence" to the next work group without the normal follow-up that would insure a beneficiary receives his/her income or other responsive information due from a trustee. It is essential that trust management reform and the on-going business of trust operations be managed by an organizational structure that has accountability from top to bottom. ...

During this Report's development, it also became obvious that information related to the "asset" portion of trust asset management primarily focused on financial assets. While that is important in an income-producing asset, it also is critical that we know how all assets are being managed, and that future reports should present the status of land and natural resource management, both by the tribes and DOI. For instance, grazing leases produce revenue for Indian individuals and Tribes, but if overgrazing occurs, the income in future years maybe seriously affected. Minerals Management Services does a good job of collecting royalty revenue, but are we managing the initial leasing process to be certain we are performing our trust duties appropriately?

Another serious problem is illustrated by the refusal of some tribes to allow for the collection of documents and other information necessary to complete actions on behalf of beneficiaries." p15-16.

In 1993, a distinguished group of scientists comprising the Independent Forest Management Assessment Team (IFMAT) identified another fundamental problem - conflict of interest. In its report entitled "An Assessment of Indian Forests and Forest Management in the United States", IFMAT observed that the BIA had a fundamental conflict of interest since the Trustee was responsible for both program operations and trust oversight. IFMAT recommended that oversight and operational responsibilities be separated. The OST also identified conflict of interest as an important issue that affects trust reform:

"During the month of September an additional issue was identified by the Special Trustee regarding OST simultaneously performing both operational responsibilities and providing oversight. The Special Trustee indicated that such dual responsibilities represented an inherent conflict." 8th Status Report p18.

With this backdrop, the Secretary of the Interior set forth four objectives for trust reform effort and affirmed her commitment to engage in meaningful consultation with Indian beneficiaries:

"Our objectives are (1) to plan and conduct a valid, cost-effective and timely accounting of the IIM trust in a manner that satisfies the Department's fiduciary duty to account to IIM beneficiaries, (2) to develop a beneficiary approach to trust management and service delivery, (3) to record and maintain comprehensive, up-to-date and accurate land and natural resource ownership records, and (4) to develop a workforce plan and associated activities to attract and maintain a qualified, effective workforce.

As we move forward, we will place high priority on consulting with the tribes. Not only is this required by Executive Order and Departmental regulations (Executive Order No. 13175 (November 6, 2000) and BIA Consultation Guidelines (December 13, 2000)), it is the right way to conduct affairs of government that affect tribes." 8th Status Report, p8.

ITC's PROPOSED APPROACH

Examination of the history of trust reform efforts within the DoI has led the Executive Board of the Intertribal Timber Council to the following conclusions:

1. DoI's BITAM approach as well as the alternatives proposed by BIA Regional Directors represent organizational chart shuffle and fail to incorporate measures necessary to effectuate trust reform.

2. Trust reform cannot be assured unless Indian beneficiaries are provided with independent verification of full accountability for the funds and assets held in trust by the United States. This requires third-party certification by an entity outside the DoI.

3. The beneficiaries of the trust must play a substantive role in effectuating trust reform.

4. Trust reform must preserve government-to-government political relationships at the regional and agency levels of the BIA.

5. Trust reform must ultimately provide for the centralization of responsibility for administering the fiduciary obligations of the trustee.

6. Trust reform must accommodate increasing interest by Indian tribes in assuming greater responsibility for managing their own affairs through self-determination and self-governance compacting.

Based on these conclusions, the Executive Board of the ITC has developed a proposed approach to provide greater accountability in trust reform. This proposal is intended to provide information and perspectives for the deliberations of the Tribal Trust Reform Task Force.

Accountability in Trust Reform

Conceptual Outline of ITC's Proposed Alternative

INDEPENDENT AMERICAN INDIAN TRUST OVERSIGHT COMMISSION

- Established by legislation
- Independent, outside the DoI
- Members appointed by the President Appointment
- FACA exempt
- Information collated by Commission exempt from FOIA
- The Commission would have a statutory duty to protect privacy of sensitive information

Functions:

1. Certification
   - Certify the development of financial accounting systems (including land records) to ensure that they satisfy standards and are fully operational prior to adoption and implementation by the BIA
   - Certify systems maintained by Indian tribes under compacting or contracting arrangements, since tribal systems would need the capacity to fully interface with BIA systems.
   - Conduct periodic reviews after initial certification to assure continuing compliance with performance standards and beneficiary requirements.

2. Audit performance of trust functions
   - Trust corpus

     i. Statistically valid sampling to spot check for compliance with general standards (How much of the resource is there and how much was sold [management planning and sustainability]?; Was the beneficiary of the trust fairly compensated for the use/extraction of trust assets?; Were the proceeds from the sale, use or extraction of trust resources properly accounted for, wisely invested, and appropriately distributed?)

     ii. Topical investigations (e.g., timber sales, leasing). The beneficiaries of the trust, tribal governments and intertribal organizations (e.g., ITMA, ITC, IAC, NAFWS, NCAI, etc.) would provide recommendations for issues and priorities to focus the Commission's efforts. The Commission would prepare and publish annual work plans for its investigations, including its rationale in prioritizing issues.

     iii. Reservation evaluations – periodic, using specific performance standards that are derived from management plans and agreements approved by the Secretary of the Interior and tribal governments. Commission to issue certificates of compliance issued upon finding of satisfactory performance. Certification would reduce/eliminate requirements for Secretarial approval of individual actions taken by tribes under approved management plans or agreements (BIA actions would still require tribal approval). This function would incorporate annual trust reviews of performance under Self-Governance Compact Agreements.

   - Once responsibilities for financial accounting systems are transferred from the OST to the BIA, the Commission would conduct statistical sampling to evaluate the functionality of financial accounting systems (tribal & individual).

Reporting Requirements:

- The Commission would prepare Annual Reports on Audit Functions:

  - Draft provided to Assistant Secretary for Indian Affairs & Office of Special Trustee. Required to comment within time certain. Failure to comment constitutes tacit acceptance of findings and recommendations of Commission.
  - Final Report provided to: Secretary of the Interior, Senate Select Committee on Indian Affairs; House Natural Resource Committee; Trust Beneficiaries
- The Commission would prepare Site-Specific Audits Reports on the management of trust resources and provide them to:
  - Trust Beneficiaries
  - Assistant Secretary of Interior for Indian Affairs
- The Commission would prepare an Annual Report on its operations containing:
  - Disclosure of Expenditures
  - Statement of Accomplishments
  - Impediments to effective discharge of Commission's responsibilities
  - Work Plan for future efforts

- The Secretary of the Interior would be required to prepare an annual report to the Commission, Senate Select Committee on Indian Affairs, and the Trust Beneficiaries describing the status of efforts by the DoI to implement the recommendations of the Commission.

Composition of the Commission:

__ Appointed Members (five year terms)
__ Members selected from a list of individuals nominated by Indian tribes
__ Independent expertise (specify skills?)
Ex-Officio Members

- Office of American Indian Trust
- Assistant Secretary of Interior for Indian Affairs
- Office of the Special Trustee (involvement would be eliminated once accountable financial accounting systems are in place, in accordance with provisions of the American Indian Trust Reform Act of 1994)

Non-Federal members would receive daily compensation at a rate equivalent to GS14?

Powers of the Commission:

- Investigative
- Subpoena powers to compel production of requested information
- Secure required expertise
- Hire & retain staff & expertise as required to discharge its responsibilities (compile monitoring information, provide support for Commission)
- Create task forces (standing or as needed) reporting to the Commission, to evaluate selected aspects of management of the trust corpus. Task force members may include:
  - Tribal expertise (appointed representatives from relevant Intertribal Entities?)
  - Office of American Indian Trust
  - Office of Audit & Evaluation
  - Office of Self-Governance
  - Independent expertise

PROPOSED ORGANIZATIONAL STRUCTURE FOR INDIAN AFFAIRS

The proposed organizational structure would be comprised of two basic elements: The Office of the Special Trustee (OST) and the Bureau of Indian Affairs (BIA). Three staff offices, presently authorized within the Departmental Manual would report to the Secretary: The Office of Self-Governance; the Office of Audit & Evaluation; and the Office of American Indian Trust. **(Chart A)**

OST (Chart B)

The functions of the OST would be limited to the development of operational financial systems required to ensure accountability for funds held in trust for tribal governments and individual Indians.

The primary functions would include:

- A Division of Financial Management. This Division would be responsible for developing operational systems to handle receivables, investments, accounting and disbursements.
- A Records Management Division that would be responsible for developing management systems to ensure that beneficial ownership of trust assets is properly determined (probate, title records, etc).
- A Historical Accounting Division would be responsible for reconciling historical accounts to establish a firm basis for the accounts to be maintained by the Division of Financial Management.

The Commission would be responsible for certifying that required elements of the financial systems are operational. When the financial systems are certified by the Commission, operational responsibility would be transferred to the BIA and the OST would cease to exist. This eventuality was anticipated in the American Indian Trust Reform Act of 1994.

BIA (Chart C)

The BIA would retain responsibility for management of the trust corpus (e.g., land, water, minerals, etc held in trust for Indian beneficiaries by the United States).

The Operations of the BIA would contain three divisions, one for BIA operations, one for education, and the other for Self-Governance compacts.

BIA Operations Regional & Agency Structure (Chart D)

At the regional and agency levels, the organizational structure would depend upon local needs. Generally, the primary divisions/functions of the BIA would include:

- Administration that would handle personnel, budgeting, finance, & contracting
- Trust Support that would handle responsibilities for land and attendant resources
- Transportation
- Tribal Services

The BIA would assume responsibility for financial records management upon certification by the Oversight Commission.

Until such time as the financial operations are transferred to the BIA, the BIA would interface with the OST in the following manner:

The BIA would access land records maintained by the OST as required to perform its management responsibilities. The BIA would notify the OST as trust assets are sold or removed. This notice

would generate a financial tracking record that would establish a tracking requirement. The OST would be responsible for collection or receivables and for investing and disbursing funds to the beneficiaries.

Once responsibility for operation and maintenance of the financial management system is assumed by the BIA, the Commission would perform periodic audits to ensure continued accountability.

Title 1, Self Governance

Tribal governments have expressed increasing interest in assuming more responsibility for management of their own affairs through self-governance compacting. As noted by the 8th Status Report, there is a "*need to achieve a responsive and efficient discharge of the trust responsibility while balancing the Department's commitment to administering the government-to-government relationship with Indian tribes by supporting tribal sovereignty, tribal self-governance and tribal self-determination, as expressed by Congress.*" This tension creates a special challenge for trust reform as each tribal government can select those elements of the programs operated for the benefit of Indians, leaving the rest to federal agencies to perform. Consequently, there are many alternative organizational structures involving tribal and BIA operations.

There are, however, certain general factors that can be taken into account:

First, it can be safely presumed that future organizational structures within BIA and tribal programs will evolve in response to tribal initiatives. The BIA will have to fulfill its fiduciary obligations to tribal governments and individual Indians, as required by treaties, executive orders, agreements, statutes, regulations, and judicial decisions. Tribes will assume greater responsibility for carrying out trust related activities in the field, seeking the greatest degree of flexibility at the reservation level.

Second, there will be a need for fundamental standards to evaluate the performance of management of trust assets, regardless of whether or not responsibility for conducting field operations lies with the BIA or a tribal government. Consequently, standards will need to apply to both tribal and BIA systems to ensure compatibility and functionality. The BIA will need to monitor and approve activities that affect its capacity to meet its statutory obligations and fiduciary responsibilities as trustee. Tribes will be able to establish priorities by redesigning budgets and functions so resource management standards will need to include beneficial use standards of individual tribes as well as appropriate regulations contained in 25 CFR, applicable Federal statutes, and regulations. Tribes operating field level programs will need to provide relevant information and records to the BIA. In the 8th Status Report, the Director of the Office of Indian Trust Transitions noted a problem with *"the refusal of some tribes to allow for the collection of documents and other information necessary to complete actions on behalf of beneficiaries."* p16. There will be a need to establish policy direction to address this issue, perhaps something along the following: *all records maintained by a tribal government which are not required for BIA approval of a trust transaction are the sole property of the tribe; all records and documents developed and submitted by the tribe to the BIA for approval of a trust transaction are the property of the BIA.* Under this policy, tribes would be free to develop internal, centralized records for BIA and non-BIA activities while the BIA would have the records (and the responsibility to ensure adequate security) required to satisfy its fiduciary obligations.

HOW ITC's APPROACH ADDRESSES EDS PRINCIPLES FOR TRUST REFORM

ITC's proposed approach addresses the principles identified in EDS2 for trust reform efforts in the following manner:

"1. Fulfill Fiduciary and Legal Responsibilities

The ITC proposal provides a mechanism to insure that the fiduciary obligations set forth in the American Indian Trust Reform Act become operational. Independent certification would require the development of a strategic plan and measurable performance criteria.

2. Ensure the integrity of Trust business processes and data

The involvement of tribally-nominated members of the Commission increases the likelihood that Indian beneficiaries will have confidence that the Department is capable of meeting its responsibility to establish and maintain a complete, accurate accounting of Trust assets, the ownership and financial interest in those assets, the use of Trust lands and the income and distributions resulting from that use.

3. Create an Accountable Organization that Communicates Reform Progress

The ITC proposal relies upon formal certification as the means to verify that interfaces between the various entities that may be involved in trust reform are functional and operational. The Commission would maintain records regarding progress and identify obstacles to implementation of reform efforts.

The separation of developmental from operational responsibility as proposed by ITC is consistent with the organizational structure anticipated by the American Indian Trust Reform Act. The transfer of responsibility for financial accounting systems upon certification that they are fully operational maintains a familiar tribal-agency-regional relationship for government-to-government relations.

Certification would require that Trust functions and services be managed by objectives with specific performance metrics to measure the effort, resources and time that will be required to achieve Trust Reform-related objectives. Providing tribally-nominated members on the Commission would increase stakeholder involvement in establishing those objectives and corresponding metrics.

The ITC proposal provides for the Commission to investigate topical areas of concern to Indian beneficiaries and to evaluate the performance of fiduciary obligations at the reservation level, using criteria and standards that are tailored to the circumstances of individual tribes.

The ITC proposal would require the Secretary of the Interior to issue a report on the status of efforts to implement recommendations of the Commission. The report is to include identification of obstacles to implementation, e.g., staffing, budget.

4. Increase Stakeholder Ownership and Support

The ITC proposal provides for stakeholder involvement at several levels. First, tribes would be invited to submit nominations for members to serve on the Commission. Second, Indian beneficiaries (tribal and individual) would be invited to suggest topical issues and priorities

for the Commission to investigate. Third, the Commission would be engaged in reservation-specific reviews. Last, the ITC proposal would require that Indian beneficiaries receive formal reports that provide information on the operations of the Commission and its findings and recommendations.

5. Provide Reliable Consistent Business Services

Under the ITC proposal, the Commission would conduct periodic performance reviews to ensure that financial accounting (including land title and use/management records) and resource management systems remain functional and operational.

Synopsis of Pros and Cons of ITC's Proposal:

Pros	Cons
• Provides for increased tribal involvement in ensuring accountability for the systems that maintain financial records and management of the land and resources that comprise the trust corpus. • Requires formal, independent certification that financial management and support systems are operational. • Provides for periodic evaluation of management performance by the BIA and independent certification that the trust corpus is properly managed. • Minimizes potential confusion and problems by clearly dividing responsibility for development of financial management systems and day-to-day management of the trust corpus. • Consistent with requirements of the Trust Reform Act of 1994 to establish a Special Trustee to develop adequate financial accounting systems. • Addresses issues raised in Cobell litigation. • Provides mechanisms for making IIM account holders "whole" by reconciling historical records and establishing an office to establish a firm basis for financial accounting. • Maintains strong, familiar BIA relationship with tribes (political acceptability) • Much less costly to implement than proposed BITAM structure with increased likelihood to effectuate necessary reforms and improvements. • Ultimately centralizes responsibility for management of the trust corpus and financial records under the BIA. • Employees are not displaced. • Preserves capacity of tribal governments to pursue compacting and assumption of greater responsibilities for self-management while ensuring that fiduciary obligations of the United States are satisfied.	• Requires legislative action and Congressional appropriation of necessary funds. • Degree to which the proposed plan may satisfy the requirements of the courts is uncertain. • Increases need for coordination between developing systems for financial management and day-to-day management responsibilities of the BIA.

