CAN A PROCESS BE DEVELOPED TO SETTLE MATTERS RELATING TO THE INDIAN TRUST FUND LAWSUIT?

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

OVERSIGHT HEARING ON "CAN A PROCESS BE DEVELOPED TO SETTLE MATTERS RELATING TO THE INDIAN TRUST FUND LAWSUIT?"

July 9, 2003
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to call, at 3:23 p.m., in room 1324, Longworth House Office Building, Hon. Richard W. Pombo (Chairman of the Committee) presiding.

Members Present: Representatives Pombo, Cannon, Tancredo, Hayworth, Osborne, Rehberg, Renzi, Cole, Pearce, Bishop, Neugebauer, Rahall, Pallone, Inslee, Udall of New Mexico, Udall of Colorado, Carson, Grijalva, Bordallo, and Baca.

The CHAIRMAN. The Committee will come to order.

The Committee is meeting today to hear testimony on whether or not a process can be developed to settle matters relating to the Indian trust fund lawsuit. Under rule 4(g) of the Committee rules, any oral opening statements at hearings are limited to the Chairman and ranking minority member. This will allow us to hear from our witnesses sooner and have members keep to their schedules.

Therefore, if other members have statements, they can be included in the hearing record under unanimous consent.

First off, I want to apologize to our witnesses and the folks that are in the room for our delayed start on the hearing. We were detained with votes on the House floor, and I apologize to all of you for the delay.

STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The purpose of today's hearing is to discuss whether a process can be developed to settle matters relating to the Indian Trust Fund lawsuit. The historic Indian Trust Fund mismanagement by the Interior Department is one of the largest problems in Indian country today. Although the roots of this case reach back to the 19th century, it wasn't until the Clinton administration and now the Bush Administration that the government was forced to confront the problem head on.

The trust fund mismanagement has been more than a century in the making. Skeptics might be excused for believing it will take a

century before the case is brought to an honorable end. But I am one of those who believes that we can find a way to bring the case to a timely and honorable settlement, one that is fair and just.

If the Social Security system had been as badly mismanaged, we would have found a solution years ago. We can and must find a fair and equitable settlement to the trust fund fiasco and ensure it doesn't happen again.

Determining what the settlement might be and how we might reform the trust system so the word "trust" really means something should be worked out through a process of consultation with the Indian country. Let us start this process today.

I look forward to hearing the views of our witnesses and look forward to having the opportunity to begin this process so that we can find a timely settlement to this matter.

I would now like to recognize the ranking member of the full Committee, Mr. Rahall, for his opening statement.

Statement of Hon. Richard Pombo, a Representative in Congress from the State of California

The purpose of today's hearing is to discuss whether a process can be developed to settle matters relating to the Indian Trust Fund lawsuit.

The historic Indian trust fund mismanagement by the Interior Department is one of the largest problems in Indian Country today. Although the roots of this case reach back to the 19thcentury, it wasn't until the Clinton Administration—and now the Bush Administration—that the government was forced to confront the problem head-on.

The trust fund mismanagement has been more than a century in the making. Skeptics might be excused for believing it will take a century before the case is brought to an honorable end.

But I'm one of those who believes we can find a way to bring the case to a timely and honorable settlement, one that is fair and just. If the Social Security system had been as badly mismanaged, we would have found a solution years ago. We can and must find a fair and equitable settlement to the trust fund fiasco and ensure it doesn't happen again.

Determining what this settlement might be, and how we might reform the trust system so the word "trust" really means something, should be worked out through a process of consultation with Indian Country. Let's start with this process today.

I look forward to hearing the views of our witnesses.

STATEMENT OF THE HON. NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. RAHALL. Thank you, Mr. Chairman, and I commend you for having these hearings today.

Last year, I took to the House floor and offered an amendment to the Interior appropriations bill to strike from that bill an ill-conceived provision that would have cheated over 300,000 Native Americans out of a full accounting of the money owed to them by the Federal Government. The provision in question would have prohibited the Interior Department from accounting for amounts owed to them prior to 1985 from their individual Indian Trust Fund accounts.

At the time, I observed that this provision was like telling Americans who had placed money in a savings account all of their adult lives that they will have the bank tell you how much is in your account regardless of what your own records show. If your records showed you saved 100,000, but the bank says 50,000, that figure stands and you have no recourse. That provision was nothing more

than and nothing less than a gag order on thousands of American Indians who are seeking a proper accounting from the Federal Government of royalties owed to them.

Fortunately, a majority of the House agreed with me and this ill-conceived provision was removed from the bill. Yet here we go again.

How long will it take for the Interior Department to quit with the gimmicks, the sleight of hand with these legislative riders that are put in the appropriation bills without any consultation with Indian tribes or representatives of individual Indian account holders? How long will it take for this Interior Department to step up to the plate and take responsibility and act responsibly in fulfilling its commitment, a statutory and moral commitment to these aggrieved parties? Apparently, we should not hold our breath waiting for that to happen.

We are now faced once again with yet another Interior appropriations rider. As NCAI recently put it, this new provision, and I quote, "is something like giving a CEO of Enron the authority to unilaterally settle the claims of Enron shareholders," end quote.

To be clear, I am as frustrated with the expense and length of the Cobell litigation as most everyone else involved with this matter is. We now find ourselves in a situation where it appears as though every single decision made by the DOI is decided after being weighed against the Cobell lawsuit. We cannot reach agreement on bringing land into trust or expanding energy opportunities for Indian tribes without having to address issues brought to light by the suit.

The Department will not accept responsibility for trust standards. A special trustee has morphed into the Indian Trust Fund's czar, and we in Congress are under heavy pressure to get involved and settle the Cobell case. But alleged solutions which entail having the wolf guard the henhouse are not the answer. Empowering the Interior Secretary to unilaterally tell account holders what they are owed based on a statistical sampling methodology devised by the Interior Secretary is not the answer.

Through our witnesses today we hope they will give us the guidance and give us the wisdom to bring this matter to a proper closure.

And I thank you for holding this hearing, Mr. Chairman, and certainly agree with your comments about consultation with those affected parties. Thank you.

The CHAIRMAN. Thank you.

It is the tradition of the Committee that members are entitled to introduce witnesses who are their constituents. Although she is on the second panel, Elouise Cobell is one of our more notable witnesses today, and I wanted to allow her Congressman, Mr. Rehberg, a minute to introduce her.

STATEMENT OF THE HON. DENNIS R. REHBERG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

Mr. REHBERG. Thank you, Mr. Chairman, and let me once again publicly thank you for coming to Montana last week and having a

hearing in our State, listening to our constituents. We appreciate you being there.

I have another constituent in the audience today, Elouise Cobell, a long-time friend of mine. There are those out there that would believe that perhaps this lawsuit would be an irritant. I don't happen to be one of those, because it didn't seem like the problem was being solved until Elouise and a number of others stepped forward and made an issue of it.

Her background is one of accounting, of being a banker, a civic leader and involved in community development in the State of Montana. So we could have no one better to speak on behalf of herself and the people who are most interested in solving the problem that literally have been around so long.

If I remember correctly, I saw a newspaper that was announcing money missing from a trust fund the same day that Custer had been defeated at the Battle of Little Big Horn—on the exact same day. This is a problem that needs to be solved.

This is a person that we need to listen to as far as the problem, and I thank you for having the hearing today and I thank you for allowing Ms. Cobell to be one of your witnesses.

Thank you, Mr. Chairman.

The CHAIRMAN. I would like to call up our first panel. And I would like welcome Jim Cason, the Associate Deputy Secretary at the Department of Interior.

Before you take your seat, if I could just have you stand and raise your right hand. It is the tradition of the Committee that we swear in all of our witnesses.

[Witness sworn.]

The CHAIRMAN. Let the record show he answered in the affirmative.

I welcome you, Mr. Cason. I know everybody is looking forward to the opportunity to hear your testimony and have the chance to ask you questions. So if you are ready, you may begin.

STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Mr. CASON. I would like to make a few brief comments, and if it will be acceptable, I'll enter our written testimony into the record.

The CHAIRMAN. Your entire written testimony will be included in the record.

Mr. CASON. Thank you, Mr. Chairman.

The first thing I would like to do is just suggest to the members of the Committee, if you have an opportunity to read the Department's testimony, it provides a good summary, history, of this accounting issue; and it will help inform the Committee on the considerations that are involved here.

Secondly, I would like to thank the Chairman for putting together this hearing and for the participation of the members that are here. This is a very important issue to the Department of Interior. It is probably the most important issue on the Secretary's docket. We spend a lot of time within the Department on this, and this is an issue the Department will not solve on its own; and it

ultimately will take the cooperative efforts of a number of people to address this issue, including the members of this Committee.

So thank you, Mr. Chairman, for your leadership in providing us an opportunity to come up and discuss this issue.

I think in the comments that came first everyone would agree that this is a problem that has been ongoing for far too long and it is a problem that needs to be addressed. And what we have been going through recently are the steps that it takes to reach a conclusion about how to address this issue.

Ultimately, the issue is, what will be fair under these circumstances; and the definition of "fair" seems to vary from party to party, and there are lots of parties that have different ideas about the extent of the accounting that the Department of Interior should be responsible for. And I would like to spend just a few minutes to make comments about that.

Ultimately, what we have to decide collectively is what is a complete and accurate accounting in this circumstance for both DOI members and for tribes; and the issue is, how do we pay for it? And ultimately there are only two real parties that are possibilities for paying for this accounting and that is the Congress of the United States, where we normally get money to pay for this accounting, or the beneficiaries. And so far, over the last 100 years, the beneficiaries haven't had to pay, so there is only one real party that's been involved in paying for these kinds of activities.

The specifications for the accounting will dictate how much it will cost overall, and the range is quite wide, depending on what kind of decisions we make about the character of the accounting. It can be all the way from a few tens of millions to do this job all the way into the billions to do an accounting, depending on what kind of decisions we make collectively.

How long it takes will depend upon how we characterize this. If we go to the full extent of doing all of the accounting that is being asked for, it could take well into more than a decade, possibly two decades to do.

And then the beneficiaries' satisfaction is an issue that will be dictated by how we frame the accounting. Obviously the more information we can provide, the more the beneficiaries would be satisfied, but that takes time and money to get there.

The feedback that we have received from Congress so far, as we have tried to wrestle with this issue, is inconsistent. If you take a look at where we are with the '94 act, the Indian Trust Reform Act, the legislative history of that would suggest that, and the language of the '94 act would suggest that, this should be a prospective accounting. The legislative history suggests that we should be doing an accounting from August 1, '93, forward.

However, when we have been in the U.S. District court, U.S. District court Judge Lamberth has decided that in order for a prospective accounting to be accurate, we have to do a historical accounting to ensure that the opening balance is accurate. And the historical accounting could be anywhere between 1 and over 100 years.

So the issue for us is, how far back in time do we go in order to ensure that the opening balance is accurate?

Currently, the technology we have available in the Department of Interior allows us to balance to the penny the accounts we have

today. However, what is in question is whether the historic opening balance for a current accounting system is accurate and that is what we have to focus on right now.

We also have feedback that says we should do limited efforts in doing an accounting. Last year, the Appropriations Committee offered a suggestion to limit the amount of accounting we do. The Appropriations Committee on the House side has done the same thing this year. We also have the feedback from various Members of Congress that the accounting should be fair and equitable. However, we haven't really been able to define what fair and equitable is under the circumstances, so we would appreciate feedback on that.

And then last, feedback that we have gotten is, we should do the accounting that the plaintiffs have requested. And if I can characterize that—and certainly Elouise is here and she can characterize it more clearly—but overall it is basically we should do an accounting for all land, natural resources and funds that have passed through the trust fund since 1987 for all Indian generations that have occurred since then.

That is a pretty big job. And, Mr. Chairman, I would just suggest that this is somewhat akin, by analogy, to challenging you to give me an account statement for your checking account for your entire life and those of your parents, grandparents and great-grandparents and all the properties that they've ever owned and then multiply that by 500,000 times. That's a pretty big job. It's very time-consuming and very expensive to do.

So far we have been involved in accounting in the Department of Interior. The first effort the Department undertook to do, quote, "historical accounting" is with tribal accounts from 1972 to 1992. And in that time period we balanced somewhere just less than $14 billion.

We found a very low error rate in the records that we did have available. As I understand it, we examined over a million records, and the error rate was somewhat less than 1 percent. There were missing documents, as you might well expect, over a period of 20 years in history. But of all the records we had which, as I understand, about 90 percent or so of the transactions were supported by documentation, the error rate was very low.

We have also done judgment and per capita accounts for individual Indian money account holders. So far, we have done about 17,000 of those. And of that 17,000 we found essentially no error. The error is in interest calculation rounding, but we wouldn't expect to find a lot of error with those types of accounts.

Finally, we have done reconciliation of the five named plaintiffs that are involved. Only four of the five plaintiffs had accounts, and out of that we examined on the order of 13,000 transactions.

The cost of doing this was approximately $20 million for all of the activities associated with it. And I would like to just share the conclusions—and we have shared this with Congress under an appropriations bill requirement, but the conclusions from Ernst & Young who did this reconciliation for the named plaintiffs was, the historical IIM ledgers were sufficient to allow DOI to create virtual ledgers that are substantially complete for the selected accounts.

The documents gathered by DOI support substantially all the dollar value of the transactions in the analyzed accounts. The documents gathered by the Department of the Interior do not reveal any collection transactions not included in the selected accounts, with a single exception in the amount of $60.94 that was paid to another account holder. An analysis of relevant contracted payments, evidenced primarily by lease agreements, showed that substantially all expected collection amounts were properly recorded and reflected in the IIM accounts, and there was no indication that the accounts were not substantially accurate nor that the transactions are not substantially supported by contemporaneous documentation.

In this particular case, for the named plaintiffs, it would appear that the historical accounting process used by the Department was reasonably accurate.

This is not a statistically valid sample of all of the accounts because there are literally tens of thousands of accounts. Just land-based accounts were approximately 200,000 accounts, so don't let me mislead you by suggesting that all accounts will turn out this way. But for all the accounting that we have done, the tribal accounts, the named plaintiffs, the judgment and per capita accounts, the results have been remarkably similar; and that would suggest that the accounting process isn't quite as bad as one might be led to believe.

There is still a substantial amount of work that needs to be done if we are going to get to a point where we have covered a majority of the accounts, or the majority of the transactions and moneys that have passed through IIM accounts over history. So this is just an indication at this point in time. The Department is continuing its efforts on historical accounting even as we speak.

We are continuing working on judgment and per capita accounts. We are involved on pilot projects and land-based accounts, so we are continuing the work at this time. However, what we are about to discuss is the majority of the job that needs to be done and the amounts of money that would be involved in doing that job, and will that satisfy all the parties involved?

We do have some options on the table, Mr. Chairman, that we could go back and take a look at the original language associated with the '94 act and do a prospective accounting from 1993 or another date that Congress chooses to do. This is, however, an issue where maybe the horse has left the barn and it's too late to do that.

We can take a look at the plan offered by the Department of Interior to Congress in July of 2002. And that plan basically was to do a very broad accounting, transaction by transaction, for all the accounts through history. The price tag on it is expensive, though. It is about $2.4 billion and at least 10 years to do, and the feedback we have received is that it's too long and too expensive.

We could take a look at the Department's plan, which is a slim-down plan that was provided to the court on January 6 of this year. And that plan basically said it would take $335 million and about 5 years to do. And that plan—we took a narrow cross-section of account holders, essentially those who had funds in the IIM account as of October 25, 1994, the passage of the Indian Trust Reform Act. And to do an account for all of those account holders, ap-

proximately 230,000 or so, what we would do in that particular case, under that plan, would be to do a historical accounting back to the opening initial balance for each of those individual accounts and do a transaction-by-transaction reconciliation with a statistical verification for land-based accounts, where we would take transactions over $5,000 and go find the supporting documentation, and for transactions under 5,000, do a statistical sample for verification purposes.

We could let the judge decide. This case has currently been in court for 7 years, and Judge Lamberth is a very active participant in evaluating what our options are. We could all sit back and let the judge decide, and then at that point it is just a matter for Congress to decide whether you are going to pay for it or not.

We could do the Appropriations plan. That was designed to get the cost down between $100 and $200 million to do this work, but that short-circuits some of the things that other parties would like to have.

The Senate is considering settlement legislation. As far as I know, they haven't written that legislation yet and so we don't know how much that would cost or how long it would take.

I have seen in the press that we could settle with the plaintiffs, and the figure I have seen in the press is a settlement figure of $137 billion. That is "billion" with a B. That seems like a pretty big number. And realistically, I think we would be able to negotiate to a lower number. But realistically, I think the number is still with a B, billions, if that is the path we are going to go.

Or we could choose other options, construct other options.

One way or the other, Mr. Chairman and members of the Committee, I think this is a serious issue and needs a serious answer and a serious dialog; and this gives us an opportunity to come and meet with the Committee and start that dialog here in the House with the authorizing Committees.

There are a number of players that are potentially involved in this. The major players are the authorizing Committees for the House and Senate, the Appropriations Committees for the House and Senate, U.S. district court, the court of appeals, the Departments of Interior and Treasury, and obviously Indian country, because this is a class action lawsuit, and obviously the taxpayers, who ultimately are likely to fund whatever we decide to do.

Mr. Chairman, I appreciate your leadership in bringing this group together to start talking about this issue. It is an important one to resolve.

Thank you.

[The prepared statement of Mr. Cason follows:]

Statement of James Cason, Associate Deputy Secretary, U.S. Department of the Interior

Mr. Chairman, thank you for the opportunity to testify today on the issues surrounding the longstanding case that originated in 1996 as Cobell v. Babbitt and is now Cobell v. Norton. In your letter of invitation, you asked the Department to address its plan for historical accounting, the results of historical accountings conducted so far, the size of the accounts the Department holds in trust for American Indians, and the likelihood of an expeditious resolution of the Indian trust fund lawsuit.

The Department of the Interior manages about 1,400 tribal accounts and over 225,000 individual Indian money (IIM) accounts. Because the Cobell case only in-

volves IIM accounts, most of my testimony will focus on the issues related to the management of those accounts. The Committee should be aware, however, that 16 tribes have filed 19 lawsuits seeking an accounting.

Background

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. This land produces income from more than 100,000 active leases for about 350,000 individual Indian owners and 315 Tribal owners. Over $862 million is typically collected annually from leases, permits, sales, and interest income. About $226 million is distributed among the IIM accounts; $536 million is distributed among the tribal accounts.

One of the most challenging aspects of trust management is the management of the very small ownership interests, which result in many very small IIM accounts and land ownership interests. In 1887, Congress passed the General Allotment Act, which resulted in the allotment of some 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, after which the Indian owner would own the land in fee. However, Congress ended up extending the trust period indefinitely once it became apparent that the goal of making the individual Indians into farmers failed.

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 over 1.4 million fractional interests of 2% or less involving 58,000 tracts of individually owned trust and restricted lands. We have to provide a range of trust services—title records, lease management, accounting, probate—to the growing number of land owners. We have single pieces of property with ownership interests that are less than .000002 of the whole interest. The Department is required to account for each owner's interest, regardless of size. Even though these interests today might generate less than one cent in revenue each year, each is managed, without the assessment of any management fees, and the revenues generated are treated with the same diligence that applies to all IIM accounts. In contrast, in a commercial setting, these small interests and accounts would have been eliminated because of the assessment of routine management fees against the account. Management costs of the IIM accounts, as well as tribal trust accounts, are covered through the general appropriations process and borne by the taxpayers as a whole, rather than the accountholders.

Past Congressional Actions

Over the past 100 years, Congress has reviewed the issue of Indian trust management many times. In 1934, the Commissioner of Indian Affairs cautioned Congress that fractionated interests in individual Indian trust lands cost large sums of money to administer, and left Indian heirs unable to control their own land. "Such has been the record, and such it will be unless the government, in impatience or despair, shall summarily retreat from a hopeless situation, abandoning the victims of its allotment system. The alternative will be to apply a constructive remedy as proposed by the present Bill." The bill ultimately led to the Act of June 18, 1934, the Indian Reorganization Act, which attempted to resolve the problems related to fractionation, but as we now know it did not.

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 the Bureau of Indian Affairs (BIA) disbursement activities to a commercial bank. This recommendation set in motion a political debate on whether to take such an action. Congress then stepped in and required BIA to reconcile and audit all Indian trust accounts prior to any transfer of responsibility to a third party. BIA contracted with Arthur Andersen to prepare a report on what would be required in an audit of all trust funds managed by BIA in 1988. Arthur Andersen's report stated it could audit the trust funds in general, but it could not provide verification of each individual transaction.

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 weaknesses in the BIA management of Indian trust funds. It pointed out that the General Accounting Office's audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 found fault with management of the system. The report notes Arthur Andersen 1988 and 1989 financial audits stated that "some of these weaknesses are as pervasive and fundamental as to render the accounting systems unreliable."

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

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

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

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

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

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

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

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

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

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

H.R. 1846 and H.R. 4833 were similar in many places. H.R. 4833 did not however include the effective date provision explicitly making the accounting requirement

prospective only. While the report notes in a number of places why changes were made to the H.R. 1846 provisions, it is silent with respect to this omission.

It may surprise Members of this Committee to note that there is no mention of the costs associated with either complying with the Act, or completing the accounting in the Committee's report. Moreover, no analysis from the Congressional Budget Office was included in the Committee's report. The Department sent a letter on H.R. 1846 and an amended S. 925 that was placed in the Committee report on H.R. 4833. Its only mention of cost is the following sentence: "We wish to note that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs." Given the lack of cost analysis contained in the legislative history, one could assume that Congress in enacting the 1994 Reform Act had no idea it may have required a multi-million or billion dollar accounting.

Interior's Historical Accounting Plan

Mr. Chairman, you specifically requested my testimony address the Department's plans for conducting an historical accounting of IIM accounts. The Cobell court ruled that the 1994 Reform Act requires the Department to provide IIM trust beneficiaries an accounting for all funds held in trust by the United States that are deposited or invested pursuant to the Act of June 24, 1938, regardless of when they were deposited. The D.C. Circuit Court noted that the statute does not make clear how to conduct such an accounting, and it is properly left up to the Department what accounting methods to use.

In the Department's fiscal year 2001 Appropriations Act, Congress directed the Department to submit a comprehensive report to the Appropriations Committees as to the costs and benefits of a comprehensive historical accounting. That report was submitted on July 2, 2002. It looked at the costs associated with doing a transaction-by-transaction accounting and transaction-by-transaction verification for the IIM account holders. The estimate for such an accounting and verification was $2.4 billion, and that would take ten years to complete. The feedback received from various Congressional members and staff suggested little support for this plan given its cost, the length of time required, and the fact that such a huge sum of money would go to accountants and lawyers, not Indian people.

In September 2002, Judge Lamberth, who presides over the Cobell litigation, ordered the Department to submit to the court by January 6, 2003 a proposed historical accounting plan. He also allowed the plaintiffs in the case to submit their own proposed accounting plan.

Our proposal is to compile a transaction-by-transaction accounting with transaction verification based in part on various statistical sampling verification methods. But all IIM account holders will receive transaction-by-transaction account histories. By using these different methods, we believe IIM account holders will receive their accountings much sooner. Interior plans to separate the historical accounting into three distinct types of IIM accounts.

- Judgment and Per Capita accounts
- Land-based IIM accounts
- Special Deposit Accounts

For the approximately 42,200 judgment and per capita accounts, we plan to reconcile 100 percent of the transactions in each account and verify all transactions.

For the approximately 200,000 land-based IIM accounts, we intend to reconcile 100% of transactions and verify those transactions using both transaction-by-transaction and statistical methods. We plan to verify all transactions that are equal to or greater than $5,000. For transactions that are less than $5,000, we will verify transactions using statistically valid sampling technologies. The statistically valid sampling methodology is expected to result in our being able to determine the accuracy rate of the historical accounting with 99 percent confidence.

For the 21,500 Special Deposit accounts, which are in effect holding accounts, we intend to distribute the funds to the proper owners and then close those accounts.

The historical accounting described in our Plan covers all IIM accounts open as of October 25, 1994, the date of the Act, or opened thereafter. The historical accounting period ends on December 31, 2000; transactions occurring thereafter are addressed in current accounting activities. Interior engaged 14 consulting firms to assist in the development of this plan, including five accounting firms (four of which are among the five largest firms in the United States), the largest commercial trust operator in the United States, two historian firms that have specialized in Indian issues for many years, and firms to assist in statistical matters, trust legal matters and other areas pertaining to historical accounting.

Under our plan, at the end of the historical accounting process we propose, we intend to be in the position to provide each IIM account holder with a Historical

Statement of Account. This statement will provide information on how much money was credited to each account, and the disbursements made from the account. It will also provide an assessment of the accuracy of the account transaction history. In addition, we intend to be in a position to provide land-based IIM account holders with information regarding their land assets. This information will be prepared by the BIA Land Title and Records Offices as a separate package to be provided to IIM account holders.

The cost of our historical accounting plan is approximately $335 million over five years. The President's proposed fiscal year 2004 budget for the Department of the Interior includes money for this accounting. Our $9.8 billion budget request is the largest in the Department's history, and represents a net increase of $344.1 million over the fiscal year 2003 enacted appropriations. Nearly one half of the proposed increases will fund trust reform improvements. Included within the total is $100 million to support the Department's plan to conduct an historical accounting for IIM accounts and $30 million to account for funds in tribal accounts.

The court has not yet ruled as to whether it believes our accounting plan is adequate. Plaintiffs have argued vehemently that it is not. Plaintiffs argue that the 1994 Reform Act requires a full verification for all transactions since the 1880s, and that such an accounting is "impossible" because the historical records are not complete—something Congress was obviously aware of when it passed the 1994 Reform Act. In the trial, plaintiffs have offered an alternative methodology, which uses various estimating techniques to approximate the amount they contend should have come into the IIM accounts since the 1880s. Their plan will, admittedly, not provide an accounting to even one IIM beneficiary, but will—like a damages model—come up with an amount of money to which plaintiffs as a class claim they are entitled. Press reports state that plaintiffs believe they are owed at least $137 billion.

Indian country argues that the money for this accounting or any judicial or congressional settlement should all be new money and not come from Indian program money. In reality, appropriators are faced with funding this accounting out of the Interior allocation, and have openly stated that funding a multi-million, potentially multi-billion, dollar accounting will mean a reduction in money for other Indian program priorities.

Recent Reconciliations and Accountings

The Committee also asked that I address the results of accountings Interior has done so far. In the 1990s, the BIA contracted with Arthur Andersen LLP to conduct a reconciliation of Tribal trust funds from 1972 to 1992 in accordance with certain agreed upon accounting procedures. More than one million records provided by BIA were examined in the reconciliation which concluded in 1996, but was augmented with additional work completed through 2001. Of the 251,432 transactions examined, 219,599 transactions worth $15.8 billion or 89 percent of total receipts and disbursements for 1972–1992 of the funds were reconciled. The error rate for the reconciled transactions was far less than one percent. For the remaining 11 percent, $1.9 billion in transactions shown posted in the accounts, sufficient documentation was not provided to reconcile the transactions.

As part of the Cobell litigation, Interior collected over 165,000 documents for the historical accounting of IIM trust fund activity through December 31, 2000 for four of the named plaintiffs and 24 of their agreed-upon predecessors. Of these documents, about 21,000 documents were used to support the transactional histories, which dated back as far as 1914, and which included a total of about 13,000 transactions. The accounting contractor, Ernst and Young, found 86 percent of the transactions and 93 percent of the funds moving through the accounts were supported by the documentation located. The cost of this accounting was over $20 million

Pursuant to the requirement in Section 131 of the fiscal year 2003 Appropriations Act, on March 25, 2003, the Department of the Interior provided Congress with a summary of the expert opinion of Mr. Joseph Rosenbaum, a partner in Ernst and Young, LLP. "on the historical accounting for the five named plaintiffs in Cobell v. Norton." This report describes the process the contractor went through and also contains a summary of his opinions. These conclusions included:

- The historical IIM ledgers were sufficient to allow DOI to create virtual ledgers that are substantially complete for the selected accounts.
- The documents gathered by DOI support substantially all of the dollar value of the transactions in the analyzed accounts.
- The documents gathered by the Department of the Interior do not reveal any collection transactions not included in the selected accounts, with a single exception in the amount of $60.94 that was paid to another account holder.

- An analysis of relevant contracted payments, evidenced primarily by lease agreements shows, that substantially all expected collection amounts were properly recorded and reflected in the IIM accounts.
- There is no indication that the accounts are not substantially accurate, nor that the transactions are not substantially supported by contemporaneous documentation.

The Department's Office of Historical Trust Accounting has also performed historical accountings for 16,821 IIM judgment accounts established for minors or restricted account holders. These accounts represent $48,496,799. No errors were found regarding the collections and postings to these accounts. Only a few of these accountings have been provided to the beneficiaries or their legal representatives because the district court in Cobell found that sending them to plaintiffs is improper and has not acted on our motion for permission to send them to the appropriate person.

Interior Trust Reform Efforts

The Department has developed a comprehensive plan for the management of Indian trust funds. The Secretary established both the Office of Historical Trust Accounting and the Office of Indian Trust Transition. The Office of Indian Trust Transition engaged in a meticulous process to develop an accurate, current state model to document trust business processes. The Department, after the most extensive consultation ever held with Indian country, is well down the road of putting in place a reorganization of trust functions in response to widespread criticism of the former trust management structure.

We have not been sitting on our hands at Interior. Trust Reform has been the number one priority for the senior management of the Department during this Administration.

Settlement of the Ongoing Trust Fund Litigation

Recently Senators Campbell and Inouye sent letters to the parties urging a fair and equitable settlement of the Cobell case. We welcome such a settlement. However, the parties are far apart on the issue of what is fair and equitable. Although I did not work at the Department of the Interior during the previous administration, I understand that the Federal Government has made a number of efforts to engage in settlement talks in Cobell with no success. From June 1996 to July 1997, the Department engaged in negotiations with the Cobell plaintiffs on the issue of development of an acceptable accounting mechanism. The Department tried again in early 1999 before the July 1999 trial and again right before the trial. Those negotiations failed.

After the July 1999 trial, Judge Lamberth asked the parties to work toward a settlement. The parties were unable to agree on an acceptable mediator, so the Judge appointed Stephen Saltzburg, a professor at George Washington University who has served as a special master in two class action cases in the District of Columbia District Court, and serves as a mediator for the U.S. Court of Appeals for the District of Columbia. The mediation ended with no resolution in November 1999.

Near the end of the previous Administration, then Special Trustee Tom Slonaker talked directly to plaintiffs" attorneys. While agreement was reached on a number of issues, other overarching issues went unresolved, and ultimately this effort failed. At the beginning of this Administration, the Department once again tried to enter into settlement talks in Cobell. The discussions became mired in a variety of issues surrounding the conduct of the negotiations. No resolution was reached on those issues.

Last year, the House Appropriations Subcommittee on Interior included language in the Interior fiscal year 2003 appropriations bill that would have limited the historical accounting to the period from 1985 forward. That language was removed by amendment on the House floor. The debate on that amendment, which was more extensive than the debate on the actual 1994 Reform Act, centered on the point that this matter should be addressed by the authorizers, not the appropriators. The appropriators urged the authorizing committees to step in and come up with a legislative settlement. Members of this Committee from both sides of the aisle spoke to the need for hearings and action on this issue.

Congressman Dicks explained on the floor that it was the intent of the appropriators to try to resolve this issue so that the vast amounts of money involved could go to Indian programs instead of accountants. More precisely he said:

> "This thing is broken; and somehow all the people that are here today expressing their wonderful concern, there is going to be a tomorrow, and we will see if anybody really wants to stand up with the majority side obviously having to be involved and work on this. This has to be done. We have

> got to get something done here." And then later in the debate, ""What we are trying to do is get them money in a reasonable period of time without decimating the Interior appropriations bill every single year. I want that $143 million to be used for other programs that will help Native Americans. I do not want to waste $1 billion in going out and trying to do accounting that is not going to give us the information pre–1985."

He also invited the authorizers to develop a settlement compromise—"[N]ow if these gentlemen who have come to the floor today to help us, if their committees would get busy and develop a compromise and do a settlement on this issue, it could be coming from Congress. Somehow we have to resolve this, because we do not have enough money."

Members of this Committee committed to engage in such a process. Mr. Young from Alaska said:

> "I think it is the responsibility of Congress. Because if we look at the trust, if we look at what is said about American Indians, the trust belongs to the Congress. We have been neglectful in not pursuing and making sure that this issue has been solved in previous years. So I am asking us to sit down, as the gentleman mentioned before, and say, let us solve this problem . . ."

Mr. Pallone stated "[T]here should be a hearing, or perhaps a series of hearings, that are being held in the Committee on Resources, in the authorizing committee, not here on the floor, when we are dealing with this larger bill."

Mr. Hayworth was one of the sponsors of the amendment that deleted the accounting limitation from the bill. He spoke the following on the floor:

> "I think it offers another compelling reason why we thank the appropriators, given the magnitude of the task, but reassert the role of the authorizing committee, and recognize the good but challenging work that has been done thus far to try and deal with this problem."

Mr. Tom Udall echoed the views of the opponents of the appropriations provision by stating:

> "This Congress should address these issues in a bipartisan way, and that is what we are trying to do on the Committee on Resources . . . The gentleman from Washington raises, I think, a very good point when he says we need to move this case to settlement. I do not think there is any doubt that we need to move this case to settlement. We should be working on the settlement issue, and we should let all of the attorneys know we want to move towards settlement. The key issue here, the committee that should be working on this is the Committee on Resources . . ."

Mr. Rahall said "[M]r. Chairman, I perfectly agree with the statements that have just been said. We want to settle this. We want a settlement."

