INDIAN TRUST FUND ACCOUNTS

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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C O N T E N T S

INDIAN TRUST FUND ACCOUNTS: THE DEPARTMENT OF THE INTERIOR'S RESTRUCTURING PROPOSAL AND THE IMPACTS OF THE COURT ORDER CLOSING ACCESS TO THE DEPARTMENT'S COMPUTER SYSTEM

Wednesday, February 6, 2002
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to notice, at 10 a.m., in room 1334, Longworth House Office Building, Hon. James V. Hansen (Chairman of the Committee) presiding.

STATEMENT OF THE HON. JAMES V. HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

The CHAIRMAN. We appreciate you all being here today, and we know there is great interest in what we are doing here. A lot of folks are in the overflow room, and we apologize that we do not have adequate room for everybody, but we just do not. We would appreciate it if those in the hall would stand against the sides so they do not clog the passageway. We are a little concerned about fire problems. We thank everyone for being here.

We are going to limit the opening statements to myself and the ranking member, and then we will go directly to the witnesses.

I would like to begin by welcoming our distinguished witnesses and thank you all for coming. The Federal Government's trust obligation to Native Americans and the Department of the Interior's management of tribal and individual Indian trust funds and assets are both complex and important issues. I look forward to an informative and frank discussion with all of our witnesses.

The scope of this hearing is broad and is intended to provide an overview of current developments in trust reform and challenges facing the Federal Government and Native Americans in our trust relationship. I expect our witnesses to discuss several issues, including the Department's proposal to restructure the Bureau of Indian Affairs, ideas to improve trust asset management, and the impacts of the recent shut-down of the Department's computer system and restriction to Internet access.

The CHAIRMAN. The Committee views the Government's trust relationship with Native Americans to be a nonpartisan issue that demands our sincere attention. There is no room for political posturing. I expect our witnesses to respond honestly to pointed and direct questions, and I expect members to respect the good intentions and good faith of all of our witnesses.

We appreciate having Secretary Norton with us today. You have inherited a complex and emotional situation. Although the current administration is on the receiving end of the brunt of the blame for inadequate trust management, previous administrations, dating back decades, have largely ignored this problem.

I appreciate Secretary Norton's direct involvement in efforts to find a solution. The Committee recognizes, however, that all three branches of the Federal Government are equally responsible for ensuring the integrity of the trust relationship. Congress has a critical role in providing funding and a meaningful direction. We look to the Department and its Secretary to carry out and manage the trust.

As recently noted by the court monitor in the Cobell v. Norton litigation, the three branches of the Government are now united to consider the creation of a long overdue trust organization to remedy past trust management, and the statement from the Court goes accordingly:

"One of the three branches of the Federal Government must manage the creation of a new fiduciary trust organization whose experienced trust officials must select, organize and train a nationwide trust staff and move forward as rapidly as possible at building a new trust management system—not tinkering with a resurrected crew and vessel—to properly house, maintain, and protect the Indian Trust beneficiaries' land, resources, and assets."

The Committee understands, however, that a resolution to the trust management problem will not come exclusively from within the government. We respect the need for tribal consultation and input from other outside experts. We are here today to explore ideas and possible solutions that will once and for all establish the necessary business practices, procedures, policies, and resources necessary for meaningful trust reform.

A notable American philosopher once said, "Those who do not remember the past are bound to repeat it." I recognize there are no easy answers to trust reform, but the Government must do everything possible to break the cycle of mismanagement that has existed for many years. Unless we identify a system to properly execute the Government's trust responsibility to Native Americans, the Department will remain at risk of investing in projects that do not satisfy basic trust management requirements.

I appreciate you all being here, and I will now turn the time over to the ranking member from West Virginia, the Honorable Nick Rahall.

[The prepared statement of Chairman Hansen follows:]

Statement of The Honorable James V. Hansen, Chairman, Committee on Resources

Good morning. I'd like to begin by welcoming our distinguished witnesses and thank you all for coming. The federal government's trust obligation to Native Americans and the Department of the Interior's management of tribal and individual

Indian trust funds and assets are both complex and important issues. I look forward to an informative and frank discussion with all of our witnesses.