Chart A
Proposed Organizational Structure

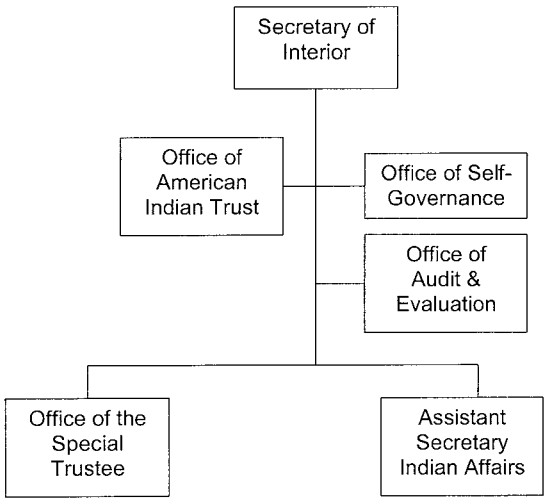


Chart B
Office of the Special Trustee

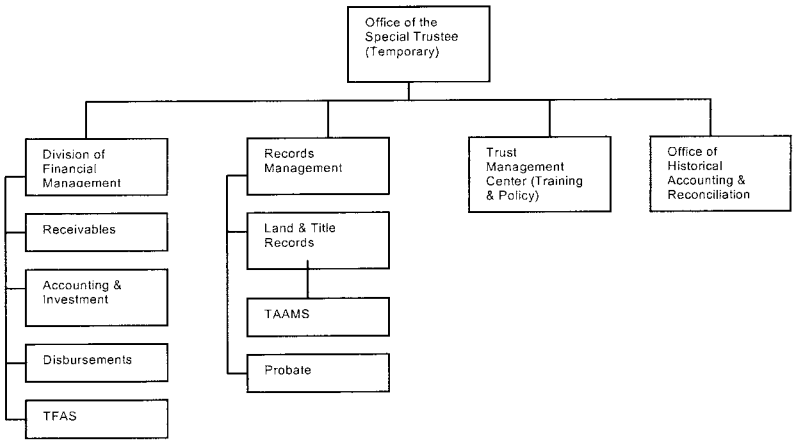


Chart C
Bureau of Indian Affairs

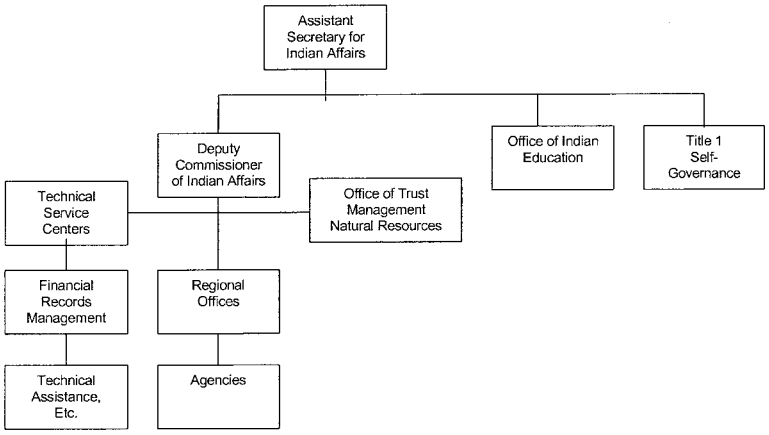
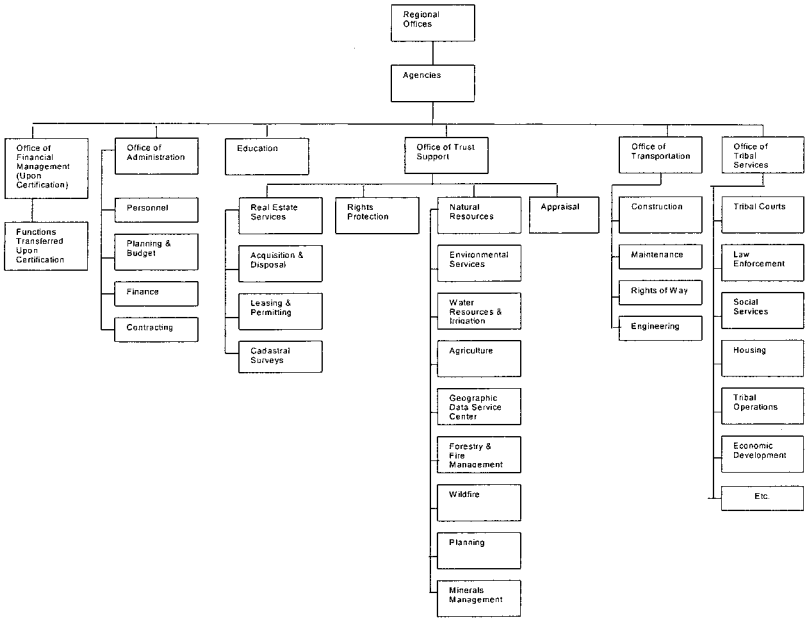


Chart D
Bureau of Indian Affairs
Regional Offices & Agencies



ATTACHMENT
Functional Requirements For Trust Reform

Trust Reform must encompass all aspects and functions that the United States performs on behalf of Indians.

The Supreme Court, in defining the trust responsibility, has held that:

> [The federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1941).

The scope of the Federal Government's duties as trustee for the Indian estate can generally be described by two requirements: 1) preserve and protect the interests of the beneficiary by prudently managing trust property in utmost good faith and 2) ensure that the beneficiary is fully informed about matters pertaining to the management of trust resources.

FUNCTIONAL REQUIREMENTS FOR TRUST FUND MANAGEMENT

Adhere to principles of common trust, generally:

- Mutual understanding of services required by beneficiary and duties of the trustee
- Accuracy – ensure that trust funds, investment income, and disbursements are correctly and accurately maintained.
- Investment – ensure that funds held in trust are expeditiously and prudently invested at minimal expense to Indian beneficiaries
- Receivables – ensure timely collection of income due.
- Disbursements – ensure that funds are dispersed in accordance with desires of beneficiary, consistent with fiduciary obligations
- Security & privacy of information and records
- Account balances – reconciliation/establishment of trust fund balances
- Adequate resources must be made available to carry out these duties.

FUNCTIONAL REQUIREMENTS FOR TRUST RESOURCE MANAGEMENT

In *Blackfeet and Gros Ventre Tribes of Indians*, (32 Ind. Cl. Comm. 65, 77 (1973), the Indian Claims Commission noted, *"the fiduciary obligations of the United States toward*

restricted Indian reservation land, including minerals and timber, are established by law and require no proof."

Generally, in managing natural resources held in trust, the United States must manage resources so as to ensure that beneficiaries receive fair value while protecting the trust corpus. The United States also has other trust duties to protect treaty rights. For example, the Western District Court of Washington found in *Muckleshoot Indian Tribe v. Hall,* 698 F. Supp. at 1510.

> The United States has a fiduciary duty and "moral obligations of the highest responsibility and trust" to protect the Indians' treaty rights. *Seminole Nation v. United States*, . . .

- Accountability should be evaluated against objectives and performance criteria specified in tribally-developed and Departmentally-approved plans, wherever such plans exist.
- For resources held in trust for individuals, maximize potential benefits (income or as specified by individual) within operational constraints established by tribal-Departmental plans, or where such plans do not exist, under principles of common law trust within constraints of applicable tribal and federal law.
- Use best practices (consideration of state of the art and budgetary constraints) in managing trust resources.
- Ensure that beneficiaries of the trust receive fair value for the use or extraction of trust resources (appraisal, sale procedures, legal instruments that are legally enforceable and otherwise protect the interests of the beneficiary)
- Ensure that trust resources are adequately protected (trespass, disease, catastrophic loss, etc.)
- Ensure that entities responsible for financial accounting are timely notified of:
    - contractual obligations for the sale or use of trust resources for which compensation is due.
    - quantity of resources involved and removed/used for each beneficial owner
- Ensure full accountability for the quantity and value of trust resources utilized/removed
- Maintain accurate records and inventories (cadastral surveys, title records, probate, etc)
- Adequate resources must be made available to carry out these duties.

OBJECTIVES & ORGANIZATIONAL CHARACTERISTICS

- Fully involve tribal governments in the design, development, and implementation of organizational structures and measures to fulfill trust obligations of the United States.
- Design policies, procedures, and systems to faithfully discharge the trust duties of the United States set forth in treaties, statutes, Executive Orders and case law.
- Costs of trust reform or payment for damages must not reduce the quality or quantity of programs, services, or funding provided to tribal communities and individual Indians.
- Conduct business on a government-to-government basis.
- Consolidate Departmental functions and responsibilities involving trust resource management (BIA, MMS, USGS, BLM, BOR, etc.)
- Retain responsibility for trust funds, trust resources, and other trust services within the BIA.
- Provide efficient, effective services to Indian beneficiaries.
- Minimize necessity for additional bureaucracy and administrative expense
- Provide for tribal self-determination and self-government, recognizing that integration will be necessary to reflect the involvement of both BIA and tribes in operating programs. Adhere to federal regulations governing tribal contracting and compacting of BIA and other programs.
- Maintain government-to-government relationships at the regional/agency level of the BIA.
- Minimize transaction costs incurred by tribes in their relations with the BIA
- Provide full accountability for management of trust funds and resources
- Minimize potential for conflict of interest.
- Maintain records and establish reporting systems that provide required information at minimum cost.

MECHANISMS TO PROMOTE ACCOUNTABILITY

- Strategic Plan

- Properly designed systems that meet functional requirements and ensure accountability (analysis of business functions)
- Standards that reflect awareness of current state of the art practices
- Performance measures
- Record Keeping
- Information and reporting systems that integrate administrative responsibilities for trust fund accounting and trust resource management.
- Internal controls to ensure compliance with standards and procedures, provide quality control, maintain operational integrity of management systems, and correct deficiencies.
- Security
- Independent Auditing
- Independent external performance evaluations
- Effective personnel incentive systems to ensure that individuals are qualified to discharge the duties to which they are assigned, to reward outstanding performance, and to sanction acts of malfeasance or nonfeasance.

TESTIMONY PRESENTED BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING
THE MANAGEMENT OF INDIAN TRIBAL TRUST FUNDS
FEBRUARY 26, 2002
10:00 A.M. ROOM 106 DIRKSON SENATE OFFICE BUILDING

Chairman Inouye, and distinguished members of the Senate Committee, on behalf of the United South and Eastern Tribes (USET), I thank you for the invitation to provide testimony regarding the management of Indian Tribal Trust Funds. The Indian Tribal Trust Funds matter is of great importance to Indian Country and I thank the Committee for holding this hearing and your interest in the tribal perspective.

My name is James T. Martin. I am an enrolled member of the Poarch Band of Creek Indians of Alabama. I am also the Executive Director of USET, an inter-tribal organization consisting of twenty-four federally recognized Indian Tribes from twelve states in the South and Eastern region of the United States. USET's primary function is to provide a forum for the exchange of information and ideas among its member tribes, the federal government and other entities.

On behalf of the USET tribes, I have been afforded the opportunity to serve on the Trust Reform Task Force. As you are aware, the Trust Reform Task Force was established after the Department of Interior (DOI) Secretary Gale A. Norton presented the Bureau of Indian Trust Asset Management (BITAM) reorganization proposal and received widespread opposition to the proposal. The one point that Indian Country and the Secretary are in agreement with is that Trust Reform is a top priority and extensive change must take place to facilitate a solution.

Congress has a critical role in providing funding and meaningful direction during this Trust Reform process. To begin, I would like to thank the House and Senate Appropriations Committees for their commitment to Tribal Consultation as evidenced in the fact that they did not reprogram $300M, as requested by the Secretary, to fund BITAM. Instead the Committee's agreed that the request would be put on hold until Congressional hearings and tribal consultation meetings were conducted. The Secretary, in her February 6, 2002 testimony before the House Resources Committee, stated the following:

> "The courts expected the Department to deliver trust services based on a very high standard. Congress must recognize that meeting these expectations will require significantly more funding and resources. The courts

first look to Congress for its expression of intent as to how the trust program should be managed. Congress must make clear what it envisions the responsibility of the Secretary to be, and provide the resources necessary to carry out those responsibilities, while recognizing the other financial responsibilities and mandates of the Bureau of Indian Affairs and the Department as a whole."

I commend the Secretary for the development of a bold and well-intended proposal, but must state that it was developed and presented in direct conflict with the Indian Self-Determination and Education Assistance Act (ISDEAA). Additionally, the BITAM proposal was presented with few details and Indian Country questions whether or not it would provide solutions to existing problems without creating new ones. Further, the BITAM proposal requires significant expansion of the federal bureaucracy and this expansion directly contradicts the President's Management Plan to downsize and streamline federal executive departments. I have heard nothing short of unanimous disapproval of the BITAM proposal from those who will be most affected by its implementation - American Indian/Alaska Native Tribal governments.

Indian Country is most concerned with the fact that the BITAM proposal would significantly

diminish the Bureau of Indian Affairs (BIA). The BITAM is consistently being referred to as a plan to "reorganize" the BIA, but in reality it is a proposal to fundamentally change the entire scope and mission of the BIA and is one step closer to dismantling the Bureau. To this end, I will be the first to admit that Indian Country has been calling for BIA reform for years, but to be fair we have never once said that we wanted the Bureau to be diminished in capacity or abolished. On the contrary, Indian Country has repeatedly requested funding necessary to strengthen the BIA. In the BITAM proposal the Secretary implies that the BIA cannot handle the Trust Reform effort in conjunction with providing other services. Indian Country believes that is an unfair assumption given the fact that the BIA has never been fully funded and thus has been unable to obtain the level of human resource needed to monitor, control and operate a sound trust management system.

In the BITAM proposal, the Secretary relies heavily on the Electronic Data Systems (EDS) report. In fact the Secretary has stated, that the BITAM "proposal was reviewed by EDS and received a supportive endorsement." However, nothing in the EDS report indicated that forming a new Bureau was necessary to correct the problems inherent in the Tribal Trust Management system. The report also went on to say that there are not adequate resources (both human and monetary) to separate the trust duties from other BIA services and that there has to be an institutional willingness to change.

Upon hearing opposition to the BITAM proposal the Secretary challenged Indian Country to develop alternative proposals and that is why I am here today. I appreciate the Secretary's commitment to the Trust Reform Task Force and her attempt at tribal consultation. USET accepted the challenge and developed an alternative proposal. A copy of the USET Alternative Proposal has been provided for the Congressional record. However, I will now provide a brief overview of the major points contained in the USET proposal:

- **Retain Trust functions within the BIA**: The USET proposal would consolidate tribal trust functions under the executive supervision of a Commissioner for Tribal Trust Management. The Commissioner would serve within the Office of the Assistant Secretary for Indian Affairs and be guided by a Tribal Trust Advisory Board consisting of tribally designated representatives.
- **Separation of Trust Programs, Services, Functions and Activities (PSFAs) from non-trust PSFAs**: The USET proposal would separate trust PSFAs from non-trust PSFAs within the BIA through the appointment of one executive responsible for trust management issues and another for Indian Program activities. The structure contemplated in this proposal is to establish two Commissioners within the Office of the Assistant Secretary for Indian Affairs. A Commissioner for Tribal Trust Management and a Commissioner for Indian Programs would be required to

achieve true separation while leaving the BIA intact.

- **Commissioner for Indian Programs**: The USET proposal requires the Commissioner for Indian Programs to be nominated by the President and be subject to Senate confirmation. The Commissioner will be the executive accountable for all non-trust PSFAs.
- **Commissioner for Tribal Trust Management**: The USET proposal requires the Commissioner for Tribal Trust Management to be nominated by the President and be subject to Senate confirmation. The Commissioner will be the executive accountable for trust management PSFAs.
- **Establishment of a Tribal Trust Advisory Board:** The USET proposal requires the establishment of a Tribal Trust Advisory Board. The Board would assist the Commissioner in developing structures, processes, guidelines and minimum standards for the trust asset management system. The Tribal Trust Advisory Board will facilitate and strengthen the government-to-government relationship.
- **Point of Trust Reform and Trust Asset Management**: The USET proposal places the responsibility for the implementation of trust reform and trust asset management at the level of the BIA Regional Offices, under the BIA Regional Director. Placing trust reform and trust asset management at the regional level honors the government-to-government relationship and allows for regional differences in the

effective management of trust assets.

- **Establishment of Minimum Standards**: The USET proposal requires that the Commissioner for Tribal Trust Management work with the Tribal Trust Advisory Board and develop minimum standards that will apply to all tribal trust assets. Additionally, it will be mandatory that each Regional Director adhere to and meet the same minimum standards when managing trust assets.
- **Commission for Indian Trust Accounting**: The USET proposal requires the establishment of a Commission for Indian Trust Accounting. This would facilitate the separation of the Individual Indian Money (IIM) account management from tribal trust asset management. The IIM accounts would be managed under the supervision of an independent Commission.

The USET proposal has been presented in several different forums and has received support from many tribes. The benefits to the USET proposal that have been identified include:

- **Reorganizes the BIA**: Trust management, trust accounting and all non-trust PSFAs would be maintained and handled separately, but still remain under the jurisdiction of the BIA. This process promotes a beneficiary driven process where accountability rests at the point of greatest sensitivity - with the tribes.