Nearly a year has passed, we are now facing another appropriations cycle, and there has been no movement toward a settlement of the Cobell case. There were no hearings held by this Committee on this issue after that floor debate until today. Since that time, the court has issued a ruling and required plans for a historical accounting to be submitted; we have developed a plan for our accounting and are moving forward with our trust reform plan; and the trial on our accounting plan as well as the plan to bring ourselves into compliance with our fiduciary obligations is wrapping up.

The House Appropriations Committee provided $55 million less for a historical accounting than we have requested in our budget. The House appropriations bill also directs us, when doing the accounting, to use statistical sampling for all transactions. However, I understand the language allows the Secretary to provide funds to accounts from the claims and judgment fund once the statistical accounting is completed. Additionally, it prohibits any downward adjustments of accounts. Thus, if the sampling indicated that account holders have received more than their fair share of moneys, we could not recover those moneys. Finally, the language authorizes the Secretary to conduct a voluntary program to buyout accounting claims of IIM account holders.

On April 20 2003, Eloise Cobell sent a letter to all class members in the Cobell case. Ms. Cobell urged them not to support any effort by Congress to authorize a voluntary settlement for their accounting claims. Ms. Cobell told them, many of whom own a minute share in one parcel of land and have accounts with throughputs under $15 annually, that the plaintiffs are about to receive "a huge many billion dollar judgment in favor of us "" all Indian trust beneficiaries." The letter also said if the voluntary program is enacted, "tens of thousands of Indian people will again be cheated by the United States government." As I mentioned above, in the press, the plaintiffs and their representatives have been quoted as saying they ex-

pect to receive over $130 billion. They say this even though they have conceded in court that the district court has no jurisdiction to enter such a judgment.

As a result, expectations are high in Indian country. Given what we have seen as a result of the reconciliations and accountings done so far, we do not believe we can justify to the American taxpayers a settlement offer in the billions of dollars.

On June 13, 2003, Senators Campbell and Inouye sent a letter to Tribal leaders asking for their help in tackling 3 major tasks that would improve the management of Indian trust:

- To stop the continuing fractionation of Indian lands and focus on the core problems of Indian probate by swiftly enacting legal reforms to the Indian probate statute.
- To begin an intense effort to reconsolidate the Indian land base—by buying small parcels of fractionated land and returning them to tribal ownership.
- To explore "creative, equitable, and expedient ways to settle the—Cobell v. Norton lawsuit.

We would like to work with you and the Senate Committee on Indian Affairs on all three of these tasks. Addressing the rapidly increasing fractionation on Indian land is critical to improving management of trust assets. Properly done probate reform could be essential. When land is leased, BIA has the responsibility to deposit receipts from the land into the appropriate IIM account. This involves probating estates, finding heirs, and holding money for unknown heirs. These tasks are all funded through the Department's Indian budget.

The purchase of fractional interests increases the likelihood of more productive economic use of the land, reduces recordkeeping and large numbers of small dollar financial transactions, and decreases the number of interests subject to probate. The BIA has conducted a pilot fractionated interest purchase program in the Midwest Region since 1999. Through fiscal year 2002, the program has acquired 47,188 ownership interests in over 25,000 acres.

Using the Office of Management and Budget's Program Assessment Rating Tool (PART), we have learned there is a high level of interest and voluntary participation by willing sellers and large numbers of owners are willing to sell fractionated ownership interests. The President's fiscal year 2004 budget request proposes $21.0 million for Indian land consolidation, an increase of $13.0 million for a nationally coordinated and targeted purchase program. Interior believes that a national purchase program can be administered in a very cost-effective manner to target acquisitions that reduce future costs in trust management functions, such as managing land title records, administering land leases, distributing lease payments to IIM accounts, and processing probate actions. We are developing a strategic plan and necessary infrastructure to support a major expansion of this program in 2004. Where appropriate and to the extent feasible, the Department plans to enter into agreements with Tribes or tribal or private entities to carry out aspects of the land acquisition program.

With respect to the third task, the settlement of the Cobell lawsuit, I can honestly say I don't think we can get there without the involvement of Congress. This does not mean we will not continue to try. Contrary to Ms. Cobell's letter to the class members, this case is not on the verge of being over. Even if the district court were to adopt the plaintiffs" accounting plan—which the Administration argues is fundamentally improper given that this is a lawsuit ostensibly brought under the Administrative Procedure Act—there are more steps before the district court, and before other tribunals, that will be required before the class members receive any money. The district court has said that it does not have the jurisdiction to compel payment of money damages. It has made clear that the reason it, rather than the Court of Federal Claims, can hear the case is that the plaintiffs have stated many times that they are not seeking money damages. Without a settlement, considerable hurdles remain before anyone other than the lawyers or accountants can see any money from this suit.

That concludes my prepared statement. Thank you again for giving me an opportunity to testify. I would be happy to answer any questions you might have.

The CHAIRMAN. Well, thank you very much. I appreciate your testimony. I am going to recognize Mr. Hayworth for the first questions.

Mr. HAYWORTH. Thank you, Mr. Chairman, my colleagues, ladies and gentlemen, thank you for being at this important hearing.

Deputy Secretary Cason, I guess it was that noted philosopher and that great Hall of Famer Yogi Berra who talked about "deja vu all over again." and here we are—as the ranking member said, here we go again.

I can recall a task force that I co-chaired with the gentleman from Michigan, Mr. Kildee, as we co-chaired the Native American Caucus and heard disturbing news back in the 104th Congress. And different administrations have tried to deal with this and indeed, as you point out, the third branch of government, as illustrated in the judiciary branch under the actions of Judge Lamberth, the judge has intervened here expressing dissatisfaction and added accountability. And I know this has been a daily concern at the Interior Department.

I likewise know that many who join us today indeed—on the second panel, many folks have been active participants in trying to achieve a consensus. So I am not here to beat up anybody today, but I am very interested in gaining some perspective, and your testimony offers some intriguing possibilities.

For the record, I have to state—and I think this transcends party—despite the efforts to move through Interior appropriations, I think the Chairman quite correctly cited the jurisdiction of this authorizing Committee to deal with this prospectively in legislation; and that is why I joined with my friend, the ranking member, on the floor with the amendment that he had sponsored the last time this came up in the appropriations process.

I understand the pressures on Interior, the contempt citations that are out there, the frustrations of trying to move forward, but sparing you all a speech, let me go to some questions for the record.

Have both sides in the litigation or the judge agreed as to how many individual Indian money accounts there are?

Mr. CASON. Congressman, the answer to that is basically a time-bound one. The number of accounts basically changes—essentially day-to-day as new accounts are opened and accounts are closed. So in order to answer the question, you would have to basically find a specific day and time as to how many accounts as of this date or how many accounts were opened at any point during a period of time.

Generically, we are somewhere, on the average for the last few years, around 300,000 accounts, plus or minus a few. The last count that I saw, 193,000 are land-based accounts, which is a fairly recent account; and there are also 42,000 judgment and per capita accounts and about 25,000 special deposit accounts, which may or may not have any funds that are IIM-related.

Mr. HAYWORTH. So, Secretary Cason, one of the challenges you confront is, this number is fluid; it is changing daily. That is not the primary concern, but that adds, part and parcel, to the degree of difficulty in trying to solve the problem.

Mr. CASON. Well, Congressman Hayworth, that is somewhat of an issue. But the bigger part of the issue that is related is having a definition of—for whom we would do an accounting, and that is basically a time-bound issue. If we do an accounting, as we suggested in the Department's plan to the court, we would take all of the account holders as of the date of the 1994 Indian Trust Reform Improvement Act, and that is roughly 250,000 accounts.

But if you were to go back and say, I want to do all of their predecessors or all IIM accounts that have ever been opened or closed, it could be a larger number or it could be a much smaller number if you choose a different parameter.

Mr. HAYWORTH. [Presiding.] I know that my time is running out, and although I have the prerogative of the Chair, I want my other friends here to have an opportunity to ask questions.

Without acting in prejudice toward any option you envision at the Department, as I heard what I will call "Option No. 3," as you delineated what was going on there, if later in writing you could amplify some of those concepts to us—I know we have your testimony here today, but perhaps really go in-depth of what I am going to call "Option No. 3" that you set up, because it seemed to me the classic conundrum.

You say, it is easy to divide between the real and the ideal, but there's the third component and that is, what is practical and is that fair? And we will hear from other witnesses as to their points of view, but I'd appreciate, in writing, more amplification on what I'm calling Option No. 3.

With that, let me turn to the ranking member, the gentleman from West Virginia.

Mr. RAHALL. Thank you, Mr. Chairman.

Thank you as well for your testimony today, Mr. Cason. It is very obvious that you have spent a great deal of time on this every day, and you are to be commended for that effort.

I would like to ask you one simple question—and hopefully just yes or no—and that is, does the Department of Interior support the settlement proposal for IIM accounts contained in section 137 in the House Interior appropriations bill?

Mr. CASON. Mr. Rahall or Congressman Rahall, the Department hasn't taken a firm position on it one way or the other. That is one of the things we will be forwarding to Congress as part of the process in reporting on bills.

However, I would like to say, the Department appreciates the effort and the interest on the part of the Appropriations Committee and on this Committee to look at this issue and help us try to address it.

I think there are a number of different ways that we can approach the problem in trying to reach a resolution about what is fair. And when we get to that position of deciding what is fair in terms of providing a historical accounting, one of the things that we have to also come to grips with is a willingness to pay for that fairness.

The Department has offered a plan to the court, and we asked for funds to pay for that plan. It is $335 million over 5 years, and we asked for, in the 2004 budget, approximately $100 million to move forward on doing individual Indian money accounting. And the information I have received so far is, neither the House nor the Senate has marked up appropriations bills for 2004 that would provide that level of funding.

So one of the things we have to decide, Congressman Rahall, is, what is fair to do for our Indian beneficiaries; and then can we reach an accommodation with Congress to fund whatever that fairness is.

Mr. RAHALL. Who do you believe should be involved in determining how a fair settlement process should be developed?

Mr. CASON. My opinion about that is, we have a collective group of people that need to be involved. Certainly Indian beneficiaries have to be on that list. Members on the authorizing Committees for both House and Senate have to be on that list; and with the involvement of this Committee and the Senate Indian Affairs, we have both of those, and the Appropriations Committees on both sides.

And clearly Judge Lamberth is an integral player at this point.

But what we have to be able to do is get to a point that whoever the decisionmaker ultimately is makes a decision that the rest of us fall in line with. And at this point, I would say, Congressman Rahall, that the Department of Interior is down at the bottom of that list. We've proffered a plan, but we don't have any real decisionmaking authority at this point; and we need the help of both the court and the Congress to reach a conclusion about what is fair as to an accounting and how we are going to pay for it.

Mr. RAHALL. You've testified that one of the big problems with the trust fund accounts has to do with the fractionalization of those accounts. And on that I am certain we can all agree, and I am glad that the Department sounds like it's now going to make consolidation a priority.

Since you did not spend some $3 million that the Congress appropriated for consolidation last year, do you expect you will be able to spend all the money that Congress appropriated for fiscal year '03?

Mr. CASON. That is our hope. We are actually accelerating as much as we can what we call the ILCA program, the Indian Land Consolidation program. We know we have a certain amount of funds for that, and we are doing everything that we can to line up fractionalized interest and attempting to buy them; and we are actually looking for other opportunities to utilize those funds productively as well.

One of those areas is in the UB reinvestment issue. We would like to go to Indian owners of fractionated interest that were transferred to tribes as part of the UB interest and see if we can offer them cash for their interest to liquidate those as well.

We are going through a process, Congressman Rahall, of looking at laying out a very clear and prioritized list of acquisition desires that we can share with both OMB and the Congress to try and accelerate that program to be much more robust than it is right now.

Mr. RAHALL. Do you feel you have all the authority you need to do the consolidation, or will you be sending Congress legislation to address this?

Mr. CASON. We haven't completely come to a conclusion on that. I suspect, based on the conversations that we have had, that we have a substantial amount of authority to address the issue. But an area that may require some additional legislation is in the area of an "unwilling seller" involved in a fractionated parcel where we own the predominant interest and we are trying to clean up the rest.

If I could give you an example, if we ended up owning 95 percent of a parcel and we had an individual that owned 1/300th of an in-

terest and we wanted to clean that up so we owned the property in fee so we could decide what to do with it, it is unclear at this point whether we have sufficient legislative authority to address a condemnation situation with an unwilling seller. So we may have to do that.

Mr. RAHALL. Thank you, Mr. Chairman.

Mr. HAYWORTH. Turning now to my colleague from Arizona, the gentleman from the First District, Mr. Renzi.

Mr. RENZI. I thank the Chairman.

Sir, during your testimony, you used an example, "There are only two entities that could possibly pay for this type of large amount." one was the U.S. Government and the other one, you used the word "beneficiary."

Can you help me understand that?

Mr. CASON. The "beneficiary" in this case is Indian individuals who are Indian tribes. In private sector trust law when you have a private sector trust, it is the beneficiary of the trust who pays for all the services of the trustee. And there is an agreement between the trustee and the beneficiary regarding the services to be provided and how much will be charged for those services. So the reference to the "beneficiary" in this case is, in private sector trust law, the beneficiary would pay.

The way we have structured this trust is, the government pays for everything; but there is another option, if Congress were to choose it, to ask the beneficiaries to pay for the accounting. And the important thing about that, Congressman, is, we have a phenomenon here that I think needs to be thought about. And the phenomenon is that we have made a long-term commitment to Indian country and established a long-term funding mechanism with Indian country that is different than normal trust law.

But we are beginning to be judged on the terms of normal trust law, and under normal trust law the beneficiary would decide. And the thing that is important about that kind of relationship is that a cost-benefit paradigm operates.

Mr. RENZI. I am with you. We wouldn't be in the position we are, though, without really the fact that we haven't met our trust obligation.

Mr. CASON. Yes, absolutely.

Mr. RENZI. So to ask the beneficiary to pay for the cost would be somewhat disingenuous?

Mr. CASON. I am not suggesting that is what you have to do. I am making the point to the Committee that there are only two places to go, and ultimately the practice has been historically that the beneficiary doesn't pay, the Congress does.

Mr. RENZI. I am with you.

We talked a little bit about the accuracy to the "penny," I think was your word, of the current system. Can you help me understand the current fiduciary management role as far as—I know there have been some contentious understandings and arguments over whether or not we actually provided you with enough money or reforms put in place. But as far as moving forward, what kind of shape are we in now as far as trust management and fiduciary obligations?

Mr. CASON. Within the Department of Interior, the trust funds are managed by the Office of Special Trustee under a thing called the OTF. We use a private sector banking system called Trust 3000 that is used by a—I don't know if it is a majority or a significant minority of the banking industry to manage their funds, but the Trust 3000 system is a very robust system for accounting for moneys. So we feel very confident at this point that on a day-to-day basis that the moneys that enter into the Trust 3000 system we can account for to the penny.

Mr. RENZI. Do the Native Americans feel confident in it?

Mr. CASON. That is probably a better question for the next panel to come up.

Mr. RENZI. Mr. Chairman, thank you.

Mr. HAYWORTH. Thank you, Congressman Renzi.

I turn to my good friend, the gentleman from American Samoa.

Mr. FALEOMAVAEGA. Mr. Chairman, I appreciate the courtesy, but I will defer to my good friend from New Jersey, who was here before me, for his questions.

Mr. HAYWORTH. Always the courteous gentleman from Samoa.

I know my friend from New Jersey welcomes that opportunity.

Mr. PALLONE. Thank you.

I just wanted to say, Mr. Cason, that I know you said the accounting process isn't that bad. I don't know what you meant by that, but I disagree. I think the Cobell court, or the judge, has repeatedly held the Department and the BIA and others in contempt. So I don't buy the idea that we don't have a major problem here, and I don't want to get into that with you. Maybe you think you fixed it, or you're on the way to fixing it, but I would say, I think it is a major problem.

You mentioned one of the options is, just let the judge decide and sit back. That would be my view. I think after so many years of mismanagement, so many citations of contempt—and, again, I don't want this to sound partisan, because I know that we had the same thing under the Clinton administration, the same thing under the Bush administration. So, please, my Republican colleagues, I am not suggesting this in any partisan way.

But I think that the Department over the years has come up with so many proposed solutions that have failed that I really believe you should just sit back and let the judge decide, that that would be the best course of action.

But the thing that bothers me the most—and I am going to get to the questions—is, you know, you talked about a dialog with the authorizing Committee, but I have to say this is the first time that I have even heard that the Department is interested in a serious dialog with the authorizing Committee. And one of the biggest problems that I've had is that it seems like the Department repeatedly goes to Appropriations and to the Interior Appropriations Subcommittee and either initiates or suggests, you know, by whispering in somebody's ear that this is what they should do.

And then we end up with this language in these annual bills that come to the floor that we, as the authorizing Committee, had either no input on or certainly very little to my knowledge.

You seem to suggest you are not involved in any way with what the Appropriations Committee comes up with every year; yet, I

don't get that impression. I'm not going to give names, but I am given the impression that the Department is very much involved.

Last year, when this idea came up about limiting the time for the '85 to 2000 or so, there were certainly strong indications that you were supportive of that and maybe even suggested it. And again this year, you said, in response to Mr. Rahall, you don't take a position on this, section 137 of this year's current bill. But there are indications from various people that you are very much involved in that.

My first question is, why is it that we have been left out of the picture as the authorizing Committee? Why is it that we hear about these proposals from the Department after the fact? And why is it, they are always brought up in the context of an appropriations bill, which is not the procedure? And if you are going to tell me you have nothing to do with that, I find it hard to believe, but I would like your response.

Why is it we don't hear about it as the authorizing Committee? And why does it come up in Appropriations? And do you have any involvement with this annual appropriations process, that comes up with these terrible proposals that we then have to try and take out on the floor?

Mr. CASON. That sounds like a multipart question. I'll try to do the best I can with it.

In terms of the involvement in this Committee, we would be very pleased to have the involvement of the Committee; and would have been pleased in the past to have had the involvement of the Committee, but any request or dialog that we have had with staffs of the Committee has not resulted in a hearing before today.

So we are very much appreciative of the leadership of Chairman Pombo for calling the group together so that we could have the initial dialog on this issue.

I have personally come up to do briefings for the staffs of both House and Senate Appropriations and authorizing Committees on a number of occasions over the last 2 years, to let the Committee staffs know where we are on this issue over the last 2 years, so I know at least that much has been done, Congressman. And I have personally, and other members of the Department of Interior talked to various members of both the House and Senate on this issue.

Did more need to be done? Probably. Do we need to have more intensive questioning? Probably we do.

In terms of your questions relating to the House appropriations language, I can tell you that I personally did not write, did not draft, did not suggest the language being offered by the House Appropriations Committee either last year or this year. As far as I understand, the Department of Interior's employees haven't.

I haven't gone to ask 70,000 employees of the Department whether they were involved in that, but to the best of my understanding, the key participants who likely would have been involved tell me that they were not involved in drafting the language. And I think—in my opinion, this is a matter that the Appropriations Committee and this body, the House, is concerned about, where we are going with this litigation and the cost involved in historical accounting and what the parameters of that are.

And they are struggling to try to make a statement that says, we need to get on top of this issue, and they have offered a couple of options to address it. And ultimately, it will take a broader cross-section of Congress, including members of this Committee, to address what is fair and equitable to deal with the situation.

If we ultimately end up defining a very broad, very long-term historical accounting and Congress is willing to pay for it, great. And ultimately if we get to a very narrow, relatively inexpensive solution, that is fine as well. But we do need to come to a conclusion and so far we haven't.

The CHAIRMAN. [Presiding.] The gentleman's time has expired.

Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. In deference to those people who came here before me, let me ask one question and one follow-up perhaps, Mr. Cason.

What percentage of your time, Deputy Secretary Griles' time and Secretary Norton's time is now being consumed in dealing with this case?

Mr. CASON. We don't keep specific records, but as an estimate, I would say that, for my time, it is about 95 percent. For Deputy Secretary Griles' time, it is well over 50 percent and for the Secretary, it is probably 25 percent or more.

Mr. CANNON. Mr. Chairman, would it be appropriate to ask if anyone is here representing Judge Lamberth?

Let me say, I care about these Interior issues, and it is just wrong to have so much of the leadership of the Interior Department—their time engaged in an issue when we have so many other issues that are just as important for the administration to be concerned with.

Thank you. I yield back.

The CHAIRMAN. Mr. Inslee.

Mr. INSLEE. Thank you. Just ball park, how much do the plaintiffs think they may be owed and how much does the Department think they may be owed, just within factors of 10? Give me some idea.

Mr. CASON. Congressman, that is actually an interesting question.

Mr. INSLEE. If you give me numbers, I would appreciate it.

Mr. CASON. First, in the lawsuit that we are dealing with, it is not supposed to be an issue about numbers. It is supposed to be an issue of just doing an accounting, and then afterwards, if the accounting actually indicates that moneys are owed, theoretically that is an issue that goes to the court of claims.

In terms of the number of dollars that are involved, so far, the Department has identified very little error in the accounting that's been done. So if we were to develop a—based on the facts we have today, what kind of number would we have, it would be very low. What we understand from press accounts from the plaintiffs is that the number is $137 billion—"billion" with a B—and I have spoken personally to a representative of the plaintiffs who suggested a number in the 20 billion range as a possibility.

Other than that, I think it would really get down to having a detailed discussion with the plaintiffs, the court and any other party participant to really work out a number.

Mr. INSLEE. I read today's report that the government had proposed an accounting plan to the court that would cost about $335 million and 5 years to complete. Now that sounds like the plaintiffs are thinking somewhere between $20 and $170 billion. And as I understand, the plaintiffs had proposed that the judicial system would do this accounting because the Federal Government executive branch has been wholly incapable, through multiple generations of Presidents of both parties, to do it.

Why isn't that a good idea when we have American citizens for over 6 to 7 years that have been stiffed with an abject failure of the executive branch of the U.S. Government to do its duty? Why don't we give our evidence and the records to the judicial branch, fund them and tell them to get this job done in a reasonable time and not 5 years?

Mr. CASON. OK, that is a good question.

The bottom line is, I think your understanding that the judicial branch would actually conduct the accounting is not accurate. The judicial branch isn't proposing to do any kind of accounting, and I don't think they are equipped to do an accounting.

Mr. INSLEE. What do the plaintiffs propose then?

Mr. CASON. What's really at issue is the parameters of what accounting will be done and for whom, over what time period, and what kind of product would be produced.

The Department of Interior has established an office, the Office of Historical Trust Accounting, so we have a separate office to do this. We have hired four of the five largest accounting firms and a number of other firms. We actually have 14 different consulting firms that are assisting us in doing this work.

The real issue is just defining how broad this accounting is going to be, over what time period it is going to be, how much it is going to cost, et cetera. And that is really what is before the court.

We prepared a plan that suggested we will do the accounting for this group of people, which was basically all the account holders as of October 25, 1994, and all the moneys they had in the accounts from whenever they made their initial deposit, however far back through December 31, 2000. And that plan, to do it would basically cost 335 million and take about 5 years to do.

That plan is much more narrow than the plaintiffs have asked for in the past. The plaintiffs' plan provided to the court basically said, we are not going to go down an accounting pathway, taking all the records that the Department has, as that is somewhere between 4- and 500 million pages of stuff that we would have to go through.

So it is a huge job to go through, and the plaintiffs plan, instead, would adopt a model process. And as I understand the model—and maybe Elouise can elaborate more than I can, but as I understand the model, it basically says, we are going to take available data wherever we can find it and try to assess how much money should have been paid to Indians over the last 112 years, or whatever it is, since 1887, and we will calculate an amount of money that should have been there. And that is where I think the basis of the 137 billion comes from.

The CHAIRMAN. The gentleman's time has expired.

Mr. Cole?

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

Accounting can be accurate and not really measure value. And one of the questions I have for you:

Let us say that land could be leased out at a certain price, a fair market price would be $100, just to use a figure, and yet was leased out for $2. An accounting might show that every one of those—every penny of that $2 was paid, and yet there still would have been an enormous theft, in effect, that occurred.

Is there any mechanism that you have, or how do you approach that kind of problem? Because, again, we know that can occur, so how do you measure that? How do you measure that kind of thing that exists outside your numerical accounting system, even though it's accurate?

Mr. CASON. Historically, what we're attempting to do is account through documentation for the funds that were actually received by the Department of Interior and placed in an account.

The issue that you raised, where the number of dollars received and placed in the account might not be the right number of dollars, is a more difficult question; and in some cases, through the documentation and verification process, we would be able to identify those, but in a number of cases, we won't. We won't have the necessary information to actually find that kind of a case.

So I guess that is a weakness, if you define "accounting" as including a reassessment of fair market value for all transactions that have occurred over whatever period of time we would look at.

Mr. COLE. Is it the Department's position, you know, frankly, the costs there should have been eaten by the beneficiaries? That having occurred, we'd know, at least historically in some cases, that we should either ignore that or make no effort. Or is that something you would need legislative direction as to what you would do? Because that is a huge, huge difference between the parties that brought the lawsuit and where the Department is at in terms of their estimations.

Mr. CASON. I think that is a real concern that is voiced by any beneficiaries, and there is certainly support for instances where that has been a problem in the past.

But I think the direction of the Department of Interior is, we're trying to stretch very scarce resources in as many places as we can. And in doing that, today and now tends to take precedence over a revisitation of history over the last 100 years.

If Congress had desired us to go through that kind of a process, certainly the Department could undertake a special initiative that is funded for that purpose to go look. But where we are right now is, we try to prioritize the assets we get on annual appropriations to do annual work; and in the case of the historical accounting claim, it hasn't been framed as an asset accounting in terms of going back to relook at all the decisions you just talked about, but it has been framed more as an accounting for funds that are in IIM accounts.

Mr. COLE. Does that put you in an untenable position? Because it sounds as if the Department's position is, no, we are not going figure out what we owe, we are going to figure out what we can pay. And those are two very different questions. Ultimately that

becomes a policy question for the Congress in terms of what we can pay.

If the Department has to approach it only in terms of what we can afford on the budget we have, I mean, you can never give us an accurate rendering of the size of the problem.

Mr. CASON. Well, certainly "untenable" is a very good word for where the Department is right now on this issue, because clearly where we are on this accounting issue has made no one happy. No one is satisfied that we got it just right.

And clearly we could do more. We could look at additional things over time if that is the decision of Congress or the court that we have to do that, and Congress is willing to fund it.

One of the things that we are faced with, though, Congressman, there hasn't seemed to be a willingness to provide a lot of resources to do a very broad-scope accounting in the past. And we have been trying to find options to accommodate a relatively modest judgment.

Mr. COLE. I suggest that that might be because we are afraid of what we might find if we did that broad scope.

Mr. CASON. Fear is an interesting thing, so I am not sure.

The CHAIRMAN. The gentleman's time has expired.

Mr. Udall.

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman.

And thank you, Mr. Cason, for coming today. I think we're doing a little better this time around than last year. As many of us remember, we had a vote on the House floor; we hadn't had a hearing in this Committee. There was a great deal of consternation in terms of dealing with these kinds of issues.

So the first thing I would like to say is, I congratulate and compliment our Chairman and Ranking Member Rahall for exerting jurisdiction over this issue. This is our Committee's issue, not the Appropriations Committee issue; and at least this time around, we are having a hearing.

What I find a little uncomfortable though is, Mr. Cason, you have incredible expertise in this area. You have lawyers that have been working on this for years and years. You're dedicating, apparently, an incredible amount of your own personal time, 95 percent, and the Deputy Secretary at 50 percent, the Secretary at 25 percent; and yet the proposal that we're going to vote on next week in the appropriations bill that's going to be before the House of Representatives, the Department with the expertise does not have a position.

So I hope you can tell us—between now and when we have to vote on this that you will have a position for us on section 137. Can you assure us that you will at least, with all the great expertise you have over there at the Department, let us know how you feel about this provision and whether you think it's legal or not and if it is in compliance with all of these court of appeals opinions and other opinions that are out there?

Mr. CASON. Yes, sir, Mr. Chairman.

Mr. UDALL OF NEW MEXICO. Well, that is a real promotion.

The CHAIRMAN. What I want to know is what their recommendation is. Does that affect how you're going to vote one way or the other? Because if it does, we have a lot of recommendations.

Mr. CASON. As I understand it, Congressman, it's just going through the normal process. I don't know exactly when in the chronological order of responding to appropriations language we write whatever it is we write to the Hill. I understand that we give observations and recommendations or findings, whatever, a report of our position on bills.

I'm not sure exactly when that occurs, but it will occur whenever it normally occurs.

Mr. UDALL OF NEW MEXICO. Well, I just hope again to repeat that all of us in this Committee are going to have to vote on section 137, I would imagine next week. And so I hope you take that back to the Department and, with the time you are spending, carve out a little bit of time and let us know. Because I am not trying to put you on the spot; this is an enormously complicated issue.

I mean, if you read through the report that the House Government Operations Committee issued in 1992, called "Misplaced Trust: The BIA's Mismanagement of the Indian Trust Fund," it's the behavior of the BIA and the Department that's absolutely appalling.

And in that report, and I'm quoting from it, it says that the Indian Trust Fund, quote, "was grossly inadequate in terms of numerous important respects," quote, "failed to fulfill its fiduciary duties to the beneficiaries of the Indian Trust Fund." and it goes on and on and on.

Mr. TOM UDALL. So I think you have the expertise to be able to weigh in and let us know if we're voting on something that is later going to be overturned in the courts. I'd also like to associate myself with Mr. Pallone's comments on the frustration that we have had getting this issue before the Committee. Could you tell me why just letting the judge decide this and give us some guidance wouldn't be the right path to go?

Mr. CASON. Congressman, I wouldn't say one way or the other whether that's the right way to go. That is certainly the pathway we're on right now. What I would suggest is as the important point is that whoever decides, whether it's the judge or it's this Committee or it's the Appropriations Committee, ultimately whatever is decided, we have to be clear about what the accounting is and how we're going to pay for it. And what I'm expressing to the authorizing Committee is that there is a uniform and broad desire to be fair and equitable in doing the accounting. And we have that same feeling. We would like to be fair and equitable and do the right kind of accounting under the circumstances.

However, there's a lot of choices that need to be made in order to arrive at the conclusion about what is a fair and equitable accounting. For example, we have choices that the accounting could spend well over 100 years. So if we choose to account for activities that have spanned 100 years, it's going to be very expensive and very time consuming. And the feedback that we've gotten from Congress so far is we don't want to spend that much money. So ultimately, we have to get down to a decision about what the accounting is and how involved it's going to be and what its terms and conditions are, and then a willingness to spent the money that it takes to do that.

Our first plan that we provided to Congress in July of 2002 was a plan that was very broad, much closer to what the plaintiffs have asked for in this case, but the price tag was $2-1/2 billion, and the time to do it was at least 10 years. And the feedback that we got from Congress is too long, too expensive. So we looked at alternatives and based upon a commentary from the judge in a September 17 opinion that statistical sampling work would be acceptable, we actually revised the plan, narrowed down the number of people that we would do accountings for to those that actually had money in the accounts as of the date of the Reform Act, and we selected to use some statistical verification means.

We would do transaction-by-transaction reconciliation of the account, but statistically based verification of documentation. And we got the price tag down to about 335 million. We asked for funding to be able to do that accounting. And both the House and Senate markups for 2004 have taken a big whack out of the request.

So the message that we're getting is that's too much money from the Appropriations Committee. And we're getting a message that your accounting needs to be broader, which is more expensive.

So what we're trying to do, Congressman, is try to get all the parties who have a role to play, to come to grips with there is a big choice for us to make. And in the case back to your question, let's let the judge decide, that's basically fine if Congress is willing to fund whatever it is a judge tells us to do. And so far the appearances are the judge would ask to us do more than what is in our plan so it would be more expensive. But the message we're getting back is Congress is not willing to fund what is in our plan.

So that is where I think the conundrum is is if you let the third party, in this case, the judge, choose, then part of that decision is are you willing to fund whatever he comes up with. And I think part of the opportunity for the Committee is for the Committee to choose what the frame of the account is going to be or the form of the accounting, and then work with the appropriations folks in the House to select an appropriate budget for it.

Mr. TOM UDALL. Thank you for your answer. And Mr. Chairman, I hope that you can work with the appropriators and make sure that they understand that we in this Committee want to work on this issue and deal with this issue and that their really I think forcing this thing forward without adequate attention by this Committee. Thank you.

The CHAIRMAN. That message has been delivered.

Mr. Osborne.

Mr. OSBORNE. Thank you, Mr. Chairman. I'll try to be brief. Mr. Case on you have mentioned several times statistical extrapolation of some kind.

Mr. CASON. Uh-huh.

Mr. OSBORNE. What I'd like to know is how is this going to happen? I know you're looking at the 99 percent accuracy level. So let's say you have a tract of land of 160 acres. And my understanding is that you're going to take a limited sample but that would still maybe encompass 200,000 accounts; is that correct?

Mr. CASON. I guess I would explain it just a little bit differently, Congressman.

Mr. OSBORNE. OK.

Mr. CASON. The sample in terms of for whom we would do the accounting is basically all IIM account holders who had an open account as of October 25, 1994, the date of the Indian Trust Reform Act. So all people, or all IIM account holders who had an open account as of that day we could do the accounting for. Then in terms of the account, it's basically we would go back to the original day that that account was open, whether it was in 1970 or 1950 or 1938 or past, because the legislation says where we held funds and deposited them pursuant to the Act of June 24, 1938, so we would go back as far as 1938 if that was necessary and we could do an accounting forward all the way through December 31, 2000, for all funds that had been deposited in that account, and all withdrawals that had been made from that account, and we would give the opening and closing balances for that account.