- **Strengthens the BIA**: The USET proposal is limited in scope, thus it is more cost effective and manageable. Altering the structure of the BIA while still maintaining the central functions will allow inter-reliant PSFAs to continue to progress at a steady pace. Indian Country believes that all PSFAs within the BIA are trust functions and one cannot operate independently of the other. For example, if a road is being constructed an appraisal has to be completed and the landholders must be identified to determine where and to whom lease payments are due. This example illustrates that so-called non-trust PSFAs rely on trust asset management PSFAs and trust accounting PSFAs. Without each component the road in this example could not be constructed, but by keeping each central PSFA within one Bureau and with appropriate resources it could.
- **Beneficiary Driven Approach to Reform**: Trust reform and trust asset management would be beneficiary driven with trust responsibilities being implemented at the regional level. This process honors the government-to-government relationship that exists between tribes and the federal government.
- **Establish Minimum Standards**: Establishment of minimum standards will prevent

each BIA Regional Office from applying different standards when managing trust assets. However, the USET proposal still allows flexibility to handle regional differences.

- **Enhance and Strengthen Tribal Self-Determination and Self-Governance**: The USET alternative for reform would enhance tribal management of trust assets under the ISDEAA and the American Indian Trust Management Reform Act. Under the USET proposal Indian control of economic development and resource management would expand.
- **Establishes Accountability for Trust Reform**: Placing oversight responsibility in the Commissioner for Tribal Trust Management establishes accountability for trust reform and trust asset management in a single executive office.

The USET alternative proposal offers a flexible framework from which an effective tribal trust asset management structure can emerge. USET offers this alternative proposal as a starting point for Indian Country to begin development of a comprehensive model through dialogue and tribal consultation. It is USET's intent to allow for modification to the plan and the proposed organizational structure as needed to obtain support from Indian Country.

Indian Country is currently not supportive of any one plan, but they are unanimously

opposed to BITAM. The key herein lies in the fact that Congress, the DOI, the Courts and Indian Country are all in agreement that trust reform is needed and is a priority. I believe that from this mutual conviction a trust reform plan that is acceptable to the majority can and will be developed with the involvement of all affected entities. However, Indian Country is increasingly concerned that the Secretary is in the process of implementing BITAM as we speak. This is evident in the fact that an Office of Indian Trust Transition (OITT) has been established and is being directed by Ross Swimmer. Additionally, appraisal PSFAs have already been removed from the BIA. The Secretary has stated that, "Mr. Swimmer will be working with all entities within the Department involved in trust asset management to develop the strategic plan." This statement begs the question, "What about tribal involvement?" In the Secretary's February 6, 2002 remarks, it was stated that, "this new plan will reflect a beneficiary approach to trust management and service delivery." This statement begs another question, "How can Indian Country take the Secretary at her word given the paternalistic manner in which BITAM was developed and presented and her statements regarding the development of a strategic plan?" The single statement made by the Secretary that is encouraging to Indian Country is that, "the proposals (tribal) contain many insightful suggestions that can be potentially merged with portions of Interior's reorganization proposal to achieve broader consensus." Indian Country is hopeful that the Secretary will cease actions taken to implement BITAM until such time as tribes have had

the opportunity to merge their ideas into a joint reorganization proposal.

In conclusion, USET believes that no proposal whether it be BITAM, a tribal alternative plan, or a combination thereof will be successful without a firm commitment from Congress to include funding and direction. USET further believes that proposals and/or strategic plans developed without substantial tribal input are destined to fail. The ultimate outcome should be a trust reform proposal and strategic plan developed by the DOI, BIA, and tribes in the truest sense of tribal consultation. To this end, USET requests that Congress delay appropriating or reprogramming funds to institute BITAM in its current form.

This concludes my testimony. Thank you again for the opportunity to affect positive change to this subject of great importance. I am now available to answer any questions.

United South and Eastern Tribes, Inc.

Alternative Proposal to BITAM

Approved by the Board of Directors of the United South and Eastern Tribes, Inc., January 31, 2002; Presented at the Department of Interior Consultation Session on Indian Trust Management February 1, 2002.

Summary:

This proposal prepared by the United South and Eastern Tribes, Inc. ("the USET proposal") consists of a beneficiary-driven tribal trust asset management reform effort to be located within the Bureau of Indian Affairs (BIA) as an alternative to the Department of Interior's (DOI) Bureau of Indian Trust Asset Management (BITAM) proposal. The USET proposal calls for the consolidation of tribal trust functions under the executive supervision of a Commissioner for Tribal Trust Management. This Commissioner would serve within the Office of the Assistant Secretary for Indian Affairs and be guided by a Tribal Trust Advisory Board made up of tribally designated representatives.

The USET proposal contemplates that the tribal caucus of the newly established Trust Reform Task Force could evolve to serve as the Tribal Trust Advisory Board to the Commissioner for Tribal Trust Management. The Board would assist the Commissioner in developing structures, processes and guidelines for determining minimum standards for the trust asset management system. The Tribal Trust Advisory Board would also serve to ensure that the agency implements trust reform and trust

asset management in a manner that accords with the government-to-government relationship upon which the federal government's fiduciary obligation to tribes is based.

The USET proposal places responsibility for the implementation of trust reform and trust asset management at the level of the BIA Regional Offices, under the BIA Regional Director. The Regional Directors would work with the tribes to establish formal management standards for each trust asset and financial account. Placing trust reform and trust asset management at the regional level honors the government-to-government relationship that exists between the federal government and each tribe, and assures flexibility in the effective management of trust assets. Placing oversight responsibility in the Commissioner for Tribal Trust Management establishes accountability for trust reform and trust asset management in a single executive officer.

The USET proposal separates Individual Indian Money (IIM) account management from tribal trust asset management by placing the IIM accounts management under the supervision of an independent Commission for Indian Trust Accounting.

Background and Justification:

In an effort to remedy a century or more of the federal government's gross mismanagement of Indian trust funds, the Department of the Interior (DOI) proposed a substantial reorganization of its trust management functions. The DOI proposal would remove trust management functions from the BIA and transfer them to a newly created BITAM. The DOI has stated that its proposal is intended to create a management structure that can "effectively implement trust reform and eliminate problems identified by the [federal district] court" and court monitor in the Cobell v. Norton litigation. The

DOI has further stated that its proposal responds to the recommendations spelled out in an analysis by the DOI consultant, Electronic Data Systems Corporation (EDS). The following were among the key recommendations the DOI alleged would be implemented to improve trust asset management through restructuring:

- Immediately appoint a single, accountable trust reform executive sponsor;
- Develop an overarching trust operations business model;
- Adopt a consistent information systems acquisition strategy;
- Establish a trust program management center; and
- Execute comprehensive staffing plans for all participating organizations.

The DOI has never explained, however, what procedures and mechanisms would accompany this restructuring in order to satisfy these recommendations. Nor has the DOI offered any justification about how the new BITAM would address these issues more effectively than a reorganization of trust management within the BIA. Moreover, the DOI has not shared any assessment of how the proposed change will affect the BIA's management of some 54 million acres of Indian lands, the administration of trust funds derived from those lands, or economic development, agriculture, and land management within Indian Country. Rather, the DOI proposal dramatically redefines the structure through which the DOI has conducted its government-to-government relationship with tribes while providing few indications of how the federal government's trust responsibility and fiduciary duties will actually be discharged.

What is clear, however, is that the DOI proposal calls for significant expansion of the federal bureaucracy. This expansion directly contradicts the Administration's call to

downsize and streamline federal executive agencies.

From its inception, the BITAM proposal has been opposed by most Indian tribes. At the Annual
Session of the National Congress of American Indians, 193 Indian tribes unanimously adopted a resolution opposing the reorganization. In regional consultation meetings between DOI officials and tribal leaders held in Albuquerque, Minneapolis, Oklahoma City, Rapid City and San Diego, tribal leaders have
condemned the reorganization plan. Nevertheless, the Secretary has not indicated that implementation of the BITAM proposal would be put on hold or withdrawn. On the contrary, the restructuring is already taking place as appraisal functions have been moved out of the BIA and into the Office of the Special Trustee.

Fortunately, the DOI has accepted the tribal leaders' call for the formation of a Trust Reform Task Force to develop an alternative plan. The alternative plan should respect principles of the government-to-government relationship, including consultation. Furthermore, the alternative plan should focus upon formulating a trust asset management system not simply to meet court orders, but to fulfill the government's trust responsibilities to Indian tribes as defined by treaties, statutes, agreements, and the course of dealings between the United States and Indian tribes.

An Alternative Approach

Dialogue and consultation with tribal leaders and other beneficiaries are needed to ensure that the trust assets management system functions to meet fiduciary standards and the needs of Indian tribes. In addition, any reform must be driven by the beneficiaries and must be designed to assure that the government-to-government

relationship between Indian tribes and the United States is improved and strengthened, not diminished or weakened. The USET proposal suggests a trust asset management structure based upon these principles.

At the outset, however, it must be noted that until the model for trust asset management is
comprehensively developed through dialogue and consultation, USET's proposed organizational structure may need to be modified. As presented here, the alternative structure offers a flexible framework from which an effective tribal trust asset management system can emerge.

The court in the Cobell v. Norton litigation is considering the appointment of a receiver to oversee IIM accounts. Yet, the DOI's proposed restructuring of trust functions covers individual trust accounts and tribal trust assets. In contrast, the USET proposal clearly separates the IIM account management structure from the tribal trust assets and accounts management. As a result, the USET proposal is directed toward the development of structures and processes related to tribal trust asset management.

Fully aware of the BIA's gross mismanagement of remaining tribal lands and resources, this proposal nonetheless contemplates that the trust reform structure and process be anchored in the BIA. It is through the BIA that tribes (along with BIA field offices) have been successful in establishing sound trust management for their lands and resources pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA).

Moreover, it is through the BIA that the American Indian Trust Management

Reform Act of 1994 requires the improvement of trust management systems, in part by giving tribes the opportunity to directly manage tribal funds currently held in trust by the United States.

In order for trust reform to advance promptly and to put an end to the agency's pattern of short-sighted, inconsequential efforts, location of the process within the BIA is both achievable and necessary given the following objectives (set out as recommendations in the EDS report):

- Creating a "beneficiary approach to trust activities and service delivery." Successful development and resource management in Indian Country are directly linked to Indian control. Accomplishing effective trust management responsibilities, such as conservation of the land and assuring a fair return on assets, requires the involvement of beneficiaries in determining the direction of the trust, opening channels of communications and dialogue with beneficiaries, and providing beneficiaries with accurate information (including the timely disclosure of trust asset performance). As pointed out in the Tribal Leaders Statement on Indian Trust Management Reform, "the future of trust management includes increased protection and tribal control over lands and resources, and a federal system that provides technical assistance and trust oversight on resource management in a flexible arrangement that is driven by self-determination through the special circumstances, legal and treaty rights of each tribe and reservation." It is the BIA field offices and the tribes themselves that have the information and experience to implement this beneficiary approach to trust activities and service delivery.
- Establish an "enterprise business and technology model to facilitate fiduciary responsibilities and beneficiary approach." Given the experience to date within

BIA (including lessons learned through failure), the BIA is as well positioned as a new bureau to facilitate the federal government's fiduciary responsibility. For the reasons described in the paragraph above, the BIA is better suited to establish a "beneficiary approach" especially in light of the BIA's accumulated experience of working with tribal and individual beneficiaries under the federal trust relationship (which, as described below, includes many elements of a common law trust, but which embodies additional elements arising from the federal government's unique relationship with Indian tribes). Data clean-up and technological improvements have already been imposed on the BIA by court order. What the EDS report recommends, however, is a new trust enterprise framework consisting of an agreed upon and coordinated process with appropriate internal standards to drive the data and technology improvements. This recommendation should be a key focus of the Trust Reform Task Force and the Tribal Advisory Board.

- Creating an organizational model with adequate resources to support it. It is essential to consolidate trust functions and services within the DOI. The EDS report makes it clear that the ultimate cure to the federal government's mismanagement of trust systems is to provide sufficient staff and resources to implement any organizational model. Achieving this goal does not require creating a new bureau. Rather, it requires some realignment of the existing BIA organizational structure and the provision of sufficient resources to staff and fund its operation. For reasons discussed above, this proposal contemplates that those functions should be consolidated within and managed through the BIA, with newly apportioned funding.
- Improving the efficiency of trust management processes, applying industry standards, and establishing clear standards for measuring performance. In

keeping with the federal trust responsibility to Indian tribes and a beneficiary-driven trust reform this objective must be achieved through the BIA. Management processes, industry standards, and standards to measure performance must be developed in a manner consistent with the unique nature of the federal trust responsibility to Indian tribes. In some cases, BIA regional offices and tribes have already established effective processes and clear standards. Tribes and the BIA should work to build upon these achievements, not dismantle them. The development of these processes and standards should be undertaken at the regional office level with assistance as necessary from the Trust Reform Task Force, Tribal Trust Advisory Board and Commissioner for Tribal Trust Management.

- Separation of trust functions and responsibilities from non-trust activities. This separation can be accomplished within the BIA through the appointment of one executive responsible for trust management issues (the Commissioner for Tribal Trust Management) and another for Indian program activities (the Commissioner for Indian Programs). Proper separation of BIA functions under a Commissioner for Tribal Trust Management will enable the trust program to develop a fiduciary duty focus and strategy. The separation of trust and non-trust functions should not be permitted to deprive tribes of the opportunity to assume responsibility for trust asset management from the BIA nor should it be allowed to impair the viability of the BIA's other programs. Separation of trust management and other Indian programs at the executive level can improve the integrity of the trust asset management system. Maintaining both trust and non-trust elements within the BIA lends economies of scale that increases the viability of each type of program.
- The Federal Government's Obligations under the Trust Responsibility Doctrine

> are Distinct from the Responsibility of a Common Law Trustee. The roots of the federal trust responsibility spring from contracts and agreements in which the tribes ceded vast acreages of land and concluded conflicts in part in exchange for the United States' promise of protection. The recommendations of the EDS report and the Secretary's BITAM fail to fully acknowledge the distinction between the federal government's trust responsibility to Indian tribes and that of a common law trustee. Certainly, it is beyond question that the federal government is bound by the fiduciary duties of a common law trustee in its dealings with Indian tribes. The trust doctrine clearly establishes the government's fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative steps to protect trust property, among other elements. Yet, those fiduciary duties arise from the "unique obligations" and the "special relationship" of the United States to Indian tribes and individuals. As pointed out repeatedly by the United States Supreme Court, no comparable duty is owed to other United States citizens.

Elements of a common law trustee business model may serve as important tools in advancing trust reform. That model on its own, however, cannot fulfill the government's duties under the trust doctrine. Trust reform must recognize and build upon the "unique obligations" and "special relationship" of the federal government to the tribes. Placing trust reform and trust asset management within the BIA, with a Tribal Trust Advisory Board, and with tribes working with regional BIA offices to implement trust management systems provides the framework needed to achieve trust reform.

Self-Determination and Trust Reform

In contrast to the frustration tribes and individual Indians have experienced due to inadequate BIA management of Indian programs, tribes have established a sound track record in program service delivery
through their assumption of federal responsibilities under the ISDEAA. Through the ISDEAA contracting process, federal programs, services, functions and activities (PFSAs) are planned, designed, and implemented at the level where beneficiaries have the most direct access to the decision-makers and administrators involved in the delivery of those PFSAs - the tribe and its staff.

The benefits resulting from tribal assumption of federal programs applies to trust management functions as well as to any other. Pursuant to agreements under Title I and Title IV of the ISDEAA, tribes have assumed trust management responsibilities and have a proven record of effectiveness. Continued tribal management of trust assets and facilitating the expansion of opportunities for tribes to further assume trust management functions is essential to the integrity of tribal trust asset management. By keeping tribal trust management within the BIA and executing agreements for tribal management of trust assets through
the ISDEAA, trust reform can be a beneficiary-driven process where accountability rests at the point of greatest sensitivity -- with the tribes.

Standards and Liability

Effective trust management requires clear standards to determine whether a trust resource has been used for its maximum value or whether the trust asset has been diminished. In consultation with the tribes, the Secretary should be required to establish formal standards for each trust asset and financial account. BIA Regional

Offices should develop inventories of assets and accounts and work with tribes to determine the appropriate management standard for those resources.

The Secretary, through the Commissioner for Tribal Trust Management, (under the advisement of the Tribal Trust Advisory Board) would be responsible for developing guidelines and principals for Regional
Directors to assure minimum standards to protect trust assets are met. For trust assets or accounts managed by tribes, the Commissioner for Tribal Trust Management, through the Regional Director, and tribe should enter into agreements stating the standards that apply to the trust assets involved. The agreement between a tribe and a Regional Director should specify the procedures and supporting documentation the tribe would provide for BIA review in order to assure trust transactions meet the government's fiduciary obligations. These agreements would permit flexibility on the local level for setting standards for a breach of the fiduciary duty. The Regional Director agreements with tribes would assist the government in demonstrating that it exercised due diligence in delegating its fiduciary duty to the tribe to manage the trust asset (and shield the government from liability in the case of an individual trust beneficiary seeking to sue for breach of trust). Tribes managing trust assets could consider establishing administrative trust appeals procedures or other informal complaint mechanisms. Through these processes, an individual trust beneficiary would have the opportunity to file a complaint against a tribe upon a reasonable belief that a fiduciary duty has been breached during the course of the tribe's management of the trust asset or account.

Trust Management Structure

The structure contemplated in this proposal is to establish two Commissioners within the Office of the Assistant Secretary for Indian Affairs. (See attachment 1). The

Commissioners would be nominated by the President and be subject to Senate confirmation. One Commissioner would be a Commissioner for Tribal Trust Management and serve as the executive accountable for trust management programs, functions, services, and activities ("PFSAs"). The other Commissioner would be responsible for oversight of all other Indian PFSAs. Through this structure, trust management would be separated from all other Indian PFSAs within the BIA. The Office of Special Trustee's (OST) responsibilities would be limited to the development of the plan to implement reforms to address the four breaches identified by the court in Cobell v. Norton. Upon completion of the plan the OST would be eliminated.

To assure a beneficiary-driven trust system, the structure includes a Tribal Trust Advisory Board that could be modeled on the tribal participation within the Trust Reform Task Force (and could include the Task Force participants). The Board would advise the Commissioner for Tribal Trust Management and work with the Commissioner to oversee implementation of the trust management improvement project. A Division of Trust Accounting (also within the Office of the Assistant Secretary) would handle trust accounting responsibilities and would report to the Commissioner for Trust Management.

The Offices of the various Regional Directors would be responsible for implementing trust management PFSAs, including establishing standards for trust assets. To maintain the separation of trust asset management PFSAs and Indian PFSAs at the regional level, a Deputy Director for Trust Management and a Deputy Director for Indian Programs would be positioned under the Regional Director. Under the Deputy Director for Trust Management, a Division of Trust

Assets would oversee the management of tangible trust assets that generate revenue for the tribes (including real estate and natural resources). A Division of Trust Accounting would be responsible for financial trust accounting matters.

The attached chart provides a visual schematic demonstrating the structure proposed by USET. Except for those positions identified and discussed here and shown on the chart, the USET proposal
suggests no other change to the current BIA structure.

Commission for Indian Trust Accounting

The management of IIM accounts is before the court in the Cobell v. Norton litigation. To facilitate the most direct accountability mechanism for individual Indian beneficiaries, the USET proposal calls for the creation of a Commission for Indian Trust Accounting. The Commission could be positioned within the BIA or perhaps as a stand-alone body under the Secretary. It would be responsible for the management of individual trust accounts under a fiduciary model that would be responsive to the interests of the account-holders. The Commission could be made up of 12 Commissioners from each of the BIA regions, or through another selection processes approved by the tribes. Legislation could be enacted by which Commissioners would be named by the President and confirmed by the Senate through the Senate Committee on Indian Affairs.

Budget

Integral to the success of any trust reform effort is the investment of sufficient funding to provide for adequate staffing and resources to implement the organizational model selected. Restructuring should not diminish funding available for other Indian programs, nor otherwise be reprogrammed from already under-funded BIA programs or

Indian Programs. The Administration must seek new appropriations for trust reform activity and trust management PFSAs.

The BIA has been delegated trust and other Indian PFSAs because at the local level many of those PFSAs are integrally intertwined. Trust and other Indian PFSAs mutually reinforce the viability of the other through the advantages of economies of scale. While effective trust asset management may require

a single accountable executive, the most cost-effective means to reform leaves the BIA largely intact (subject to the exceptions noted above).

To date, the significant resources allocated to trust reform have failed to produce measurable improvements. The USET proposal approaches trust reform with a cost-effective principle in place. Yet, as called for in the EDS report, the Secretary must provide this beneficiary driven trust reform process with more resources than previous trust reform efforts. The Trust Reform Task Force should be sufficiently funded immediately and the Task Force charged to assist the Secretary in developing a budget to implement the reforms identified and to meet the on-going requirements of trust asset management.

Advantages of the USET Proposal

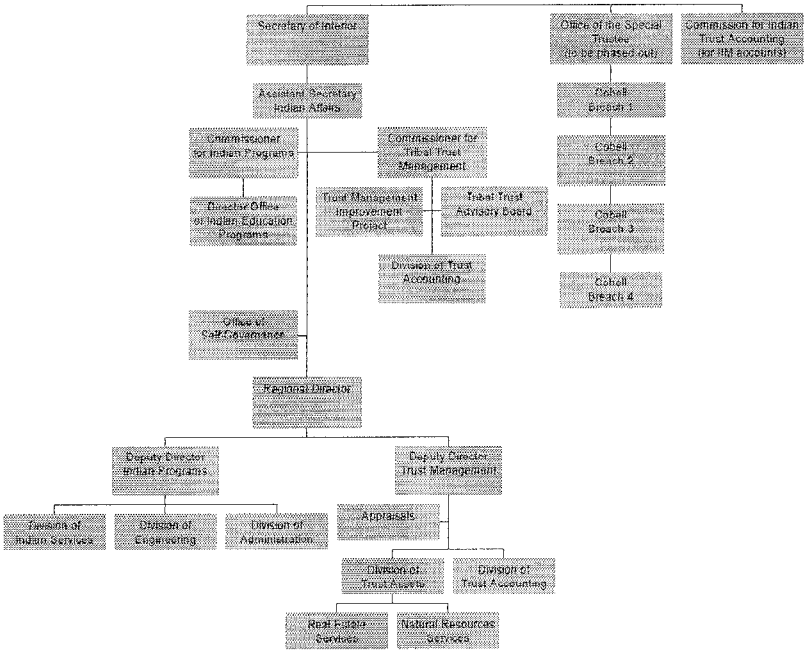
The USET proposed alternative to place trust reform and trust asset management structure within the BIA has numerous advantages over the DOI's BITAM proposal. Among them are the following:

- Trust reform and trust asset management would be beneficiary-driven with trust responsibilities being implemented at the regional level;

- Placing trust reform and trust asset management at the regional level honors the government-to-government relationship that exists between the federal government and each tribe;
- Anchoring trust reform and trust asset management at the regional level assures flexibility in the effective management of trust assets;
- Management processes and standards to assess performance would be developed in a manner consistent with the unique nature of the federal trust responsibility to Indian tribes;

- The reform effort would not interfere with, but would enhance tribal management of trust assets under the ISDEAA and the American Indian Trust Management Reform Act;
- The reform would not impair but expand Indian control of economic development and resource management in Indian Country;
- Placing oversight responsibility in the Commissioner for Tribal Trust Management establishes accountability for trust reform and trust asset management in a single executive officer;
- IIM account management would be handled separate and apart from tribal trust asset management by a Commission for Indian Trust Accounting;
- Trust asset management within the BIA would permit trust and other Indian programs to mutually reinforce the sustainability of the other through economies of scale;
- Restructuring is limited in scope, making it cost-effective and more manageable;
- Procedures and agreements between tribes and Regional Directors will assure that minimum standards to protect trust assets are met and assist the government in demonstrating that it exercised due diligence in delegating any fiduciary duties to tribes.

USET'S PROPOSED TRUST MANAGEMENT STRUCTURE



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TESTIMONY OF THE HONORABLE EDWARD K. THOMAS

President, Central Council of the Tlingit and Haida Indian Tribes of Alaska
on
Bureau of Indian Affairs Trust Management Reform

To the
Senate Committee on Indian Affairs

February 26, 2002

GREETINGS FROM ALASKA! My name is Edward K. Thomas. I am the elected President of the Central Council of the Tlingit and Haida Indian Tribes of Alaska, a federally recognized Indian tribe of 24,000 tribal citizens. The ancestral homeland of the Tlingit and Haida people is Southeast Alaska. I have been the President of my tribe since 1984. I am honored to be here today to testify on this very important matter of Bureau of Indian Affairs (BIA) Trust Management. Since its inception pursuant to the 1994 Act, I have served as a member of the Special Trustee's Advisory Board.

Let me begin by commending Congress, and especially this Committee, for showing special interest in this very important issue and for holding this hearing. One of the most important legal principles in defining the relationship between federal government and the Indian and Alaska Native Tribes is that there exists a Trust relationship between our governments. I believe that the United States has a moral and a legal obligation to preserve this Trust relationship. This important Trust relationship is seriously compromised by the extensive breakdown in the BIA management of the Trust assets of tribes and the individual Indian account holders.

I will cover four (4) topics in my testimony today:

1. My understanding of what the 1994 Act was to accomplish;
2. The composition of the Office of the Special Trustee Board and the challenges it faces;
3. The obstacles of Trust Reform; and
4. Recommendations on Trust Asset Management.

The 1994 Act

Prior to the 1994 Act my tribe was actively involved with the Inter-Tribal Monitoring Association (ITMA) in working with Congress to come up with solutions to the many problems that we were aware of in the BIA management of Trust assets. The 1994 Act was tribally driven legislation. This means that it was the tribes, not the Department of the Interior (DOI), who recognized that these Trust management problems were severe enough that it would need

Congress to step in and help us fix these serious problems. I must say that many of the questions and problems being discussed today were similar to the ones we were trying to get answers to back then.

Although, I personally felt the 1994 Act was not aggressive enough because these severe breaches of Trust should have been dealt with at the same level of resolve as the national Savings and Loan (S&L) scandal. You may recall that the federal government set up a temporary, quasi-governmental agency called the Resolution Trust Corporation (RTC) with far-reaching authorities to fix the S&L problems and the findings of the RTC led to immediate acts of Congress to restore to citizens moneys illegally invested and eventually lost by these S&Ls. Nonetheless, I decided that I was willing to do my best to work with others in finding solutions and take necessary action to fix these problems. I was honored in being selected to serve on the initial Advisory Board for the Special Trustee.

I understood that in passing the 1994 Act Congress intended that the Special Trustee take the necessary steps to put forth solutions to the Trust Management problems. The legislative record and the findings set forth in the Act support this assertion. The fatal flaw in this approach was that it left the Office of the Special Trustee (OST) under the administrative authority of the DOI Secretary, who made it very clear from the beginning that he did not feel the OST was necessary nor did he support the work being performed under this authority. Now, Secretary Norton has inherited the Special Trustee put in place by Secretary Babbitt.

Special Trustee Board Composition and Challenges

The OST Board is composed of five (5) tribal leaders and 3 investment bankers with substantial experience in Trust Asset Management. The tribal leaders on the Board are intimately familiar with the legal requirements of tribal and individual Indian Trust Asset Management as well as with the many problems at all levels of the BIA in managing these assets. It is fair to say that the Board needs very little, if any, orientation on the issues of Indian Trust Management.

The Board monitored the implementation of the automated Trust Fund Accounting System (TFAS) as well as the development of the High Level Implementation Plan (HLIP). Although it is clear that the Office of Trust Fund Management (OTFM) is still not up to acceptable standards, the new automated system is a dramatic improvement over what it was before. The HLIP was a plan that had firm dates for completing specific tasks relative to fixing problems in BIA Trust Management. This plan was greatly compromised by the DOI Secretary, Bruce Babbitt:

- Secretary Babbitt refused to sign off on the HLIP unless the tasks relative to the design and implementation the Trust Asset and Accounting Management System (TAAMS) and the BIA Data Cleanup components remain under the direct administration of the BIA.
- The BIA never gave TAAMS the level of priority it needed. The BIA put seven (7) different people in charge of TAAMS in two years. None of whom had the authority or expertise to get the job done.
- Very little was done on BIA data cleanup except in response to very limited, narrow and specific directives from Judge Lamberth in the Cobell case.

- The BIA never took the initiative to finalize and certify the architecture of TAAMS even after numerous reminders that timelines have been missed and that the project could not be properly implemented without certifying the architecture of the proposed system.
- Secretary Babbitt authorized the "roll out" of the Billings component of TAAMS before the certification of the TAAMS architecture which was intended to demonstrate that they were making progress on TAAMS and it ended up, instead, distracting from the work that should have been done to get the total system running like it was intended to.
- Requests by the Board to meet with Secretary Babbitt were ignored.
- Secretary Babbitt fired former Special Trustee, Paul Homan, when Mr. Homan pointed out the fact that very little more in could be done in data cleanup and TAAMS implementation without total cooperation from all levels of BIA management and a total commitment from Secretary Babbitt to provide the necessary authority to the Special Trustee to require BIA employees to get Trust issues addressed in concert with timelines set for those projects.

The Board has also had difficulty in getting our current Special Trustee to follow up on our requests or directives:

- Last year the Board requested that the minutes of our meetings be copied to members of this Senate Committee on a regular basis. We have no confidence that even this simple task has been done.
- The Board has authorized the implementation of an "action tracking" form to be used to track administrative action taken on Board action. This form would specify the Board action taken; specify who is responsible for following up on the action and the expected date of completion. The Special Trustee has not implemented this "action tracking" form nor any similar accountability procedure.
- We have requested BIA employees key to the implementation of the TAAMS project and records cleanup to meet with the Board. We have been receiving report after report that BIA employees were behind on these projects so the Board wanted to get out of the business of just pointing blame and on to some strategies to work together to get the job done. None of these BIA employees were made available to meet with us.
- We requested that the Chief of Staff to this Committee be invited to the Billings TAAMS roll out to see first hand its deficiencies and that a serious problem was brewing. The invitation was not extended.
- As a member of the Board I have asked for specific financial information as to how much it would cost to fully implement the recommendations in the EDS Report and where would the money come from if more money was needed. This was never provided. I am very concerned that if these additional costs are not put forth in the form of DOI budget amendments there would be proposals to take funding from other BIA programs to pay for these costs.
- We requested a meeting with Secretary Norton to discuss our findings and problems encountered with her predecessor. The request to meet with her was never extended.

The Board has been very vocal with the Special Trustee and his staff as to our displeasure that project timelines were being violated on a regular basis and that there did not seem to be any interest in putting these major projects under the direction of highly qualified people within the BIA. The response we have received time-after-time is that the BIA did not do this and the BIA did not do that but we have never been given the opportunity to talk directly to these people whom we have been led to believe are in charge of getting the job done.

Obstacles to Trust Reform

- The single most formidable obstacle to creating and implementing solutions to problems in Trust Management is the absence of "buy-in" by the DOI Secretary and all administrative levels of the BIA that they have the responsibility and authority to require that BIA employees must fully cooperate in any proposed solutions to Trust Management problems.
- The absence of a written plan as to how the BIA and the OST will work cooperatively in the development of a joint mission statement, guiding principles, goals and objectives and a clear delineation of who is responsible for what is a huge obstacle.
- The absence of authority being placed upon the Board to enable it to require certain action as opposed to just recommending action is an obstacle.
- The absence of a person who is highly qualified to lead these projects to completion is another major obstacle. Whoever is in charge must fully understand the principles and legalities of Trust Management, be an excellent manager, and must have extensive experience in the implementation of computerized data management systems.
- There are no consequences when people who are in charge are directed to perform a task needed to fix a problem and they do not do it. Nothing will happen unless there is accountability.
- There is a lack of adequate human, financial, and technological resources to administer Trust Management in a manner consistent with acceptable industry standards.
- The pressure on the Department brought to bear by the Cobell litigation is a two-edged sword. It has indeed caused this Department, like no other Administration before it, to spend lots of time and effort on the Indian trust mismanagement problems. But it has also been a distraction, geared more toward avoiding punishment and toward ducking responsibility than in paying the price of fully rehabilitating the system.
- Finally, there is reluctance by the United States to do what is necessary to fix all of the Trust Management problems to the same level of resolve that it did in the savings and loan scandal.

Recommendations

I must make it clear that my recommendations are mine and do not in each instance reflect the entire Board of the Office of the Special Trustee. For the most part, my recommendations are broad in nature put forth for the consideration of Congress.

- The United States Congress and the President must make a commitment to fix the Trust Management problems with the same degree of resolve that you did in addressing the problems in the savings and loan scandal.