The statistical sampling that you're referring to is in the area of where we would go search for supporting documentation for the transaction. And basically in the accounting parlance we have ledger sheets or ledger cards or ledger books that basically describe, like, your checkbook. I put so much money in deposit I wrote checks on it for so much and I have this kind of balance. We have those ledger cards and we would essentially assemble a statement that would include all of those transactions.

And then on the statistical side, what we would be doing is saying for all the transactions that were over $5,000, go find documentation to support all of those. For transactions under $5,000, we would take a statistical sample of those transactions and go find the supporting documentation to make sure that what was recorded on the ledger card was recorded accurately.

Mr. OSBORNE. OK. So what if you find that there is considerable discrepancy in what is recorded on the ledger cards? My understanding is from your testimony that 80 percent of the transactions are under $50.

Mr. CASON. Umm, I don't know that 80 percent right off the top of my head, but it's in that ballpark, a substantial number of the transactions are under—very small.

Mr. OSBORNE. So you would have to be doing a lot of extrapolating then.

Mr. CASON. Yeah.

Mr. OSBORNE. Let's assume that the ledger in your sample you're finding that there's a lot of discrepancy. What would be the recourse at that point?

Mr. CASON. We had a substantial amount of discussion in the preparation of our plan for the court on this issue. And the position that we've taken is the Department doesn't have an independent authority right now to address the issue where there is a discrepancy, and that what our plan was if we're allowed to go forward to do our historical accounting plan, is to do all the work on the historical accounting plan, get to the end of the plan, and basically provide a report to Congress that says here is all the errors that we found in the process. And here's our analysis of the errors and here's our recommendations about how to deal with those errors. So what we'll likely find is, in some cases, someone will be overpaid, and in some cases, someone will be underpaid. And that we need to go out and find out by how much each of those occurred,

how frequently they occurred, what magnitude they occurred, and then we would come to Congress and say here's what we think we ought to do about it.

And there's obviously a number of options on how to address that. But ultimately, the funding the corrective action would be something we would have to work out with Congress.

Mr. OSBORNE. So just to refresh my thinking here, you're proposing a plan that would take 5 years, cost 335 million?

Mr. CASON. Yes.

Mr. OSBORNE. The plaintiffs you're estimating 10 years and 2.4 billion?

Mr. CASON. No, that was the plan that the Department of Interior provided to Congress.

Mr. OSBORNE. That was previous?

Mr. CASON. Yes. It was the July 2, 2002 plan that was much broader than the plan that we gave to Congress.

Mr. OSBORNE. All right. Thank you.

The CHAIRMAN. The gentleman's time has expired.

Mr. Carson.

Mr. CARSON. Thank you so much. Just a couple of questions. You said you did accountings for the five named plaintiffs in the Cobell litigation?

Mr. CASON. Yes.

Mr. CARSON. What was the various balances for those? These only four had accounts, what were the balances on those?

Mr. CASON. Yes. We've treated the balance information and specific information about the accounts as protected by the Privacy Act, so I really can't tell you.

Mr. CARSON. Very good. How far back in time did you have to go to ensure that the opening balance of those accounts was accurate?

Mr. CASON. As I recall, a couple of the accounts went back to 1918.

Mr. CARSON. And do you have a sense—you estimate that there are 225,000 or 200,000 individual money accounts, is that correct?

Mr. CASON. It's in that ballpark. Between—there's—at the last snapshot that we did in time, there were about 193,000 land-based accounts that had IIM accounts attached to them and then there were on the order of 42,000 per capita and judgment accounts.

Mr. CARSON. You also said in your opening testimony that you estimated that a full accounting might come up to an award of, I think, $20 billion? Did you have a number and estimate on that?

Mr. CASON. And again, just to be careful in communication, if the Department of Interior were giving you a projection of what we think should be owed, the figure at this point, based on the evidence we have at this point, would be very low. That's based on conversations that we had from the plaintiffs or press reports.

Mr. CARSON. What was your estimate that you have?

Mr. CASON. We don't have a specific number. The number would be very low because based on what we've done so far, the error rate for tribal accounting was far less than 1 percent. It was very small. The four named plaintiffs and the predecessors involved, we found an error of one check for $61 that went to the wrong place. And for judgment per capita accounts, we've done almost 17,000 of those

and the error rate is basically none. There are some rounding error or interest calculations.

Mr. CARSON. When you're saying it's very low, you're implying that you have a number you're talking about. You're saying it's very low relative to the 150 billion the plaintiffs are saying?

Mr. CASON. Relative, yes.

Mr. CARSON. It has no meaning, this term "very low." so in what range are you talking about?

Mr. CASON. Well, if the Department were looking at settlement based on error, it would be in the low, very low millions. If we did some kind of projection based on the error rates we have now spread across the class, and you would have to determine what part of the class you would be spreading into. It would be very low millions, versus billions or tens of millions.

Mr. CARSON. Very low millions?

Mr. CASON. Yeah.

Mr. CARSON. So explain to me where the difference in valuation comes from? Plaintiffs say 150 billion, or more or less. You say given your rates of error, that you detected it's in the low millions. Explain to me where there's a divergence? What's the method where are there differences in method that explain that tremendous difference?

Mr. CASON. Again, this is a matter that I think Elouise can comment on fairly extensively, but it's my understanding that the major divergence is in what we consider relatively to be an accounting, what's involved in the accounting, and how we would approach it. The way that the Department has been approaching accounting is, as we understand the litigation that's involved, it's an accounting for funds that were received in IIM accounts that were deposited in IIM accounts and invested pursuant to the Act of June 24, 1938. So we have that relatively narrow construct. And then it's a matter of did I receive money, did I post it in the account, did I send a check out from that account, what's the balance? That my understanding of where the plaintiffs are is that they're not doing any of that actually taking the records and constructing a statement and verifying the statement, that they are taking an entirely different approach, which is basically constructing a model of what they think should have been deposited in accounts based upon their research of resources activities and land ownership over time.

Mr. CARSON. If I could interrupt you. Those two things should equal the same in a perfect world. Is the difference in those what the Congressman Cole mentioned that they have a different valuation of what the property or the resources is worth?

Mr. CASON. I think that's part of it.

Mr. CARSON. Are there other things to it than that?

Mr. CASON. I don't have a very sophisticated understanding of their model, but as I understand it, when they put a model together to look at resource values, they are assigning prices to—they are calculating how much of a resource has actually been taken off of Indian land over time. They've calculated how much the price should have been for that product over time, what the overall value should have been for those products, assumed all of that was deposited in IIM accounts, assumed that the monies were not paid out in a timely way, therefore interest is owed over long periods of

time for the resource. So that's my general understanding of the model. But they would be better prepared to tell you specifically how that model works and how they get at their numbers.

Mr. CARSON. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. Mr. Cason, thanks for testimony on a very difficult subject. On the bottom page, the front page of your testimony, you talk about one of the problems being the very small accounts.

Mr. CASON. Yes.

Mr. PEARCE. Small interest. The GAO report that you reference on page 4 suggested back in 1955, that one of the solutions would be to have small interest owners just pay directly from the lessees. Was any—has that ever been put into effect from that 1955 report?

Mr. CASON. Congressman, there is a mix of methods for paying individual lessees. In some cases, they can be paid under direct pay, which is this kind of an option that GAO talked about. That the direct pay works in some cases and there has actually been more contemporaneous commentary to the Department that the Department should be responsible for tracking all the direct pay situations, too. So it's not entirely a solution to the issue. In most cases, as I understand it, leases are set up by the BIA and funds are paid to the BIA and then disbursed.

Mr. PEARCE. Is there any reason for that, you feel like the recipients just don't have the capability to manage these accounts or why would we take—you have to account for it? I suspect that the office is paying these, either the oil companies or whatever they have to account for them, and they have to justify them and then they turn them loose to you, and you put them in a pot and you then have to rejustify them. Is there any reason for the feeling that the recipients can't do this for themselves?

Mr. CASON. Congressman, I have personally very strong feelings against any of the suggestions that have been made throughout time that the Indians are not competent to manage their own affairs. I personally think they are much more competent to manage their affairs and much more capable of tracking their own interest than the Federal Government is.

Mr. PEARCE. Is there any reason that the Department continues not to do that?

Mr. CASON. Yeah, I think there's a practical reason. The practical reason is what we refer to as land fractionation. That it's not unheard of for there to be tens or hundreds or thousands of owners in each individual allotment. So you may have 160 acres that has 2,000 owners. So it's not very practical for an oil company to try and write or distribute a royalty check, for example, to 2000 different owners on a parcel. And that over time, what's occurred is BIA has assumed the responsibility for making the lease, gathering up all the owners or making the decision to lease the property and then gathering the payment and taking the responsibility to distribute it among all the owners. So fractionation is a terrible problem for us.

Mr. PEARCE. I would argue the other side that the oil companies are exactly in charge of doing that precise thing of my wife gets a check for 64 cents. It was initially an acre of about 100-acre roy-

alty that has been divided multiple, multiple times through three or four generations, so she gets a check for 64 cents. I think the oil companies precisely do that very thing. And to then put it into an accounting system, a bureaucratic accounting system that has no expertise in that at all seems to me upside down. It just—I guess my next question is at the point you became aware that there was significant problem, whether it's 55 or 94, have you begun distributing by a new formula so that you're not—you're not—you've got an accumulation of problems for the last 100 years.

If your new disbursements are coming from that same tank, if we didn't put them over into a fresh new tank where the disbursements aren't contaminated by the last 100 years then every year we simply accumulate more problems into a mix that is unintelligible. And I wonder if, at any point, have you ever switched to where at least you know that since 1994 when you began to really focus on that, the distributions are correct or is it still going into the same old accounting system?

Mr. CASON. Congressman, as I understand it, that's a good and interesting point that maybe we need a break like that. But as I understand it, it's been a process of converting from one kind of an accounting approach to another kind of an accounting approach. But no clean break to say the past is the past, now deal with that and the future is the future. I'm going to start clean at this point. There have been conversions from various accounting opportunities or various accounting techniques in. And the last one was a conversion from our IRMS system into the new TFAS Trust 3000 system I described earlier.

Mr. PEARCE. Thank you, Mr. Chairman. One last point then, you can answer if you—but if it has not been done in the past, at least this current group of officials in the BIA and the Interior Department, you all have split it out to where it's not continuing to flow in, or you've got a plan to split it out to where it's not still going in. Because to me, if we don't stop the accumulation of the problems, with full knowledge that the problems are simply building, that's unthinkable.

Mr. CASON. Uh-huh. Congressman, we're kind of there. And the reason I say that is we haven't created a separate independent fund to channel new dollars into, but what we've tried to structure with our historical accounting plan is to do historical accounting up to December 31, 2000. And at that point, we had converted all of the IIM accounts to the Trust 3000 system, which we think is a very robust accounting system. And so the issue at this point is we can balance to the penny the fund now, and what what's in question is whether the opening balance as of January 1st, 2001 was accurate and whether we needed to go back to take a look at the historical activity of each individual account prior to that date. So we're kind of there.

The CHAIRMAN. Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman. And if I may, sir, just a couple of quick questions. Many of your comments to my colleagues have dealt with some of the other questions that I had. Let's talk a little bit about standards for the trust. I'm not sure at this point does the Secretary support or agree to a congressional

statement of standards for the trust or is that still a question that the Secretary is opposed to?

Mr. CASON. Congressman, the Department has looked at the issue and we actually think that we have a number of standards in place, which is the multiple statutes that have been provided to the Department of Interior directing us on how to management trust. And court decisions that have given us additional guidance on the subject. So we think we have in place fairly robust set of standards and direction as to how we're supposed to manage this trust.

Mr. GRIJALVA. So if I may interpret the answer is that at this point, a statement of congressional—from Congress of standards for the trust is a viable alternative to maybe establishing some trust in the trust? Or is it—or is it still the Secretary's position to oppose a congressional statement on standards?

Mr. CASON. Well, I think it would depend, Congressman, on what kinds of standards Congress was going to draft up and offer. And then I'm sure that the Department of Interior would have comments on whatever those standards are. If they were fairly consistent as a restatement of all the direction that has already been provided to the department, it probably wouldn't be much of an issue. However, if it were dramatically different, then certainly we would have to have discussions about the implications of dramatically different standards and whatever funding would come along with them. Because we've certainly had our attention raised to a very high level regarding the possibilities that we would be brought to court on breach of trust. And each time Congress gives us a dictate or a standard that we're unable to meet because we don't have adequate resources, that presents a problem. So certainly we would talk about it.

Mr. GRIJALVA. The question is prompted by, I think, the GAO report of April of '99 which stated briefly until interior defines the logical characteristic of its business environment and uses them to establish technical standards and approaches, it will remain at risk of investing in projects that are redundant and incompatible and do not satisfy Indian antitrust management requirements for cost effectiveness.

Mr. CASON. What was the context? I'm sorry, what was the context of the technical standards?

Mr. GRIJALVA. The context was talking about standards and the context was in about the trust having not only fiduciary responsibility but a responsibility to deal with the Indian nations in a way that had some established standards that were verifiable and codifiable for everyone. And that's the reference to that report.

Mr. CASON. Um-hmm.

Mr. GRIJALVA. I don't have anything else, Mr. Chairman.

The CHAIRMAN. Mr. Bishop. Mr. Baca.

Mr. BACA. Thank you very much, Mr. Chairman. First of all, I want some clarification, and if I may, before I ask some additional questions, and the clarification is is the Department waiting for the court to make a decision on the Cobell litigation before implementing its reorganizational plan? I'm sort of, like, confused.

Mr. CASON. No.

Mr. BACA. No what?

Mr. CASON. No, we're not waiting for the court to implement a reorganization plan.

Mr. BACA. So you basically have gone in with the reorganizational plan at this point?

Mr. CASON. We are currently in the process of implementing our reorganization plan.

Mr. BACA. Was there any input from anyone in that reorganizational plan?

Mr. CASON. Oh, yeah.

Mr. BACA. OK. What was the extent of the involvement or native friends involvement in the organizational plan that actually affects them? Was there any input at all from them?

Mr. CASON. Yes, Congressman. The Department of Interior hosted, if I remember right, nine field hearings, consultation sessions, communications sessions, whatever you would want to call them. We had participation collectively in those 9 of hundreds, if not thousands, of Indians who came to express opinions or be participants in the process, followed by a tribal task force exercise. The tribal task force took about 10 months, had eight or nine meetings, I don't remember exactly, but in that ballpark. Where we had a tribal task force of 24 Indian leaders from across the country, two from each BIA region. There was also a third alternate from each BIA region who at times would also attend.

In large part, the meetings were open to other Indians to participate in and often we had dozens of other Indians who came to the task force meetings to participate in the process. So we believe that at the Department of Interior, we had an extensive amount of communication with Indian country regarding the options. During the course of the task force process, the task force formed subcommittees. I personally sat on the subcommittee to look at reorganization options. Indian country generated, as I recall, 29 separate options that was analyzed by the Task Force Subcommittee on reorganization options. And the approach that we took was to assemble jointly a composite of the best features of all of those into a recommendation that was shared with the task force and debated at great length. And that at the end of the process, the department has done as much as we can to formulate our reorganization proposal consistent with the discussions we had with Indian country.

Mr. BACA. Thank you. Because I was a little confused. I assumed under the testimony that you've testified here that you're waiting until the courts had ruled on the litigation, but then you also indicated in your original written statement that you've implemented a plan, so I wanted to clarify which was it. And you have clarified that right now.

Mr. CASON. Thank you for the question.

Mr. BACA. Thank you. The other question that I have, as you know, U.S. has a trust responsibility legal obligation to protect tribes' assets and provide service needed to the Indian people. In your opinion, has the Bureau of Indian Affairs breached its trust responsibility in handling individual Indian money accounts? I want your opinion.

Mr. CASON. In handling individual Indian money accounts over time, I think it's pretty clear that the Bureau of Indian Affairs

probably could have done better over time than they have. And that the issue—

Mr. BACA. Is that a yes or no?

Mr. CASON. That's a, they could have done better over time. Clearly the concerns that have been expressed about the ability of Indian country IIM account holders to have confidence in the ending balances or beginning balances of their account is one that we take very seriously, and we think that Congress also take seriously and that somehow we have to come to grips with that. And that's the root of the historical accounting question, is how far back and how broadly do we do this job of going back to verify the transactions that have occurred over time so that we can provide confidence to IIM account holders that the balance that they have is an accurate reflection of the transactions in their account.

Mr. BACA. Thank you. I appreciate of you admitting that they should have done a better job. And in your opinion, what could the Department of Interior do to fulfill their true obligation?

The CHAIRMAN. The gentleman's time has expired. But I'll allow you to answer the question.

Mr. CASON. Thank you, Mr. Chairman. The Department of Interior has fully engaged a fairly broad cross-section of initiatives to try and improve how we management trust. The reorganization effort that we had is one of those exercises where we're trying to line up the resources of the Department to do a better job of focusing on the trust. We're actively engaged in trying to improve our probate process, how we manage land title information, how we set up our computer systems. We're trying to recruit for better talent to come in and help us manage this.

We're relooking at all the systems we use to provide service. We're actively engaged in reevaluating all of the business processes used to do trust work and try to streamline, integrate those processes better. I think we've put a priority on involving members of Indian country in the process, trying to solicit information from them as to how the process works, really in the field and how can we improve it, being sensitive to all the vagaries in Indian country and with the BIA and its 12 regions.

So there's a big job to do, and I think we're doing a lot of the big job. But it's not a simple process. This is a hugely complicated trust. One of the things that I think would be interesting for the Committee is going through the trial that we've just done, trial 1.5 in front of Judge Lamberth. We had an expert and it's a defendant's expert so take it with whatever grain of salt you want, but it was a Harvard professor named John Langbein who came in to talk about comparing this trust that we have to other private sector trusts in which he has a huge amount of experience.

And the things that he had to say is basically this is a trust unlike any other trust in the world. It's hugely complex. It's very different from private sector trusts that a large party private sector trustee wouldn't touch this thing with a 10-foot pole, and that's because it's very large it's very complicated and has some really unusual features that the private sector wouldn't touch.

So when we're talking about trying to improve it, we need to understand that the character of this trust is far different than people are normally used to. And that within the confines of those sub-

stantial differences between this and a private sector trust, we're doing a lot of things to try and improve it.

Mr. BACA. Thank you.

[The prepared statement of Mr. Baca follows:]

Statement of Hon. Joe Baca, a Representative in Congress from the State of California

First, let me thank all of our panelists for coming here today. I look forward to hearing your testimony and asking important questions on how we can settle this matter of Indian trust fund mismanagement.

Over ,the past couple of years, we have witnessed a number of corporate scandals–Enron, Tyco, Health South just to name a few. But the fact that the U.S. government has mismanaged Native American trust funds for over 100 years makes Enron Executives look like pick-pockets. I understand that we don't have any one responsible party-any Enron-like Executives-in the room here today. But, I understand that this is an injustice that has snowballed for a century or more without a fair solution.

I think we all know that the United States has a trust responsibility-a legal obligation—to protect tribes' assets and to provide services needed to the Native American people. This trust obligation is legally binding. As members of Congress, we must take this legal obligation seriously! The victims in this case, our First Americans, are the ones who should tell us the best way to right this wrong. And I am interested in listening to the tribes' input on (1) how these funds can best be settled, and (2) how trust management can be reformed. I am concerned that the input of the tribes has not been considered enough-and even purposely left out of the equation.

Congress is obligated to see that Native Americans won't end up paying for the government's mistakes out of their own pockets. This is why I am especially interested in hearing the Department of Interior answer tough questions on how they will clear their debt to the tribes fair and square. This is billions of dollars that belong to the Tribes! This is billions of dollars that could boost the Native American economy, build infrastructure, pave roads, renovate schools and send their children off to college.

Let's not let generations of Enron accounting, the destroying of documents and other crimes keep this government from fulfilling its trust responsibility any longer!

The CHAIRMAN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I want to thank Secretary Cason for his testimony this afternoon. It's my understanding there's some 60,000 people that work for Secretary Norton downtown. I just wanted to ask Secretary Cason if I were to raise any issues about this matter that we're discussing this afternoon, would it be safe for me to say that you are the No. 1 man to go to?

Mr. CASON. Well, I spend a substantial amount of my time on it and depending on the issue, if it wasn't me, I would take it to either the deputy secretary or the secretary for resolution.

Mr. FALEOMAVAEGA. The issue is the trust fund. Would it be safe for me to say you're the man to go to if we really have some concerns or problems with the administration's position on this?

Mr. CASON. For what it's worth, Congressman, we try as much as possible to manage as a team. And within the team—

Mr. FALEOMAVAEGA. My time is running out. I got you. Team effort.

I think Senator McCain could not have said it better when he stated that this whole matter is a national disgrace. 10 years now and we're still plodding, going here and there. We still have not found a solution to the problem. Now, I know you say that this is a very complicated issue. I'm not an economist, but I don't know,

I kind of like to think that this is the Department of Interior and these are the funds to be held in trust for some 500,000 native Americans. Over the years, whether it be 2 billion or $10 billion, I'm surprised to say that there's no money in the pot. The money's there, these are not hand-outs. These are not entitlements. This is the money that our government is responsible to keep on behalf of the native American people.

I just wanted to ask you, Mr. Cason, why are we so reluctant to say, hey, give them what is owed them? My understanding, the letter that I noted here from Mr. Echohawk to Senator Campbell that the plaintiffs wanted, five times they wanted, to negotiate in good faith. The administration has just been unwilling to negotiate in good faith. Can you respond to that?

Mr. CASON. Well, a couple things, Congressman. First, when you're talking about the money in the cup, to the extent that we're talking about individual Indian resources, there is no objection in the Department of Interior for giving Indians what is theirs. You know that's the entire purpose of the trust and there has never been any argument about whether that's the case. So we're not fighting against some issue of we want to take Indian resources and make it ours.

Secondly, when you talk about a settlement, I guess there is probably other perspectives as to why five previous attempts at settlement have not succeeded. And I would suggest that one of the possible things that this Committee needs to consider is that the definition of a reasonable settlement is probably pretty far apart.

And that the Department of Interior's point of view—

Mr. FALEOMAVAEGA. I appreciate your explanation, but I also noted in your statement that there's a media report that the Indians were asking for $137 billion. How ridiculous can this be?

Mr. CASON. I'm sorry?

Mr. FALEOMAVAEGA. How ridiculous can this be? Is this really what they requested?

Mr. CASON. All I can say, Congressman, is that's what we've seen in the press. And in a very limited conversation I had with a representative, the number of 20 billion was used. And certainly, I think in fairness, that if we actually had a sit-down session with serious parties to negotiate a settlement to this issue, the number would be more reasonable. But the question still is probably not as reasonable—

Mr. FALEOMAVAEGA. You mentioned that the Department of Interior has scarce resources. I'm not talking about scarce resources. The money's in the bank.

Mr. CASON. Well—

Mr. FALEOMAVAEGA. It hasn't been stolen. Nobody has taken it. The money's there. Now there's a question of saying well, let's settle it and how should we pay it. But there's no question of having there's no money in the kitty. The money's there. Why can't we just negotiate in good faith a settlement with these plaintiffs, whom our government owes? My understanding is on a yearly basis, the Interior collects about $500 million. Are we accounting for that on a yearly basis?

Mr. CASON. Congressman, we actually for individual Indian money accounts, we collect less than 500 million. Probably some-

where in the order of 150 to 300 million depending on land sales. For tribal accounts we probably do about 800 million a year. We do account for those funds. Generally they're pass-through funds as a result of leasing activities or land sales. Congressman, we do keep track of the money that we believe is owed to Indians. They are in individual accounts and tribal accounts. And if the individuals want them, we'd be happy to give them. Typically we pay out most of the money we have on a routine basis, either monthly or quarterly as soon as an account balance comes up to $15. And most of the residual that we have, approximately $400 million in the account for individuals, is a result of minor accounts or restricted accounts for one reason or another.

Mr. FALEOMAVAEGA. Mr. Chairman, I'll wait for my second round. Thank you.

The CHAIRMAN. The gentleman's time has expired. Another—do any of the members have additional questions that they would like to ask at this time?

Mr. Cole, did you have any additional questions?

Mr. COLE. No, I'm fine. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Pallone.

Mr. PALLONE. Briefly because I know we want to get to the second panel. Mr. Cason, the problem I have is you suggested that the tribes had input into the trust reform, that the Department is now implementing that I guess came out in December or January, my understanding is just the opposite. I would like to you comment on it. My understanding is that these task forces, a lot of them, under the auspices of NCAI, met several times over last year, but by October or November, essentially there were no more meetings and they were totally dissatisfied with what the Department was doing.

And the negotiations or dialog just was cutoff by the Department essentially. And then when you came out with your proposal in December or January, it was not, in fact, what the task force from Indian country had recommended, particularly that they wanted an independent commission, in part, to be reviewing these trust funds. They didn't want an internal reorganization within the BIA or the Department of Interior. Since you came up with this proposal there's been no opportunity for the tribes or Indian country to comment on it or say they like it or don't like it at all. So I don't know how can you say that this is a product in some way of those consultations of those task force. They're telling me just the opposite. How can you say that that's a product of those consultations with Indian country?

Mr. CASON. Congressman, we had, I would say, very extensive conversations with tribal representatives and through the course of nine or so consultation meetings or communication meetings prior to the task force with lots of other Indians, we got lots of perspectives. Clearly when we received 29 separate proposals about how we ought to do reorganization, there is no uniform position in Indian country about how the Bureau of Indian Affairs should be structured. There's lots of people with lots of ideas. I think it would be very hard for you to find particular Indians who had variety of ideas about how we should be organized.

My commentary is that where we started off is a proposal that the Indian communities referred to as buydown of the Bureau of

Indian trust assets management. The senior management of the Department felt that given where we were with litigation in this case, that we would be better off segmenting the assets that are under trust into a separate organization and making that organization charged specifically with managing those assets and have no other task or other competing interest. We advanced that to Indian country, and Indian country suggested that they didn't like that very much. In fact, I haven't found a single Indian that wants to stand up and say I do like it.

So where we ended up is dramatically different than the buydown proposal. We ended up there precisely because we ended up having extensive conversation with Indian country about what they liked and didn't like. It doesn't mean we have uniform agreement with Indian country about where we ended up. We ended up having extensive discussions about what would be preferable, and we tried to act on the feedback that we got. You will still find Indians that don't like where we are. I think the preference of Indian country as far as the organization of BIA is we do nothing. That we stay exactly where we are. But we don't feel like we have the luxury to stay right where we are because we're under the Cobell litigation on individual side, we have another 22 lawsuits on tribal side. And the message we're getting is we're not doing a good enough job. You need to figure out how to get your resources more focused on doing this job and improving the results. And that's what we're trying to do.

Mr. PALLONE. Thank you.

The CHAIRMAN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Just one quick question, Mr. Chairman. Mr. Secretary, over the years there has always been discussion about reorganizing the BIA, and there were attempts even by the previous administration. Am I to understand that it is also the effort of the current administration to do a revamp or reorganization of the BIA?

Mr. CASON. There is some reorganization, Congressman, of BIA and the Office of Special Trustee. And that essentially, if you boil down what the reorganization does is it attempts to lineup the field structures of both organizations to facilitate communication on trust, our fiduciary trust responsibilities. So if you look at it overall, the same people are in BIA, they're, in large part, doing the same jobs, the same resources in BIA the same thing for OST. We are planning to add some trust officer resources in the Office of Special Trustee and get them lined up with their counterparts in BIA to assure that we have a clear focus on managing our fiduciary responsibilities.

Mr. FALEOMAVAEGA. So it's more of a selective reorganization.

Mr. CASON. It's a grouping issue rather than a major reorganization.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Cason, just to kind of summarize this before we excuse you, no matter how we look at this, we're talking about a lot of money.

Mr. CASON. Yes.

The CHAIRMAN. And one of the major differences that we have is between the monies that were actually deposited into the trust

account and a model of what is believed to have been the true market value of those leases or monies that should have come in. So it's not just a matter of the money being in the cup, so to speak, as it is, there's a possibility that there were monies that should have been collected that didn't. Is that accurate?

Mr. CASON. That's a way I would characterize what I think the differences are. The accounting plan we proffered to the court is one of accounting for the funds we actually received and placed into IIM funds. And I believe, based on the reading that I've made of the plaintiff's materials, is the model basically calculates what should have been done, what should have been received, and the assumption is made that it was received but it's not accounted for.

The CHAIRMAN. Well, I would just say to my colleagues that I hope you listened to the answers as well as asked the questions because a big part of the responsibility here is ours. And you know, we like to throw rocks at the administration, whether it's this one or the previous one, but the truth is a big part of the problem is us and what we've done or failed to do over the years. And in terms of a resolution of this, it's going to fall on our shoulders. And to the Department of Interior, Mr. Cason, I'll tell you, if there is a resolution to this, a legislative resolution, it will be done in this Committee and it will not be done in the Appropriations Committee.

I am very appreciative that the Appropriations Committee in the past has been willing to take up this issue and have been willing to put dollars behind an effort to try to come to a settlement, but this is within the jurisdiction of this Committee. And it is all of the hours that they put in this these hearings and in trying to educate themselves to understand these issues, that's why we have authorizing Committees. And I feel very strongly that any solution that will come out of this will come out of this Committee. I want to tell you that I really appreciate the work that you've done, the effort that you put in this answering all of the questions that the members have.

Obviously, this is an extremely complicated issue that we are going to spend time figuring out exactly where we're going to go. And any solution, any settlement, any legislation that comes out of Congress will have to not only work for the Department of Interior, but it's also going to have to work in Indian country. As I've told you in the past and I've told others, that solution—we have to have confidence that it's going to work. That it's fair and equitable and it takes care of future problems. You have to have that confidence, we have to have that confidence as Congress.

And those that are the beneficiaries of the trust have to have confidence that it's going to work into the future. And I will work with you, the members of this Committee will work with you as well as with those beneficiaries of the trust in order to make that happen.

I'm sorry that in the past that Congress has not stepped up to the plate and taken care of this. But that's changing. And under this Committee, you will have a different era. And we will work with you. And I don't want the next Secretary of Interior to go through what this Secretary of Interior has had to go through. I think it's a shame that we have gone through this over the past several years here. And it's a shame that those in Indian country

have had to go through this. And I will work with you. I appreciate what—everything that you've put into this so far and hopefully, hopefully we can come up with a settlement so you're not spending 95 percent of your time trying to deal with this issue in the future.

Mr. FALEOMAVAEGA. Would the Chairman yield?

The CHAIRMAN. I'm going to excuse Mr. Cason and bring up the next witnesses. I apologize, Mr. Carson, but our next two panels have been waiting for over 2 hours. And I don't think it's fair to them to keep them any longer. I will say, Mr. Cason, that there will be additional questions that members have. They will be submitted to you in writing. If could you answer those in a timely manner so they can be included in the Committee hearing. Because I know Mr. Cole and Mr. Carson and others have additional questions.

Mr. CASON. We'd be happy to, Mr. Chairman. And we too at the Department of Interior would be very happy to work with the Committee, very in a detail way, to address this issue. It's very important and we would—we too would like to come to a fair and equitable resolution of this issue. Because it's not a good position for the Department to be managing the BIA affairs and the Indian trust when there's so little trust in the process. So we too would like to resolve this in a way that restores that trust.

The CHAIRMAN. Thank you.

Mr. FALEOMAVAEGA. Mr. Chairman.

The CHAIRMAN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. This is not posing a question, but I certainly want to commend you for your statement because this is a very profound statement in terms of how this Committee is going to continue to act, especially when dealing with native American issues. I want Mr. Cason to know this is not in any way trying to be partisan. We've always tried to work on a bipartisan basis. Please understand that this is nothing personal. This is just as much as failure of the previous administration in addressing this issue. I do want to let you know, Mr. Chairman, I'm sure those of us on this side of the aisle are more than happy to work with you closely on this issue, and work with the administration officials so we can find a resolution to this problem. Thank you, Mr. Chairman.

Mr. CASON. I can't take any of it personally, this issue has been here for 100 years. And it has been through successive Congresses and successive administrations of both parties. It's not a partisan issue. We collectively need to get on top of that issue. With your help and leadership, Mr. Chairman, I think we can do that. I would also suggest that perhaps for the Committee time may be of the essence because right now the ball is in the court of the U.S. District Court. So it may be we would be willing to work with the Committee on an expeditious review and consideration of these issues. Thank you very much.

The CHAIRMAN. Thank you. I'd like to call up our next panel consisting of Elouise Cobell, John Berrey and Tex Hall if you would join us at the witness table, please. And before you take your seat, I'll have you take the oath. So please join us.

If I could have you raise your right hand.

[witnesses sworn.]

The CHAIRMAN. Let the record show they all answered in the affirmative. Apologize for the length of the hearing, but I know that some of you have been waiting years to have the opportunity to do this. So I welcome you.

The CHAIRMAN. I welcome you here today. Mrs. Cobell, we are going to begin with you. I will just say that your entire written testimony will be included in the record of the hearing. If you could try to contain your oral testimony to 5 minutes. There are lights in front of you. The green light is to talk. The yellow light is to hurry up. And the red light is to stop. Just like a traffic light. So, Mrs. Cobell, if you're ready, you may begin.

STATEMENT OF ELOUISE C. COBELL, PROJECT DIRECTOR, BLACKFEET RESERVATION DEVELOPMENT FUND, INC.

Ms. COBELL. Thank you and good afternoon everyone. Chairman Pombo and Chairman—Mr. Rahall, members of the Committee, I would like to thank you for inviting me here today to address the Committee on the critical issue of Indian Trust Funds. And I would like to thank you, Mr. Chairman, for your outspoken opposition to Section 137 of the House Interior Appropriations bill which is also being called the Mandatory Account Adjustment Directive or MAAD. MAAD is the most repressive measure designed to destroy the rights of Indian beneficiaries and steal from us the victories that we have achieved through 7 years of litigation. MAAD is a blatant violation of the Separation of Power Doctrine, which seeks to change the judicial rules in midstream by massive legislative intrusion into a court case that has been going on for 7 years. Further, if enacted, it would be an unconstitutional taking of our Fifth-amendment-protected property rights. I will discuss MAAD further in a moment.