- The EDS Report recommendations must be implemented in the Bureau of Indian Affairs **before looking at alternative structures.** There are so many false expectations created by talking about alternative structures when we have not taken the time to fully evaluate the EDS recommendations. There are no political solutions to these problems. All solutions require work carried out in a professional and timely manner.
- Establish the Office of Indian Trust Transition and hire an Executive Sponsor who is highly qualified and fully authorized to get the job done. I believe that this office could remain in the BIA if given the proper authority and held responsible to an appointed Board.
- Appoint a member of this Senate Committee on Indian Affairs to serve on the Board charged with overseeing Trust Management Reform. This may be the best way to vest the Board with a voice of authority that will instill accountability into the reform effort.
- Request that the President modify his budget to include all anticipated costs for getting the job done and enough money to run all Trust programs after reform tasks are completed.
- Require that all proposals demonstrate how they will improve the Trust process and how they will apply industry standards to every aspect of Trust Management while honoring and furthering tribal self-governance and Indian self-determination.
- Finally, there must be consequences for not performing duties as assigned when it comes to implementing solutions to Trust Management problems. People at all levels who do not do what they are requested to do must be given notice and replaced if necessary when they do not perform.

Once again Mr. Chairman, I thank you for the opportunity to share my views with you on Trust Management. I wish you well in your deliberations and I trust you will make the right decisions on the issues of grave concern to our people

Gunalcheesh! Howa!

INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
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TESTIMONY

of the
INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS
before the
SENATE COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

Washington, D.C.

February 26, 2002

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following federally recognized tribes: **Central Council of Tlingit & Haida Indian Tribes, Kenaitze Indian Tribe, Metlakatla Indian Tribe, Hopi Nation, Tohono O'odham Nation, Salt River Pima-Maricopa Indian Tribe, Hoopa Valley Tribe, Yurok Tribe, Soboba Band of Luiseno Indians, Southern Ute Tribe, Nez Perce Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa Indians, Grand Portage Tribe, Leech Lake Band of Ojibwe, Red Lake Band of Chippewa Indians, Blackfeet Tribe, Chippewa Cree Tribe of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe, Fort Belknap Tribes, Fort Peck Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Walker River Paiute Tribal Council, Jicarilla Apache Nation, Mescalero Apache Tribe, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Sandia, Three Affiliated Tribes of Fort Berthold, Turtle Mountain Band of Chippewa, Absentee Shawnee Tribe, Alabama Quassarte, Cherokee Nation, Kaw Nation, Kiowa Tribe of Oklahoma, Muscogee Creek Nation, Osage Tribe, Quapaw Tribe, Thlopthlocco Tribal Town, Confederated Tribes of Umatilla, Confederated Tribes of Warm Springs, Cheyenne River Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, Chehalis Tribe, Confederated Tribes of Colville, Forest County Potawatomi Tribe, Oneida Tribe of Wisconsin, Eastern Shoshone Tribe, and the Northern Arapaho Tribe.**

Mr. Chairman and members of the Committee, my name is William Martin and I am the elected First Vice President of the Central Council of Tlingit & Haida Tribes of Alaska. I also serve a Treasurer of the Board of Directors of the Intertribal Monitoring Association on Indian Trust Funds (ITMA). Accompanying me here today is Chairman Richard Monette of the Turtle Mountain Band of Chippewa. Also present today is ITMA Board Member

Charles Jackson, Secretary/Treasurer of the Confederated Tribes of the Warm Springs Reservation and ITMA's Technical Consultant, David Harrison.

ITMA is a tribal organization comprised of the above named 53 federally recognized Indian tribes which are vitally interested in the continuing efforts to reform the administration of the Indian trust estate by the federal government. We believe strongly that the current attention focused on reorganization of functions within the Department of the Interior is premature and not likely to result in meaningful reform unless more fundamental, underlying issues are first addressed.

Transparency and Honesty

We do not think it impugns the motives of anyone involved in trust reform to point out the prominence given to these two attributes in the current Congressional inquiries into the largest corporate bankruptcy in our nation's history. Nine committees of the Congress are decrying the lack of these two attributes in recent years in the operations of the 7th largest corporation in America. For all the same reasons that these two factors are receiving so much attention in the wake of Enron's failure, ITMA believes that effective Congressional oversight of Indian trust reform depends on the degree to which the reform efforts are characterized by transparency and honor. Accordingly, ITMA respectfully suggests that this Committee's inquiries must pierce the veil of organizational structure and inquire into undisclosed objectives and the unexamined policies they serve.

ITMA suggests that the Department of the Interior has affirmatively misled this Committee for many years regarding trust reform. The previous Secretary testified to this committee that there was no evidence of significant theft or fraud in the administration of Indian trust funds. ITMA has discovered one incidence of the theft of more than $7.75 million in trust funds. Perhaps that is not considered significant in the context of a $3 billion portfolio, but ITMA believes it was materially misleading for the Secretary not to correct his earlier statement when Senator Campbell gave him the opportunity in a subsequent hearing.

ITMA also believes the current strategy of the Department of Interior includes setting the stage for recommended legislation to privatize much of the Indian trust administration. ITMA believes the Department hopes to establish lower standards of care for the administration of the trust, and to charge the Indian trust estate for unexamined and unaudited costs of administration.

Focus on "Organization" Misses Larger and More Fundamental Issues

ITMA believes the current focus on "reorganization" of the Department distracts tribes and the Congress while basic issues are being foreclosed from future deliberations or rethinking. ITMA believes current activities include perpetuating a continuing stain on the honor of the United States at a time when "restoring honor and decency" were the hallmark of the present Administration's path to Washington. ITMA believes important policy decisions are being made or directed from the Department of Justice while public attention is directed to debating with Interior. ITMA believes reductions in force within the "Indian" side of DOI are underway while long under-employed veterans of discredited efforts within the Minerals Management Service are transferred into the Indian trust program. ITMA

believes important trust records are being delivered in the scores of thousands of cubic feet in volume to distant repositories without being adequately imaged, inventoried, or catalogued.

ITMA believes that the Department's strategy is being largely successful in focusing attention away from fundamental precepts of trust administration, including good faith, disclosure, fair dealing, and duty to correct known errors. ITMA believes the government knows that more than $2 million were never recovered from the theft of more than $7 in the mid-1980's. ITMA believes the government knows that accounts at agencies where thefts occurred by employees were never adequately examined to determine the scope of the thievery. Instead, the government took the word of the thieves as to the extent of their pilferage. ITMA believes that the Departments of Interior and Justice are determined not to acknowledge anything that might result in monetary liability of the United States unless the matter is brought to light through judicial enforcement of the trust. ITMA believes the Departments of Justice and Interior continue to rely on the inability of most individuals and tribes to maintain such an action, given the more than $8 million the *Cobell* plaintiffs have been required to raise to try merely the largely procedural aspects of that case.

Reorganization of Trust Functions within Interior

ITMA has to date declined to enter the fray regarding competing organizational proposals for administering the Indian trust within Interior. We believe that rearranging boxes and functions is a temporizing exercise at best until a serious effort is made to determine the duties that need to be performed. We note in this regard that, in respect to one area in which she is on trial for contempt, the Secretary obviously agrees with us. The discussion of information technology security in her January 16, 2002 report to the *Cobell* court recites that she has undertaken a review of the "... requirements contained in applicable statutes, regulations, Court Orders, treaties, investigations, and Congressional budget directives." Status Report to the Court Number Eight at 45 (January 16, 2002).

ITMA also believes that the near frenzy in focusing attention on organizational proposals is totally inconsistent with the Department's approach to another trust reform matter in which the Secretary finds herself in difficulty with the court. The current contempt trial also includes the matter of historical accounting for IIM accounts. As massive an undertaking as this will prove to be, if it is undertaken at all, this is but a very small piece of the trust reform effort and represents no more than one-quarter of the trust fund portfolio. Nevertheless, in addressing this piece of trust reform, the Secretary hired a former executive of a large accounting firm and provided him 60 days merely to develop a plan for proceeding, and then an additional 120 days to identify "preliminary work" before addressing the development of "detailed plans" to guide actual work.

ITMA believes this schedule for dealing with an historical accounting for IIM accounts is probably reasonable, but the schedule with which wholesale reorganization of the entire panoply of trust administration has been thrust upon us is totally unreasonable, and maybe even irresponsible.

ITMA believes the current frenzy over reorganization merely repeats the mistake that this Secretary now acknowledges to have been made by her predecessor with TAAMS and data cleanup, namely, a rush to "do something big" before determining "what it is" that needs to be done. ITMA points to the $1 billion or so that have been paid in settlements and judgments over the past fifteen years, and notes that not one red cent of that was paid because of a misalignment of boxes or the absence of an automated system. Each of those settlements or judgments was paid because some duty required by law or fair dealing was breached.

ITMA continues to suggest that meaningful trust reform should begin with an identification of the duties to be performed by the trustee, followed by the development of policies and procedures to carry out those duties. Internal controls should be designed to identify failures to follow those policies and procedures, and enforcement mechanisms put in place to correct those failures and prevent their reoccurrence. The current system of incentives and sanctions should be revised to reward those who perform or surface problems and to punish those who cover up and conceal. This Committee is thoroughly familiar with this approach from earlier statements of ITMA and GAO regarding TAAMS. ITMA urges the Committee not to be pulled down the same path with respect to reorganization as we experienced with TAAMS.

Current Trust Reform Implements Unexamined (and possibly illegal) Policies

ITMA believes the current strategy for trust reform is being carried out by a "transition office" that is not clearly understood by anyone outside the Department. ITMA believes this strategy includes implementing the Royalty Simplification and Fairness Act of 1996 for Indian lands, even though that Act explicitly excludes Indian lands from its coverage. ITMA believes the current engagement of EDS to "benchmark" current trust practices of the Department is designed to provide cachet for recommendations to lower the trust standards to which the Department is being held by the courts. ITMA further suggests that the current engagement of EDS to "benchmark" current practices against "industry standards" is a misguided exercise at best, and a sham on the public and the Congress at worst. A "benchmark" in any dictionary suggests a reference to a known datum point, and neither the Department nor the contractor can point to any source for such a known reference point to guide EDS in its "benchmarking" efforts. The predictable result is that perhaps at the direction of the Department, the report will be based on the contractor's reliance on a judgment sample of opinion or commercial practices. In other words, the report will be based on the practices of persons or institutions chosen subjectively, and no legitimate "benchmark" will be established.

The only benchmark that should have any legal significance should be the existing legal duties of the United States to tribes and allottees vis a vis their property which is in trust administered by the United States. Identifying so-called industry practices in lieu of those trust duties is NOT ACCEPTABLE. If Enron's accounting practices were viewed two years ago to be acceptable industry practices because Arthur Andersen said at the time that they were, that assertion would have nothing whatsoever to do with the trustee's practices and obligations due to Indian beneficiaries. The reason for this is ought to be obvious and that is that the United States' unilaterally imposed trust on Indian tribes and Indian people is

unique, sui generis. And it requires the highest level of fiduciary loyalty and care and not simply that which one can get away with in the marketplace such as the Enron and Arthur Andersen deceptive practices.

Trust Reform Efforts Must be Infused with Transparency and Honesty

Except for "national security," perhaps-no two words have received more attention from more committees of this Congress than "transparency" and "honesty," as those words have been used in the current Congressional inquiries into the collapse of Enron. ITMA refers this Committee to the spate of publications emanating from the Department of the Interior over the past dozen years purporting to set forth the Department's commitment to trust reform. ITMA further suggests that these two attributes have never received so much as a glancing nod in any published trust reform effort of the government to date, including the current deliberations on reorganizing functions within the Department of Interior. We believe that the Department of Justice, in its zeal to defend the U.S. Treasury from liability, is largely responsible for the absence of these attributes in any description of the government's trust reform efforts. ITMA also suggests that until the Department of Interior exercises some greater degree of autonomy from Justice in this matter, or until Justice is brought to the table, the terms transparency and honesty will never invade the lexicon of the government's trust reformers.

Charging Fees Against Indian Trust Corpus

ITMA categorically rejects this notion because it would be an enforced exaction and tantamount to a federal tax on the Indian trust estate. ITMA understands the Committee is interested in views on this matter, and notes that Secretary Norton invited the Congress to consider this matter in her testimony before the House Resources Committee on February 6. ITMA further respectfully suggests the Congress should act immediately to repeal the current authority of the Secretary to impose such fees as currently provided by 25 U.S.C. 413. The National Congress of American Indians (NCAI) has passed a resolution calling upon the Congress to repeal this antiquated provision of the law.

ITMA suggests that the concept of charging a fee for administering the Indian trust estate is wholly inappropriate because consideration for this trust relationship was given in the enormous land cessions and promises of peace contained in many treaties. In situations where this trust relationship has been unilaterally self-imposed by the government, adding later the right to recoup the expenses of carrying out these trust duties would be to convert a promise of protection into an exercise of confiscation. It is especially outrageous when one considers, in addition, the government's own repeated confession of absolute and utter incompetence as a trustee for Indian tribes and allottees. When, and if, Congressmen and Senators and employees of the Departments of Justice, Treasury and Interior are willing to turn their retirement funds over to the Department of Interior to invest and manage then, and only then, might Tribes and allottees be willing to re-examine the question of the extent and magnitude of the Department of Interior's unblemished record of colossal and undisputed incompetence as a trustee.

ITMA is aware that the present Administration appears enamored of the "private sector" example of trust administration, including the profit motive that animates most of the trust

industry in this country. ITMA adamantly rejects the proposition that the trust relationship between the United States and Indian tribes or their members is analogous to a trust voluntarily created in the private sector and administered by a commercial trustee.

The Department cannot seem to accept that its duties as an agent of the United States as trustee are just that -- duties -- that can be neither shirked nor turned to profit.

ITMA further suggests that the current authority contained in 25 U.S.C. 413 to impose such fees has been invoked in a retaliatory and wholly arbitrary and capricious fashion. The leasing and grazing regulations that went into effect in March of 2001 require that an administrative fee of 3 per cent (limited to a minimum of $10 and a maximum of $500) shall be charged for every lease, permit, assignment, or other transaction covered by the leasing and grazing regulations. This fee is putatively intended, according to the preamble to the regulations, "to cover the costs" of processing the documents. ITMA suggests the 3 per cent figure in these regulations is wholly arbitrary and capricious and that the BIA has no earthly idea what it costs to process a lease or assignment transaction. The cost of processing an assignment or other transfer of leasehold rights between lessees is categorically not the same as the cost of processing the original lease or permit. ITMA believes this provision was inserted into regulations in 2001 in direct contravention of a standing Secretarial Order that specifically requires an economic analysis of regulations affecting trust resources before the regulations are promulgated. When ITMA suggested to Interior that those regulations unarguably raise the cost of doing business on Indian lands without benefiting Indians whatsoever, we were told that we should submit an economic analysis to support our proposition, notwithstanding that the Secretarial Order places this responsibility squarely on the issuing agency.

Paying a fee for services also suggests that there is some competition for those services, and that the party who pays the fee has a right to choose the service provider. Indian tribes and individual trust account holders have absolutely no voice in the individuals employed or the vendors selected to provide these services. Fees for brokerage, custodial services, auditing services, investment advice, subscriptions to quoting services, etc. for example, are customarily negotiated between customers and financial institutions. If a commercial trust customer does not agree to the fee arrangement proposed by one trust institution, the customer can take the business elsewhere. A "fee" charged by the government to an individual or entity that has no choice but to pay it is not a fee at all, but a tax, whatever euphemistic label is attached to it.

Where fees are paid for trust services, the government customarily acts as a protector of the commercial system, and not as a participant in it. The government customarily acts as a regulator of the party that charges the fee. Investment advisors and securities brokers are licensed. Banking institutions are regulated. In the instance of the Indian trust estate, there is no law whatsoever beyond the trustee itself. The Department of the Interior as agent of the trustee, in fact, apparently can flout the law and its own regulations with total impunity.

The trust regime that Indian beneficiaries have today defiantly rejects transparency, refuses to accept honesty as a benchmark for its performance, and acts as if it is a law unto itself. The very idea of paying fees for the services of such a regime is utterly repugnant to the most rudimentary concepts of good faith or fair dealing.

ITMA Recommendations

ITMA suggests that this Committee exercise its oversight authority to forestall widespread reorganization of trust functions until the trust duties to be performed by any organization are well understood those charged with both their performance and their oversight, as well as by those whose rights and property are at stake.

ITMA suggests that the Congress should act swiftly to pass legislation tolling the statute of limitations on claims arising from the administration of the Indian trust estate until such time as the Congress has convincing evidence that the beneficiaries of this trust have not been denied the good faith, fair dealing, and full disclosure demanded of trustees generally.

ITMA suggests that Congress should act swiftly to repeal the current statutory authority of the Secretary of the Interior unilaterally to collect fees to cover the cost of administering the Indian trust, at least until such time as the congress is satisfied that the trust is being honestly, prudently, and competently administered.

ITMA respectfully requests this Committee to urge in the strongest possible terms that any "benchmarking" of current trust practices in the Department of the Interior be REJECTED. The Department should be required to properly identify its legal obligations as a trustee arising out of existing treaties, executive orders, statutes, case law, and contractual documents authorized under those authorities such as grazing, mining leases, etc. The Department should be required to also include a review of the Department's current "practices" regarding losses, mistakes, errors and omissions, thefts and other defalcations, and disclosure of material facts. While the private trust industry might provide useful models after the relevant legal duties are identified, ITMA submits that the most modern, efficient, and competent regime of trust administration known to man will fail if its "business culture" is characterized by a determination to hide losses, cover up thefts, and bury mistakes in buzz words and a blizzard of promises.

Conclusion

ITMA takes no pride or pleasure in expressing such dissatisfaction with our government's agencies. It is our government, too. We continue to have faith that those in charge of it will step forward to restore our faith in the honesty of what Jefferson called "the last best hope of mankind on earth." Toward that end, we earnestly seek the diligence of this Committee in continuing to champion that goal, and we stand ready to provide whatever additional information the Committee might request of us. Thank you for your consideration of our views in this matter.

Written Testimony of the Navajo Nation
Senate Indian Affairs Committee Hearing
on Indian Trust Fund Management
February 26, 2002

Introductory Remarks Relative to Establishment of BITAM

The Navajo Nation submits this written testimony to the Senate Indian Affairs Committee in accord with the government-to-government relationship between the Navajo Nation and the United States Government. While the Navajo Nation has participated in meetings of a task force established and funded by the Department of Interior to address trust asset reform, the Navajo Nation is intent on maintaining its own positions particular to the interests of the Navajo Nation, separate and apart from any positions which may be established by that task force. Accordingly, the written testimony of the Navajo Nation will likely have both similarities to and differences from positions taken by the Department of Interior's task force.

The Navajo Nation became aware of the current plans of the Department of the Interior to create a Bureau of Indian Trust Asset Management (BITAM) through a press release from the Department of Interior, issued on November 15, 2001. The Navajo Nation Council passed its Resolution CN-85-01, attached as an appendix to this written testimony, stating its opposition to the BITAM proposal. The Intergovernmental Relations Committee of the Navajo Nation Council adopted the Navajo Nation interim position on the BITAM through passage of its Resolution IGRD-308-01, attached as an appendix. While the Navajo Nation has participated in meetings with the Department of the Interior and the Bureau of Indian Affairs since December 2001 across the United States, it has received no detailed or specific information which would cause the Navajo Nation to rethink its rejection of the BITAM. The Navajo Nation continues its firm opposition to the BITAM proposal as a vehicle for Indian trust asset management reform.

Factors Impacting on Navajo Nation Opposition to BITAM

The Navajo Nation's opposition to the creation of the BITAM is based on a number of factors. These factors include a severe lack of clarity and detail from the Department of the Interior relative to the organization and staffing of the BITAM, the lack of information relative to the effect of the establishment of BITAM on well-established federal statutes, regulations and policies regarding Indian self-determination and self-governance, as well as Congressionally-mandated trust reform under the American Indian Trust Fund Management Act of 1994, the failure of the BITAM proposal to address even the limited scope of the trust breaches found thus far by Judge Lamberth in the Cobell litigation, the effect of the establishment of BITAM on the remainder of the Bureau of Indian Affairs, and the failure of the Department of the Interior to consider the views of the trust beneficiaries, Indian tribes and peoples, by moving forward with the establishment of the BITAM in the face of its unanimous rejection by Indian tribes. The negative factors amply support the opposition of the Navajo Nation to the BITAM proposal.

Navajo Nation Support of Trust Fund and Asset Management Reform

The Navajo Nation does support trust fund management reform, as well as the larger issue of trust asset management reform. The Navajo Nation supports the continued and improved provision of trust fund management to Individual Indian Money (IIM) account holders, without interruption of that crucial source of income to individual Indians. The Navajo Nation supports the continued and improved provision of trust asset management services to both Indian tribes and individual Indians.

The Navajo Nation position is that such reform should only be attempted in a manner which will preserve and strengthen the trust responsibilities of the United States Government to Indian tribes and the gains made in the areas of Indian self-determination and self-governance over the past three decades. Reform must be designed in order to address the well-founded concerns of both Indian tribes and individual Indians relative to their assets, as well as other services received by Indian tribes and individual Indians in connection with the federal trust responsibilities which do not relate to land, minerals, timber and other natural resource assets. Reform must not result in the dismantling of the Bureau of Indian Affairs and the outsourcing of other essential trust services, including but not limited to education, roads, other infrastructure, and social services. The accomplishment of valid and effective trust fund and trust asset management reform can only be done in close consultation between the United States Government and the Indian tribes, taking into account the natural resources, population, and organizational capacities of those Indian tribes, as distinct sovereign nations. Only in this manner can the United States Government act in accordance with its trust responsibilities to Indian tribes.

Lack of Information on BITAM from Department of the Interior

The Department of the Interior has not provided significantly more information to Indian tribes on its BITAM proposal than was first provided in the November 15, 2001 press release. During the course of the DOI/BIA meetings in Albuquerque, Minneapolis, Oklahoma City, Rapid City, San Diego, Anchorage and Crystal City, the press release was augmented by only a single page organizational chart, and a critique of the BITAM proposal which was prepared by five (5) unnamed BIA Regional Directors. The BITAM critique was, in fact, only released by the Bureau of Indian Affairs long after it had been leaked to Indian tribes. Neither the Department of the Interior, nor the Bureau of Indian Affairs has provided to the Navajo Nation any information relative to the federal funds or federal full time equivalent positions (FTEs) which would be transferred from existing BIA Regional Offices or other offices currently serving the Navajo Nation to fund or staff the BITAM. The Department of the Interior has provided no information to the Navajo Nation relative to how the establishment of the BITAM would affect self-determination contracts and grants currently in effect between the United States and the Navajo Nation. The Department of the Interior has not provided any information to the Navajo Nation relative to how the establishment of the BITAM would affect the provision of other essential trust services to the Navajo Nation. The Department of the Interior has failed to provide this information in spite of repeated questions in these regards by the Navajo Nation at both the public hearings and in a December 13, 2001 written request for documents under the Freedom of Information Act (FOIA).

Unknown Effect of BITAM on Self-Determination Contracts and Grants

The Navajo Nation is very concerned about how the establishment of the BITAM would affect self-determination contracts and grants which it operates as a tribe, or which it has authorized to be operated by sanctioned tribal organizations. There is no indication from the Department of the Interior or the Bureau of Indian Affairs of how the establishment of the BITAM would affect these self-determination agreements in the areas of land and natural resources development, production, and management. The Navajo Nation does not know whether these self-determination contracts and grants, and their annual funding agreements, would continue to be negotiated by the same entities and personnel. The Navajo Nation does not know whether the agreements would continue as currently executed or whether they would require BITAM review or approval. The Navajo Nation does not know whether these self-determination contracts would be subjected to additional or even contradictory requirements by BITAM staff.

Inconsistency of BITAM and American Indian Trust Fund Management Act of 1994

The Navajo Nation is extremely concerned that the Department of the Interior proposal for establishment of the BITAM has not addressed in any manner the American Indian Trust Fund Management Act of 1994, 25 U.S.C. §4001 et seq., which established the Office of Special Trustee (OST) and which represents the most recent effort of the Congress to address trust fund management reform. The BITAM appears to be contradictory to the American Indian Trust Fund Management Act of 1994, in that the organizational chart shows the OST within the BITAM under the supervision of a new Assistant Secretary. Under the American Indian Trust Fund Management Act of 1994, the OST is required to report directly to the Secretary of the Interior. Further, while the OST would phase out after the components of trust asset management reform are developed and implemented, there is no such phase out of the BITAM proposed by the Department of the Interior.

BITAM Proposal Fails to Address Cobell Litigation Breaches of Trust

The Navajo Nation has heard repeatedly from the Department of the Interior and the Bureau of Indian Affairs that the BITAM proposal resulted from the necessity for the Secretary of the Interior and the Assistant Secretary for Indian Affairs to respond to the breaches of trust found by Judge Lamberth in the Cobell case. However, the BITAM proposal fails utterly to address those five (5) breaches of trust. The BITAM proposal does not contain a written plan to gather missing data; it does not contain a written plan for the retention of IIM trust documents; it does not contain a written architecture plan for the management of trust assets and it does not establish a written plan for addressing the staffing of trust functions.

Effect of BITAM on Remainder of the Bureau of Indian Affairs

The Navajo Nation has repeatedly raised with the Department of the Interior its concerns relative to the dismantling of the Bureau of Indian Affairs which would be accomplished by the creation of the BITAM. Unlike the OST under the provisions of the American Indian Trust Fund Management Act of 1994, the BITAM would not have a limited period of existence. The

permanent removal of the land and natural resources trust functions from the BIA would render a much-reduced federal agency, and the status of the remaining programs and services might be later characterized or considered as having a reduced or eliminated trust status. The creation of the Bureau of Indian Trust Assets Management might have the practical result of reducing the level of appropriation to the BIA for trust programs, including but not limited to, education, social services, roads and other infrastructure. The Navajo Nation opposes the permanent segregation of land-related trust programs from the other trust programs.

While the Navajo Nation and other Indian tribes have been advised in the Department of the Interior meetings that the creation of BITAM is not intended to result in the dismantling of the Bureau of Indian Affairs, the actions of the administration show that further reduction of the BIA is sought by the Department of the Interior. One example of this intent to dismantle the BIA is the plan for "privatization" of remaining Bureau of Indian Affairs operated schools, as set forth in the Department of the Interior FY 2003 budget document. The "privatization" plan is intended to place the operation of BIA operated schools in the hands of private contractors, beginning in FY2003. This privatization effort has been characterized by the Department of the Interior as "the centerpiece of the Administration's initiative to improve the performance of the lowest performing BIA schools." The "privatization" plan does not address how, if at all, the Department of Interior would maintain the government-to-government relationship between the United States and the Indian tribes when these educational trust responsibilities are passed to private contractors, or whether BIA/Office of Indian Education Programs (OIEP) would remain a viable federal agency upon accomplishment of the "privatization" plan goals.

Department of the Interior Moving Forward with BITAM Without Tribal Support

At each of the meetings held by the Department of the Interior and Bureau of Indian Affairs, in Albuquerque, Minneapolis, Oklahoma City, Rapid City, San Diego, Anchorage, and Crystal City, the Indian tribes advised the Department of the Interior and Bureau of Indian Affairs that they rejected the BITAM proposal. The Bureau of Indian Affairs announced during the course of the meetings that the Department of the Interior would be financing a "tribal leaders task force" to address obtain input from Indian country on the process and alternative proposals for trust asset management reform. It was repeatedly stated to Indian tribes that the only members of the "tribal leaders task force" would be elected tribal leaders appointed by the tribes within the twelve (12) BIA Regions. On January 17, 2002, in San Diego, the Department of the Interior held the first meeting of a task force of two (2) tribal leaders from each BIA Region, to provide recommendations to the Department of the Interior on the process for addressing trust asset management and to consider and develop alternative proposals to BITAM. The only participants in that meeting were elected tribal leaders from the twelve (12) BIA Regions, although it was unclear as to what method the Indian tribes within many of the BIA Regions were provided the opportunity to select their representatives and by what method they did, in fact, make their selection. The BIA Navajo Region selected its representatives by resolution of the Intergovernmental Relations Committee.

The Department of the Interior next held a retreat for its "tribal leaders task force" on February 1 - 3, 2002. Secretary Norton visited briefly with the task force on the evening of February 1,

2002 and the late afternoon of February 3, 2002. The task force received presentations from a law professor and a commercial trust specialist on February 2, 2002. On February 3, 2002, the task force received preliminary presentations on nine (9) alternative proposals to BITAM. However, the task force was not formally constituted during this retreat, and has yet to adopt any organizational document. In fact, the basic membership of the task force was proposed by the Department of the Interior to be changed to provide for membership by officials and staff from the Department of the Interior. As well, the scope of the task force was proposed by the Department of the Interior to be limited to certain particular tasks, including only the review of alternative proposals to BITAM and the modification of the scope of work for the Department of Interior's already selected consultant in trust reform, EDS. The retreat on February 1 - 3, 2002 did not, and was not intended to, result in any final recommendation on an alternative proposal. Secretary Norton received a brief report from the task force late in the afternoon of February 3, 2002, in which these matters were made clear to her.

On February 6, 2002, Secretary Gale Norton testified to the House Resources Committee that the BITAM proposal is "superior" to any of the nine (9) alternative proposals which have been submitted so far by Indian tribes, organizations and individuals to the Department of Interior task force. Accordingly, it appears clear that Secretary Norton intends to move forward with the establishment of BITAM, notwithstanding the unanimous rejection of BITAM as a vehicle for trust asset management reform. This intent to move forward is of extreme concern to the Navajo Nation, and calls into question the intent of the Department of the Interior in convening a task force to address the matter of trust asset management reform.

Closing Remarks

The Navajo Nation does support trust fund management reform, as well as the larger issue of trust asset management reform. The recent experience of Navajo allottees with the unwarranted interruption in the payment of income from their IIM accounts highlights the need for such reform, as well as the necessity that IIM account holders not again be subjected to the harmful effects of the loss of their primary or sole source of income by action of the Department of the Interior. Such failures by the Department of the Interior to adequately perform their trust fund management functions also negatively impacted the Navajo Nation, as a sovereign Indian nation.

In the midst of the Department of the Interior's four (4) month stoppage of payment from IIM accounts, the Navajo allottees sought assistance from the Navajo Nation government in relief of the financial, physical, emotional and spiritual damage which they were enduring as a result of the abrupt cessation of their primary or sole sources of income. While these hardships were imposed by the Department of Interior's stoppage of the IIM account checks, the Navajo Nation could not, as a sovereign Indian nation, simply ignore the suffering of the Navajo allottees. By Resolution, CJA-03-02, attached as an Appendix, the Navajo Nation Council appropriated $534,276 from its scarce general fund reserves as grant assistance to the Navajo allottees. The Navajo Nation must not be placed in a similar situation by its trustee, the Department of the Interior, in the future.

The Navajo Nation supports the continued and improved provision of trust fund management to Individual Indian Money (IIM) account holders, without interruption of that crucial source of

income to individual Indians. The narrow reliance by the Department of the Interior on the Internet as the sole mechanism for the transmission of information necessary to the calculation and processing of the income of the IIM account holders, without back-up contingency, is but another example of the gross failure of the Department of the Interior to meet its trust fund management responsibilities.

While there are currently proposals which address the long term goal of trust asset management for both Indian tribes and individual Indians, the Department of the Interior should be required to focus in the short term on the more limited goal of trust fund management for IIM account holders. The matters of trust fund management are the only ones directly impacted by the Cobell litigation, and the breaches of trust found by Judge Lamberth in that litigation relate to only that more limited goal. To the maximum extent possible, the Department of the Interior should exert its energies towards the resolution of these issues, leaving the much broader campaign of trust asset management reform as a long term goal. The Navajo Nation believes that the exigencies placed on the Secretary of the Interior and the Assistant Secretary for Indian Affairs by the Cobell litigation do not justify the hasty establishment of BITAM or some other vehicle for trust fund management reform. Full consideration of the other implications of such reform efforts in consultation with the trust beneficiaries must be accomplished.

The Navajo Nation looks forward to trust fund management and trust asset management reform and will continue to participate in the process. In moving forward, the Navajo Nation is extremely concerned about the true intent of the Department of the Interior in its formation and reformation of the "tribal leaders task force." The Navajo Nation does not believe that it is appropriate for any organization claiming to speak for Indian country to hijack the consultation process, and the Navajo Nation will continue to express its positions both within the "tribal leaders task force" and as a sovereign Indian nation. While the process of development and consideration of alternative proposals for trust fund management and trust asset management reform is still in an embryonic stage, the Navajo Nation is convinced that Indian tribes have already proposed components of reform which are better than BITAM. The Navajo Nation will continue to work towards the development and advocacy of a trust fund and trust asset management entity which will meet the needs of the Indian beneficiaries and will provide for true trust fund and trust asset management reform.