I am pleased to come here today to provide testimony on the virtually important, timely question posed by this hearing. Can a process be developed to settle matters relating to the Indian Trust Fund lawsuit. I want to make our position very clear. Plaintiffs are now, and we have been since the commencement of this litigation, prepared to engage in a fair settlement process and resolve these longstanding trust mismanagement issues. Mr. Chairman, as you know, these Trust Funds are not a handout or an entitlement program. It is imperative to keep in mind that this is our money. It is our property. That is the reason I brought this lawsuit 7 years ago. We tried to work with government for over a decade to resolve the mismanagement of the IIM Trust. Even after the misplaced Trust Report was unanimously issued in 1992 under the leadership of Congressmen Mike Synar and Bill Clinger, nothing changed. But the report led to the passage of the Congress of the Trust Reform Act of 1994. After enactment, however, still no progress. As a last resort, and with reluctant resignation and deep frustration, I asked my attorneys to bring the Cobell lawsuit. First and foremost, the lawsuit is about establishing an effective IIM Trust management system. Second, the lawsuit seeks an equitable accounting for individual Indian trust beneficiaries.

The Congress, GAO and Interior's own Inspector General, Interior's contractors, including PriceWaterhouse and Arthur Andersen, have all concluded that a full accounting is impossible. It is our po-

sition that any moneys spent on this type of accounting is a waste. Since defendants will not admit what all objective observers have already concluded, we must establish by judicial findings that there are not sufficient documents or reliable data for defendants to discharge their trust responsibilities to account. Yesterday, I attended the closing argument after a 44-day-long trial before the district court, a trial where one of the central issues before the court is whether defendants can ever complete a fair and full accounting given the unreliability of their data and destruction of documents. The lawsuit is not about money damages, rather it is about the restatement of our IIM accounts based on a fair accounting. The parties expect a decision within the next few months. That decision will set forth the appropriate parameters to proceed on the remainder of the case, including how to reach corrective account balances. Those same parameters will also provide a helpful basis for launching settlement discussions. A central stated justification for Section 137, the appropriators' MAAD proposal is the mistaken notion that there is no end in sight for the Cobell lawsuit. This is simply not true. The court could hold its final trial, the equitable accounting trial, as early as this fall. Mr. Cason says in his testimony that the court does not have the jurisdiction to restate account balances. The law is otherwise. And the court has held otherwise. The truth is that this is precisely because the court is approaching a judgment sooner than later that Interior is now desperate for Congress to enact MAAD. This case has taken as long as it has because of the obstructionist behavior of the government, counsel and officials for which they have been held in contempt of court twice. We, the IIM beneficiaries, on the other hand, have pursued expedient resolution of this case. We want resolution because each and every day trust beneficiaries are dying without receiving justice. Some have disputed this notion and have suggested that plaintiffs want this case to last forever because class counsel is getting rich. One politician said, my lawyers were making millions of dollars. That is totally untrue. I have not paid my lawyers a dime for 4 years. Each day that passes is a day that they are not getting paid. My lawyers have worked day and night at great personal sacrifice without compensation, hardly a sound approach to getting rich. We want resolution more than anyone, especially for the plaintiffs' class who have for the last century not seen a working trust system.

The MAAD proposal is not a sound proposal and will not achieve the justice this case demands. MAAD is a bald-faced attempt at taking the property of individual Indian beneficiaries by eliminating their judicially established rights. I want to comment very quickly on the House Appropriations Report which attempts to justify MAAD that there is a wild assertion that is intended to benefit individual account holders. The U.S. Court of Appeals has already held that the beneficiaries have the right to have all items in trust accounted for by the Department of Interior. The U.S. District Court has rejected and discredited statistical sampling as a methodology for accounting of the IIM trust embraced by MAAD. MAAD, in its own terms, will also delay resolution and spawn further litigation. On their Ernst & Young report that was talked about with the previous witness, I would like to clarify a few issues. It is clear from the Interior Subcommittee's report on fiscal

year 2004 appropriations, a major driving force of the MAAD proposal is the insupportable notion that the accounts of IIM Trusts are substantially accurate. This notion is based on the absurdly inaccurate Ernst & Young report. In sworn testimony, the Department of Interior's lead expert at the trial admitted that the Ernst & Young report is not an accounting after the Interior spent $22 million. Just last week, another expert testified at the trial that the Ernst & Young report was riddled with errors. Ernst & Young did not independently verify a shred of evidence and refused to sign and certify their report. I made the comment that anybody that would agree to that $60 was missing over 100 years, I have a lot of beads to trade him for some land. In conclusion, I would like to close today by thanking the many members of this Committee who stood by Indian beneficiaries and supported Mr. Rahall's amendment last term that stripped another hostile anti-Indian rider from the Interior Appropriations bill. The Rahall amendment prevailed with bipartisan support by a final vote of 281 to 144 and was a historical victory for Indian Country and justice. We are glad to hear the support of both you Mr. Chairman and Mr. Rahall and so many others on the Committee to ensure that MAAD will never become law. The disaster of the IIM Trust has stood as a blight on this great Nation for too long, the national disgrace in the words of Senator McCain, has too long been allowed to exist. It has outlived many heros, including Mike Synar and Mildred Cleghorn.

So I welcome this Committee's intention to be involved in the fair resolution of this case. The plaintiffs are committed and we have been from the beginning to achieving justice for all individual Indian beneficiaries. And we look forward to working with you on this goal. Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Cobell follows:]

Statement of Elouise C. Cobell, Class Representative - Cobell v. Norton

Good afternoon, Chairman Pombo, Mr. Rahall, Members of the Committee - thank you for inviting me here today to address the Committee on the critical issue of Indian trust funds. I would like to begin by taking this opportunity to personally thank you Mr. Chairman - for your outspoken opposition to Section 137 of the House Interior Appropriations bill - which is also being called the "Mandatory Account Adjustment Directive" or MAAD.

As you are aware, MAAD is a most repressive measure designed to eviscerate the rights of Indian beneficiaries and steal from us the victories we have achieved through seven years of litigation. MAAD is touted by its proponents as a sound, reasonable and fair process for "settling" the on-going Indian trust fund case, Cobell v. Norton. But in reality, it is neither sound, nor reasonable, nor fair. Rather, MAAD is a draconian provision that would involuntary extinguish the claims of trust beneficiaries and eliminate their right to seek redress from the courts for the uncontested century of mismanagement of our trust funds. Put simply, MAAD is bad federal Indian policy. I will discuss its implications and the misinformation that supports it in greater detail in a moment. MAAD is a blatant violation of the Separation of Powers doctrine which seeks to change the judicial rules in midstream by a massive legislative intrusion in to a court case that has been going on for seven years.

I am pleased to come here today to provide testimony on the vitally important and timely question posed by this hearing: "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit." The Cobell plaintiffs believe that the answer to that question is self-evident: Of course, such a process can be developed. Moreover, I want to be make our position on one matter unmistakably clear: We are now - as we have been since the commencement of this litigation - prepared to engage in a fair settlement process and resolve these longstanding trust

mismanagement issues. The key word is of course, is "fair." On behalf of over 500,000 plaintiffs of the Cobell class, I am here to offer our support for a fair process to settle the Cobell case and offer some suggestions to aid this Committee in its deliberations on this issue.

In order to better understand how to develop a process, I think its important to start with an overview on why we are where we are. Why, after a century, is the Interior Department still - by its own admissions - mismanaging our assets and monies? Why has Federal District Court Judge Royce C. Lamberth held two successive Secretaries of Interior - Babbitt and Norton - in contempt of Court? Why are some in Congress seeking resolution of Cobell by doing injustice to beneficiaries?

Cobell Overview

Mr. Chairman, when I last appeared before the Committee on February 6, 2002, I described the compelling nature of the lawsuit. The Individual Indian Money (IIM) trust is supposed to be the mechanism by which revenues from Indian-owned lands throughout the Western states are collected and distributed to approximately 500,000 current individual Indian trust beneficiaries. This trust is a vital lifeline for Native Americans, many of whom are among the poorest people in this country. Where I live, in Glacier County, Montana, the home of the Blackfeet Nation and one of the 25 poorest counties in the United States, I can tell you that many Indian people depend on these payments for the bare necessities of life.

As you know, these trust funds are not a handout or an entitlement program. It is imperative to keep in mind that this is our money - our property - revenues generated from leasing and sales of our land and resources, including oil and gas, grazing, farming, logging and mineral extraction on our lands. The IIM Trust was devised by the United States government, imposed on Indian people more than a century ago, without our consent. As trustee, the United States and each branch of the federal government has the highest legal duty and fiduciary responsibility to properly manage the IIM trust. Unfortunately - as you and many of the members of this Committee are well aware, Mr. Chairman - there is no one that disputes that this has been and remains, a severely broken trust.

That is the reason I brought this suit seven years ago. We tried working with the government for over a decade to resolve the mismanagement of the IIM Trust. Even after the Misplaced Trust Report was unanimously issued in 1992 under the leadership of Congressmen Mike Synar (D) and Bill Clinger (R), nothing changed. But the report led to the passage by Congress of the Trust Reform Act of 1994. After enactment, however, still no progress was realized. Administration after administration, both parties simply ignored us and continued to lose hundreds of millions of dollars of our money each year. As a last resort and with reluctant resignation and deep frustration, I asked my attorneys to bring the Cobell case.

We brought the case to achieve certain simple goals relevant here. First and foremost, this lawsuit is about establishing an effective IIM trust management system. The only way to accomplish this reachable goal is through sound planning and competent management, two ingredients that have been missing for far too long. The Interior Department has tried to blame Congress, saying that you have not devoted sufficient funds to reform. But resources have been available - indeed, close to $1 billion - has been appropriated for trust reform with little to no success. Resources are not the main problem.

Second, this lawsuit seeks an equitable accounting for the Individual Indian Trust beneficiaries. At least $500 million dollars a year in trust revenues is generated from individual Indian owned lands. Where is this money? The United States as Trustee, as the Court of Appeals has held must account for all "deposits, accruals and withdrawals" to and from the IIM Trust. That is the government's fundamental fiduciary obligation. The problem is a massive and unquantifiable amount of documents and data have been lost or destroyed. As a result, defendants cannot discharge their duty to account. The Congress, GAO, Interior's own Inspector General, Interior's contractors, including Price Waterhouse and Arthur Andersen, have all concluded that a full accounting is impossible. Still, the defendants will not admit that fundamental fact. So Interior says that an historical accounting requires Congress to appropriate hundreds of millions, possibly billions, of dollars to do an accounting that will not discharge their duties. It is our position that any money spent on that type of an accounting is a waste, because it will not lead to a result satisfactory to the courts, Congress of individual Indian trust beneficiaries.

So why spend the money? The Department of the Interior says because the Court has required them to do an accounting - but that is only because Interior refuses to admit that such an accounting is impossible. If Interior did so, then Interior officials fear an alternative approach would be used for the Court to formulate an equitable decree to correct the account balances in lieu of the accounting and finally do

justice for individual beneficiaries. But this would end the delays and legal wrangling and require the government to finally address 100 years of abuse and malfeasance in the near term, something they do not want to do.

Since defendants will not admit what all objective observers have already concluded, we must establish by judicial findings that there are not sufficient documents or reliable data for defendants to discharge their trust responsibility to account. Yesterday, I attended closing argument for a 44 day long trial before the District Court - a trial where one of the central issues before the Court is whether defendants' can ever complete a fair and full accounting given the unreliability of their data and destruction of documents. Plaintiffs will ask the Court to hold that they cannot and an alternative mechanism, consistent with principles of trust law, should be used to determine accurate account balances.

The parties expect a decision within the next few months. That decision will set forth the appropriate parameters to proceed on the remainder of the case including how to reach corrected account balances. Those same parameters will also provide a helpful basis for launching settlement discussions.

Timing and Settlement

A central stated justification for Section 137, the appropriators' MAAD proposal is the mistaken notion that there is no end in sight to the Cobell v. Norton lawsuit. That is simply not true. In point of fact, as mentioned, we have just concluded a trial that will decide many of the remaining disputed issues. The Court could hold its final trial - the equitable accounting trial - as early as this fall. The truth is that it is precisely because the Court is approaching a judgment sooner rather than later that Interior is now desperate for Congress to enact MAAD.

It is important to note that this case has been in litigation over seven years. It is a matter of record that time and time again the case has been unconscionably delayed as a result of government litigation misconduct. Put another way, this case has taken as long as it has because of the obstructionist behavior of the government counsel and officials for which they have been held in contempt of Court - twice.

We, the IIM beneficiaries, on the other hand have pursued expedited resolution of this case. We have vigorously contested each and every government-sponsored delay tactic. That is the record of this case. We want resolution because each and every day trust beneficiaries are dying without receiving justice.

Some have disputed this notion and have suggested that plaintiffs want this case to last forever because class counsel is getting rich. One politician said my lawyers were making millions of dollars. That is patently untrue. In fact, Mr. Chairman, I have not paid my lawyers a dime for over four years. They are not getting rich; in fact, each day that passes is a day that they are not getting paid. The fact is, my lawyers have worked day and night at great personal sacrifice without compensation. Hardly, a sound approach to getting rich.

We want resolution more than anyone, especially for the plaintiffs' class who have, for the last century, not seen a working trust system or justice. So, I would welcome an opportunity to reach a fair settlement of the Cobell case and we welcome the involvement of this Committee and the Senate Committee on Indian Affairs in determining a sound process.

In fact Mr. Chairman, as you know, by letter dated April 8, 2003, Senators Campbell and Inouye expressed their "strongly held belief that the parties to this case should pursue a mediated resolution rather than the current course of continued litigation" (copy attached). The Senators encouraged the parties "to engage the services of an enhanced mediation team that will bring to bear trust, accounting, and legal expertise to develop alternative models that will resolve the Cobell case fairly and honorably for all parties."

By letter dated May 23, 2003 John Echohawk on behalf of the plaintiffs' class responded affirmatively to the Senators' proposal. I have included a copy of this letter with my testimony. A recitation of some of Mr. Echohawk's response is quoted below and demonstrates our commitment to resolving this case:

> First and foremost, on behalf of the 500,000 individual Indian trust beneficiaries we express our gratitude for your sincere interest in the Cobell litigation and your willingness and desire to see that it is resolved fairly and expeditiously. Be assured that the Cobell plaintiffs are now, and always have been, willing to engage in frank and honest discussions for a fair resolution of this case. However the executive branch - with the exception of Treasury - has been steadfast in its unwillingness to negotiate such a resolution. Without your direct and active participation in the settlement process, we have no hope that the Administration will discuss these matters in good faith.

> On five previous occasions, we have engaged the executive branch in fruitless settlement discussions. Each time, government officials broke promises they had made to the Cobell plaintiffs and rejected settlement of matters that the negotiators had resolved. And, they have never made a good faith offer to resolve the accounting matter.
>
> [P]laintiffs are skeptical that Interior and Justice are prepared to resolve the Cobell case in good faith and in a fair manner. Nevertheless, with your involvement, we hope that it is possible. As a firm commitment to resolve this case as soon as possible, we hereby pledge to you that we are now - and we have always been - open to a resolution that ensures our clients are treated fairly and justly. For this reason, we welcome your efforts to begin a resolution process before the close of this year.

Letter from Echohawk to Senators Campbell and Inouye, dated May 23, 2003.

I understand that Interior has not responded in writing to the Senators. Mr. Chairman, the Individual Indian trust beneficiaries stand ready to participate in a fair settlement process with this Committee, in conjunction with the Senate Committee on Indian Affairs. Given past history, plaintiffs are not optimistic that a resolution can be reached, but we are willing to try. It is not clear to us how to ensure that the Interior Department will take settlement seriously. Our hope is that with the involvement of the authorizing committees there will be sufficient pressure brought to bear to ensure a good faith negotiation and perhaps a successful resolution to the Cobell case.

The MAAD Proposal

The MAAD proposal obviously is not a sound proposal and will not achieve the justice this case demands. After a century of mismanagement, MAAD is a bald-faced attempt at taking the property of individual Indian beneficiaries by eliminating their judicially established rights. After a century of mismanagement of their property, MAAD adds insult to injury and we are glad so many members of this committee have rejected it as unfair and unsound.

The MAAD proposal is based not on truth and fact and the record of this case. Instead, it is based on myths and falsehoods. We will discuss these in turn.

In the House Appropriations Report which attempts to justify MAAD, there is a wild assertion that it is intended to benefit individual account holders. The U.S. Court of Appeals has already held that the beneficiaries have the right to have all items held in trust accounted for by the Department of the Interior. The U.S. District Court has rejected and discredited statistical sampling as a methodology for the accounting of the IIM Trust embraced by MAAD. So how does it help beneficiaries by allowing the government to get away with a lesser standard rejected by the Courts?

Equally important, the individual Indian trust beneficiaries have also clearly rejected the very statistical sampling approach MAAD would purport to impose on them. In 2000, the Department of the Interior published a Federal Register notice requesting comments from the beneficiaries whether they wanted a full "transaction-by-transaction" reconciliation or a "statistical sampling." Within the notice, the Department clearly pushed for the statistical sampling approach by stating, among other things, that it would be quicker for beneficiaries to get paid. To their dismay, officials at the Department were forced to report back that "an overwhelming majority . . . wanted to see a transaction-by-transaction reconciliation in spite of discouraging language contained in the Federal Register Notice stating that such a solution was not very likely . . .."[1] Account beneficiaries presented with the choice rejected the MAAD approach. Make no mistake about it - the truth is that MAAD severely diminishes rights of individual Indian trust beneficiaries to enforce their rights through the courts and forces statistical sampling down their throats.

Furthermore, MAAD's proponents also say it is intended to limit protracted litigation. What is clear, however, is that MAAD, by its own terms will delay resolution and spawn further litigation. MAAD provides for an initial one year delay for Interior to develop a process and seek to force settlements of claims. Then it allows for an additional four years for Interior to implement the process. At the end of that process, Interior will deal with the inefficient process of individualized IIM claims for the many people who will undoubtedly challenge the unfair "adjustments" to their IIM accounts.

In addition, MAAD is most likely unconstitutional as it denies Indian beneficiaries fundamental due process rights and would constitute an unconstitutional taking of their 5th Amendment-protected property. It also contravenes the separation of pow-

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[1] Memorandum of Kevin Gover, Assistant Secretary Indian Affairs to Lisa Guide, Acting Assistant Secretary PMB, et al., December 21, 2000 at 4 (attached).

ers doctrine as Congress is attempting to dictate the outcome in a judicial proceeding. I will assure you that if Section 137 passes, we will challenge it at every juncture. In short, MAAD, rather than limit litigation, will actually lead to additional protracted litigation, thus increasing the costs to the United States and delaying justice to the individual Indian trust beneficiaries.

Another persistent myth is that MAAD somehow offers a "voluntary" settlement process. But MAAD is about as voluntary as holding a gun to someone's head and telling them to sign away their rights. MAAD allows - at the Secretary's discretion - for a "settlement" process prior to the Department's implementation of statistical sampling. If the individual Indian trust beneficiaries do not "agree" to settle, then the Secretary can unilaterally determine the appropriate "adjustment" to their accounts based on judicially-rejected "statistical sampling" and force them to accept Interior's findings. If the individual Indian trust beneficiaries want to challenge the findings, MAAD materially limits judicial review to a determination if Interior acted "arbitrary and capricious." All such appeals must be filed with the U.S. Court of Appeals for the D.C. Circuit within 60 days. Hardly a fair and voluntary settlement process.

Equally important to bear in mind, MAAD eliminates the generally applicable federal court protections for members of a plaintiff-class. When a defendant in a class action lawsuit seeks to "side settle" claims with individual members of a class, they are required to have the court review and authorize the communication. This judicial check is to ensure that the individual members are making their decision based on good information and not based on the "spin" of the defendant. The danger of not having this protection is that a person might "consent" to settlement based on false or misleading information. MAAD eliminates critically important due process protections for individual Indians and give the Secretary unbridled discretion to coerce settlements and ultimately force unfair "adjustments" on 500,000 Indian beneficiaries.

In addition, as is clear from the Interior Subcommittee's report on fiscal year 2004 Appropriations, a major driving force of the MAAD proposal is the insupportable notion that the accounts of the IIM Trust are "substantially accurate." This notion is based on the absurdly inaccurate, Ernst & Young Report. In sworn testimony, the Department of the Interior's lead expert at trial, Dr. Lasater, admitted that the Ernst & Young report is "not an accounting" - after Interior spent over $22 million. Just last week, another expert, testified at trial that the Ernst & Young Report was "riddled with errors." More telling still, the report itself states that it "assumes" all information is accurate and Ernst & Young did not independently verify a shred of evidence and refused to sign or certify it. The truth is that the Report is so riddled with errors, unreliable and insupportable that it is in fact a sham and cannot serve as the basis of any sound decision-making.

Conclusion

I would like to close today, by thanking the many members of this Committee who stood by Indian beneficiaries and supported Mr. Rahall's Amendment last term that stripped another hostile-anti–Indian rider from the Interior Appropriations bill. The Rahall Amendment prevailed with bipartisan support by a final vote of - 281 to 144 - and was a historic victory for Indian Country and justice. We are glad to hear the support of both you Mr. Chairman and Mr. Rahall and so many others on this Committee to ensure that MAAD will never become law.

The disaster of the IIM trust has stood as a blight on this great nation for too long. This "national disgrace" in the words of Senator John McCain, has for too long been allowed to exist. It has outlived many heroes - including Mike Synar and Mildred Cleghorn.

And so I welcome this Committee's intention to be involved in fair resolution of this case. The plaintiffs are committed, as we have been from the beginning to achieving justice for all individual Indian beneficiaries - we look forward to working with you on that most commendable goal.

Thank you.

[Attachments to Ms. Cobell's statement have been retained in the Committee's official files.]

The CHAIRMAN. Mr. Berrey.

Mr. BERREY. Good afternoon. Mr. Chairman, my name is John Berrey, I am the Chairman of the—

The CHAIRMAN. If the gentleman would suspend. I wanted to recognize Mr. Carson to introduce our next witness.

Mr. CARSON. Well, thank you Mr. Chairman. I won't take long, other than to say that Chairman Berrey is a proud constituent of northeastern Oklahoma. He is Chairman of the Quapaw Tribe that has a very vested interest in this issue. A visionary young leader in Indian Country and someone who is also part Osage, and I think Chief Gray of the Osage Nation is here too. Very active in a variety of issues dealing with reform of the Department of Interior; something vitally needed and something that everyone in this room would agree is hopefully going to come sooner rather than later. So it is a pleasure to have Chairman Berrey here today, who is also vice-chairman of the Inter-Tribal Monitoring Association, which has worked extensively on this issue.

So, John, welcome. Thank you for being here.

STATEMENT OF JOHN BERREY, CHAIRMAN, QUAPAW TRIBE

Mr. BERREY. Thank you very much.

I would also like to acknowledge Congressman Cole, a fellow Oklahoman and a member of a sister tribe, the Chickasaw Nation. I am the Chairman of the Quapaw tribe, vice-chairman of ITMA.

The Quapaw Tribe is one of the many tribes that currently has litigation in Federal courts for mismanagement or claims of mismanagement to the DOI. We also claim and we are disputing the 1996 reconciliation report by Arthur Andersen that was discussed by Mr. Cason. We are also asking for an accounting of the natural resource management, which was discussed by Mr. Cole. And we are also asking for a management accounting, because we have the largest superfund site in the United States on our tribal lands. But one thing I would like to say, and I am very proud to announce, is the Quapaw Tribe is the only tribe in the United States that is currently going through formal alternative dispute resolution processes with the Federal Government. We have been working with the Department of Interior, Department of Justice and the Department of Treasury to try to work outside of litigation to come to terms with our claims, and we feel like we are making a lot of progress and we are very proud of that and we appreciate the hard work that the Department of Interior has put toward this process.

Also, I am a member of the Osage Nation as Mr. Carson acknowledged. My immediate and extended family are very much stakeholders in this process. We have had millions of dollars go through our IIM accounts due to the large Osage mineral estate. And there are a lot of us that are concerned and want to come to a settlement.

Also, the members of my tribe were the owners of one time the largest lead and zinc estate in the history of the United States. I have also personally sponsored or been part of the promotion of two key National Congress of American Indian resolutions. One that I sponsored last year in San Diego was against a similar appropriation bill that we have talked about earlier. And I worked this year in Phoenix on a resolution that came out in support of Senator Campbell and Senator Inouye's efforts in the process to lead to an end of this endless litigation. I have had the great fortune to be part of the Department of Interior's effort to identify and detail the business processes that they used to deliver trust services today. We spent over a year last year traveling across Indian Country and

identified how those processes are managed, the problems within them, and I am glad to be part of a new process called the "To Be" reengineering, which is how we are going to fix the system in the future. To answer some of you all's questions earlier, I believe we can fix it. I believe working with Indian Country, the Department of Interior and our trustee and a lot of hard work, we can fix the process for the future.

I have got the added responsibility to be the Chairman of the—vice-Chairman of ITMA, and I support all the testimony you will hear from them today. First of all, I am very grateful for Ms. Cobell here. She and her attorneys have done an excellent job of bringing this terrible historical mismanagement to light that has been plaguing Indian Country for years. Many of the things that she has described are some of the things we are trying to fix today in terms of accounting, mismanagement, enforcement, compliance, all of the issues that are related to the Trust service delivery to the Indian beneficiary.

As a tribal leader, I have become very frustrated with the direction of the case. The scorched-earth tactics of the attorneys from both sides of the case have created tremendous hardships on the very beneficiaries both sides represent. The dollars allocated for tribal services are being used to produce endless data calls, insane computer security and the failure of the solicitor's office to take action on day-to-day business resulting in the fact that the burden of this case is now squarely on the shoulders of the tribes and the individual tribal members. In the last quarter at my agency, 80 percent of the full-time equivalent (FTE) in realty was spent on litigation document production, directly affecting the agency's ability to perform much needed realty services such as leasing, rent collections, and lease enforcement for Quapaw Tribal members.

The court has broadened the scope of this case so wide that it is impossible to describe the case as it was originally intended. All parties involved are working on business processes such as fee-to-trust, resource management planning and leasing, title management, and appraisals, the very types of activities that are typically DOI/Tribal government-specific issues, not related to IIM accounting. We now have a court that is involved in these activities that threaten tribal governance and self-determination. And I am afraid that a case that about 10 percent of the trust corpus is threatening the 90 percent of the Trust Corpus that is not part of the court's jurisdiction. It is very obvious that the people are tired and weary of this case that has lingered on for eight long years remember resulting in the destruction of many dedicated peoples' reputations, careers, and ultimately the delay in payments to needy Indian families. I lost seven IIM account holders 2 weeks ago in my tribe. We are losing people everyday and we need resolution now. The result has been the burning down of the house of the very trustee delegated to provide services to the Indian beneficiary. You know it bothers me. Gale Norton gets paid. The attorneys for the Department of Justice are getting paid. Judge Lambreth is getting paid. But the members of the class, the American Indian and their tribes are suffering.

The time is now to stop this endless insane method of resolving a series of claims that needs to be settled in a fair and collabo-

rative way. The success of any dispute resolution is embedded in the very process used to resolve the conflict. I appreciate the appropriators' attempt in finding a resolution, but the Section 137 of the Appropriations bill falls terribly short in terms of process. There has been no consultation with the plaintiffs, with the plaintiffs' counsel or tribal leadership. The entire issue of settlement must be process driven. Instead of predetermining any settlement structure, the focus must be on process, process and process. It's a proven method of dealing and resolving conflicts and issues and allows the stakeholders a voice in the outcome. I'm sure that an effectively managed collaborative process will work in a very timely way if allowed to happen. I am asking and pleading for Congressman Pombo and Congressman Rahall to work with Senator Campbell and Senator Inouye quickly in a joint effort to resolve this litigation using a collaborative process that includes IIM account holders, tribal leaders, plaintiffs' counsel and the Department of Interior. Please allow this process to begin. Require a time line and hold all parties accountable, but please allow a fair and collaborative method to settle this mess. The time is right. The method of collaborative dispute resolutions are proven and the process must be given an opportunity. As a tribal leader, I am determined to come to grips with the past. It's not fair for me to teach my children and my grandchildren to constantly be looking backwards. The time has come. We got to teach them to look to the future and focus on the feature. And I appreciate your time.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Berrey follows:]

Statement of John Berrey, Chairman, Quapaw Tribe

Mr. Chairman and distinguished members of the committee thank you for the invitation to speak to you today. My name is John Berrey, I am the Chairman if the Quapaw Tribe of Oklahoma and Vice–Chairman of The Inter–Tribal Monitoring Association (ITMA). The Quapaw Tribe is one of the Thirty Tribes currently involved in litigation in federal court claiming Trust mismanagement by the Department of the Interior (DOI). The Quapaw Tribe's membership are individual class members represented in the Cobell v. Norton litigation, as a result of the largest lead and zinc mines in the history of the United States that were managed by the DOI. I am very pleased to also tell you that the Quapaw Tribe is the only Tribe that is currently pursuing a formal alternative dispute resolution (ADR) process outside of our litigation. We are very pleased with the progress and successes we have achieved working with the DOI, Department of Justice (DOJ) and Department of the Treasury (Treasury) attempting to settle Tribal and Individual claims. I am also a member of the Osage Nation. My immediate and extended family may represent some of the individuals in the Cobell class with the very most at stake in terms of settlement because of the millions of dollars from the Osage mineral estate that moved through these Individual Indian Money accounts (IIM).

I personally sponsored or helped promote the two most recent settlement related resolutions passed by The National Congress of the American Indian (NCAI). The first, SD–02–099, approved and passed last year in San Diego against a similar appropriations rider to the one currently in the DOI appropriations legislation, that rider proposed creating a poorly conceived voluntary buyout plan. Most recently, PHX–03–040, a resolution passed a few weeks ago in Phoenix, supports Senator Ben Nighthorse Campbell and Senator Daniel K. Inouye's efforts to begin a process that would lead to a fair and equitable solution to the endless litigation.

I have had the great fortune to be part of a DOI effort to identify in detail the business process problems that created in part the claims in the Cobell v. Norton litigation called the "As Is" business model. I am part of a team that is tasked with reengineering these processes to eliminate any future claims called the "To Be" reengineering team. These efforts have allowed me the opportunity to travel through-

out Indian Country interviewing nearly two thousand individuals directly involved in the management of Native American Trust assets.

I have the added responsibility to be the vice chairman of the Inter Tribal Monitoring Association (ITMA), an organization whose very existence revolves around monitoring DOI Trust management. I support the ITMA testimony that you will hear today. It is these experiences that have led me here to discuss these pressing settlement matters.

First, I am very grateful to Eloise Cobell and the attorneys involved in the Cobell v. Norton litigation. The efforts of these individuals have brought to light the terrible historic mismanagement of Indian Beneficiary Trust Assets. Many of the described problems relating to the DOI management have created the current reengineering that I am involved with. With the efforts of the Office of the Special Trustee (OST), the Bureau of Indian Affairs (BIA) and Tribal representatives, we will create better business processes for the DOI Trust Management service delivery to the Native American Beneficiary.

As a Tribal leader I have become very frustrated with the direction the case and the decisions the court has taken. The scorched-earth tactics of attorneys from both sides of the case have created tremendous hardships on the very beneficiaries both sides represent. The dollars allocated for tribal services are being used to produce endless data calls, insane computer security, and the failure of the solicitors office to take action on day-to-day business resulting in the fact that the burden of the case is now squarely on the shoulders of Tribes and Individual Tribal members. In the last quarter at my agency, the Miami Agency, eighty percent of the full time equivalent (FTE) in realty was spent on litigation document production, directly effecting the agencies ability to perform much needed realty service such as leasing, rent collections and lease enforcement for Quapaw Tribal members.

The court has broadened the scope of this case so wide that it is impossible to describe the case as it was originally intended. The court and both parties have become involved in business processes such as; fee-to-trust applications, resource management planning and leasing, title management and appraisals, the very types of activities that are typically DOI/Tribal issues and not specific to IIM accounting. We now have a court that is involved in activities that threaten Tribal governance and self-determination, and I am terrified that a case about ten percent of the Trust Corpus is threatening the ninety percent that should not be part of this courts jurisdiction. It is very obvious that many people are tired and wary of this case that has lingered for eight long years resulting in the destruction of many dedicated peoples reputations, careers, and ultimately the delay in payments to needy Indian families. The result has also been the burning down of the house of the very trustee delegated to providing services to the Indian beneficiary. Gale Norton, the attorneys from the DOJ, Judge Lambreth and the attorneys for the class are getting paid while Native American Indian people and Tribes are suffering.

The time is now to stop this endless, insane method of resolving a series of claims that need to be settled in a fair and collaborative way. The success of any dispute resolution is imbedded in the very process used to resolve the conflict. I appreciate the appropriators" attempt at finding a resolution in section 137 of the DOI appropriations bill, but it falls terribly short in terms of process. There has been absolutely no consultation with any of the plaintiffs, plaintiff's council or Tribal leadership. The entire issue of settlement must be process driven, instead of predetermining any settlement structure the focus must be on process, process, and process. This is a proven method of resolving complex issues and allows all the stakeholders a voice in the outcome. I am sure that an effectively managed collaborative process will work in a very timely way if allowed to happen. I am here to ask and to plead to Congressman Richard W. Pombo and the Congressman Nick J. Rahall II to work with Senator Ben Nighthorse Campbell and Senator Daniel K. Inouye quickly in a joint effort to resolve the Cobell v. Norton litigation using a collaborative process that will include IIM account holders, Tribal leaders, plaintiff's council, and DOI officials in a timely way. Please allow this process to begin, require a timeline and hold all parties accountable, but please allow a fair and collaborative method to settle this mess. The time is right, the methods of collaborative dispute resolution are proven and the process must be given the opportunity to work. As a Tribal leader I am dedicated to coming to terms regarding issues of the past. It is not right for me to teach my children to constantly look backwards, when I must teach them to focus on the future. Thank you for your time.