IGRF-27-02

RESOLUTION
OF THE INTERGOVERNMENTAL RELATIONS COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving Testimony of the Navajo Nation for Submittal to the United States Senate Committee on Indian Affairs Relative to Indian Trust Fund Management

WHEREAS:

1. Pursuant to 2 N.N.C. §821, the Intergovernmental Relations Committee of the Navajo Nation Council is a standing committee of the Navajo Nation Council; and

2. Pursuant to 2 N.N.C. §822 (B), the Intergovernmental Relations Committee of the Navajo Nation Council ensures the presence and voice of the Navajo Nation Council; and

3. Pursuant to 2 N.N.C. §824 (B)(2), the Intergovernmental Relations Committee of the Navajo Nation Council is empowered to assist with all testimony relating to legislation impacting the Navajo Nation; and

4. The Intergovernmental Relations Committee is empowered to coordinate with all entities concerned with all Navajo appearances and testimony before congressional committees, pursuant to 2 N.N.C. §824 (B)(5); and

5. On February 26, 2002, the Senate Indian Affairs Committee will hold an oversight hearing on the subject of Indian trust fund management; and

6. On February 19, 2002, Speaker Edward T. Begay and President Kelsey A. Begaye submitted a letter requesting that the Senate Indian Affairs Committee allow the Navajo Nation to testify at the February 26, 2002 hearing, see letter attached as Exhibit "A"; and

7. The Navajo Nation's written statement, attached as Exhibit "B", conveys the Navajo Nation's views with respect to Indian trust fund management, based upon the Navajo Nation Council and Intergovernmental Relations Committee resolutions passed relative to the matter, as well as information obtained subsequent to passage of those resolutions; and

8. Speaker Edward T. Begay and President Kelsey A. Begaye have advised the Committee that they are available to act as the Navajo Nation government representatives to express the views, concerns and recommendations on the respective topic and to advocate with the Senate Indian Affairs Committee in accord with the written testimony of the Navajo Nation.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Intergovernmental Relations Committee of the Navajo Nation Council hereby approves the testimony attached as Exhibit "B".

2. The Intergovernmental Relations Committee of the Navajo Nation Council hereby authorizes the Speaker Edward T. Begay and President Kelsey A. Begaye, to appear before the U.S. Senate Committee on Indian Affairs to advocate on behalf of the Navajo Nation consistent with the Exhibit "B".

3. The Intergovernmental Relations Committee of the Navajo Nation Council hereby directs representatives from the Navajo Justice Department, the Office of Legislative Counsel, the Office of the President and Vice President and the Office of the Speaker of the Navajo Nation to provide support and technical assistance to Speaker Edward T. Begay and President Kelsey A. Begaye.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Intergovernmental Relations Committee of the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 7 in favor, 0 opposed and 0 abstained, this 22nd day of February, 2002.

Edward T. Begay, Chairperson
Intergovernmental Relations Committee

Motion:Ervin Keeswood
Second Kenneth L. Begay

TESTIMONY
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON INDIAN TRUST REFORM
FEBRUARY 26, 2002
Submitted by
DANIEL S. PRESS, Esq.
On behalf of
THE MANDAN HIDATSA AND ARIKARA NATION

Mr. Chairman and members of the Committee, my name is Daniel S. Press, Washington, D.C., counsel for the Mandan, Hidatsa and Arikara Nation. The Nation believes that trust reform must keep the BIA intact but must be carried out by an entity that is independent of the Interior Department. I will be discussing an approach for trust reform that incorporates those two elements and which does so in a manner that builds on a proven model – the very positive and parallel experience of the D.C. Control Board in reforming the government of the District of Columbia.

In putting this approach forward, the Nation is not suggesting that this approach is the final answer or suggesting that the draft bill attached to the testimony should be adopted into legislation. The final recommendation on an approach for trust reform must emerge from a consensus of tribes, working through the NCAI Trust Reform Taskforce. The Nation is putting this approach before the Committee because it believes it can help to move forward the discussion by showing what has in fact worked elsewhere, and what we can learn from that experience.

I first testified before Congress on the Indian trust problem in 1990, when the late Congressman Synar held his groundbreaking hearings. Since then, I have participated in almost thirty congressional hearings on the trust problem, including close to ten before this Committee. Yet, despite all of these hearings and the expenditure of hundreds of millions of dollars, the sad fact is that twelve years later, the Indian trust beneficiaries are basically no better off today than they were in 1990. For example, in 1990, it was disclosed with great dismay that the Interior Department lacked one of the most basic elements of any accounting system – an accounts receivable system for tracking payments due Indian trust beneficiaries. Twelve years later, there is still no accounts receivable system in place.

As recent reports by the Court Monitor in the *Cobell* litigation and EDS have indicated, it appears that very little can be salvaged from the expensive wasted efforts by the Interior Department over the past twelve years. It may be that the only thing that can be salvaged from those twelve years are some hard-learned lessons. If we do not salvage and heed those lessons, then the past 12 years truly will have been a complete waste and we will be doomed to repeat all of the mistakes made during that time. From my vantage point, those lessons are so clear that they should be spelled out in neon for all to see and consider. They are:

1. The Interior Department is incapable of cleaning up this problem from within. Giving Interior another chance would fly directly in the face of the lessons of the past twelve years, and past 150 years, as well as fly in the face of every private sector experience on what it takes to clean up a failed institution; and
2. An outside entity, if given the full authority and sufficient resources, can clean up the problem. Not only is this true for the private sector, as expert after expert has testified over the past twelve years, but it is true for the public sector, as demonstrated by the experience of the D.C. Control Board.

The 1994 Indian Trust Fund Management Reform Act and the District of Columbia Responsibility and Management Assistance Authority Act, (the Act creating the D.C. Control Board), were enacted within a few months of each other. Seven years later, the contrast in results could not be more stark. The Control Board closed itself down several years ago after successfully accomplishing its mission of reforming what was then a failed District of Columbia government, while Indian trust reform is no further along today than it was in 1994, and many will argue that it is in worse shape. The reason for the difference goes back to the two lessons I mentioned above. Because of a veto threat from the then-Secretary, the bill that became the Indian Trust Fund Reform Act was watered down so that the Special Trustee, rather than being an independent position outside of the Department, was made part of the Interior Department and reported to the Secretary. On the other hand, the D.C. Control Board was placed outside and over the D.C. Government. The experiences of these two entities simply confirm the management principle that guides the private sector – when an institution has failed, the only way to clean it up is to bring in outsiders and give them the plenary authority they need to turn the institution around.

I do not want to dwell on lesson number one – that Interior will never be capable of cleaning up this problem from within no matter how many reorganizations the Secretary devises – because many others will be addressing it. However, if any members of the Committee are disposed to believe the Secretary's position that the trust reform will be handled better if responsibility is placed elsewhere in the Department, I urge you to read the reports of the Court Monitor in the *Cobell* litigation, in which he makes clear that the responsibility for the failures over the past twelve years do not rest solely with the BIA. Rather, he concluded that a substantial portion of the responsibility rests with senior Interior officials, who worked behind the scenes to undermine legitimate trust reform. These senior officials were also the ones who led the charge to undermine former Special Trustee Paul Homan because his reform efforts would have decreased their authority. Yet, under BITAM, the power of these officials over trust reform will only increase, such that they will be in an even stronger position to undermine true trust reform..

The focus of my testimony is on what we can learn from lesson number two – the success of the D.C Control Board. Attached to my testimony is draft legislation that seeks to incorporate those lessons into a trust reform bill. As indicated, it is intended solely as a source of ideas and discussion, and is not a bill the Nation is proposing be enacted, unless

and until tribal consensus is reached. To briefly summarize the elements of the Control Board:

a. An Authority outside and above the D.C. Government was created by Federal legislation;
b. The members of the Authority were full-time appointees, not part-time commissioners;
c. The Authority was given the responsibility for developing a comprehensive plan for cleaning up the D.C. Government. While seeking information and opinions for the D.C. Government, it developed the plan objectively and independently, so the plan was not distorted by the efforts of D.C. officials to preserve their power bases or sweep problems caused by them under the rug;
d. The Authority was given the responsibility for implementing the plan in conjunction with the D.C. officials, so the latter could be part of the solution. However, the Authority was given the necessary powers to make sure the plan was implemented as written. This included the power to order the removal or reassignment of any D.C. official who tried to thwart implementation of the plan. Officials are more likely to cooperate if they know they will lose their jobs if they do not; and
e. Most importantly, the Authority was given the power of the purse. It had complete control over the checkbook, so the D.C. government could not request or expend any funds without the Authority's approval.

The Lessons That Can Be Learned from the D.C. Control Board Experience:

1. An Outside Entity Can Effectively Clean Up a Governmental Entity if Provided the Requisite Authority

In the private sector, it is so well established that an outside power needs to be brought in to clean up a failed institution, that is has become a basic guiding management principle. If there were doubts about whether that principle works as well in the public sector, the experience of the D.C. Control Board put those doubts to rest. It has proven that there are no significant differences between the public and private sectors when it comes to turning around failed institutions.

The Interior Department may argue that there is a significant legal difference between a local government and a Department in the Executive Branch, such that, not withstanding the lessons of the D.C. Control Board, it would be unconstitutional or at least inappropriate to place an outside entity in control of the Interior Department. However, if you dissect that argument, you find it is an appeal to the emotions that has no legal merit. There is no violation of the Constitutional separation of powers since the outside entity with authority over the Department would be part of the Executive Branch. There are many examples of one agency in the Executive Branch exercising control over another agency or Department. For example, OMB has veto authority over regulations being proposed by a Department and can compel a Department to revise its budget request. There is no other legal aspect to the Control Board approach that even begins to raise

constitutional questions. Nor is there anything else about it that would make it legally appropriate for the District of Columbia but not for the Department of the Interior. Clearly it will not be a pleasant sight to see certain activities of one of the thirteen Executive Departments placed under outside control, but the alternative is once again wasting twelve years without any improvements

2. The Outside Must Be Properly Structured and Empowered If It Is To Be Effective

If Congress chooses to create an entity similar to the Control Board to clean up the trust situation, the second lesson to be learned from the D.C. Control Board experience is that the outside entity must be properly empowered and structured. Any watering down of that power or any compromises in structure in order to satisfy Interior Department demands will render that outside Authority ineffective. Specifically, based on the D.C. Control Board experience, the following must be incorporated into any legislation creating an outside Authority for trust reform:

a. The outside Authority must be composed of individuals who devote their full time to the Authority. It is not a role that can be successfully carried out by a commissioner who attends a meeting once a month. The members of the Authority, to put it bluntly, must stay in the face of the entity it is cleaning up every day, because the entrenched powers in that entity will try every day to find ways to undermine the Authority's reform efforts.

b. The outside Authority must have the necessary power, on a practical level, to compel the agency to comply with its directions. First, it must have the power of the purse, the ability to approve any dollar the agency spends for trust management or trust reform. Second, it must have the power to require the removal or reassignment of officials in the agency who refuse to cooperate or who try to undermine the Authority's reform effort. Third, it must be composed of persons who have stature and respect in Washington in order to be able to withstand the mudslinging and character assassination that the Agency being reformed will try use in order to sway public opinion in its effort to undermine the Authority. (I know this is not a pretty picture but experience shows that those entrenched in a failed institution will use every underhanded technique available to try to undermine those assigned to clean up that Agency.)

c. The outside Authority must have the exclusive power to develop the reform plan. As the past twelve years at Interior has demonstrated, when the officials in the failed Agency are permitted to influence the plan, they will bring the same philosophy that led to the failure and will tend to gloss over the same problems they glossed over when they were running the Agency – such as Interior's very casual view of the need to do a complete

clean-up of the trust records so they have accurate ownership information and accurate balances. Taking this one step further, too often the goal of the Agency officials in designing the reform plan is to protect their powers and prerogatives and to sweep the old problems under the rug.

d. The failed Agency does not have to be broken apart in order to be reformed. The Control Board did not dismantle the D.C. Government. To the contrary, once the plan was completed, the Control Board worked to strengthen the various departments in the D.C. Government so they could stand on their own at the end of the process. The Authority should have the ability to recommend to Congress new structures for trust management, but it should do so only after it has been deeply engaged in the reform effort so whatever new structures it believes are needed emerge from the reform process, not pulled out of thin air as a substitute for serious thinking about reform, as is the case with BITAM. In addition, any proposals for new structures need to emerge from the wishes of and be endorsed by the Indian tribes as they participate in the reform effort. Tribes will not support an approach that is shoved down their throats. The tribes and the Congress have seen too many examples of efforts to force foul tasting medicine down the throats of Indian people based on the argument that it will be good for them. That is why self-determination has been the only successful Federal Indian policy in history. BITAM flies in the face of that policy and should be rejected. The BIA can and must be kept intact under the Control Board approach.

There is one area in which the experience of the D.C Control Board is not directly applicable to a trust reform Authority. The D.C. Control Board was dissolved once the D.C. Government returned to being a functioning entity. The trust fund Authority, or at least a portion of it, needs to be established as a permanent institution. The Interior Department administers a legal trust that has fiduciary obligations very similar to those of a bank trust department. However, the Indian trust system is the only large trust operation in this country that is not subject to close oversight by a Federal or state agency. For example, the Office of the Comptroller of the Currency (OCC) examines national bank trust departments to insure they are complying with their fiduciary obligations and has broad authority to compel corrective action if they are not.

To prevent the Interior Department from slipping out of its compliance with trust standards once the reform effort is completed, it must be examined in the same way that the OCC examines bank trust departments. There is no agency in the Federal government that has the expertise or desire to examine the multifaceted aspects of the Indian trust. Therefore, Congress will need to establish a new oversight entity. Since the trust reform Authority will have the expertise and the commitment to insure its plan is complied with going forward, it would make the most appropriate entity to serve as the examiner of the Indian trust systems. For these reasons, once the Authority has completed its reform efforts, it needs to become the permanent monitor of the Indian trust system, with the same powers the OCC has to insure full compliance.

As mentioned, draft legislation adopting the D.C. Control Board experience to the Indian Trust Reform effort is attached. Thank you for the opportunity to testify.

AMENDMENTS TO THE INDIAN TRUST FUND MANAGEMENT REFORM ACT TO CREATE THE INDIAN TRUST MANAGEMENT REFORM AUTHORITY

The Indian Trust Fund Management Reform Act is amended by adding a new title, "The Indian Trust Management Reform Authority", which shall read as follows:

TITLE __ THE INDIAN TRUST MANAGEMENT REFORM AUTHORITY

Section __ Establishment of the Indian Trust Management Reform Authority

(a) Establishment – There is hereby created the Indian Trust Management Reform Authority, an independent agency that reports directly to the President of the United States.
(b) Composition – The Authority shall be composed of five members nominated by the President, after consultation with the Indian tribes and individual Indian account holders, and confirmed by the Senate. At least two members of the Authority shall be representatives of the Indian tribes and individual Indian account holders who have extensive experience with the Indian trust management systems. The other members shall be persons with expertise in trust management and the reform of trust systems. The President shall designate one nominee for the Authority as the chairman of the Authority. The members of the Authority shall serve on a full-time basis and shall be compensated for such service at a rate determined by the President to be appropriate for the position but not less than the daily rate of basic pay payable at level II of the Executive Schedule under Section 5313 of Title 5.
(c) Staff and Consultants -- The Authority shall employ such staff and such consultants as it deems necessary to carry out the responsibilities assigned to it by this Title, including a general counsel, subject to a plan and budget approved by the President and to the availability of funds.

Section __ Powers and Responsibilities of the Authority

The Authority shall have the primary responsibility and all powers necessary to, first, bring the management of Indian trust funds and trust assets into compliance with trust standards, as such standards have been established by the caselaw and by Federal regulatory agencies that examine national bank trust departments, second to carry out on-ongoing examination and monitoring of the Indian trust systems, acting through its office of Indian Trust Regulation, created by Section __ of this Title. Specifically the Authority shall:

(a) In consultation with the Secretaries of the Interior and the Treasury, Indian tribes and Indian trust account holders, develop a comprehensive plan for bringing the management of Indian trust funds and assets into compliance

with trust standards. The plan shall include specific implementation steps, a detailed implementation schedule and a promulgated set of trust standards.

(b) Establish an implementation working group composed of the Secretaries of the Interior and Treasuries and such other Interior and Treasury Department officials as the Authority deems appropriate, representatives of the Indian tribes and Indian account holders, and such contractors and consultants as the Authority chooses to participate, to implement the plan developed pursuant to subsection (a) of this section. Each member of the team shall take any and all steps within the member's authority to implement the terms of the plan, under the direction of and subject to the instructions of the Chairman of the Authority or the Chairman's designee.

(c) Assume management responsibility for any contracts for trust reform-related activities that the Interior department entered into prior to the effective date of this Act.

(d) Regularly monitor the management of trust functions by the Interior and Treasury Departments to determine if said Departments are implementing the plan developed pursuant to subsection (a) of this section. The Departments shall make available all records, information, and personnel as requested by the Authority in carrying out this responsibility.

(e) Require all employees of the Interior and Treasury Departments to comply with any instructions issued by the Authority regarding trust reform and trust management and to require the Secretary to remove or reassign any Department manager from his or her position who fails, or whose employees fail, to comply with any instructions issued by the Authority regarding trust reform and trust management.

(f) Approve all expenditures of funds by the Interior and Treasury Departments for activities involving Indian trust reform and trust management, and approve all budgets submitted to the Office of Management and Budget and Congress and all reprogramming and all reprogramming requests to Congress for activities involving Indian trust reform and trust management..

(g) Approve any appointments within the Interior and Treasury Departments to positions that have, as a significant portion of their responsibilities, the management of trust functions or the implementation of the plan provided for in subsection (a) of this section.

Section __ Funding for the Carrying Out of the Authority's Functions.

(a) The Authority shall annually submit to the Secretary of the Interior its proposed budget for the forthcoming year, providing for such sums as the Authority deems necessary to carry out its responsibilities under this Act. Said budget shall be included, without any changes, in the President's budget request to Congress.

(b) Consistent with the Authority's budget as provided for in subsection (a) of this Section, the Authority shall assess the Interior Department for any costs the Authority incurs in carrying out its responsibilities under this Title by

submitting monthly invoices to the Secretary of the Interior and by entering into such arrangements as are necessary with the Secretary for the payment of the salaries of the members of the Authority and employees of the Authority in the same manner as other Federal employees are so paid. Such salaries and such invoices shall be paid solely from funds appropriated for trust reform. Invoices shall be paid within 21 days of their receipt by the Secretary. If the Secretary disagrees with any element of the invoice or salary request, he or she shall pay said request and then submit the matter to the General Accounting Office for resolution.

Section __ Control over All Expenditures for Trust Reform and Trust Management

All funds appropriated by Congress to the Interior and Treasury Departments for trust reform shall be subject to the control of the Authority. Specifically, the

(a) The Secretaries of the Interior and the Treasury, prior to submitting their budget requests for the forthcoming fiscal year to the Office of Management and Budget shall submit to the Authority the Departments' proposed budget requests for all trust management programs administered by the Departments. The Authority shall certify whether, in its expert opinion, the proposed budget requests will be adequate to enable the Departments to meet their trust responsibility and whether the funds will be used in a manner that is in compliance with its trust responsibilities. A copy of those certifications shall be included in the President's budget request. In addition, the Authority shall send a copy of its certifications directly to the Subcommittees on Interior and Related Agencies of the House and Senate Appropriations Committees, the House Committee on Resources and the Senate Committee on Indian Affairs.

(b) The Secretaries of the Interior and the Treasury shall expend no funds for trust reform or trust management unless said funds either were provided for in a budget approved by the Authority or the expenditure of said funds were specifically approved by the Authority.

Section __ Advisory Committee

The Authority shall, after consultation with the Indian tribes and individual Indian account holders, establish an advisory board composed of nine representatives, no fewer than four of whom shall be representatives of tribal account holders and no fewer than one shall be a representative of the individual Indian account holders. The Advisory Committee shall be exempt from the requirements of the Federal Advisory Committee Act [5 U.S.C.A App 2].

Section __ Technical Assistance to Tribes

The Authority shall provide technical assistance to tribes that wish to assume administration of some or all of the tribal and/or trust functions on their reservations pursuant to the Indian Self-Determination Act and the Indian Self-Governance Act.

Section __ Reinventing the Indian Trust Programs

The Authority, with the direct involvement of the Advisory Committee, and through full participation of the tribal and IIM account holders, shall develop a "reinvention" plan for the Indian trust fund and trust asset management program that fully reflects (a)the unique trust relationship between Indians and Indian tribes and the federal government, (b) which promotes self-determination and economic development, and (c) which otherwise restructures said programs so will be implemented in a manner that is consistent with Federal Indian policy and the needs and status of the tribes and individual account holders in the Twenty-First Century and beyond. In said plan the Authority shall recommend such structure for the carrying out of the reinvented trust programs that the Authority concludes will be best able to implement its plan and manage the trust programs in the future. The Authority shall submit the reinvention plan to the Congress, along with a summary of the position of the tribes, individual Indian account holders and Indian organization regarding the plan, within two years after the effective date of this Act. A copy shall be sent to each tribe and made available to the individual Indian account holders in such manner as the Authority determines will best reach those individuals.

Section __ Office of Indian Trust Regulation

There shall be established within the Authority, the Office of Indian Trust Regulation, which shall be a permanent office responsible for examining and overseeing the Interior and Treasury Departments' on-going compliance with the plan provided for in Section __(a) of this Title and with trust standards, as such standards are promulgated by the Authority pursuant to this Act. The Office shall carry out the following functions:

(a) On-going examination of the Indian Trust Systems – The Office shall annually examine each component of the Indian trust management system within the Departments of the Interior and Treasury to insure said components remain in compliance with trust standards, including any component of that system that remains in Federal trust status but the administration of which has been assumed by a tribe or other entity pursuant to the provisions of this Act, the Self-Determination Act, the Self-Governance Act or any other Act. The Office shall submit an annual report to the Secretaries setting out the results of its examination. A copy of said annual report shall be provided to the Indian tribes, the IIM account holders, and the Chairmen of the Senate Committee on Indian Affairs, the House Resources Committee and the Subcommittees on Interior and Related Agencies of the House and Senate Appropriations Committees.

(b) Remedial Action – If the Office determines that any component of the system, whether administered by a Federal agency, a tribe, or any other party, is failing to comply with the plan provided for in Section __ (a) of this Act or the trust standards established pursuant to this Act, it shall immediately notify the appropriate Secretary or other cognizant official. If the Secretary or other

cognizant official does not correct the problem within such reasonable time as is established by the Office, the Office may file suit in Federal District Court and seek such relief as is appropriate to address the problem identified, including but not limited to a request for a cease and desist order and a request that the Court order the removal of responsibility for that component from that Department. If the component is being administered by a tribe or other entity, the Office shall request such remedy as it deems appropriate to correct the problem. Any action taken by the Office pursuant to this subsection shall in no way diminish the Federal trust status of the component at issue. Copies of all notifications pursuant to subsection (a) of this section and all court filings and orders pursuant to this subsection shall be sent to the Chairmen of the Senate Committee on Indian Affairs, the House Resources Committee and the Subcommittees on Interior and Related Agencies of the House and Senate Appropriations Committees.

Section ___ Restructuring of the Authority

When the Authority has concluded that trust reform, as set out in the plan provided for in section _ (a) of this Title, as said plan may be revised by the Authority, has been completed and all entities carrying out Indian trust functions are in compliance with the trust standards established by the Authority pursuant to this Title, the Authority shall submit to the Congress a proposed plan for the reorganization of the Authority so it is properly structured to carry out the permanent examination and oversight functions provided for in section __ of this Title; provided that, said plan shall provide that the Authority shall remain an independent agency reporting directly to the President and shall be a permanent agency.

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CLIFFORD TAILFEATHERS
JIMMY ST. GODDARD
HUGH MONROE
ERVIN C. CARLSON

February 1, 2002

To: Senate Committee
On Indian Affairs.

Honorable

I come before you to ask for your assistance in the plight to do the right thing for the Indian people. The Cobell vs. Norton case has revealed that the interior is not doing the job that was intended by Congress. Trust responsibility to the Indian people cannot be dealt with in the state arena, the senate arena or the congressional arena; trust responsibility can only be dealt with in Indian country. Trust responsibility is undefined in all areas of US Government, but in Indian country trust responsibility is the future and part of an ancient culture that needs to survive.

You have been instrumental in helping and respecting our people. To reorganize the Bureau of Indian Affairs is very positive. But only if the tribes and tribal people have total participation. Our bleak history under the BIA is evident in itself. This congress has the chance to change the course of history and bad relationships it has had with the Indian people.

I demand that the IIM monies be distributed as the plaintiffs have requested and the monies be given the interest amount it deserves.

If we cheated the people on their Social Security or Income tax return this government would be overrun.

I also see a solution to reorganization of BIA, send a team of competent people to each Indian Nation for two years to gather the needs and wants of how our future should be. Not how BIA wants it. The deeper we get into the deeds of the BIA the sicker it gets ladies and gentlemen. The Blackfeet have more degrees in education per capita than the population of US self-determination and 638 was developed through the Interior and has not worked. I challenge you to challenge the Indian Nations to set their own policy for their own people. The process will take some time, but time is needed when dealing with the most sacred people on earth. We were created by the dirt of this sacred nation you call America. Give us the respect that we deserve.

The task force committees that are being set up need to go over all the evidence being presented by the tribes. It would be unlawful to have the BIA evaluate the process at this time. (Congress developed BIA to take our request to Washington, not for BIA to give us orders from Washington, when did this change?) The majority of the people agree, so agree with your constituents.

Thank you,

James St. Goddard

James St. Goddard
Blackfeet Tribal Business Council
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ERVIN C. CARLSON

February 1, 2002

RE: TRUST RESPONSIBILITY TO INDIAN PEOPLE

To Whom It May Concern:

United States trust responsibility to the Indian people and Indigenous human beings and also the nee-sit-tah-pee, original or real people. Original people gave up their sacred lands through an agreement or treaty by signing or handshake, or even an interpreter.

These lands were used to help citizens of the United State progress. Upon allowing or sometimes forced from our lands, the United States agreed or promised with the signature of the President of the United States whoever was in office at the time. These agreements or promises had to be ratified by congress first.

These promises or agreements said the United States would provide health, education, welfare, and preservation. The definition of Health and Education has stayed the same. Welfare has changed and preservation will live on. These lands that were given up by the Indian people now generate trillions and trillions of dollars each year. Just in Montana, which was known as Blackfeet territory in 1840, the income of Montana surpasses 3 trillion, budget for the state is 3 billion.

We gave up these lands for the people and also for the United States benefit. These lands provide to the wealthiest country on earth, why aren't the landlords of the country being given the resources to succeed through the trust responsibility of the great United States of America.

America justify yourself and change the disparity against the Indian people. Abraham Lincoln the greatest President of all time said; "History is not history unless it's the truth." Are we going to desecrate Abraham Lincoln and not do the right and truthful thing for the Indian people?

Thank you,

James St. Goddard

James St. Goddard
Blackfeet Tribal Business Council
Box 850
Browning, MT 59417

note. Please report BIA,
James "Jimmy" St. Goddard

American Indian Trust Reform: The Challenge to Consensus

Posted: **February 25, 2002** - 7:00am EST
by: **Gale Norton** / Secretary of the Interior

Improving the federal government's management of its Indian trust responsibilities is the most significant challenge facing the Department of the Interior. Although these problems have gained a disturbing aura of insolubility during the past few decades, the program can and must be improved. The significance, complexity, and urgency of the effort cannot be overstated.

The solution requires courage and a willingness to embrace change. American Indian leaders have strongly disagreed with my initial proposal to restructure Interior's trust assets management organization. I respect tribal leaders' objections and welcome the alternative proposals I have received from Indian country.

These tribal leaders clearly recognize the critical need for significant improvement in trust operations. Together, we'd like to reconcile our different points of view as a prelude to defining a reorganization proposal that will allow for improved management and accountability.

Our trust reform management team received valuable insights during a series of regional consultation meetings with Indian leaders over the past several months. We appreciated the frank exchange of views, received many valuable suggestions and remain open to all ideas. No options or approaches have been foreclosed.

We continue to meet and work with Indian leaders, who have formed a Tribal Leaders Task Force to coordinate their efforts. The group is composed of two elected tribal leaders from each region, with a third tribal leader acting as an alternate. I have provided financial resources to support the task force and the consultation efforts.

Together, we are earnestly endeavoring to achieve progress on trust reform. The task force and my team are currently evaluating several recommendations that were presented by American Indian tribes, individuals, and organizations during the consultation process.

My initial reaction is that the various proposals all recognize a need for significant improvement in trust management and contain many insightful recommendations that can potentially be merged to achieve a broad consensus on a fresh approach.

I am optimistic that together we can agree on a reorganization plan that will enable us to address the major long-standing issues in trust reform. These issues are not new, either to American Indian communities or Interior officials. As trustee, the department is responsible for about 11 million acres of land owned by individual Indians and nearly 45 million acres owned by tribes. Interior is also responsible for managing the income from

more than 100,000 active leases for approximately 350,000 individual Indian owners and 315 tribal owners. The department distributes leasing and sales revenues of $300 million per year to more than 225,000 Individual Indian Money accounts and about $800 million a year to 1,400 tribal accounts.

However, the department is not well structured to focus on its trust duties. The work is shared by many bureaus, making trust leadership diffuse. The Bureau of Indian Affairs itself has a long history of localized management and as a result, does not have clear and unified policies and procedures for trust management.

The current planning systems related to trust are inadequate. The High-Level implementation Plan is outdated and has failed to accomplish significant progress in improving delivery of trust management to the tribes and individual account holders.

The Trust Asset and Accounting Management System software (TAAMS), which Interior had hoped would go a long way to solving trust problems, has yet to achieve many of its objectives. In addition, Interior must improve the integrity and security of information technology security measures associated with Indian trust data.

Finally, the challenges related to fragmented interests in allotted land continue. Over time, ownership has "fractionated" into interests divided among heirs of the original allottees. In some cases, ownership interests have subdivided exponentially, with the passing of each generation, to the point where we have single pieces of property with ownership interests that are less than .000002 of the whole.

There are about 1.4 million fractional interests of two percent or less involving 58,000 tracts of individually owned trust and restricted lands. Currently, Interior is bound by its trust obligations to account for each owner's interest, regardless of size. Though these accounts today might generate less than one cent in revenue each year, each is being managed, without the assessment of any management fees, with the same diligence that applies to all accounts.

These are some of the major parameters of the challenge facing us. Litigation has resulted in Court rulings that further spur the need for significant changes in how the trust is managed. Among other things, Interior and Treasury are required to provide plaintiffs an accurate accounting of money in their individual Indian money trust without regard to when the funds were deposited.

To better coordinate all activities relating to historical accounting, we established the Office of Historical Trust Accounting. Interior will deliver a Comprehensive Plan to the Court and to the Congress to outline the full range of historical accounting activities and to provide a foundation for Congress to evaluate our funding requests.

While we work with tribal leaders to evaluate the options for addressing this reform obligation, all of us need to maintain our focus on the overriding test for whatever plan we work out -- is it the most effective method for delivering trust services and other functions to American Indians and tribal governments.

Tribal leaders and I are moving forward to improve our trust programs. I encourage tribal leaders to continue to provide constructive suggestions and proposals. We appreciate their insights in defining practical solutions. Our work together will help our efforts to improve the management of trust assets for Indian country today and for generations to come.

PREPARED STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, thank this opportunity for the committee to examine the problem of trust fund management and recent efforts toward its reform. Trust fund mismanagement marks a significant failure of the U.S. Government's trust responsibility toward tribes and individual account holders. As the chairperson of the Colville Tribes from Washington State framed it, "One of the saddest chapters in American history is the long-term mismanagement of trust resources" which were intended for the benefit of Indians and tribes.

Most recently, the class action lawsuit, *Cobell* v. *Norton,* has brought renewed urgency to the need to reform trust fund mismanagement. I share the dissatisfaction of the court in the failure of the U.S. Government's trust responsibilities, and I echo its calls to reform trust management. However, it is critical that this reform be done with careful calculation and in a way that affirms, not diminishes, trust responsibilities, tribal self-determination, and self-governance.

Numerous tribes from Washington State have expressed serious concerns about the Department of the Interior's proposal to create a new Bureau of Indian Trust Assets Management, and I share these concerns. In fact, several tribal leaders from Washington State are in attendance today, and I would like to thank them for their leadership on this issue.

The tribes agree that there is significant room for improvement in the management of trust functions; however, they are concerned about both the merits of Interior's plans to create a new Bureau and the fact that tribes were not consulted prior to the development of its proposal. Indeed, tribes and individual Indians are the beneficiaries of trust assets, and the United States' has responsibility to honor the government-to-government relationship it has with tribes. Therefore, it is absolutely critical that tribes play a central role in any successful trust management reform.

Representatives from Interior have advised the committee that trust fund management would be improved by removing all trust management duties from BIA, therefore keeping the services BIA provides to Native Americans and trust management completely separate. Washington State tribes have expressed their serious concern that removing trust functions from the BIA would effectively dismantle the agency, which has been the foothold for tribes in the Federal Government. for example, many tribes have partnerships with BIA in the execution of several trust responsibilities, such as natural resource management, and tribes do not want to see their role in the management of their resources diminish if these trust functions are taken out of the BIA. I will ask the witnesses to speak to these concerns today.

I understand that we will have the opportunity today to learn about a few of the proposals for trust reform designed by tribal organizations. In addition, the Tribal Task Force is reviewing these proposals and several others that have been tribally generated.

It is my hope that Interior will seriously consider the concerns, suggestions, and proposals from the tribal community and also take advantage of the wisdom and insight from the leaders who are working hard to create a viable plan for reform. Again, any successful attempt at rectifying this complex and centuries-long problem must include the experience of the tribes.

Again, thank you Mr. Chairman, and I would also like to thank the witnesses and the representatives from Washington State for being here today. I look forward to hearing the testimony and learning more about what we can do to assist in the effort of meaningful trust management reform.

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