[An attachment to Mr. Berrey's statement follows:]

THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION PHX–03–040

Title:. Supporting Tribal Leaders' Involvement in a Congressional Process to Settle Trust Claims; Strongly Opposing the Department of Interior's Indian Trust Reform Reorganization Plan and Related fiscal year 2004 Budget Report; Creating a Tribal Leaders Workgroup to Address Both Issues

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people and their way of life, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native Tribal governments; and

WHEREAS, the federal government has a longstanding comprehensive trust responsibility to Indian tribes based on treaties, the United States Constitution, federal statutes, executive orders, and judicial decisions; and

WHEREAS, the issue of whether the federal government has violated its trust responsibility to Individual Indian Money account holders has been in litigation since 1996, under what is now named the Cobell v. Norton case; and

WHEREAS, as one means of dealing with the issues in Cobell v. Norton, the Department of Interior (DOI) has developed and is implementing a reorganization plan which attempts to diminish and limit the nature of the federal government's trust responsibility; and

WHEREAS, the DOI reorganization plan creates a top-heavy bureaucracy which will divert desperately needed funding and resources from regional offices and local agencies, . strip important decision-making authority from those offices and agencies, and negatively impact trust fund and trust resource management programs at the local level; and

WHEREAS, the DOI has incorrectly asserted that segments of its reorganization plan have the approval of Tribal leaders; and

WHEREAS, the DOI plan in fact ignores and rejects Tribal leaders' core consensus positions, developed at great expense of Tribal time and resources, that trust reform must not negatively affect BIA programs, that it must recognize the comprehensive trust responsibility of the DOI/BIA with enforceable standards for meeting that responsibility, that the BIA must not be arbitrarily split between "trust" and so-called "non-trust" programs, as every BIA function is a trust function; and that decision-making must take place at the "lowest" (agency/region) level possible rather than in Washington, DC; and

WHEREAS, the DOI reorganization plan lacks substance and details in the areas of management and delivery of trust services; does not describe the new or improved business processes that will be implemented; lacks any recognition of enforceable standards that will guide the implementation of such processes; does not provide accountability to Congress, the courts, Indian tribes and their members; does not provide for a trust oversight mechanism; and fails to provide any details on how service delivery will be improved at the regional and local levels; and

WHEREAS, DOI's fiscal year 2004 budget makes improper requests, and in likely violation of federal law, consolidates authority and funding in OST at the expense of Tribal programs: DOI seeks a $123 million increase for OST, nearly doubling its funding, while, at the same time, seeking a $63 million cut to BIA construction, including a $32 million cut for school construction, as well as an $8 million cut to Indian Water and Claims Settlement funding. Equally disturbing, DOI is seeking a

less than one percent (0.3%) increase for Tribal Priority Allocations, funding that flows directly to Tribes for trust programs; and

WHEREAS, this attempted reorganization is premature because the "To–Be" reengineering study on how to fix the trust management apparatus has not been completed; and

WHEREAS, Tribal leaders strongly oppose the reorganization for the reasons herein described; and

WHEREAS, Senators Ben Nighthorse Campbell and Daniel K. Inouye, Chairman and Vice–Chairman of the Senate Committee on Indian Affairs, have written to all Tribal leaders asking for their participation in helping to settle the Cobell v. Norton case and "reforming the Federal trust management apparatus"; and

WHEREAS, the continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the Bureau of Indian Affairs and the Department of Interior to carry out their trust responsibilities to Indian tribes; and

WHEREAS, it is in the best interests of Tribes that Tribal leaders participate in the resolution of trust related claims and the development of a workable and effective BIA reorganization plan which incorporates the core consensus positions earlier articulated by Tribal leaders; and

WHEREAS, Tribal leaders are willing to discuss the Senators' proposal to achieve a settlement of trust claims and related issues because it focuses on land consolidation, development of settlement legislation, continuation of the effort to reengineer trust management processes, and the reorganization of the BIA in true and meaningful consultation with Tribal leadership;

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby strongly oppose the DOI's Indian Trust Reform Reorganization Plan and its related fiscal year 2004 Budget Request; and

BE IT FURTHER RESOLVED, that the NCAI calls upon Congress to immediately halt the reorganization of the Bureau of Indian Affairs until the concerns of Tribal Leaders are fully addressed by a workable and effective reorganization plan, and until the "To Be" process, developed through true and meaningful consultation with Indian Tribes, is completed; and

BE IT FURTHER RESOLVED, that the NCAI hereby (1) opposes the fiscal year 2004 proposed $123 million budget increase to OST, (2) supports the restoration of funding for BIA Construction and Indian Water and Claims Settlements, and (3) supports a substantial increase, of at least 4%, for TPA funding; and

BE IT FURTHER RESOLVED, that the NCAI requests a series of hearings before the Senate Committee on Indian Affairs and the House Resources Committee on the BIA reorganization and the DOT's fiscal year 2004 budget request, and that the Tribal Leader witnesses represent direct service, contracting and compacting tribes, all regions, and Tribes with diverse trust holdings; and

BE IT FURTHER RESOLVED, that the NCAI supports the efforts of Senators Campbell and Inouye to help reach a settlement of trust claims and to effectively reform the federal trust apparatus, and encourages the participation of Tribal leaders, individually and through a Tribal Leaders Workgroup, in both these crucial processes; and

BE IT FURTHER RESOLVED, that the President of the NCAI is hereby authorized to take all actions necessary to fulfill this Resolution; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted at the 2003 Mid–Year Session of the National Congress of American Indians, held at the Sheraton Wild Horse Pass Gila

River Indian Community, in Phoenix, Arizona on June 18, 2003 with a quorum present.

Tex Hall, President

ATTEST:

Juana Majel, Recording Secretary

Adopted by the General Assembly during the 2003 Mid–Year Session of the National Congress of American Indians, held at the Sheraton Wild Horse Pass Gila River Indian Community, in Phoenix, Arizona on June 18, 2003.

THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION #SD-02–099

Title: Opposition to Legislative Rider to Authorize a Settlement Process for Extinguishment of Individual Trust Accounting Claims

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and out descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people and their way of life, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Department of Interior has drafted legislative language that would create a settlement process for extinguishment of individual Indian landowner trust accounting claims; and

WHEREAS, NCAI supports the discussion and development of settlement processes for such processes; and

WHEREAS, the NCAI desires the continual promotion of full and meaningful Tribal consultation in matters pertaining to the government-to-government relationships Tribes maintain with the United States; and

WHEREAS, the NCAI desires full hearings before bills that would substantially alter tribal rights or status are considered by Congress in any form; and

WHEREAS, the NCAI opposes legislative riders that would avoid substantive dialogue and tribal input; and

WHEREAS, the NCAI opposes the limitation of the rights of individual Indian account holders; and

WHEREAS, the NCAI opposes legislation that limits the ability of tribes and individual Indians to seek court review; and

WHEREAS, the NCAI opposes legislation that would potentially takes advantage of the vulnerable and elderly; and

WHEREAS, accurate information on the scope of a potential claim is required before the rights of beneficiaries are altered; and

WHEREAS, it is not in the best interest of IIM account holders or Indian tribes to support legislation that is in the form of a last minute appropriations rider due to the negative history of bill language introduced in this manner.

NOW THEREFORE BE IT RESOLVED, that the NCAI hereby opposes the introduction or passage of any appropriations rider language settling or extinguishing individual Indian account holder rights, also called the "voluntary incentive program"; and

BE IT FURTHER RESOLVED, that the NCAI supports discussion of settlement options and encourages the Department of Interior and Congress to enter into full and meaningful consultation with tribes to ensure that the rights of individual Indians are not detrimentally affected; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION
The foregoing resolution was adopted at the 2002 Annual Session of the National Congress of American Indians, held at the Town and Country Convention Center, in San Diego, California on November 10–15, 2002 with a quorum present.

Tex Hall, President

Juana Majel, Recording Secretary

Adopted by the General Assembly during the 2002 Annual Session of the National Congress of American Indians, held at the Town and Country Convention Center, in San Diego, California on November 10–15, 2002.

[Additional attachments to Mr. Berrey's statement have been retained in the Committee's official files.]

The CHAIRMAN. Mr. Hall.

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

Mr. HALL. [Short statement given in Native language.]

Thank you, Chairman Pombo, and members of the Committee. I am very honored to be here to speak about this very important issue in Indian Country. I would like to thank you and Chairman Pombo and ranking member Rahall for inviting the National Congress of American Indians to testify. I would like to thank you for your words this afternoon, your initiative in demonstrating the leadership by calling this hearing. Also, I would like to thank Chris Fluhr and Marie Howard of the staffs for their hard work in putting this together.

Just briefly, I would like to mention, not only am I President of National Congress of American Indians, also a tribal chairman and also an IIM account holder. And Mr. Chairman and members of the Committee, I really believe this is a very good opportunity for us to talk today frankly and honestly. And it is very important that we have these kind of dialogs because listening to all of the information previously, there are some gaps in our information. One of the gaps I heard was on consultation. We haven't been consulted for a long, long time. And so I have submitted for the record my testimony, resolution from Phoenix PHX-03-040 which opposes the reorganization for lack of consultation and for various other reasons that I have submitted.

So let me get to my testimony. I will speak basically on two issues in the testimony. First is on the 137 rider, which we really feel is definitely wrong. And second I want to talk about the general question of what can be done to settle Cobell. First, again, I want to make it perfectly clear that NCAI is 100 percent opposed

to the Section 137 rider. And the basic issue is fairness and what is fair to the individual beneficiaries, and as an IIM account holder, and a pretty substantial holder of land and minerals, and that represents, I think, a lot of people that are in the same situation. To have Section 137 go forward without consultation or without letting the court continue its proceedings would be stepping in and denying property owners their right to fairness. And I think that's wrong. And 137 imposes a unilateral and unfair settlement on Indian plaintiffs. And remember, the only goal of the plaintiffs is to get their money back, money that the United States has lost. And I want to preface what I heard earlier that this is not taxpayers' dollars, this is Indian Trust Asset management money. So the entire purpose of the lawsuit is to hold the United States accountable as a trustee. So instead, the 137 rider authorizes the Department of Interior to offer cash payments to willing individual Indian Money account holders and for those not settled after a year, the Department would be allowed to use statistical sampling, a method overwhelmingly rejected in Indian individual beneficiaries. I would point out to the Committee that it was just only a few years ago that the House led the fight to reject the use of statistical sampling in the 2000 census. And if I recall, it was speaker Dennis Hastert who said that the administration should abandon its illegal and risky polling scheme and start preparing for a true headcount. I say if statistical sampling was a bad idea for the country 3 years ago, it's a bad idea today. I would point out that we were talking about accountability in a cup that was up there. And I would also mention that there are approximately 45,000 IIM account holders whose addresses are unknown. So where is that cup for each of those 45,000. Where is that money going and are they getting their fair share. When will they get their fair share and will there be interest on top of that. I would like to point out that letting the government settle its own case is unfair. As I have said before, this legislation is somehow like giving the CEO of Enron authority to unilaterally settle the claims of Enron shareholders. Lambreth wrote last year that the agency has undisputedly proven to the court, Congress and the individual Indian beneficiaries that it is either unwilling or unable to administer competently the Indian Trust. If that is the case, then how can Congress give them the power to settle the lawsuit by themselves with Section 137. So we can see a distinct and frightful parallel that is happening here. And we can't repeat the mistakes of the past.

Last year, Congress overwhelmingly rejected similar legislation. If anything, we now have a better idea that true damages that a trust scandal has caused Indian Country can be. Congress cannot afford to let the government off the hook. It was a bad idea then, and it's a bad idea today. As I mentioned a resolution from NCAI Phoenix 040, and I would also like to mention Resolution 02-099 clearly states NCAI's opposition to any rider that settles or extinguishes account holders' rights such as Section 137.

Let me just get to the point about the settlement principles. Second part of my testimony has to do with these. NCAI has taken approach that Congress should look at these issues in two parts. First, should a process be developed to settle matters relating to

the Indian Trust Fund lawsuit. And second, can an equitable process be established. Our answer is yes to both of those.

First, tribal leaders have consistently supported the goals of the Cobell plaintiffs in seeking to correct the trust fund accounting. At the same time, tribes are very concerned about the impacts of this litigation. And from the beginning, the Department of Interior has operated with the primary goal of protecting itself from liability. This litigation posture has had a direct effect on the Department's ability to provide proper land management services that are desperately needed in Indian Country. Even more troubling, the litigation process created an atmosphere of mistrust and has affected the ability of tribes and the Department to work together on a government-to-government basis. Continued litigation will cost many more millions of dollars and may take years to final completion. Therefore, NCAI takes the position that settlement is an ultimate goal and should be accomplished as soon as possible. Settlement can't come at any cost. We know, Mr. Chairman, there are many sides and many issues on settlement. First of all, any process must have the full participation of Indian plaintiffs and Indian tribes.

Second, the settlement process must be fair and honest.

Third, we must take the time to do it right. We can't afford mistakes again. It has taken over 100 years to create this mess, and it can't be cleaned up overnight.

Fourth, the process must be structured so as to put pressure on the parties. Without a structured process to support settlement discussions, settlement talks will likely fail. Thus, Congress must be involved. And the Resource Committee and Indian Affairs Committee in the Senate should take the lead as this issue clearly falls within your jurisdiction.

Fifth, the settlement plan must fix the trust systems for the future so we don't make the mistakes of today. The record shows the Interior Department only moves forward when prodded by the court or prodded by Congress. It would be disastrous to approve a settlement that would resolve the past liability and then lapse into future mismanagement ignoring trust responsibilities.

Sixth, an independent body should play a significant role in the settlement process. This will create trust on both sides and will help ensure fairness.

Seventh, one size does not fit all. There is a great deal of diversity among account holders. Some have large land-based resource based accounts. Others have fractionated interest worth less than a dollar. Any settlement must accommodate the different classes of accounts and interest.

Eighth, account holders should have an opportunity to negotiate or make that choice if they want to or not. No one, neither Congress nor the courts, should be able to force a settlement without the individual Indian property owner's consent. Fairness requires that the account holders should have the ability to negotiate at arms length based on reasonable knowledge and understanding of the underlying facts and circumstances.

Ninth, bring relief for the old people, for the elders. Many of our elders deserve quick relief. For that reason, once a solid process is in place, there should be no foot dragging or holding out by the

government as we have seen in the Navajo case in order to ensure an unfair agreement.

Tenth, do not allow the process to prey on the most vulnerable. This means that all account holders should be able to get the basic information on their accounts and property. They should have access to that information, legal assistance and language translation if they are traditional language speakers. This has to be apart of the basic trust obligation.

Eleventh, and I just got 12, funds for settlement must not deplete funding—or you can cut me off, Mr. Chairman, if you want to—must not deplete funding for Federal Indian programs. You cannot rob Peter to pay Paul. The settlement funds should come from the judgment funds, but should not have to be replaced from future Interior Appropriations.

And finally, twelfth, consider the impact on Tribal Trust Fund claims. In most instances, tribal claims are separate and involve different issues. Many are currently pending. The settlement process for the individual claims will have a direct impact on tribal claims and Congress should be aware of it as it moves forward. NCAI will convene a meeting on July 24 in Portland to discuss trust reform and discuss a settlement process. In Resolution 040, it talks about that and lays out a tribal work group to continue negotiations for this settlement issue. Contrary to what has been said and been said over and over, tribes want change. Tribes want the government to be accountable and tribes want to be involved and are sophisticated and look forward to working with the Committee on this very important issue.

[Short statement given in Native language.]

[The prepared statement of Mr. Hall follows:]

Statement of Tex G. Hall, President, National Congress of American Indians and Chairman Mandan, Hidatsa & Arikara Nation

Introduction

Chairman Pombo, Representative Rahall, and members of the Committee, thank you for your invitation to testify today. On behalf of the member tribes and individuals of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The Question posed before this hearing should perhaps be broken into two parts: (1) Should a process be developed to settle matters related to the Indian trust fund lawsuit?; and (2) Can an equitable process be established?

The answer to the first question is yes. Tribal leaders have consistently supported the goals of the Cobell plaintiffs in seeking to correct the trust funds accounting fiasco that has lingered for too long at the Department. At the same time, tribes are concerned about the impacts of the litigation. From the beginning, the DOI has operated with the primary interest of protecting itself from liability rather than complying with its statutory duties. See, e.g., Cobell v. Norton, 226 F. Supp. 2d at 11 (citing attempts by the DOI to cover up failures to comply with the Court's orders "through semantics and strained, unilateral, self-serving interpretations of their own duties"). This litigation posture has had a direct impact on the BIA's ability and willingness to provide the land management services that are so vital to tribes and individuals. Significant financial and human resources have been diverted by DOI machinations in response to the litigation. The BIA has become extraordinarily risk averse and slow to implement the policies, procedures and systems to improve its performance of its trust responsibility to Indian tribes and individual Indians. Perhaps most significantly, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship to promote tribal self-determination and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Because of this, NCAI believes that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX–03–040, attached.

The answer to the second question is also yes, an equitable process for settlement can be developed, but it is not the one provided for in Section 137 of the House Interior Appropriations Bill. We are very pleased that the Resources Committee understands the need to develop a process that would lead to settlement, rather than trying to settle a complicated and contentious matter of historical accounting in one fell swoop. The bottom line is that the DOI has not maintained a record keeping system that will allow a complete historical accounting, and the two parties to the Cobell litigation are very far apart in their views of what the Department's responsibilities should be. The goal should be to develop a good process of consultation that will lead to the development of a settlement proposal. If a good process is developed, then the end result will have legitimacy—and that is the larger goal—to compensate the account holders fairly and put the issue behind us so that Indian Country, the DOI, and Congress can move forward with the continuing progress of Indian people and tribal self-determination.

I serve as the President of NCAI, and the organization has not yet come to a position on what a settlement process should look like. I know that good ideas will come forward from Indian country, and the very beginning (as well as the middle and the end) of the process should include consultation with the tribes and the individual Indian account holders. NCAI is convening a meeting among tribal leaders on July 24 in Portland, Oregon to discuss this issue, and I know we will be scheduling additional meetings on the same topic, working collaboratively with the Intertribal Monitoring Association on Indian Trust Funds. We must develop a timetable, and I would suggest that we consult on this issue through the summer and fall, and develop a proposal by the end of February 2004.

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

1) Take the time to do it right. NCAI has witnessed the trust reform efforts since the 1980's as one quick fix after another has been proposed, implemented, and eventually fallen to the wayside. We have wasted over 20 years looking for a quick fix. Developing a lasting solution is going to take time and resources. We should recognize that now and commit to doing it right.
2) Establish a process that will keep the pressure on for settlement. It is my understanding that the parties to the litigation have tried several times resolve the case but have been unsuccessful in reaching agreement. I believe that this has been due in large part to a failure to establish a structured process to support settlement discussions. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement. While settlement deliberations are in process, I believe the litigation should continue until the historical accounting has been settled, and the Department has successfully implemented the necessary reforms to ensure sound trust management in the future. I would like to offer three specific suggestions for consideration:
   a. Congress should be involved in developing a settlement process. I believe that the House Resources Committee and the Senate Committee on Indian Affairs should forge an alliance to work on this issue and convene meetings to consult with the parties to the litigation and with the tribes and the allottee associations. Out of these consultations, which could take place this summer and into the fall, we should develop a proposal for a settlement process.
   b. Separate historical accounting from current accounting systems. Ensure that settlement also fixes trust systems for the future. The historical record has shown that DOI will only move forward in improving Indian trust systems if there is exterior pressure from the courts or from Congress. There are two critical issues here that need to be addressed: (i) the establishment of account balances (historical accounting); and (ii) the functionality of accounting systems. It would be disastrous to create a settlement that would resolve the past liability and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and accounting.
   c. An independent body should play a significant role in the settlement process. The parties to the litigation have a significant financial stake in the outcome. The tribes and the IIM account holders will distrust any

process where the Secretary of Interior is in control of all aspects of the settlement. To ensure fairness and transparency, an independent body should play a significant role. One function would be to ensure that the settlement offer has an objective basis to ensure legitimacy and fairness. At a minimum, each account holder is entitled to an accounting, and if the federal government cannot provide that, they should receive the value of an accounting. In addition, the account holder should have a clear understanding of what property and funds are involved and what kind of revenues should have been received—whether this information is from actual records, or a comparison and analysis of similar properties and accounts. The account holders should have unimpeded and cooperative access to work with the local BIA Agency Superintendent to gather information about their holdings and comparative information about similar holdings.

3) One size will not fit all. There is a great deal of diversity among account holders. Some have large stakes in very valuable natural resources, such as oil, gas, or timber. Others have only a small fractionated interest that is worth less than a dollar. Any settlement process must be able to deal with different classes of accounts and interests.
4) Account holders should have the opportunity to negotiate and make a choice. You cannot force a "settlement." In today's world, the hallmark of fairness is the ability to negotiate an arms length agreement based on a reasonable knowledge and understanding of the underlying facts and circumstances. Indian account holders must also have this ability.
5) Move quickly to bring relief to elder account holders. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to improve their financial conditions without delay.
6) Do not allow the settlement process to prey on the most vulnerable. Many Indian people are not in a good position to evaluate whether or not they are receiving a fair settlement. They do not have good information about their property or the activities that took place on it. Many are economically impoverished or are traditional language speakers and could be wrongly encouraged to simply accept any offer of a settlement—no matter how unfair.
7) Funds for the settlement must not deplete funding for federal Indian programs. The resources for fixing the broken system must not come from reprogramming the budget away from other vitally needed BIA services. This is one area where we agree with Section 137. The judgment fund is the right source of federal money to settle Indian trust claims, so long as the DOI is not required to reimburse the judgment fund.
8) Consider the impact on tribal trust fund claims. It must be clearly understood that the Cobell litigation involves only the individual Indians claims for trust fund accounting. The tribal trust fund claims are separate and involve very different issues and will have to be resolved on a separate basis. At the same time, any settlement process will set precedents for the tribal claims and this should be kept in mind as the process moves forward.

The Views of One IIM Account Holder on Information Needed to Settle

I am a cattle and buffalo rancher, an owner of trust land within the Mandan, Arikara & Hidatsa Nation Reservation, and also an IIM account holder. I believe it might be instructive to share my own personal views on what information I believe would be necessary for me to consider a settlement for my trust fund accounting claims. Although there certainly are Indians with much more valuable lands than my own, I own a significant amount of trust land that is in various uses and is in some ways a microcosm of issues you will find in developing a process for settlement.

I am the sole owner of seven different parcels of trust land which total slightly over 1000 acres, and I own fractionated interests in another seven or eight parcels, although I am never certain of these fractionated interests. I directly manage three of the larger units of land in my ranch operation, so these funds do not go through my IIM account. However, the other four units of land are managed by the BIA and grouped together with other trust land to form grazing ranges that are permitted to other cattle ranchers for an annual grazing fee. The BIA has leased some gravel mining on these lands.

I also know that the one parcel of land that I inherited from my mother's side has had significant oil development in the past. The northwest corner of our reservation had a lot of oil development and oil leasing beginning in the 1950's and continuing through the 1980's. Up to 1980, my mother was receiving significant oil revenues from her lands - which have now passed to me. Today they are considering

some new oil development up there, so it could be that this property will be in production once again.

My concern with BIA accounting is that I occasionally receive a trust funds check in the mail, but I never receive any information about which property the funds were received from. It could be from any one of the four full allotments, or from the fractionated interests, or from some combination. I don't know what leases have been let out, or what rate they received, or whether the full amount was correctly collected, invested and distributed. All I get is a check in the mail. I am supposed to trust the BIA that everything was accounted for correctly. My mother had the same concerns with her oil lease. She would simply receive a check from the BIA with no indication about how many barrels or the market rate at which they were sold.

Let's consider the unlikely scenario that one day the Secretary of Interior showed up on my doorstep, checkbook in hand, and said "Tex Hall I would like to settle your IIM accounting claims, how much do you need to make your claim go away?" Well I would be extremely surprised, and then grateful for so much attention from the Secretary, but then I would have to invite her inside for a cup of coffee and explain that I will need some information before I am able to settle my claim.

First, I would need a listing of all the tracts of land in which I have an ownership interest, and this includes my share in the fractionated lands where I have never received clear information on exactly what I own. Second, I need to know what activities and leases have taken place on those lands - is it grazing or gravel or coal or oil? Of course I would want to have a full accounting. I want copies of all the leases. I want records of exactly how much was distributed in the past, to me and to my parents. I want to see the accounts receivable and the accounting ledger to see if the lease payments were properly collected, invested and distributed.

But let's say that the Secretary responds that records are missing and a full accounting is not possible. I would want to know what records are available and what is missing but even this, she responds, would be very expensive and time consuming—so she would like to see if we can settle with somewhat less information than that.

Even in the lack of a full accounting, I could see my way clear toward a settlement if I had some other kinds of information to make an educated estimation. I would still need to know exactly what property I own and have a good general sense of what activities took place on those properties. For this I believe I would need to have access to the BIA Agency Superintendent and the realty office personnel. Our local BIA people have a lot of information and I generally trust them to be truthful with me. I believe that having a cooperative and open relationship with the local BIA would facilitate settlements much more readily that the current adversarial approach.

If we were considering the oil property, I would want to have a professional and independent opinion about how much property such as my mother's should have produced. This could be done with a direct study of any available records and analysis of prevailing market rates, or it could be done by comparison to similar properties at the same period of time. For the grazing land, I would want a different expert, and there could be any number of valid methods used to calculate the value of grazing land.

Once I gained a general sense of how much should have been received from each property, then the burden would be on the Secretary to demonstrate how much had actually been distributed to me or to my predecessors. I know that the Department must have some records, but then the Secretary may tell me once again that these records would be too expensive to produce, so she would like to rely on a statistical sampling of the average rate of accounting error for similar accounts. I would want to know a great deal more about the method she proposed to use, and whether it considered the types of errors and omissions that can occur in all phases of the trust business cycle, including title maintenance, probate, surveys, appraisal, sales procedures, collections, enforcement of lease terms, verification of resource quantity and value, accounting, investment, distribution and reporting. If all of these things were included, then I would want to know that it was tailored to my region of the country and the types of natural resources that are found on my lands.

I will give you an example. In my part of the country the most common use of land is for grazing, and the BIA has never had adequate staff to enforce on overstocking—where a permittee will put more cattle on a piece of ground than allowed under the permit. After a couple of years this hurts the grazing resource, and next thing you know its carrying capacity has been cut in half. The Indian landowner is receiving only half of the value of the resource because the BIA did not properly carry out its responsibilities. This is a common problem on my reservation and I have seen it on other reservations throughout the country. Will the problems of lack

of grazing enforcement in the Great Plains be factored into the methodology that the Secretary uses to determine the settlement offer? That is the kind of information I would need.

At some point, it would come down to what kind of number the Secretary had to offer. I would want to have the ability to accept or reject her offer based on my own understanding of what is fair and reasonable after I considered the properties involved and the activities on those properties. I would like to be able to make a counter-offer, and I may want to be able to divide up the different kinds of resources. I may feel comfortable with the analysis of grazing values, but I may want to go back and study the oil issues some more. At the end, I want to feel that I was treated fairly by the Secretary of Interior. Indian people have been so abused and mistreated by the federal government, we are not willing to let it happen again.

Finally, I would like to note that this is only my own personal view of what might be necessary to settle my claims. Other account holders are in very different situations and might feel differently about what kind of information they need. One property owner might know that they have only a small interest in relatively low value land, so they would quickly accept a fixed offer. Another person might have extremely high value oil property and good reason to believe that royalties have gone uncollected. They may want much more research and investigation before they are willing to settle. This all goes back to the principal outlined above that one size will not fit all, and any settlement process will have to find ways to accommodate different classes of trust land ownership.

Opposition to Section 137 of House Interior Appropriations Bill - Forced Settlement of Indian Trust Funds Accounting

The context of this hearing is very important. In Congress there is an increasing frustration with respect to the seemingly inability of the Administration to resolve Indian trust accounting claims. The Senate Committee on Indian Affairs has corresponded with DOI, the Cobell Plaintiffs, and Tribal leaders on this topic; and has also scheduled a hearing. Another significant reflection of this desire is the fiscal year 04 Interior Appropriations bill, which includes legislation, Section 137, that would give the Secretary of the Interior the authority to unilaterally settle all claims relating to the accounting or the balance of any individual Indian money account. Under this proposal, the Secretary would adjust the balances in Indian trust accounts according to a statistical sampling methodology. The adjustments would be final and judicial review would be severely constricted.

Section 137 would be extraordinarily unfair to the Indian account holders. The Department of Interior is essentially acting as a bank for Indian trust accounts. This legislation would give the bank (Interior) complete authority to end all disputes over account balances under a methodology of its own choosing. It would absolve the Department of claims based on failed collections or inaccurate starting balances from predecessor accounts. All other claims would be limited to reviewing only the statistical sampling under a standard that is the most highly deferential to the Secretary. The legislation would presumably bar Cobell v. Norton outright. Tribes expect that federal government accounting for Indian trust funds be marked by transparency and high legal and moral standards—not designed to allow the federal government to absolve itself of accountability for its failures to manage Indian resources and funds in a manner consistent with the duties demanded of a trustee.

Moreover, no hearings have been held on this proposal, and there has been no consultation with tribes or with individual Indian account holders. Tribal leaders are interested to begin dialogue on settlement options for trust claims, but the process must be fair and respectful of the interests of tribal governments and individual Indian account holders. We are deeply appreciative of Chairman Pombo's opposition to Section 137, and would urge all of the members of the Committee to oppose it as well.

Additional Perspectives on Trust Reform

I would also like to take this opportunity to provide the Committee with some additional perspectives on trust reform to take into consideration during its deliberations.

The United States has a trust responsibility for Indian resources and the income produced from those resources. This responsibility was extended towards individual Indians as a result of the forced allotment of Indian reservation lands that began in the 1800's. The complexity of managing and accounting for these individual trust holdings and accounts increase with each passing generation and result in idle resources and loss of income to already impoverished tribal communities. It is well documented that the BIA has grossly mismanaged Indian trust funds and billions of dollars worth of resources through leasing, sale, and management of the natural

resources on Indian lands, such as agriculture, grazing, timber, coal, minerals, and oil & gas.[1]

The 1994 American Indian Trust Funds Management Reform Act directed the Department of Interior and the Department of Treasury to complete a historical accounting of Indian trust funds and create a process to improve trust funds accounting in the future. Because the Departments have not met this Congressional mandate, a group of individual Indian account holders developed a class action lawsuit against the federal government. The Cobell v. Norton litigation has been in the federal court for over seven years, and because of the protracted refusal of the federal government to comply with its responsibilities under the statute, the federal judge has held numerous federal officials in contempt of court, and is now considering whether a structural injunction is necessary to direct the historical accounting as well as the future reforms for trust administration.

NCAI has a strong interest in the Cobell litigation and any proposed settlement process. NCAI is the oldest and largest national organization representing Indian tribal governments and individuals, with a membership of more than 250 American Indian tribes and Alaska Native villages and thousands of individual Indian members. The tribal leaders of NCAI are the elected tribal representatives of their members who are individual Indian account holders, and as such have a direct concern about the management of individual IIM accounts held in trust by the federal government for the individual beneficiaries. As I noted, I am an IIM account holder and most of my constituents on the reservation are IIM account holders, and they look to me to speak on behalf of their concerns.

In addition, NCAI and tribal leaders have a direct interest in any decisions that may affect the ability of the Department of Interior as an institution to fulfill its broader obligations towards Indian tribes. These obligations encompass not only the responsibility to manage the resources that comprise the tribal estate, but also extend to the protection and advancement of tribes' inherent powers of self-government and rights to self-determination. The federal government also has treaty and trust obligations to provide education, health care and promote the general welfare of Indians, and to protect fishing, hunting and water rights and the integrity of the reservation environment. This obligation was underscored in the historic Message to Congress from President Nixon, H. Doc. No. 91–363, reprinted in Cong. Rec. 23258, July 8, 1970:

> Termination [of the trust relationship] implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans. This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.

Finally, the amounts the Department of Interior (DOI) holds in trust for tribes ($2.6 billion) far exceeds the $400 million held in individual Indian trust accounts. The tribal interests in trust land and natural resources are physically intermingled and recorded in the same title and ownership systems as the individual interests. In fact, in many instances, tribes and individuals hold undivided property interests in the same parcel of land. Sometimes individuals own the surface rights, and tribes own the subsurface rights under the same parcel. Additionally, tribal and individual resources are often managed and leased in large units under the same leasing or contractual agreements. In short, with respect to land and natural resources, tribal governments have a keen financial and management interest in the decisions that may affect the functioning of the common Indian trust systems.

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

Opposition to Current BIA Reorganization Efforts

As I noted above, consideration of a settlement process is a very positive step but it cannot be considered in a vacuum. Perhaps even more important than the historical settlement is the trust reform fix for the future. My mother's oil property may soon be in production again, and it is not in anyone's interest to allow the kinds of trust accounting failures of the past to be repeated in the future. I would like to devote the rest of this written testimony to explaining NCAI's position on other trust reform efforts that are underway within the Department of Interior.

NCAI is strongly opposed to the current trust reform reorganization effort that the DOI is engaged in, and to the dramatic shifts in BIA funding that are proposed in the fiscal year 04 budget. We would like the assistance of the Committee in stopping this process. NCAI Resolution PHX–03–040 regarding this issue is attached.

Tribal leaders understand better than anyone that the Bureau of Indian Affairs needs to change, that it has significant difficulty in fulfilling its responsibilities in management of trust funds, and that some of the problems relate to the way that the Bureau is organized. We want to see successful change and improvement in the way the BIA does business. We are not opposed to reorganization per se; we simply want to do it right. We cannot afford to squander the opportunity we have before us.

In our view, effective organizational change to effectuate trust reform must contain three essential elements:

(1) Systems, Standards and Accountability—a clear definition of core business processes accompanied by meaningful standards for performance and mechanisms to ensure accountability
(2) Locally Responsive Systems—implementation details that fit specific contexts of service delivery at the regional and local levels where tribal governments interact with the Department
(3) Continuing Consultation—an effective and efficient means for on-going tribal involvement in establishing the direction, substance, and form of organizational structures and processes involving trust administration.

These elements are lacking in the current proposal of the Department of Interior (DOI) for reorganizing the BIA.

The organizational charts which accompanied the DOI's plan show the establishment of newly created Trust Officers, potentially placed at every BIA local Agency Office. These Trust Officers are to be funded under the Administration's budget request for fiscal year 2004 for a significant initiative to increase funding for trust management within the Office of Special Trustee (OST). OST would receive a $123 million increase—to $275 million—which is partially offset by a $63 million cut to the BIA Construction and an $8 million cut to Indian Water and Claims Settlements.

Of BIA Construction accounts, Education Construction will lose $32 million—despite a terrible backlog of new school construction needs that everyone agrees must be addressed. Tribal leaders have repeatedly emphasized that funding needed to correct problems and inefficiencies in DOI trust management must not come from existing BIA programs or administrative monies. It is critical that the DOI request additional funding from Congress to correct the internal problems created through administrative mistakes rather than depleting existing, insufficient BIA program dollars for these purposes. Increased funding for trust reform has the potential to be money well spent but it is an empty promise if it comes at the costs of diminished capacity to deliver services to tribal communities, and is implemented without clear standards for federal accountability, a plan to put the money at the local level where it is most needed, and consultation with the tribes and individuals whose accounts are at stake.

We are extremely concerned that the lack of definition of the responsibilities and authorities of new OST offices will cause serious conflicts with the functions performed by the BIA Agency Superintendents and/or Indian tribes. The authority and role of the proposed Trust Officers need much more explanation. Moreover, we believe that the funding and staff needs to flow directly to the agency and regional levels not just to new Trust Officers—to address long-standing personnel shortages needed to fully carry out the trust responsibility of the United States. Before DOI begins the process of establishing an entire new mini-bureaucracy, the financial and management impact of such an action must be thoroughly examined by the Congress and by affected tribal governments.

We believe that any attempt by DOI to implement its proposed reorganization without addressing the three essential elements we have identified above for trust administration will prove to be ill advised, premature, and ultimately disastrous. We fear that the DOI is on the verge of repeating the classic mistake that has ruined the majority of its efforts to reform trust administration in the past—a small

group of executives get together and simply draw up a new organizational chart. The preoccupation with moving or creating boxes on a chart is the antithesis of how effective organizational change can and should be brought about.

We also firmly believe that this reorganization is putting the cart before the horse. Organizational structures must be aligned with specific business processes and they must be designed to function within a system where services are provided by the DOI and tribal governments. DOI has not yet figured out its new business processes. Millions of dollars have been invested in an "As–Is" study of trust services, but the Department has only just begun to undertake the critical "To–Be" phase of reengineering the business processes of trust management. By implementing a new organizational plan prematurely, DOI is running a great risk of ignoring the findings of its own study and wasting the valuable resources that the agency and tribes have already dedicated to understanding systemic problems. DOI will most likely refer to the recent "consultation" sessions that have occurred throughout the regions. I would note the tribal leaders strongly object to these so-called "consultations," as the DOI representatives were informing the tribes about how the re-organization would proceed, and not discussing whether it adequately addresses tribal concerns regarding meaningful trust reform.

Reorganization should only come after the new business processes have been identified and remedies devised through a collaborative process involving both BIA employees and tribal leadership. We must include the input of tribes and BIA employees so that the great numbers of people who must implement changes in trust administration understand and support necessary reforms. Only then, as a final step, can we design an organizational chart to carry out the functions of trust management without creating conflicting lines of authority throughout Indian country. The history of trust reform is filled with failed efforts that did not go to the heart of the problem and do the detailed, hard work necessary to fix a large and often dysfunctional system.

Developing an Alternative Approach to Reorganization of the Bureau of Indian Affairs

Tribal leaders very much agree with the goal of the proposed reorganization to ensure accountability for trust management throughout all operational levels. However we have a great concern that a "stove piped" reorganization, such as the current proposal, will sharply separate the ability to make decisions on trust resource management and trust services at the local level, and will put an unbearable level of bureaucracy into a system that is already overloaded with bureaucratic requirements. In short, tribal leaders want to ensure that decision-making and resources are placed at the local level. Tribes believe that the Department must maintain a single point of decision making authority at the local level to deal with issues that cut across both trust resource management and other trust services.

Reservations are active, developing communities that are very dependent on trust property, and need decisions made on routine matters at the local level in a reasonable time frame. For example, all of the major infrastructure activities like housing, roads, irrigation, drinking water, telephone service, etc. take place on trust land. There are also quite a number of important daily relationships at the local level regarding the provision of social services to elders and minors, and the management of their IIM accounts. Social workers, medical professionals and Superintendents work together to set up restricted accounts and approved spending plans for the protection of their trust funds. BIA and tribal law enforcement also must regularly deal with activities that take place on trust lands, deal with trust resources, or relate specifically to leasing activities. Examples of such circumstances include problems of trespassing cattle and the remedies under a grazing lease for impoundment or fees, timber theft and timber leases, violations of irrigation and water rights, eviction of a tenant for nonpayment on a lease, etc.

All of these types of decisions require strong coordination and decision making at the local level on matters that affect both a trust resource interest and the broader trust responsibility to provide services. These make up the routine kinds of decisions local BIA officials make that often never reach the central office level.

Imagine having to get central office approval every time there is a disagreement over a housing lease approval or construction of an irrigation ditch—this is something tribes don't want and we don't think the DOI wants either. Central office decisions take a long time—and this means more business deals go stale, more financing dries up, projects don't move forward, and the cycle of missed opportunities for Indian country is badly exacerbated.

We believe that trust reform reorganization can be effective in improving administrative accountability while still allowing for local decision making on routine matters that cut across trust resource management and trust services. We generally

agree with the DOI that it would be valuable to group the trust funds management and the trust resource management activities at the local level, with clear lines of responsibility and staffing. However, we do not believe that the individuals responsible for these functions should be under a separate administrative authority from the staff responsible for performing other trust services. Rather, the BIA Regional and Agency office authorities should remain as the primary focal point of contact with individual tribes, preserving local control of functions and programs to support tribal self-determination. Accountability is not going to be assured through any organizational structure, but we believe it can be achieved in part with the following improvements:

- Identification of duties
- Adequate funding, staffing and training to perform those duties
- Policies, procedures, standards
- Internal controls
- External audits (performance and financial)
- Transparency (basis for decisions is clearly stated and evident)
- Adequate staff training with performance standards
- Focus on responsiveness to beneficiaries
- DOI/BIA staff committed to change and improvement of trust activities

In broad terms, tribal leaders have supported the idea of creating a structure that would have three major operational divisions under the Assistant Secretary for Indian Affairs: 1) Trust Funds and Trust Resources Management; 2) Trust Services (such as law enforcement, social services, roads, etc.); and 3) Indian Education. An administrative services section to handle such functions as budget, personnel and information systems would support these three divisions. Central office functions within these divisions could include: (1) the establishment of standards, procedures, protocols, internal controls for accountability, and program priorities; (2) delegations of authority to regional offices; (3) technical assistance; (4) reporting and troubleshooting; and (5) development of budgetary needs. The tribal leaders who participated in a Trust Reform Task Force with DOI suggested that the Office of Trust Funds Management and other offices, which are currently or prospectively under the administrative control of the OST, would be phased back into the BIA in order to have integrated beneficiary services. This is essential to maintain accountability; by having these offices report to the OST, the OST is placed in the tenuous and untenable position of overseeing itself.

At this time, Congress should prevent the DOI from proceeding with its proposed reorganization plan and focus instead on funding land consolidation that will in time reduce the cost of trust administration, and on developing good systems for the core trust business processes: land title, leasing and accounting. Without adequate land title, leasing and accounting systems, reorganization, especially as proposed by DOI, does little to effectuate true trust reform and the cost of reform of trust administration will continue to escalate.

Land Consolidation

Addressing fractionation is critical to improving the management of trust assets. Fractionation promises to greatly exacerbate problems that currently plague the DOI's efforts to fulfill its trust responsibilities, diminish the ability to productively use and manage trust resources, and threaten the capacity of tribes to provide secure political and economic homelands for their members. If allowed to continue unabated, fractionation will eventually overwhelm systems for trust administration and exact enormous costs for both the Administration and tribal communities.

Reduction of fractional interests will increase the likelihood of more productive economic use of the land, reduce record keeping and large numbers of small dollar financial transactions, and decrease the number of interests subject to probate. Management of this huge number of small ownership interests has created an enormous workload problem at the BIA. Given this, we do not understand why the fiscal year 2004 Administration request proposes a $123 million increase for OST, but only a $13 million increase (to total funding of only $21 million) for the land consolidation program. Congress needs to put funding directly on the problem, and we believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system, including reorganizing the BIA.

Core Business Systems - What are We Trying to Fix?

Over the decades, Indian tribes have witnessed a multitude of trust reform initiatives, reorganizations, plans, meetings, summits, work groups, task forces, computer systems, software, outsourcing contracts, and other efforts to fix the problems with management of Indian trust funds. To date, none of these efforts have proven successful. The DOI has failed to correct fundamental deficiencies in core systems that

are essential to trust funds accounting and trust resource management. NCAI believes that this Congress should focus its oversight efforts on these core systems to ensure that reform efforts meet requirements for fiduciary trust fund administration.

Indian trust fund administration requires accountability in three core systems that comprise the trust business cycle: 1) Title; 2) Leases/Sales; and 3) Accounting. These core systems must be accurate and integrated, timely, and be subject to credible standards and oversight. Pursuant to the 1994 American Indian Trust Funds Management Reform Act, these are exactly the systems that the Special Trustee should address. The Secretary must be able to provide to the beneficiaries an accurate and timely statement of the source, type and status of the funds; the beginning balance; gains and losses; receipts and disbursements; and the ending balance. 25 U.S.C. § 4011. Correcting the DOI's performance in these core functions will also require the DOI to employ sufficient personnel, provide staff with proper training, and support their activities with adequate funds.

Title - The title and ownership system is the most fundamental aspect of the trust system. DOI cannot accurately collect and distribute trust funds if it does not have correct information about the owners of the trust assets. This is the starting point for any effort to fix the trust system.

Maintaining accurate ownership information is made exceedingly difficult by the ever-expanding fractionated ownership of lands divided and redivided among heirs. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands, and these four million interests could expand to 11 million interests by 2030. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest.

Currently, the BIA is using ten different title systems in the various Land Title Record Offices around the country, both manual and electronic. These systems contain overlapping and inconsistent information. The systems are largely "stand alone" in that they do not automatically reconcile the ownership information in the agency offices, in tribal records, or in the lease distribution records that are used for daily operations. Because records management standards and quality control procedures are lacking, there is no assurance that title records are accurate. These inaccuracies result in incorrect distribution of proceeds from trust resources, questions regarding the validity of trust resource transactions, and the necessity to repeatedly perform administrative procedures such as probate.

Consequently, a large backlog of corrections has developed in many of the title offices, and this has compounded the delays in probate, leasing, mortgages, and other trust transactions that rely on title and ownership information. In turn, each of these delays compounds the errors in the distribution of trust funds. See, Draft As–Is Model Preliminary Findings, Electronic Data Systems, December 20, 2002. Cleaning up the ownership information and implementing an effective title system that is integrated with the leasing and accounting systems is a primary need for the Indian trust system. NCAI encourages this Congress to ensure that expeditious reforms are made to the title system. The reorganization proposal, which is focused on developing oversight capacity at OST, appears to do little to address this most fundamental problem at the BIA.

Leasing — Most Indian trust transactions take the form of a lease of the surface or subsurface of an allotment, permits to allow the lessee to conduct certain activities in return for a fee, or a contract for the sale of natural resources such as timber or oil. Although leasing records are vital to ensure accurate collection of rents or royalties, there are no consistent procedures or fully integrated systems for capturing this information or for accurately identifying an inventory of trust assets. Currently, BIA has no standard accounts receivable system and many offices have no systems to monitor or enforce compliance, or to verify and reconcile the quantity and value of natural resources extracted with payments received. The accounting system most often begins with the receipt of a check that is assumed to be accurate and timely. Implementing an effective lease recording system that is integrated with the title and accounting systems is a primary need for the Indian trust system, but the BIA has only recently begun to investigate possible technologies for this effort. NCAI urges Congress to ensure that the information management and administrative systems put in place are organized to provide accurate and timely information regarding the trust resource transactions that produce the income that is deposited into trust fund accounts.

Accounting - The 1994 Act requires the Secretary to account for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian ... ." 25 U.S.C. § 4011. The DOI needs to develop

accounting systems that will integrate and verify information from one function into another (from title to leasing to accounting). The DOI should also set out what oversight capabilities are planned into the system (verification and audit) as well as a plan for document retention and ease of access to facilitate audit and internal verification procedures. Furthermore, the DOI system needs a built-in crosscheck between BIA entries to its control account and Treasury's entries to its control account. This system should automatically produce a daily exception list that would be examined and remedied in a timely manner.

By its own representations, the Government makes clear that it still lacks a cohesive, integrated strategy for fulfilling this fiduciary duty to accurately account for trust funds balances. Rather than focusing attention and energy on a reorganization, Congress should ensure that DOI develops the core trust systems—title, leasing and accounting—to ensure that those systems provide accurate information regarding the trust corpus as well as trust resource transactions that produce income that is deposited into trust funds on behalf of individual and tribal beneficiaries. Once these processes have been developed, an organizational structure can be developed to ensure their proper implementation.

Accountability and Standards

It is well known that DOI has mismanaged the Indian trust for decades. The real question for Congress is why decades of reform efforts have produced so little change in DOI's willingness to take corrective actions, to reconcile accounts, and to put adequate accounting and auditing procedures and policies in place.

The real answer to this is that the DOI and the Department of Justice have always viewed their primary role as ensuring that the U.S. is not held liable for its failure to properly administer trust assets. For this reason, they have never been willing to put any standards into regulations to govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new culture of transparency and accountability for Indian trust management. Once the DOI understands that mismanagement will no longer be tolerated, the system will change and true reform will begin. In effect, the DOI is acting as a bank for Indian trust funds—and just like every other bank in the U.S., the DOI must be subject to standards and accountability.

Beyond the issue of reorganization, we believe that it is critical for Congress to substantively address the underlying issues of transparency and accountability in fixing the trust system. We would greatly encourage the Committee to take up trust reform legislation that would hold the DOI to the ordinary standards of a trustee, and we would be pleased to work with you in developing that legislation.

Continuing Involvement of Tribal Governments

Tribal governments must be substantively and continuously involved in trust reform efforts, working in partnership with Congress and the Administration. Trust Administration goes to the heart of government-to-government relationships and to the capacity of tribal governments to exercise their sovereign powers and ensure that the rights and interests of its members are protected and well served. Tribal governments have a great deal at stake in developing effective mechanisms for trust administration within unique political-legal-economic relationships with the United States. We urge Congress to make every effort to ensure that tribes are "at the table" when critical decisions regarding trust reform are being made.

Conclusion

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into the trust reform effort. If we maintain a serious level of effort and commitment by Congress, the Administration, and Tribal Governments to work collaboratively together to make informed, strategic decisions on key policies and priorities, we can provide the guidance necessary to bring about true reform in trust administration.

[Resolutions submitted by Mr. Hall were also submitted by Mr. Berrrey and can be found at the end of Mr. Berrey's statement.]

The CHAIRMAN. Thank you, and I thank the entire panel for your testimony.

The CHAIRMAN. Mr. Hayworth.

Mr. HAYWORTH. Thank you, Mr. Chairman. Let me thank all three panelists again for your patience today, and let me turn to

the President of the National Congress of American Indians, my good friend Tex, since we are on a first name.

I can recall everybody getting together out in Phoenix, you know, in an effort to try and achieve consensus. And this has been to say the least, a very difficult problem to deal with. You just cited 12 goals of what you would like to see done. Boy, sometimes, you know, it's like when I get on this Capitol over here. The Architect of the Capitol gave the elevator operators around here 16 rules. And the God Lord only gave us 10 commandments. But I don't look askance at your evaluation of this because I am reminded that President Wilson had 14 points that he dealt with in post World War I. And perhaps the number of principles you bring to the table just encompasses how much of a challenge we have to get our hands around. Having said that, Mr. President, was there anything in the preceding scenario offered by the Assistant Under Secretary from the Department of Interior, anything that you could hang your hat on; anything there that you see is common ground to arrive at some consensus?

Mr. HALL. I believe there is, Mr. Hayworth. Congressman Hayworth, I believe there is. I believe reform is one initiative. There needs to be the appropriate staff. There needs to be training. There needs to be appropriate staff, and I think we all agree on that, the tribes and the DOI and BIA. As I mentioned earlier to some members of the Committee, and I believe I mentioned it briefly to Chairman Pombo, if there are not appropriate staff out in the field, out in the reservation to manage the assets, if it's grazing land, oil, timber or fishery, if there's not appropriate staff, there could be an abuse of that resource. And if there's abuse of that resource, that's a short change check to that beneficiary. We agree that additional staff, trained and efficient staff, if it's oil, grazing or timber, must be on a reservation level.

Mr. HAYWORTH. Let me offer another scenario. And I'll start again with you President Hall, but I would like our other two witnesses to offer their thoughts on this, too. So often, and this has happened in so many court cases, there is an appointment of a special trustee. And we have been around the bend with this in the previous administration in trying to deal with getting our arms around this challenge. But if memory serves—we can go back in the record—I can recall a gentleman who came in who was a trust expert, who testified before this Committee in the last Congress, gentleman from California, I'm sorry I don't remember his name, but he warned us from his purview in the private sector and being involved—and forgive me if it's not the correct term, I believe the term "forensic accounting" can apply to this—the investigative work. He wanted to stress that this was highly specialized work. And the implication for me in hearing him was the suggestion that perhaps this was not the domain of DOI or, with all due respect, necessarily the domain of a tribal consensus. So let me offer this scenario that I really don't think has been articulated today. Is there any interest, for lack of a better term—and I am not trying to go with a court concept—but with that concept of special trustee—and I know in existing law we already have some of that designation, and I guess I will go a step further. Should we look outside government to someone in the private sector who has had con-

siderable experience in forensic accounting and enlist their help in getting their arms around this? And I'm curious to see if you think that might be one course of action that might be viable.

Mr. HALL. Just one comment. I think it is. In 1980 or 1982 in my neck of the woods, in North Dakota, there was a huge oil and gas sale. And I know my mother received a substantial check for her allotment, but it wouldn't show the number of barrels. It wouldn't show the number of barrels and how much she received for that. It was a check for an oil lease for this many mineral acres, but it was inconclusive. So I would that if an individual or a tribe are looking to settlement, you would want to have an expert there to say, well, what would that have generated; how many mineral acres were leased; what was a comparative sale off the reservation for that price of oil; what was the comparative sale for that grazing land, and let's see if it has fair market value; and let's go backward and let's let the forensic accountant do it. I would think an individual or a tribe would want to have that information to make a reasonable response to say, yes, I want to proceed to settlement, or no, I don't think I have enough facts.

Mr. HAYWORTH. Elouise and John, I know my time's up, but just your brief comments on that concept.

Ms. COBELL. I would say I agree, and that's what we have submitted as the plaintiffs to the court is that a receiver be brought in. And I believe that someone made the point that earlier one Congressman stating the court does it all the time. They appoint special masters. Special masters can come in with the special expertise that you're talking about and they can do the accounting, contrary to Mr. Cason's answer. I'd also like to say that, contrary to Mr. Cason's testimony, that both parties have agreed that approximately $13 billion has been generated by these trusts. We have agreed. That was stated in court yesterday without the accrued interest. So I want to make that clear. You know, the accuracy—I think that the—what the government and what I can determine from the Department of Interior is they don't want to admit that they can't do an accounting. And we understand that there is missing data and the documents have been destroyed and so you can't do an accounting. Two courts have proved that statistical sampling won't work. So what you're suggesting makes sense. And it is basically the methodology that we have presented to the court in our plan is going out and determining through experts the amount of money that's in the trust that we have determined was $13 billion and what I heard yesterday was the Department of Interior was not disputing that. They also thought it was $13 billion, but the accrued interest is what they have not agreed to.

Mr. BERREY. I personally would caution against designing a vehicle of settlement. I think you have to back up a little bit and define a process. And I think the process is in front of us right now. Senator Campbell and Senator Inouye and this Committee is committed to try to work on a settlement. That's the start. And then you bring the parties together and you use people that are practiced in the profession of alternative dispute resolution to design the vehicle collaboratively . I think the idea needs to be let's come together, let's create some parameters and let's look at a time line and then let's assess where we're at through conversations with all

the parties. We may not need an accounting. We may just want to go right to the nut of—you know, let's create a settlement. I think and I caution instead of trying to design a vehicle, you just let the process take place and it works. It's working well with our tribe. We're going through a process. We have had it assessed and we're having conversations and we are narrowing quickly to where both sides want to go. So I think you should try to work on creating a process instead of designing a vehicle.

The CHAIRMAN. Thank you. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Mr. Chairman, I'll defer to my good friend from New Jersey.

Mr. PALLONE. I am going to try to get in one question to each of you. If I can get each of you to answer a different question. With regard to Tex Hall, you heard what Mr. Cason said. He sort of implied that Indian Country and the NCAI Task Force, if I could call them that, were really consulted and supportive of the BIA reorganization. And then later he sort of suggested on my question that that wasn't completely the case. But I just—my understanding is that the task force has essentially ceased functioning with the BIA sometime last October, November, because you didn't think the BIA was really willing to listen to what you had to say. And you know since that time after January, there really was no more consultation after they come up with this proposal and that the two key issues which were no standards and no independent commission were the main reason why you were opposed to this. And if you could just briefly—because I want to get to the other two comments on that.

Mr. HALL. Thank you, Congressman Pallone, and you described it quite correct. And as I mentioned Resolution 040 lays that out, that historical perspective. We were working, I thought very well, as a task force in Indian Country and represented all the 12 regions of the United States and had 24 members and the alternates were a total of 36. So the whole country was covered. And we were working in Committees, and I thought just started a great process. And then when it got to standards, when it got to oversight, negotiations stopped. And it's hard to get a clear answer from the response of DOI or BIA. The response I hear most often is that the task force lived out its time, and it served its purpose, and it's over. And I never had settlement talks with anybody from DOI or BIA as well.

Mr. PALLONE. I appreciate it, and I am trying to move on, I apologize.

Mr. Berrey my understanding, and you clarify this, is you're against the 137, the MAAD that we are going to have to deal with in the next few weeks, but you're in favor of the BIA organization that's been proposed or was proposed since January. And I'm going to try to ask you not to take this in the wrong way, but there have been some reports in the Indian media that you're in favor of the BIA reorganization because you are on the Federal payroll in some way. And I mention this mainly to give you an opportunity to comment on it because is it the case that you're for the BIA reorganization but against 137? And if you want to comment on the suggestion that somehow you're on the Federal payroll with the trust reform.

Mr. BERREY. I am against 137; that's correct. I am not on the Federal payroll. I actually work for the United South and Eastern tribes, which Keller George is the president of. And I get paid for my work on trying to not only identify the trust processes, but to design and reengineer those processes. So, you know, sticks and stones may break my bones, but I am trying to fix it when everybody wants to sit around and complain about it.

Mr. PALLONE. What about the BIA reorganization?

Mr. BERREY. I have problems with the reorganization. I think it's the cart before the horse. I think what we ought to be doing is concentrating on the reengineering of the processes of trust management. Get those in line and then follow it with an organizational package that fits it. But in our as-is study, there were tremendous line authority problems within Interior. And I think part of the response of the reorganization was to address those problems in the line authority. You had regions all across the United States following the same regulations in a different interpretation. So there is an extreme variety of the way the management is delivered throughout Indian Country and it was apparent that there needed to be some sort of a change to try to polarize and align those things together. So I'm for better line authority, better processes, but I really believe that the reengineering of the trust service processes, accounting, leasing, title, probate, the day in and day out activity that's worked on everyday at the grass-roots level in Indian Country needs to be fixed first and foremost.

Mr. PALLONE. I know there is almost no time, Mrs. Cobell, we are going to have a difficult time next week in trying to get rid of 137? And hopefully the Rules Committee will make it in order, and Mr. Pombo will have an amendment, and we will be able to fight and take it out. If you could give us any kind of written follow-up on what you said because we need as much ammunition as possible going into the next week or whenever this comes up to make the case against 137. I know you tried to outline that, but if you could follow up and give us whatever follow-up you can on what you said, so we have those arguments that we can send out to our colleagues and make the arguments on the floor, because it's going to be a hard-fought fight in my opinion. And maybe with the permission of the Chair, we could ask her to give us some follow-up about what she said on 137 that we can use, if that's OK?

Mrs. COBELL. I certainly will. And I had much more to give you today but the red light went on, but we will follow up with additional information for you.

The CHAIRMAN. We'll give her an opportunity to submit, in writing, further testimony. Mr. Renzi.

Mr. RENZI. Thank you all for your patience and your testimony today. Mr. Hall, thanks. Good seeing you again. I wanted to ask, and I guess I am not afraid to show my ignorance, you spoke during your testimony about the threat or the delay that the Navajo Nation had incurred and the possibility of that same tactic being a threat to this. Could you help me in understanding.

Mr. HALL. I was referring to the Supreme Court case of the Navajo Nation. It was delayed, delayed and delayed, and no decisions were made when I thought decisions for possible settlement could have been made before. But there never were and so the ruling in

the Supreme Court went against them. So as a result they don't have any money for that loss. We believe at least—they would say for their mineral resource and that being coal. So I would think that any settlement process, there shouldn't be any delays. If a willing party is willing to settle, there should be a timeframe of when that happens from the government side.

Mr. RENZI. Ms. Cobell, I read your testimony this afternoon and going through it, I notice that you talk about the alternative models. And it was interesting to hear Congressman Hayworth talk about that new—asking for more information on the third option as he described it, kind of a blended model. And just your thoughts on whether this new blended model—I think what it does is it combines not only the transaction by transaction reconciliation process but some statistical sampling below the 5,000 level. Is that something—

Ms. COBELL. We're certainly against the statistical sampling basically because of the fact that nobody knows how much is in those accounts.

Mr. RENZI. I realize that, but I think what we're talking about here, and maybe my coach can help me here, are we talking about a blended third option?

Ms. COBELL. What we had proposed is a modeling methodology where we use experts that—the oil and gas experts. We know where every single oil well was drilled in this country, including the dry holes, and using the technology that's available from third parties which the government has never attempted to do, and using information that's out there concerning what should be in those accounts. And I think Congressman Cason said or Carson said that—he was right on. You know, if you use that type of technology you can really come up to near what the amount should be in the account, and that is what we have determined. And we have determined that $13 billion should have flowed through these accounts without the interest. The interest, of course, would have to be plus that.

Mr. RENZI. That relates specifically to oil?

Ms. COBELL. It relates to all of the different resources that are out there, agricultural leases, grazing, timber, all of the resources that are derived on what's on top and what's underneath the property.

Mr. RENZI. And that would fit in also to the idea of having processed an alternative dispute resolution? It would fit into the idea that you would gain that substance or you would gain those factors as a part of the mediation process?

Ms. COBELL. Exactly. It definitely can be used for the basis of settlement negotiations.

Mr. RENZI. Again, thank you all.

Mr. HAYWORTH. [Presiding.] And thank you, Congressman Renzi. One of the great congressional ironies is we just heard from Congressman Renzi from the First District of Arizona. And we turn now to a gentleman who was born within the parameters of what is now the First District of Arizona, but represents the State of Oklahoma, Mr. Carson.

Mr. CARSON. Standing on the corner in Winslow, Arizona.

Mr. RENZI. Eagles in concert this weekend.

Mr. CARSON. Mrs. Cobell, I am still trying to get to what is a fairly basic question that there is some confusion on in the earlier panel. $13 billion without interest is now the amount that you assert are the damages owed to the plaintiff class?

Ms. COBELL. Not damages, but the money—revenues that should be in the account.

Mr. CARSON. That should be in the account. And with interest, what would that be today?

Ms. COBELL. I believe that amount is in excess of $140 billion.

Mr. CARSON. That is how we get to the $140 or $150 billion that was being bandied about earlier. Mr. Cason, in his testimony, and the approach they're using is largely not to do what it seems like Mr. Hall was suggesting being done in his North Dakota mineral lease, which is to say he is looking at how much was paid into the account and how much is there and the difference between those in calculating the several million dollars or low millions of dollars in lost dollars or amount owed to IIM account holders. You're asserting to get that $13 billion number that having a forensic accountant or having all these experts go in and say, look even if money was paid into the account, it may have been not at the fair market value, there may have been fraud involved or there was fraud involved—is that correct? I mean the assertion is that the $13 billion is how much should have been paid in there and you are asserting that money could have paid into those accounts but it was less than what the fair market value could have been?

Ms. COBELL. No. We're not talking about the fair market value. This is the amount of money that should have gone into those accounts based on the information from third party information and technology. We are not assuming that this particular lease did not create this amount of money, you know, what was the basis for that at that particular time for instance on agricultural leases, what were they paying during that era of time and that is how it is calculated into the model.

Mr. CARSON. That would be the fair market value. For example, Congressman Cole's example earlier, let's say the lease was worth $100, but only $2 was being paid into it. That's what the lease holders negotiated. That would be a breach of fiduciary duty and all of those kind of things, but there would be money being paid into the IIM account. It wasn't that it was lost or never paid into it. It is that the amount that should have been paid into it under a fair and arms-length negotiation was not being paid into it. Am I making myself clear about the distinction?

Ms. COBELL. Actually, the government is not that far from what we say, that $13 billion went into those accounts. That's what should have been generated by the revenues that went into that account and basically the government is saying the same thing, that $13 billion was generated.

Mr. CARSON. How do you get to the $13 billion though. You don't have the actual records. You're looking at how much a mineral lease was going for in North Dakota in 1910, 1950 or 1970, and you are saying we have records as to how much the going rate was and this is how much this IIM account holder should have been getting, and then we project it from there; is that correct?

Ms. COBELL. That's correct.

Mr. CARSON. Is there a sense that there was fraud involved, that people weren't being paid the fair market value?

Ms. COBELL. Oh, yeah. The exhibits that we are going to be sharing that we didn't have available from the court, there are certain—like the Ernst & Young report is so riddled with errors, they used documentation that didn't even relate to that particular IIM account holder. There were situations where canceled checks were signed by the superintendent that went into the superintendent's account. So even though that they're saying this disbursement might have been made and who was it made to, who was the verification made to.

Mr. CARSON. Right. One last question on this as my time is running out. Mr. Cason said that their analysis showed that statistical sampling, 99 percent of the records were more or less accurate, you know—I think that's a rough paraphrase. He's shaking his head that that is not what he said. Do you assert the statistical sampling is not an effective way of verifying the amount in there and why not.

Ms. COBELL. Statistical sampling will not work because there isn't accurate data. The Bureau of Indian Affairs, they do not have accurate data, and there is too many missing documents that have been willfully destroyed and they cannot find. There are hundreds of thousands of documents that they haven't even indexed yet that it will take a process that will be much more my lifetime that you could ever try to get some sort of information on the account. There's no way you can do an accounting the way the Department of Interior is proposing.

Mr. CARSON. My time is up.

The CHAIRMAN. [Presiding.] Mr. Cole.

Mr. COLE. Thank you very much—

The CHAIRMAN. If the gentleman would suspend for a minute. We have a vote going on the floor, so you guys can silence your beepers.

Mr. COLE. Thank you very much, Mr. Chairman, and first I was remiss earlier for not thanking you for holding this hearing and asserting the authority of this Committee. I appreciate it very, very much. So little time, so many questions. If I may I would like to pose a three-part question and then start with you, Ms. Cobell, and go to the others.

First in your respective opinions, what would you see as a—describe for me a fair settlement process, not an outcome, just the process that you think that would be fair, that would render a decision at the end that the people would regard as legitimate? Second, a fair accounting process, because that's clearly part of this, too. You have to have some set of numbers on which people can agree. And I would—and I agree very much that we have a rigged numbers game going on here. And then third, do you think the process at this time is better left to the court or congressional action?

Ms. COBELL. First of all, on the process, I think that we have to go out into the field and meet with IIM beneficiaries and get their input on a fair process for settlement. I think that that's very crucial. Second of all, the second question was the—

Mr. COLE. Accounting process.

Ms. COBELL. First of all, the government just has to admit—why are they spending millions and millions of dollars and telling you that they need $300 plus millions of dollars to do an accounting, when they know they can't do an accounting. They have to admit that they can't do an accounting, and then we would be on the same page. And third, on the courts versus Congress, of course, you know my answer is let the judicial process and stop the end run around the judicial process that's going forward right now.

Mr. COLE. Every now and then we throw you a softball.

Mr. BERREY. First, on how the process works, I think there is a proven productive science that is growing widely today that is called alternative dispute resolution. You bring the parties together, you describe the claims, you interview the parties and you start working through the issues one by one. And when you are in a nonlitigation type environment and you let down your guard, the answers start falling in line. I know it sounds impossible, but it works. It's working for us. And our claims are much more complex than the claims that are laid out in this Cobell lawsuit. Ours are more broad than just an accounting claim for IIM accounts. Ours are way more broader and we're getting somewhere because we decided to put our guns away and try to sit down and forge a way through it and I think it can be done. Second, I think an accounting is ultimately going to be a waste of time. We need to draw a line in the sand and say let's fix the future and let's make a cut at the best, because I don't want to see a bunch of money spent on accountants. And ultimately, Congress, I believe, is only going to allow so much money. Why do we have to go all the way around the world to get to the place where we'll end up anyway. Why don't we start now. Why don't we figure out what the people, the citizens, the taxpayers are willing to pay and let's make a cut and go on down the road and let's start looking forward. I think Congress needs to step in. I think the court has gone too broad. They're not limiting their efforts to just an IIM accounting. They're getting into issues that are specific to tribal governance and self determination and I think the impact it ultimately erodes those two things that we're so proud of and hold so dearly. So my wish is that the Congress steps in, that the House Resources Committee, God, and the Senate Indian affairs Committee sit down together, and let's begin this alternative dispute process and make it work.

Mr. HALL. Thank you for the question, Congressman. I think everybody has to be at the table, the property owners, the individuals and the tribes have to be at the table. Tribes are willing. We have NCAI resolution now that supports a work group to be developed. I believe that this will happen with the involvement. Without the involvement, it won't happen. And I believe the information. We have to be frank, we have to be honest. I believe maybe some facilitation from some neutral parties have to be involved. Congress has to be involved because the funding for this has to happen. And as far as the accounting is concerned, I think you raise—and I had the same thought you did when you mentioned what's in the system versus what's not been entered. That has to be factored in the settlement process because many of the IIM account holders will say, you know, last year or 5 years ago I got this much check for my resource, but this year I got a lot less and there is no explanation

with that check as to why. Now, when you go back to 1887, that's even going to be 10-fold. And the local staff, the local BIA office is very critical. Some people worked there 20, 25, 30, 40 years they have worked in those offices. They have a lot of the historical information on who the families are and the IIM account holder has to have access to that information not so much from Washington but from local, because that's where those accounts have been generated locally at that agency office out on that particular reservation.

So we're ready. Want to get engaged and our first meeting is in Portland July 24.

The CHAIRMAN. Thank you. We have a series of votes on the House floor. We have four votes right now for the Members. We are going to recess the Committee. Probably going to take 30 minutes to go through all the votes, maybe a little bit longer than that. As soon as the votes are completed, we will reconvene the hearing and return. I apologize, but we can't control the votes on the floor, so Committee is in recess.

[Recess.]

The CHAIRMAN. We're going to call the hearing back to order if I could have our witnesses come back.

Call the hearing back to order. I want to thank our witnesses. I'm going to start with Mr. Faleomavaega for his questions.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. Before proceeding I'd like to request unanimous consent that the statement of our co-chair of our American Indian Congressional Caucus, Mr. Dale Kildee from Michigan, be made part of the record.

The CHAIRMAN. Without objection.

[The statement of Mr. Kildee follows:]

Statement of Dale E. Kildee, a Representative in Congress from the State of Michigan

Good afternoon. Mr. Chairman, as a Member of the Resources Committee and as Co-chair of the Congressional Native American Caucus, I am pleased to have the opportunity to speak on the issue of Indian trust funds.

For more than a century, Interior has done a poor job maintaining trust fund records.

The Federal government has managed funds for individual Indians since the passage of the 1887 General Allotment Act.

Allotment laws were designed to break up tribal lands by providing tracts of land to individual Indians. Congress stopped the allotment process in 1934, after a loss of millions of acres of tribal lands and hundreds of thousands of acres that were lost to taxes that Indians did not know they owed. Unfortunately, these injustices of the past remain as the problems of today.

Because of the allotment policy, Indian allotees or heirs of the original allotment holder face the complex problem of owning fractionated interests in allotted land.

It is common for hundreds of owners to hold an interest in one tract of land. This situation has added to the complexity of this problem and has served to undermine reform efforts.

In 1994, congress passed a law to reform the management of trust funds for individual Indians and tribes. The law was intended to rectify many bureaucratic practices that had stalled the proper administration of these accounts and to restore what rightfully belonged to Indian people.

Sadly, the interior department has yet to restore old land records and the income derived from the land.

In 1996, Congressman J.D. Hayworth and I led the Resources Committee's task force on Indian trust fund management. The result was that the committee held four hearings on the issue in 1996.

That same year, Eloise Cobell, a beneficiary of an individual Indian money (IIM) account and a witness at today's hearing, filed a class-action lawsuit against the sec-

retary of interior on behalf of 500,000 IIM account holders seeking an accounting of the money owed to the account holders and to bring permanent reform to the trust fund system.

In phase one of the case, the federal judge found that the government breached its trust responsibilities to the Indian beneficiaries.

The judge requires quarterly reports of the department's efforts to reform the trust fund system.

Mr. Chairman, I am troubled by efforts to develop trust reform plans without consulting with the authorizing committee, Indian tribes, or individual account holders.

In November 2002, the department of interior unilaterally developed a reorganization plan. Interior's plan would have stripped the BIA of all its trust functions and consolidated those functions into a new bureau of Indian trust assets management (BI TAM).

Interior submitted a $300 million reprogramming request to the House and Senate Appropriations Committee to fund the reorganization proposal.

Both the house and senate appropriators agreed, however, to put the request on hold until Congressional hearings and tribal consultation sessions were conducted.

This committee held an oversight hearing on Indian trust funds last year and we heard strong opposition to the plan from tribes and the individual account holders. The Department abandoned that proposal.

During the December 2002 holiday recess, the House and Senate Appropriators approved a $5 million reprogramming request by the Department so that it could implement a comprehensive trust reform plan. The Department failed to provide this Committee and Indian tribes with the critical details of what the reprogrammed funds would be used for, or how the reorganization plan would fix the broken trust.

Simultaneous to these reform efforts by the Department is the Appropriations Committee's unilateral effort to limit the legal obligation of the Department to provide a full historical accounting of Indian trust funds. Last year, in the fiscal year 2003 interior funding bill, the appropriators tried to limit the historical accounting from the period of 1985 to 2000. The House voted down that plan.

While we gather here today to discuss whether a process can be developed to settle matters relating to the Cobell litigation, we must be mindful of our responsibility to work concurrently with all interested parties in developing a thoughtful and participatory solution to reform the management of trust funds.

I look forward to hearing the testimony today. Thank you.

Mr. FALEOMAVAEGA. Thank you. And I do want to thank our witnesses for testifying this afternoon—or early evening, if I might say.

I think it goes without saying that I certainly would like to offer my personal and highest commendation to Ms. Cobell for the work that she has done over the years and acknowledge without any question the amount of pain and suffering and the problems that she may have attended to while trying to bring a solution to this problem. It's quite obvious that there was a failure on the part of our government to find a settlement and this is the reason why we are now in court.

I wanted to ask Ms. Cobell, in her best judgment. It's 10 years now, and we're still running here and there and trying to find a solution to this. I wanted to ask you, do you have any sense of what would be a reasonable timetable that you see the possibility of a settlement of this issue?

Ms. COBELL. I think that the judicial process will not take as long as some think. I believe that by the fall, that we could have the accounting portion of the trial completed. And you know, within a year we could be at a point of entering into judgment.

Mr. FALEOMAVAEGA. In your best opinion, do you think that there is still a chance, an opportunity, for you and your associates and the plaintiffs that you represent with the other of your associate plaintiffs, for settlement of this issue outside of the court?

Ms. COBELL. Yes, I believe that that there is. And we've always wanted to sit down and settle. Like I provided in the testimony, it was not always met with good faith on the other side. So, yes we've always been willing to settle.

Mr. FALEOMAVAEGA. Of course, in fairness to the current administration, you also found resistance with the previous administration?

Ms. COBELL. That's correct.

Mr. FALEOMAVAEGA. So it's not a Republican or Democratic issue, it's just the fact that somehow, some way, our friends downtown just don't seem to be cooperative at all.

There was a mention of Secretary Cason's statement, of some media report. I don't know why we're making this such a big issue. Maybe for purposes of clarification, in regards to this $137 billion price tag. There may have been some media reports on what would be considered a settlement of the issue. Can you elaborate on that, Ms. Cobell, if you have an understanding of this?

Ms. COBELL. I'd be very happy to. The 137 billion amount comes from the point where it's my understanding, too, that the Department of Interior has basically said has flowed into—revenues that have flowed into the trust is $13 billion. That's what we have determined, too, is $13 billion. So I don't know where Mr. Cason got off on there is only a few million dollars or 300 million or—I don't know what the amount was, because that is totally inaccurate. That's not what they're saying in court.

And the $13 billion, of course, interest has to be paid. It's a law that interest has to be paid. So the amount of interest that would be accumulated or accrued would be approximately around 137 billion to 157 billion. So that's where that figure comes from. Without any disbursement. So we understand that there has to be a way that we determine what are the disbursements that have gone out of that account.

Mr. FALEOMAVAEGA. Was this estimate made by the Department of Interior or by non-administration officials? I'm concerned about this, because the problem is once you start dangling this $137 billion price tag, you're going to scare the heck out of the Members, and Congress is not going to take this very lightly. That's the reason why I want to make sure that we have factual data and make sure that we stick with the right figures so that we don't get into this problem of inflating the numbers, if you will.

Ms. COBELL. The $13 billion was from both sides. The $13 billion was our experts—our resource experts, the best in this country, have come up with the figure of $13 billion flowed from revenues into the trust. The Department, at least in their testimony in court, said the same thing; $13 billion went into those accounts. And so if you add the interest part, then you end up in the billions. But that's taken into consideration that there's no disbursement. So we know that there are disbursements that came out of that account. But that pretty much gives you the one side of it, $13 billion that went into the revenues, that went into the account, plus the accumulated interest. But we know that disbursements have been made from that account. It's up to the government to determine what those disbursement were.

Mr. FALEOMAVAEGA. But this cumulative interest is what I'm trying to figure out—how you came out with this $137 billion figure. I want to make sure this is not coming from the administration, this is coming from some other source, so that we can have a better understanding so that people don't get the idea that this is the actual figure. This is what I'm concerned about.

Ms. COBELL. Right. Well, the interest is something that the government, of course, is not really wanting to put within the amount that is owed. But by law, the interest has to be calculated. I believe it's calculated at the 4 percent long bond rate. And I don't know if I'm still getting at your question, let me ask Keith if you have—do you have anything to add?

Keith Harper is one of our attorneys and he might be able to add and make it clear.

Mr. FALEOMAVAEGA. Because of the time, you know, just a minute. For the record, if you would. Just wanted to get for the record that this is not a media hype or some kind of a story going around saying that this is what Indian country is demanding. This is what concerns me. I'm sorry. My time is up.

Ms. COBELL. Our information is based on the modeling that our experts has done, but also the government has also said that $13 billion had to flow.

Mr. FALEOMAVAEGA. I'm sorry I didn't have a chance to ask Mr. Berrey and Mr. Hall. But, Mr. Chairman, I'll wait for the second round.

The CHAIRMAN. Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I'd like to first of all apologize for not having been here. I had a markup in Judiciary with lots of votes. I have had to stay down there to some degree.

But if I could, Ms. Cobell, I'd like to follow up on what Mr. Faleomavaega has been asking and just take it to the next step. You've got an agreement from your side and from the Department's side that 13 billion has gone into the funds. Do you have any sense of how much has come out? In other words, how much has been paid out?

Ms. COBELL. No, we don't have that information.

Mr. CANNON. Do you have a ballpark? Has 98 percent been paid out?

Ms. COBELL. No, I don't know what it would—we would have to make sure however it was paid out, that it went to the right person. You know, that's a big issue that Ernst and Young I think uncovered, is many of the checks were not given to the proper people. They were given to the superintendent.

Mr. CANNON. Were they like—they were given to the superintendent who then went and cashed them and got drunk or something?

Ms. COBELL. The superintendent?

Mr. CANNON. I'm sorry, I don't mean to be—

Ms. COBELL. I'm sure there's a lot of fraud involved. I mean, there's—it could be anything, anything; all of the above. Because if you don't have any type of audits, nobody monitoring, no oversight for 100-plus years, you could have a little bit of everything.

Mr. CANNON. But a little bit of everything is not the same—we got to have a sense that half or three-quarters, there has got to be

some level at which plaintiffs are going to acknowledge has gone out and to the right person without fraud.

Ms. COBELL. I'm sure that that will come. I don't know if I'm ready to give you the percentage right now. I'm not prepared on the amount, the percentage that actually has come out from those accounts.

Mr. CANNON. Do either of our other two witnesses have any sense of what the order of magnitude is that is at risk or at stake here?

Mr. BERREY. No, sir.

Mr. CANNON. I mean, it's clear where Mr. Faleomavaega was going was that the 137 billion is the total amount there could be if no dollars went anywhere, and yet that becomes highly misleading in the process.

You said that Mr. Cason was inaccurate. I didn't quite catch it. What was it you were saying he was inaccurate on?

Ms. COBELL. Well, Mr. Cason talked about that there were millions, just millions of dollars. And that's not right. I mean, that's not what they're saying in court.

Mr. CANNON. Millions as opposed to 13 billion.

Ms. COBELL. Yeah. Yeah. I mean, that's what I heard anyway, was that there were millions versus the 13 billion.

Mr. CANNON. But for purposes of this discussion now, we can talk about 13 billion as the whole corpus of the amount of money that is out there that we're looking at the distribution on.

You as a named plaintiff, you've—a lot of accounting has been done on your account. Have you seen that accounting?

Ms. COBELL. Well, I know that the Ernst and Young report that you're referring to on the four named plaintiffs that they said that they did an accounting is riddled with errors. We actually have the exhibits that show that the virtual ledger didn't even tie into the right source documents. And so—

Mr. CANNON. I don't care so much about the particular defects that might have happened there. But in your life, how much have you had and how much error do you think there is in just in your lifetime since have you received payments from the trust fund?

Ms. COBELL. I really wish I knew. And that's the big problem.

Mr. CANNON. Can you tell me the total amount, more or less, that you've had?

Ms. COBELL. No, I don't have that figure available.

Mr. CANNON. Can do a little ballpark, you know, what is the monthly check times 12, times the number of years more or less?

Ms. COBELL. How much in my account? Well, I don't know that, and that's one of the issues that we have because our ancestors are—my relatives that I am supposed to inherit the proper land holdings has not ever been disclosed to me so I can't answer your question.

Mr. CANNON. The question is how much have you actually had paid to you over time? That's probably in the record. I just don't have that in front of me right now.

Ms. COBELL. During my lifetime, what kind of ballpark figure? Probably—it's very hard. You know, could have been up to 100,000.

Mr. CANNON. Well, 100,000 for one individual means a lot of money has come out. I mean, I can't do the math. How many peo-

ple have been—do we have alive today that are getting trust disbursement?

Ms. COBELL. We don't know those answers. I mean that's—

Mr. CANNON. We got to have an order of magnitude. You have a class of people out there that you have communicated with, have you not?

Ms. COBELL. Well, most of them say they're not getting their money. Most of the individual Indians are saying they're not getting their money.

Mr. CANNON. Oh. I guess it's just a matter—I need to follow up on that one just by looking at a couple—

Ms. COBELL. If we all knew, then we wouldn't have to do an accounting, but that is the issue.

Mr. CANNON. But I think it's not unfair to say that if you were sitting here with $100,000 disbursements, there's a lot of other people in the ballpark of $100,000 disbursements. It doesn't take very many people over a very long period of time to get $13 billion.

Ms. COBELL. Well, Congressman, when you asked the question, I didn't quite understand. You said, how much money do you think you've—and then you said "disbursed" afterwards. I don't know. I feel that I probably should have had 100,000. I don't know the amount that has been disbursed to me.

Mr. CANNON. But—and I thought I was asking you—I'm sorry, Mr. Chairman, I have gone beyond. But if I can just clarify this question. What I thought I was asking is how much money have you received in your lifetime as just a guess. So I take it you're saying that you guessed you should have received $100,000. Can you give us an idea of how much you have actually received in your lifetime?

Ms. COBELL. No, I can't.

Mr. CANNON. Thank you, Mr. Chairman. I yield back the balance of my time.

The CHAIRMAN. Were there any further questions for this panel?

Mr. PALLONE. Just briefly, if I could.

The CHAIRMAN. Mr. Pallone. We do have another panel.

Mr. PALLONE. Maybe you can give it to me in writing. But you said in the beginning—and I'm just trying to get this as preparation for when we have to deal with this section 137. You said, Mrs. Cobell, that 137 was oppressive, it was a blatant violation of separation of powers, an intrusion into the court case and unconstitutional taking of property.

If you could just give us some more information, you know, about why you think that is true. Because I think we need—I mean, that is really valuable material. If a lot of Members of Congress understood that, I think they would not be supportive of section 137. So I know you're going to give us some written follow-up—if could you go into that a little more, because I think that's a pretty strong case to be made against it.

Thank you, Mr. Chairman.

The CHAIRMAN. I'm not going to take all of my time to ask questions because I know everybody has been here for a long time today. But I just in dismissing this panel, I think it's important that you work with us on this, because this Committee will take up this issue. And in working in concert with our counterparts on

the Senate side, we will take on this issue and try to come to some kind of an equitable conclusion to this.

But I would just remind you that we need 218 votes in the House and 60 votes in the Senate to pass it. And so the pressure is on us to come up with something not only that you believe is fair and equitable and that the Department feels is fair and equitable, but that 218 of our colleagues feel is fair for the taxpayers and for their constituents. So it's a matter of trying to put together something that is not only fair and equitable in your minds but also a political document that we can pass and get onto the President's desk. So it's a process that we have to go through.

So I'll just ask you to keep that in mind as we enter into this process and try to work through it, because I do think that this is something we can do, but we need your help in order to achieve that. So thank you very much for your testimony and your patience in sticking with us today.

Mr. HALL. Thank you, Mr. Chairman. We accept the challenge.

The CHAIRMAN. I thank all of you very much.

I'm going to call up our third panel. We have Harold Frazier, Keller George, and A. David Lester. If you could approach the witness table. If I could just have you gentlemen stand and raise your right hand.

[Witnesses sworn.]

The CHAIRMAN. Let the record show that they all answered in the affirmative. I want to thank you for your extraordinary patience in sticking with us today. I know this has been an extremely long hearing, but I think you will all agree with me it has been a very important hearing. I think all of our panels, we could spend hours discussing this case and the point of view that all of you have. So I want to thank you for being here today.

The CHAIRMAN. I'm going to start with Mr. Frazier. You may begin.

STATEMENT OF HAROLD FRAZIER, BOARD MEMBER, INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

Mr. FRAZIER. Thank you.

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, my name is Harold Frazier and I'm the chairman of the Cheyenne River Sioux Tribe in South Dakota. I want to shake your hand, your good heart.

I am honored to present testimony today on behalf of the Intertribal Monitoring Association on Indian Trust Funds. ITMA believes that a process can be developed to settle matters relating to Indian trust fund law—to the Indian trust fund lawsuit. Before I get into the details of ITMA's testimony I would first like to briefly mention ITMA's activities and in particular the trust issues that affect my area.

ITMA has served as a longstanding watchdog over the Department of Interior's management of Indian trust. The member tribes of ITMA are holders of significant trust funds and resources. Also their membership consists of many IIM account holders.

The member tribes of ITMA are holders of significant—I'm sorry. For example, most tribes from the Great Plains and all the tribes

within the Rocky Mountain region are members of ITMA. Together these two regions hold 68 percent of tribal trust lands and represent a great number of IIM account holders. Tribes of the Great Plains have over 68,000 IIM accounts, which is the largest number of accounts within all of Indian country. And Rocky Mountain has more than 50,000 account holders. This example just tells you a little bit of what's at stake in our two regions and shows how crucial it is that all stakeholders be represented in this process.

While the recent focus of ITMA efforts in the arena of trust reform has been to protect tribal sovereign governmental rights, ITMA has also been concerned about the financial impact of the ongoing Cobell litigation on critical program funds.

While recognizing that the Cobell lawsuit was critical to effectuate exchange within the Department of Interior and to draw attention to the serious neglect of the United States in the management of Indian trust, ITMA believes that continuous litigation for several more years may not be in the best interest of all IIM account holders. ITMA is concerned that the litigation may outlive many IIM account holders who are waiting for financial relief from the management of their accounts.

ITMA believes that an opportunity for individual Indians to voluntarily settle IIM trust fund claims would benefit many account holders who have waited several years to resolve trust fund-related disputes with the Department of Interior.

However, ITMA does not support the current legislative rider that has developed as a result of IIM claims. First, tribal governments were not consulted. Further, the House language contains several restrictions that would unfairly resolve these claims for the IIM account holders. Given ITMA's vast experience with these issues, ITMA should be involved and, further, supports the involvement of respective tribal governments who have a heightened interest to ensure fairness and justice for the members who have IIM accounts. First and foremost, any settlement proposal must allow for voluntary participation by IIM account holders with preservation of current legal rights to seek recovery through litigation for those account holders who choose not to participate.

ITMA does not support a process like that proposed in the current rider to the Interior appropriations bill that would authorize the Secretary to establish error rates in an IIM account and then propose settlements that the account holders cannot refuse. Account holders must be allowed to voluntarily accept a settlement offer after a judicial review for fairness. If an account holder chooses not to accept the settlement offer, his or her current right to seek redress in the courts of law must be maintained. Further, no limitation should exist to prevent compensation to an account holder if later investigations reveal the account holder is entitled to additional funds.

ITMA disagrees with the establishment of a cap for settlement funds. Setting a cap before determining the amounts due to the account holders via an agreed-upon accounting method is illogical. Further, a source to fund settlement should be considered after the determination of a range of the mismanagement liability.

Some ITMA members support utilization of the judgment fund, as provided by 31 USC 1304, only if the use of the judgment fund

would not result in a depletion of existing funds of tribal government operations. Other ITMA member tribes support a specific appropriation with new moneys to fund settlements. Again, only if such appropriations will not result in a depletion of existing funds for tribal government organizations or funding of current BIA reorganization efforts.

ITMA members believe that proposed limitation of liability for any IIM account prior to October 25th, 1994, is completely unacceptable. The time period of account liability must extend to the establishment of the current accounts, including predecessor accounts. Further, the process must include claims for uncollected amounts and inaccurate starting balances. Any limitations to claims must be determined by the parties developing the settlement process.

ITMA believes that judicial review should be assured beyond just a historical accounting method. If current legal remedies available for account holders remain intact, then expanded review language within the process would be unnecessary. However, judicial review of actual settlements for each IIM account may be necessary to ensure the settlement is fair to the account holder. Without an effective judicial review of the settlement terms, individual Indians cannot be assured of the fairness of their agreement. Many individual Indians will not have access to legal counsel to review settlement documents, and therefore its trustee should promote a judicial review to ensure protection of the beneficiary's rights.

In summary, ITMA believes the time has come for the affected parties to coordinate a concerted effort to develop a viable mechanism for IIM account holders to consider and utilize as a means to resolve trust fund-related claims. ITMA stands ready to assist in a meaningful capacity in the critical efforts.

And as the chairman of Cheyenne River Sioux Tribe, I would like to make a few comments. One of the things I respectfully ask from the Chairman and your Committee members is to have a hearing on the BIA reorganization. The current BIA reorganization does not benefit our grass-roots people, does not benefit our IIM holders. This reorganization creates more upper-level bureaucracy which will in turn create more delays in the turnaround of IIM account holders' checks. It doesn't provide more resources or authority at the local agency level that is needed to address a lot of our grass-roots people's concerns and issues.

I guess with that, I want to thank you for the opportunity to be here. Thank you.

The CHAIRMAN. Thank you. Mr. George.

STATEMENT OF KELLER GEORGE, PRESIDENT, UNITED SOUTH AND EASTERN TRIBES

Mr. GEORGE. Thank you, Mr. Chairman, for this opportunity to testify before you today. I currently serve as president of the United Southeastern Tribes and also am a member of the United Indian Nation of New York.

The Cobell case is widely perceived as being the catalyst which first started trust reform. It is now making Members of Congress impatient and less likely to have an open ear regarding trust issues.

One example of that is the House Appropriations Committee rider Section 137 that was introduced June 25th of this year. We believe this is an effort to curtail the Cobell litigation. An attempt was made by the DOI and the tribal trust reform to work through many of the current reorganization issues and home consultation meetings with tribal leaders regarding suggestions from the task force. This has since failed due to a number of roadblocks in that negotiating process. The DOI officials have stated that they have consulted with tribes on various reorganization issues that are being instituted. However, this is not totally true. Consultation is not throwing out an idea in the Indian country and seeing a negative response and moving toward with ideas regardless. Consultation is listening to tribal concerns and taking these concerns and comments into account.

Two main points the tribe wanted to address was the Under Secretary position and Trust Principals. Tribes stated from the beginning of this process that the two items that must be incorporated into any reorganization efforts in order to establish a sense of accountability within the BIA. Tribes are still waiting to see these very important priorities given attention.

It all comes down to the issues that tribes must be reengaged if the reform process is going to be successful. Tribes are receiving confusing information about reorganization activities, which is extremely frustrating. Tribes must be involved in the entire process, not just shown the end product. We fear that without meaningful consultation and clear information that a new reorganized structure will be perceived in the same negative light that has plagued the BIA for years.

Reform reorganization versus general BIA operation. USET agrees that the trust and other functions need to be separated. However, in the BIA's reorganization structure there seems to be two complete—competing organizations have been developed. The Office of Special Trustee and the Bureau of Indian Affairs must compete against each other for authority, resources and manpower. This struggle will always exist unless certain issues are addressed. Tribes have made it clear that the DOI should not use program dollars to help fund the mistakes of the administration. Tribes have stressed that the BIA's funding should not be diminished in order to fund the trust efforts of the OST. The BIA is in dire straits and have additional funds—and must have additional funds in order to accomplish a truly successful reorganization. Limited funding could be extremely detrimental to the efficiency of processes within the BIA's new organization.

Trust principles. Recent Supreme Court decisions have concluded that the Federal Government has avoided fiduciary trust responsibilities and operated with bad faith in its business relationship with Indian tribes. The tribal leadership of the Trust Reform Task Force which I was a member of made a concerted effort to get DOI to incorporate a list of general trust principles that could be used as a reference point for all trust activities. This suggestion was adamantly opposed by the DOI members of the task force.

Both White Mountain Apache and the Navaho Nation cases have had opinions written and both reaffirm now more than ever the need for a standardized set of trust principles.

Indian country should not be held at bay any longer by pending cases in the Supreme Court. The time is now for the Federal Government and the Secretary of the Interior to be held accountable for their trust responsibility. It is critical that the continually—that continuity and accountability be established as a cornerstone of reorganization efforts. There can be no oversight of the trust relationship without standards set of general trust principles in place. Indian country must have a way to hold their trustees accountable for actions taken that may be contrary to the advancement of Indian people.

The Under Secretary position. USET Tribes has stressed from the beginning of the process the need to have Indian Affairs authority elevated to the Secretary level within the Department of Interior. There is a strong need for an Under Secretary of Indian Affairs position to be established in order to remedy the ambivalent attitude toward Indian Affairs that has been so apparent within the DOI.

Through legislation USET feels that the creation of an Under Secretary could be greatly beneficial to Indian people. Once again, USET stresses that trust principles and oversight must be a part of the establishment of an Under Secretary for Indian Affairs. This is the only way that Indian issues will receive the attention, resources and respect they deserve from the trust relationship.

Many hypotheses are circulating through Indian country as how the regional reorganization of the Bureau affairs will actually work. There has been little direct discussion between the Federal Government and tribal leaders regarding this level of reorganization despite repeated requests from Indian country. The new Department manual once again is unclear as to all of the multiple and complex relationships expected at the regional level and below. USET has spent countless hours analyzing the new Department manual and the Cobell report to the court and the relationship between the OST employees and the BIA employees. The BIA employees at the regional level should be responsible for service delivery to the tribes while the OST trust officers should be responsible for ensuring the trust responsibilities of the Federal Government are held. Trust positions should also be able to provide beneficiaries with resources concerning trust issues and look at any complaints of mismanagement by the BIA.

The Cobell litigation is widely perceived as being the catalyst which first started trust reform discussions and exposed the gross mismanagement of Indian trust assets by the Department of Interior and the Bureau of Indian Affairs. USET recognizes the need of the Cobell plaintiffs to seek resolution and attain an adequate remedy of law. The litigation, however, is reaching into a dangerous point where the court has threatened to appoint receivership over the BIA assets. The plaintiffs have argued that while they appreciate tribal input, Cobell is an individual Indian plaintiff case. If receivership is appointed and it then becomes everybody's case, receivership could negatively affect numerous Indian programs and service delivery to all tribes.

It is time to introduce legislation that will bring a fair settlement to the ongoing litigation and work with Congress to develop a resolution of the case. Congress should appoint a body of legal and fi-

nancial scholars, such as Mr. Thomas Gray, who is the expert that testified before this Committee a couple of years ago.

A fair and reasonable settlement litigation. The Cobell litigation is a drain on the Federal Government and is depleting funding that could go to other Indian programs or to enhance reorganization effort. We must get beyond Cobell in order to realize a true and lasting trust reform.

And in conclusion, there is not a simple answer to the question, can a process be developed to settle matters relating to the Indian trust fund lawsuit? Fulfillment of the government trust responsibility to Indian tribes and individual Indians is complex.

USET tribes support reform and understand that reorganization is necessary for the government to fulfill its new fishery responsibility. Many tribes feel that efforts to this point have been futile and the DOI is moving with their own agenda. USET recognizes the urgent need for tribes to be actively engaged in the reform and reorganization. Future generations of Indian people are depending on tribal leaders to take a stand and approach reform with a united voice. It is time to have that voice heard through legislation being developed and true consultation with the administration. The process has become stagnant over the past several months, but now is the time for Congress, tribes, and the administration to be actively involved.

I thank you for this opportunity and I would be willing to answer any questions.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. George follows:]

Statement of Keller George, President, United South and Eastern Tribes, and Member of the Oneida Indian Nation

Good morning, Mr. Chairman and Honorable members of the House Committee on Resources. Thank you for taking time to listen to testimony from tribal leaders regarding Indian Trust Reform and particularly posing the question, "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?" My name is Keller George, and I am appearing this morning on behalf of the United South and Eastern Tribes, Inc.(USET). I am a member of the Oneida Indian Nation's Men's Council and have served as USET's President for eight years. As you know, USET is an inter-tribal organization comprised of 24 federally-recognized Indian Tribes. USET is dedicated to assisting its member tribes, through epitomizing the highest ideals of Indian leadership, in dealing effectively with public policy that affect Indian people; and serving the broad needs of Indian people. USET serves a population in excess of 60,000 Indian people in twelve different states.

The USET member Tribes feel strongly that they must work for the advancement of Indian people while maintaining a strong sense of self-determination. Because of this strong belief, USET has been actively involved in the Trust Reform and Re-organization efforts from the very beginning. I served as a representative of the USET Tribes, along with James T. Martin, USET Executive Director and Peter Schultz, Vice–Chairman of the Mohegan Tribe of Connecticut, on the initial Department of Interior/ Tribal Trust Reform Task Force. USET spent many hours analyzing the various issues of re-organization and trust reform in an effort to provide insight and tribal perspective on the changes that are currently taking place and those that are forecast in the years to come. I believe that the experience gained through this process has produced valuable knowledge that can be used by all parties to forge the Bureau of Indian Affairs into an agency that operates more efficiently.

Today's hearing is posing the question, "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?" That question can not be posed without addressing the broader issues of overall trust reform. USET will address six areas of concern regarding trust reform: Continuing Litigation, Consultation with Tribes, Reform/Re-organization vs. General BIA Operation, Incorporation of

Trust Principles, Creation of an Under–Secretary Position, and Regional Level Reorganization relationships.

Continuing Litigation

The Cobell litigation is widely perceived as being the catalyst which first sparked trust reform discussions and exposed the gross mismanagement of Indian Trust Assets by the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA). USET recognizes the need for the Cobell plaintiffs to seek resolution and obtain an adequate remedy of law. The litigation, however, is reaching a dangerous point where the court has threatened to appoint receivership over the BIA and trust assets. The plaintiffs have argued that while they appreciate tribal input, Cobell is an Individual Indian Plaintiff's case. If a receivership is appointed, it becomes everyone's case. Receivership could negatively affect numerous Indian programs and service delivery systems to Indian tribes.

The Cobell case is also making members of Congress impatient and less likely to have an open ear regarding this issue. Most recently, the Interior Appropriations Bill passed by the full House Appropriations Committee on June 25, 2003, contains an anti–Indian rider, Section 137. Section 137 is an effort to curtail the Cobell v. Norton litigation. In short, Section 137 would call on the Secretary of the Interior to conduct a "statistical sampling" of trust fund accounts in a manner that the Secretary alone deems feasible and appropriate given the availability of records. Under this proposal the Secretary would adjust the balances in Indian trust accounts. These adjustments would be final and judicial review would be severely constricted. Section 137 is problematic from an Indian policy standpoint. It is another effort by the House Interior Appropriations Subcommittee to determine the substantive legislative course of Federal Indian policy. It is improper for the Appropriations Committee to legislate on these important issues without proper consultation with tribal governments. USET objects to Section 137 and any other Appropriation riders that bypass the government-to-government consultation with tribal governments. This is clearly legislating on an Appropriations Bill in violation of House Rule XXI 2.(b). No hearings have been held on this proposal, and there has been no consultation with tribes or with individual Indian account holders. Tribal leaders have expressed interest in beginning dialogue on settlement options for trust claims, but the process must be fair and respectful of the interests of tribal governments and individual Indian account holders.

It is time to introduce legislation following proper consultation, that will bring a fair settlement to the ongoing litigation. USET is in favor of such legislation and working with Congress to develop a resolution to the case. The Cobell litigation is a drain on the federal government and is depleting funding that could go to other Indian programs or to enhance the re-organization effort. Even if the Cobell case is decided in favor of the plaintiffs, Congress would be hard pressed to appropriate the large settlement that would be due them. A large settlement to the plaintiffs would inevitability hurt the rest of Indian country during these hard economic and budget restricted times. We must get beyond Cobell in order to realize true and lasting trust reform. USET believes that any legislation that will achieve buy-in of the concerned parties must contain a Congressionally authorized and appointed committee to assist the DOI in conducting the components and/or processes that the intent of Section 137 wishes to bring about.

Consultation with Tribes

An attempt was made by the DOI/Tribal Trust Reform Task Force to work through many of the current re-organization issues and hold consultation meetings with tribal leaders regarding suggestions from the Task Force. This has since failed due to "road blocks" in the negotiating process. The DOI officials have stated that they have consulted with the tribes on the various re-organization issues that are being instituted, however, this is not totally true. Consultation is not throwing an idea out into Indian country, seeing a negative response, and moving forward with the idea regardless. Consultation is listening to tribal concerns and taking those comments into account. Lately the DOI has made consultation into a mere ritual they must go through in order to push the DOI's agenda. Negotiation is an essential part of consultation and while you may not be able to please everyone, the majority opinion should prevail in the end.

Some aspects of the re-organization efforts do reflect tribal views, but the two main points tribes wanted addressed, the Under–Secretary position and Trust Principals, remain untouched. Tribes stated from the beginning of the process that these two items must be incorporated into any re-organization efforts in order to establish a sense of accountability within the BIA. Tribes are still waiting to see these very important priorities given attention.

It all comes down to the issue that the Tribes must be re-engaged if the reform process is going to be successful. Tribes are receiving ambiguous and confusing information about the re-organization activities, which is extremely frustrating. Tribes must be involved in the entire process, not just shown the end product. The Department of the Interior and Bureau of Indian Affairs are not holding to their policy of meaningful consultation with tribes. We fear that without consultation and clear information the new re-organized structure will be perceived in the same negative light that has plagued the BIA for years.

Reform/Re–Organization vs. General BIA Operation

The first issue that has become a byproduct of the reform process is the struggle between the establishment of an organization that upholds the fiduciary trust responsibility on the one hand, while maintaining general operations on the other. This internal struggle has become obvious in the past several months as the re-organization process has been pushed into its initial phase. USET agrees that trust and other functions need to be separated, however, in the BIA's re-organization structure two competing organizations have developed. The OST and the BIA must compete against each other for authority, resources, and manpower. This struggle will always exist unless certain issues are addressed.

From the beginning of the Trust Reform process, Tribes have made it clear that the DOI should not use program dollars to help fund the mistakes of the Administration. Tribes have stressed that the BIA's funding should not be diminished in order to fund the trust efforts of the OST. The BIA is in dire straits and must have additional funds in order to accomplish a truly successful re-organization. USET tribes fear that the majority of trust funding will be directed to the OST where the BIA will have to request the use of funds for trust activities. This makes the BIA subordinate to the funding needs of another organization and the employees of the BIA dependant upon two sources of direction for performing tasks. This could be extremely detrimental to the efficiency of processes within the BIA's new organization.

USET is committed to trust reform and the much needed re-organization of the Bureau of Indian Affairs. The mismanagement and trust issues are escalating problems that must be dealt with immediately for the sake of future generations. The Land Consolidation and Fractionation problems alone, if solved today, would take years to organize and properly manage. There are numerous unmet needs in Indian country in addition to Trust Reform which cannot be ignored. Programs such as Law Enforcement, Welfare, Social Services, and Education should not be "taxed" in order to pay for the mismanagement of the federal government's trust responsibility to tribes. New funding must be provided to the BIA for this re-organization process, while other programs should operate as intended without interference from budget restraints due to re-organization.

Trust Principles

Recent Supreme Court decisions have concluded that the federal government has avoided fiduciary trust responsibilities and operated with "bad-faith" in its business relationships with Indian tribes. In United States v. Navajo Nation, the Supreme Court stated that the

Mitchell and Mitchell analysis must focus on a specific right-creating or duty-imposing statute or regulation. In this case, the Court held against imposing a trust obligation on the Government. It reasoned that the existence of a trust relationship alone is not sufficient to support a claim for damages under the Indian Tucker Act (28 U.S.C. Sec. 1505). Conversely, in United States v. White Mountain Apache, the Court acknowledged the statute at issue did not expressly subject the Government to fiduciary duties of a trustee. Nonetheless, the Court determined that the Fort Apache property was expressly subject to a trust. In so doing, the Court drew a "fair inference" to find an obligation on the part of the Government to preserve the property as a trustee, and determined that its breach of trust was enforceable by damages.

From these cases, we have learned that unless a statute or regulation imposes a specific fiduciary obligation on the part of the Government toward tribes and their resources, the Court will look unfavorably on the imposition of such a duty. We have also learned that trust principals must be clearly defined in order for the Government to be held accountable for a breach of trust duties. In a sense, Indian country was fortunate that the Court felt compelled to infer a trust obligation in the White Mountain Apache decision; Indian country was not so lucky in Navajo Nation. The dichotomy of rationales created by these decisions indicates that without clear guidelines and definition of trust principles, the Court will continue to infer-or ignore as the case may be-the Government's fiduciary responsibility towards Indian tribes. Indian tribes must be allowed to hold their trustee accountable for mis-

management of their resources. We must begin by defining trust principles that create consistency in application across all trust activities. Tribes should no longer be forces to find remedy through the courts.

The tribal leadership of the Trust Reform Task Force made a concerted effort to get the DOI to incorporate a list of general Trust Principles, that could be used as a reference point for all trust activity, into the re-organization efforts. This suggestion was adamantly opposed by the DOI members of the Task Force, as they wanted to wait until the Supreme Court had provided decisions in both White Mountain Apache and Navajo Nation. These two cases have had opinions written and both reaffirm, now more than ever, the need for a standardized set of trust principles.

Indian country should not be held at bay any longer by pending cases in the Supreme Court. The time is now for the federal government and the Secretary of the Interior to be held accountable for their trust responsibility. It is critical that continuity and accountability be established as a cornerstone of the re-organization efforts. There can be no oversight of the trust relationship without a standardized set of general trust principles in place. Indian country must have a way to hold their trustee accountable for actions taken that may be contrary to the advancement of Indian people.

Under–Secretary Position

USET tribes have stressed from the beginning of the reform process the need to have Indian Affairs authority elevated to a Secretariat Level within the Department of Interior (DOI). Many tribes feel that the DOI overlooks the needs of the BIA , consequently tribal issues are pushed to the bottom of the list of DOI priorities. There is a strong need for an Under–Secretary of Indian Affairs position to be established in order to remedy the ambivalent attitude toward Indian affairs that has been so apparent within the DOI.

Through legislation, USET feels that the creation of an Under–Secretary could greatly benefit Indian people. Both tribal leaders and federal officials on the Trust Reform Task Force reached general consensus on creation of the new position. This common ground shows that both Indian country and the administration support the elevation of Indian affairs within the Administration. Tribes envision the Under–Secretary as having direct contact with the Secretary of the Department of the Interior regarding all Indian issues, as well as exercising authority over other bureaus within the DOI in regard to their Indian trust responsibilities. Currently other DOI bureaus report to the Secretary of the Interior and there is little communication or collaboration among the different bureaus regarding Indian trust issues. It is vitally important that all bureaus understand the importance of the federal government's trust obligation. An Under–Secretary could instill this trust responsibility across the bureaus and within the BIA, whereas the Assistant Secretary of Indian Affairs does not have any authority over other bureaus. This is the most direct way to ensure that Indian issues receive the attention, resources, and respect they deserve and to assure successful trust reform.

Regional Level Re–Organization

Many hypothesis are circulating throughout Indian country as to how the regional re-organization of the Bureau of Indian Affairs will actually work. There has been little direct discussion between the federal government and tribal leaders regarding this level of re-organization despite repeated requests from Indian country. The new Department Manual once again is unclear as to all of the multiple and complex relationships expected at the regional level and below. Tribal leaders are confused and need clarification. Will there be Trust Officers at every regional office? Who will they answer to directly? What will be their relationship with other BIA regional staff? What will the relationship be like between the Trust Officers and BIA officials? Who will have final determination authority? These are the types of questions that Tribes need answered in order to understand the complexity of the situation.

USET has spent countless hours analyzing the new Department Manual, the Cobell reports to the court, and the relationships between OST employees and BIA employees. USET believes these regional position interactions are based on an oversight (OST employees) and work product (BIA employees) relationship. The BIA employees at the regional level should be responsible for service delivery to the tribes, while the OST Trust Officers should be responsible for ensuring the trust responsibilities of the federal government are upheld. Trust positions should also be able to provide beneficiaries with resources concerning trust issues and look into any complaints of mismanagement by the BIA.

Furthermore, there is confusion as to how the OST Trust Officers will perform these oversight functions. In past discussions, the idea of Memorandums of Agreement (MOA) between the OST and the BIA were suggested. These MOA's would

allow the BIA regional and agency level offices to "contract" the trust responsibility from the OST. The OST would then be free to focus totally on the oversight issues of ensuring that trust obligations are upheld by the BIA. If there are going to be two "stovepipe" organizations established to handle trust, one must be in charge of the implementation while the other organization must focus on oversight and standards of service.

These interactive relationships as described are merely speculative and based on USET's analysis of the DOI Department Manual. There are many grey areas in the Department Manual that need further clarification. However, if USET's analysis is correct, the new structure could be a viable tool to reaching greater efficiency within the BIA.

Conclusion

There is not a simple answer to the question, "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?" The fulfillment of the government trust responsibility to Indian tribes and individual Indians is complex. USET Tribes support reform and understand that re-organization is necessary for the government to fulfill its fiduciary responsibilities. Many tribes feel like efforts to this point have been futile and the DOI is moving forward with their own agenda. USET recognizes the urgent need for tribes to be actively engaged in the reform and re-organization processes. Future generations of Indian people are depending on tribal leaders to take a stand and approach reform with a united voice. It is time to have that voice heard through legislation being developed and true consultation with the administration. The process has become stagnate over the past several months, but now is the time for Congress, Tribes, and the Administration to be active and involved.

In closing, I would like to emphasize the great importance of proper trustee accountability and the federal trust obligation. Efficiently operated trust programs could benefit Indian country greatly, but we all know the chaos that a poorly operated trust system can produce in Indian country. Indian people have given so much to the federal government based on the promise of adequate management of assets through the Trustee relationship. That relationship has been severely damaged, and must be mended.

Mr. Chairman and Honorable Committee Members, USET stands ready to assist in the processes of mending the relationship, establishing accountability of trust, and re-organization of the BIA. USET tribes have the experience and knowledge to work through these issues, all we need is someone to tap into those valuable resources. Thank you for taking the time to listen to tribal comments and take them into consideration. USET looks forward to working with Congress to reach lasting solutions and I would be pleased to answer any questions you may have regarding the USET testimony.

The CHAIRMAN. Mr. Lester.

STATEMENT OF A. DAVID LESTER, EXECUTIVE DIRECTOR, COUNCIL OF ENERGY RESOURCE TRIBES

Mr. LESTER. Thank you, Mr. Chairman. I am A. David Lester, Executive Director for the Council of Energy Resource Tribes, a position I've held since 1982. Our chairman, Darrell Martin, who is also the Vice President of the Fort Belknap, Assiniboine and Gros Ventre Tribes of Montana, asked me to provide additional perspective to the written statement that has been submitted under his name.

I want to make it very clear first off that CERT, the member tribes, are unequivocally opposed to the settlement of the Cobell case through the appropriations process. It is patently unfair and deprives literally hundreds of thousands of American citizens of due process.

I really appreciated your opening remarks, Mr. Chairman, speaking for equity justice and fairness. And I think the No. 1 job that the government faces and probably has faced since day one with Indian country is the gaining and the retaining of the trust and

confidence of the people that, in fact, the agencies were created to serve.

The question of trust and confidence is not to cast aspersions on the character of the current incumbents. I've known Secretary Norton for some time. She was the Secretary of—I mean she was the Attorney General of Colorado, and I'm a resident of Colorado, and I've known her and her dealings with the tribes in Colorado. And I know her to be a just person and a fair person.

But the issue of confidence and trust really is the at the heart of the institutional relationship between Indian peoples, tribal governments, and individual Indian account holders and the institution of the Department of Interior. And in the discussions about how much can we afford to pay, it seems somewhat ironic that the question really seems to me to be, is the taxpayer dollar more sacred than the Indian trust dollar? And that's a question that has to be answered.

With respect to the account holders paying for the administration of the trust, it must be remembered that the trust was imposed upon us. It didn't come as a voluntary democratic process. Abraham Lincoln remarked in his debates with Senator—I mean Stephen Douglas—that when the white man proposes to rule himself, that's democracy; when he proposes to rule other people, that's tyranny. And in the 19th century, that's in fact what America did to the Indian nations, proposed to rule us, and in some respects that legacy persists in the Department of Interior.

Some of the problems that I've observed in trying to come to settlement, both on reorganization as well as the Cobell case, is that the Department insists on being in charge of the process. It's like a burglary has occurred in my home and I call the police, and the burglar shows up to investigate the burglary. How much trust and confidence can I have in a fair process when that occurs?

Cobell is not the problem, it's a symptom of the problem. Cobell has insisted that a process be put into place to correct the systematic management problems. When that process is undertaken, then it brings more than just those involved in the lawsuit. And that involves the tribal government who own the bulk of the trust lands and whose lands base have been growing in recent years. And it's quite correct that the volume of dollars flowing through the accounts is predominantly tribal dollars and the larger share of those dollars come from the energy leases, oil, natural gas, methane and coal. And so CERT was formed to address those kinds of issues.

In 1982 the Congress, with our working with the Congress, passed two important reform bills that I think really need to be looked at: the Indian Mineral Development Act and the Federal Oil and Gas Royalty Management Act. The Federal Oil and Gas Royalty Management Act for the first time provided transparency to the collection of Indian mineral royalties. As the tribes began to see what was occurring in the management—collection and management of the royalties, they began to be concerned deeply about how the trust funds were managed and they began looking at that. They joined with the timber tribes and the agriculture tribes to form ITMA. And that is why CERT continues to look to ITMA as the lead tribal organization in the resolution of the tribal trust

fund's accounts and the overall reform of the trust process management of the Department of Interior.

Thank you.

[The prepared statement of Mr. Lester follows:]

Statement of A. David Lester for Darrell Martin, Chairman, Board of Directors, Council of Energy Resource Tribes, Denver, Colorado

Thank you, Chairman Pombo and Members of the House Resources Committee, for giving the Council of Energy Resources Tribes the opportunity to testify today. The issue before the Committee is whether Tribes and the Congress can formulate a process to resolve the federal court case of Cobell v. Norton that involves accounting for hundreds of thousands of Individual Indian Money (IIM) account.

We understand the Committee's objective today is to see whether there might be a way to avoid continued expensive, time-consuming and often acrimonious litigation in a manner that is fair and equitable to the plaintiffs in the case. CERT Tribes would of course like to participate in developing an alternative process but does not have a formal position on what such a process would be like or how it might be structured. What we offer today are simple insights and suggestions that might be a starting point for achieving such a process. CERT Tribes have some experience and wisdom that would be useful if there is a will to move forward with a settlement process.

Let me begin by telling the Committee a bit about CERT. It is an organization comprised of 52 Tribes, each of which has significant energy resources. The Tribes use CERT to come together to discuss common problems and to share solutions to problems that impact the development of tribal renewable and non-renewable energy resources. Our Mission is to support the development of viable, diversified self-governed Tribal economies through the prudent protection, management and development and use of Tribal energy resources according to each Tribe's own values and priorities. The energy Tribes that direct and govern CERT have not given CERT portfolio to engage in issues involving individual Indian allotted trust lands.

Tribes with significant energy resources normally have Tribal Trust Accounts held by the Bureau of Indian Affairs into which funds earned from leases of land and minerals are deposited. This is not unlike the system using to make deposits into the accounts of individual Indians on whose lands there are grazing leases, timber leases, mineral leases and the like. The BIA collects the money from the lessee and deposits the funds in the IIM accounts and into Tribal Trust Accounts.

Unlike most individual Indians, tribal governments have some ability to track the money that is deposited into tribal accounts and to monitor lease activity on tribal lands. CERT is an active participant in the Intertribal Trust Funds Monitoring Association ("ITMA") that consults with the BIA about tribal trust funds issues. There is substantial cross membership between CERT and ITMA due to the significant cash flow through the Tribal Trust Accounts from energy mineral leases. But ITMA does not, however, have any oversight or responsibility for individual Indian trust funds. It is unclear whether expansion of its mission to include IIM accounts would be a conflict of interest. According to the Judge in the IIM lawsuit, the Department of Interior's accounting system for individual accounts is in shambles. The situation appears to have reached ridiculous proportions. The same accounting systems that have allowed for individual Indian monies accounts to be mismanaged is the same system that is used to account for Tribal accounts.

The Tribes with energy minerals resource leases along with Tribes with substantial timber and agricultural resource lands formed ITMA because they discovered serious problems in the management of the leases and of the income produced from the leases as well as problems in properly managing the Trust accounts themselves. There are many remaining issues between the Department of Interior and the Tribes over these issues but Tribal organizations under the direction of their governing bodies have consistently avoided intervening in the issues relating to IIM accounts.

We think a brief history on how we got here probably would probably be helpful to Committee members, particularly to those who are new to Indian country issues. Only when we know where we have been can we begin to see how to get where we want to go.

Historically there have been five major eras defining federal Indian policy; some contributed heavily to the current trust failure. The "Treaty-making era" began in colonial times and ended with a statute announcing the end of treaties with tribes in 1871. In the treaty era, promises made by the United States after adoption of the Constitution in 1780 were paid in accordance with the terms of the treaties.

Most treaties, as we know, were broken. There was a significant effort to resolve Tribes" treaty accounting and land claims under the Indian Claims Commission Act of 1946. The Indian Claims Commission, established by the Act, expired in the early 1978 and residual claims were shifted to the Court of Claims for resolution. The deadline for filing a claim was August 13, 1951. These cases resolved tribal claims, not individual Indian claims because treaty promises generally went to the Tribes, not to Indian individuals directly.

The "Allotment Era" or the "Assimilation period" began in 1887 with enactment of the General Allotment Act, commonly known as the Dawes Act, when Congress initiated the policy of allotting tribal lands to individual Indian members, generally in quarter sections of 160 acres and sometimes more. The intent, based on the Jeffersonian vision of America as a nation of gentlemen landowners, was to make farmers of Indians and to break the communal ties that bound individual Indians to their Tribal cultures and values that perpetuated the existence of Tribes as separate political communities. The intent of the Indian reformers of that day was to free the Indian from the slavery of tribalism as they had freed the African Americans from slavery itself. Though history shows that the Dawes Act was well intended by its authors who believed it would benefit Indian country, those good intentions ended in disaster. Under the Act, the United States held the individual land in trust for 25 years after allotment. When that period elapsed, the land was subject to taxation by state. Most of the land lost by individual Indians after the expiration of the 25 years was for tax foreclosures. Nearly 100 million acres of Indian land passed from Indian ownership as a result.

Much of the land held by the Tribe as a collective owner that was not allotted to members was declared surplus Indian land and was opened up for homesteading by non–Indian settlers. The remaining lands are still in tribal ownership. In addition, the United States deeded alternating sections of land throughout some reservations in the West to railroads. Thus came into being the term "checkerboard" reservation. Most of the jurisdictional disputes we see today between Tribes and states trace directly to the allotment policy and to the railroad deeds.

In 1934, 47 years after the Dawes Act, the Allotment Era ended when Congress passed the Indian Reorganization Act ("IRA"). The IRA ushered in the "Reorganization Period" and, among other things, ended the policy of allowing Indian land to be taxed after the 25-year period. The intention of the new trust policy of the United States was to keep in Indian ownership those Indian lands that had not yet been lost and to restore lost tribal lands to Tribes. The Congress was prompted to enact the IRA when it became aware that over 90 million acres of Indian land had gone out of Indian ownership because of the policies of the Allotment Era. It was a social and economic disaster to Indian country.

In the 1953, some not so very well intentioned Members of Congress caused the enactment of H.Con.Res.108, the infamous "termination resolution." Under that resolution, the "Termination Era" began during which over 20 Tribes were terminated by the United States and the Tribes" land and resources were sold, mostly to non–Indians. Congress has now restored all of these terminated Tribes to federal recognition but of course very little of their former lands have been restored. The Menominee and Klamath Tribes, both with vast timber holdings, were very big losers during the Termination Era. Hundreds of thousands of acres of land were lost to the Tribes.

In 1975, the Congress passed the Indian Self–Determination and Education Assistance Act (P.L. 93–638), an Act that had been espoused by former President Nixon and endorsed by every President since. This was the beginning of the modern era of federal Indian policy, the "Self–Determination Era", the federal policy of Self-determination and the recognition of Tribal rights to self-governance has is supported by every Indian Tribe in the United States and is the policy upon which Tribal economic and social development success of recent years is built. For these reasons we hope that this policy remains the hallmark of federal policy.

Under self-determination, tribal governments manage and operate programs that had previously been the responsibility of the United States. Tribes operate housing, education, health, roads, welfare, justice and other programs under contract with the BIA, IHS and other agencies under the 638 contracting process. The management skills and the technology transferred to the Tribes have empowered Tribes to engage in competitive economic activities using Tribal human and natural resources to advance more diversified Tribal economies.

At the beginning of the Allotment Era in the late 1887, the United States assumed for itself the responsibility for "managing" both individual and tribal land. Under leasing laws and other statutes, the BIA would sign leases for logging, for grazing, for farming, for oil and gas development and for other uses permissible by law. The funds from the lessees were to be placed in appropriate accounts for use

either by the landowners or by the Tribe. It may well be that the management of trust accounts was marred from the beginning in part because non–Indians believed the Tribes would cease to exist as organized communities and that the Indian allottees would, in fact, be assimilated within a generation or two. That being the case, the actual collection of monies and accounting for them it appears was something of an afterthought. The United States is now completely unable to account for the monies received for these individuals (and maybe even the Tribes) and whether the monies due the Indian landowner from private parties were even placed in the accounts. This may be due in part to the way Indian land devolved through probate to fractionated interests of miniscule amounts, and in part because the United States just did not set a high priority on tracking interests in land or income from land. The Allotment Policy was reversed but its authorizing statutes were not repealed or amended to make clear the on-going Trust obligations were of the highest priority.

Individuals Indians were concerned for years about the funds in their accounts (or funds not in their accounts, as the case may be) and could find no relief. This forced Ms. Eloise Cobell and other plaintiffs to bring suit to secure an accounting of the funds from the United States. The genesis of the problem is clear and the reason for the lawsuit is completely justifiable. However, the question now is whether we leave the federal courts to unravel the issues and demand a true accounting or whether Congress can step in to create an atmosphere for settlement. At the outset, we need say that section 137 of the House Interior Appropriations bill for fiscal year 2004 is not the answer.

Section 137 is relatively simple. It applies to any claim against the United States arising out of any obligation of the United States or any person of instrumentality thereof "relating to the conduct of an accounting, or the balance of, and individual Indian money account arising prior to December 31, 2000.

Subsection (b) then provides that the Secretary of Interior shall formulate, and within four years complete, a "statistical sampling evaluation" of all covered IIM accounts "in a manner that the Secretary deems feasible and appropriate given the availability of records, data, and other historic information, and shall estimate, so as to achieve a ninety-eight percent confidence level, the rate of past accounting error "." As the language indicates, the Secretary has nearly unfettered discretion in determining the manner in which such sampling is conducted, and is only required to "estimate" the rate of past accounting error.

Once the statistical evaluation is complete, the Secretary must certify the sampling and publish such certification in the Federal Register. Within 180 days following such certification, the Secretary must adjust all IIM accounts covered by the certification, provided that the Secretary may not adjust an account downward.

Judicial review by an IIM account holder is extremely limited. As set forth in subsection (f), judicial review is limited to filing an Administrative Procedure Act style action with the U.S. Court of Appeals for the District of Columbia. Any such petition must be filed within 60 days of the date the Secretary adjusts the respective account. Such review would accordingly be limited to the "arbitrary and capricious" standard of review and would therefore be limited to the administrative record. Also, nothing in subsection (f) or in Section 137 requires the Secretary to personally notify the respective account holders that their account has been adjusted. Without such notification and given the short 60-day window, it is foreseeable that most account holders would not have an adequate opportunity to challenge the Secretary's adjustments to their IIM accounts. This judicial review provision is exclusive and applies retroactively to "any litigation filed before, on, or after the date of enactment of this section," and would necessarily include the plaintiff class members in the Cobell litigation.

Subsection (g) of Section 137 provides that the balance of any account as determined under Section 137 "shall conclusively constitute the new balance of the account—and shall not be subject to any further adjustments "." Section 137 also allows the Secretary, in her discretion, to voluntary settle any claims directly with IIM account holders. Account holders who settle are not entitled to any further adjustment to their account balances.

Because Section 137 retroactively affects pending causes of action and potentially affects the amount of damages recoverable under such actions, it may well violate the constitution, specifically the Due Process and Takings Clauses of the Fifth Amendment to the U.S. Constitution. If held to be constitutional, Section 137 would eliminate the Cobell case and any other cases related to the mismanagement of IIM accounts to the extent those accounts existed prior to December 31, 2000. It essentially gives the Secretary nearly unlimited discretion to resolve any IIM accounts discrepancies without meaningful judicial review.

The foregoing analysis moves us to say what a true settlement would definitely not look like. It would not look like Section 137. In fact, Section 137 looks remarkably like Justice Department's dream resolution of the Cobell case.

In focusing on what a settlement process would look like, common sense and fairness dictates that there needs to be complete agreement on the part of the plaintiffs to participate in such a process. And the option of returning to the litigation if the process fails must be absolute. As for how such a process might look, one possibility is that Congress could take a nugget from history on how it has resolved similar issues involving non–Indian account holders along the lines of what was done in the Thrift Savings resolution. In that case the US even protected account holders who had balances above the government's insured levels to maintain the integrity of the banking system and the trust and confidence of the American citizens affected by the crisis. Those two standards, establishment of a system that has internal integrity and that is accountable to a regulatory authority and the re-establishment of trust and confidence of the Indian account holders, should be included in the fundamental principles that guide the resolution of the trust funds crisis as well.

If in the agreed upon process for resolution of the crisis the Indian account holders are willing to consider the idea of a statistical error rate that would adjust accounts upward but not downward, that error rate could be determined but not at the cost to the plaintiffs that is envisioned in Section 137.

Congress could also establish an accounting organization to do the historical accounting work and then certify unpaid or underpaid IIM accounts to Treasury for payment. There are probably dozens of ways for Congress to wrap its arms around the IIM accounting (and damages) claims. But one thing is certain. Any method or process will cost money. Justice to Indian account holders should not be subjected to a bureaucratic cost benefit analysis. If that had been applied to the freeing of the slaves or to the processes of American self- governance itself they would have failed the test. But a fair process agreed to by the stakeholders to resolve the accounting, we believe it will save millions over the long haul in legal costs and in damage claims.

Indian money was collected by the government acting as Trustee for the Indian landowner but did not create a system by which the money could be properly accounted and a system that has not been accountable to any external review to assure its integrity. This is the reason the problem developed early in the history of allotted Indian lands. The unaccountable accounting system persisted because no one could imagine that a federal agency acting as trustee would ever create such a mess in the first place and Indian people placed a great deal of trust in the integrity of the Department of Interior and its Bureau of Indian Affairs to do the right thing. Is there any other group of American citizens or a single citizen any where whose monies had been mismanaged by an agency of the federal government who would think Section 137 would be a fair process to achieve settlement? We think not.

Fair resolution of the Trust Funds scandal cannot revolve around the cost benefit analysis. What price is Congress willing to pay to restore National honor and regain the trust and confidence of the hundreds of thousands of Indian account holders who trusted in the integrity of their federal trustee? The Founding Fathers pledged "their lives and their sacred honor" in establishing the American Republic of which Indian Tribes and individual Indian landowners are now a part. The Department of Interior has not only breached its Trust obligations to Indians it has cast a shadow on the "sacred trust" that was bequeathed to all Americans, our trust in the fairness and in the integrity of our own government. That is what is at issue!

The CHAIRMAN. Thank you. We just were called to another series of votes on the floor, but in all fairness I'm not going to make you guys sit here through another thing like that. If any of the members have a particular burning question that they would like to ask of the panel at this time, I will yield to them. One. One short one.

Mr. PALLONE. Thank you, Mr. Chairman. I just—I ask it of Keller George, but I guess Mr. Frazier could answer, too. But Keller, you mentioned that there has been little discussion with the tribal leaders about the BIA's trust reform proposal. I'm assuming this is the new one that they started with in January. And then you talked about, you know, regional offices and the possible Under Secretary for Trust Reform.

I just wondered if you could tell me briefly, you know, the question, there really has been no consultation since this came out. If would you answer that. And second, has USET—

The CHAIRMAN. I said one.

Mr. PALLONE. Forget that then. Has USET or the ITMA, have either of you, collectively or separately, come up with a proposal of what you would like us to do? I'm not sure if you have, but I seem to have heard that one or both of you have some kind of proposal.

Mr. GEORGE. USET, in the beginning when we were first established, the DOI Tribal Task Force had a proposal—there were 29 proposals in the beginning, but in the course of our negotiations they were dwindled down to two. And I think that USET and other regions took the best parts out and made these two proposals. And I think we even got it further, we could agree on one specific proposal.

To answer the question about the Under Secretary, we were in agreement, the DOI and the USET tribes—I mean the task force was in agreement that there was a need for an Under Secretary. But the tribes of the task force needed the trust principles and oversight along with it, where the DOI only wanted our support to get legislation passed that would establish an Under Secretary.

When we refused to do that, that's when the wheels fell off of the whole process and we never had a meeting since that particular time. Everything fell apart because we would not agree to an Under Secretary without trust principles and some oversight. And that was the danger.

And yes, we do have a plan that we have. And in addressing the lack of consultation, we had a meeting yesterday with the Assistant Secretary of Indian Affairs and Mr. Swimmer from the OST, the Office of Special Trust. It was the first time that we asked the question, Well, when are you going to begin reorganization? He said, it's already going as we speak. The Secretary signed off on a new BIA manual a while ago. And we're not here in consultation, but we're here to tell you about the roll-up of the new BIA.

So that was really on that point, there was really no consultation. We thought we were here yesterday for a consultation. But as it turned out we were told this is not consultation, we're here telling you that the roll-out has been begun and we've been meeting at various locations and that was the extent of it. So to answer the question, were we consulted on this since January on trust? No.

Mr. PALLONE. OK. Thank you.

The CHAIRMAN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. I don't have a question, but I just want to commend the gentlemen for their testimonies. Realizing, I think, we've come up with at least two or three major issues that I certainly would like to offer my recommendation to you, Mr. Chairman, that we need more oversight hearings, especially on this reorganization that we keep hearing about. With that, Mr. Chairman, again I want to thank Mr. Frazier, Mr. George and Mr. Lester for traveling such long distances to be with us in this hearing.

Thank you, Mr. Chairman.

Mr. FRAZIER. Can I respond to Congressman Pallone real quick on his question?

The CHAIRMAN. Mr. Cole, did you have—

Mr. COLE. In deference to time, that's fine.

The CHAIRMAN. Mr. Carson?

Go ahead.

Mr. FRAZIER. The tribe, we don't believe that we have been truly consulted. I know that I have been, back in December of 2000 when they had a big meeting down in Albuquerque and there was probably 3- or 400 tribal leaders down there. One of the things that sticks out in my mind at that particular meeting that everybody said no to this reorganization, and several months later they come up into Rapid City in the Great Plains area and all the tribes there said no.

And just lately, like what Mr. George mentioned, they've been going out and doing some series of meetings. And everybody I talk to, they all said the same thing, is no. And I don't think there has really been any true consultation.

That task force, I think they utilize that, you know, as a ploy in calling the consultation. Like I mentioned, this reorganization, if you look at it, will not benefit Indian country. There is nothing coming down to the local level in the area of resources, authority or anything.

I think that the solutions are out there in Indian country. And you heard Mr. Cason say there was 29 proposals, but unfortunately he didn't take time to look at every one of them, because if he had, maybe we would have a solution today, because out there we live and breathe it.

In the area of ITMA, we got a trust reform legislation and we are in town tomorrow to look for some sponsorship from the House side. And this legislation was drafted in coordination with a lot of tribes, you know. And ITMA is also going to be having a meeting in Portland on July 21st. But for the record, the Rocky Mountain Tribes and the United Sioux Tribes in South Dakota are in support of this legislation.

So, thank you.

The CHAIRMAN. Thank you very much. I apologize to this panel. I know that the members have a number of questions that they would like to ask. But I want to thank you for your patience. I want to thank you for your testimony and being here.

There will be additional questions that will be submitted to you in writing. I know I have a number of questions that I wanted to ask. But at this time they will be submitted to you in writing. If you would answer those in writing for the Committee so that they can be included in the Committee record.

I want to thank this panel and the previous panels for your testimony. I know this is an extremely important issue. And myself, Mr. Rahall, and the rest of the members of the Committee look forward to working with you hopefully to come to a solution of this on as quick a basis as we possibly can.

So thank you very much. The hearing is adjourned.

[Whereupon, at 7:10 p.m., the Committee was adjourned.]

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