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We will now hear from our first panel. Secretary Norton, please proceed.

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

Mr. RAHALL. Thank you, Mr. Chairman.

I want to, first, thank you, Chairman Hansen, for honoring my request to have today's hearing. It is unfortunate, but true, that through both Democratic and Republican administrations, as you have said, Mr. Chairman, for decades, the Interior Department has acted like the Enron of Federal agencies when it comes to managing Indian trust funds and Indian trust assets.

Over the years, countless investigative reports by the Congress, the GAO, the Inspector General, and others have been issued on the failure of the BIA to properly account for and manage Indian trust funds. Congressional hearings have been held and millions of dollars have been spent in ill-fated attempts to fix the system. However, each administration has fumbled, with the succeeding administration recovering the ball, only to hand it off to the next with

that seemingly elusive goal of restoring faith and integrity into a system yet to be achieved.

It is true that Secretary Norton is in contempt proceedings, but I would observe that every Interior Secretary in modern times is culpable to one extent or another to this situation. One of the reasons that I requested this hearing was to examine the Secretary's rather sudden and unexpected proposal at the time to form a new agency within the Interior Department that would be vested with all of the Indian trust fund responsibilities that are currently managed by the BIA and the Office of Special Trustee.

This plan was developed with no input from Indian tribes or account holders. It was a huge mistake, causing process to become the issue instead of what really is the matter at hand, which is whether each individual Indian and tribal account accurately reflects the amount of money that it should contain. But make no mistake about it, there is pain and misery in Indian Country because of the failure in Federal trust responsibility.

Today's hearing, hopefully, will shed additional light on how all of the stakeholders, members of this Committee included, can reach for a fair resolution of this matter in the near future.

As I told Deputy Secretary Steven Griles in my office last week, we want to be a part of the solution, not the problem. At the same time, in speaking for members on this side of the aisle, at least, we will not stand idle if we see the rights and privileges of those we are charged with a trust responsibility for are being trammeled.

I look forward to hearing the testimony today and, again, I thank you, Chairman Hansen, for honoring my request for this hearing.

[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall II, a Representative in Congress from the State of West Virginia

I would like to first thank Chairman Hansen for honoring my request for this hearing.

It is unfortunate, but true, that through both Democrat and Republican Administrations the Interior Department has acted like the Enron of federal agencies when it comes to managing Indian trust assets.

Over the years, countless investigative reports by the Congress, GAO, the Inspector General and others have been issued on the failure of the BIA to properly account for and manage the Indian trust funds. Congressional hearings have been held. And millions of dollars have been spent in ill-fated attempts to fix the system.

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I look forward to hearing the testimony of the witnesses.

The CHAIRMAN. Thank you, Mr. Rahall. Let met thank the Secretary for being with us, and, again, let me apologize. This isn't the room we normally use for a hearing of this size, but the other one is going through a little restructuring right now, so we are just going to have to get along.

Madam Secretary, we would appreciate it if you would come up and take your place. And, Nancy, don't run the clock on the Secretary, OK?

Maybe you would like to introduce who is accompanying you, and we turn the time to you.

STATEMENT OF THE HONORABLE GALE A. NORTON, SECRETARY OF THE INTERIOR, ACCOMPANIED BY NEAL McCALEB, ASSISTANT SECRETARY OF INDIAN AFFAIRS AND TOM SLONAKER, SPECIAL TRUSTEE, WASHINGTON, D.C.

Secretary NORTON. Thank you very much, Mr. Chairman and members of the Committee. I am very pleased to join you today to testify about our Indian trust programs.

I have submitted a written statement that I ask be incorporated into the record.

The CHAIRMAN. Without objection.

Secretary NORTON. Thank you.

Before I begin my statement, I would like to introduce other officials of the Department of Interior who are here today. With me is Neal McCaleb, who is the Assistant Secretary for Indian Affairs, and Tom Slonaker, who is the Special Trustee for Native American Trust.

Also, here in the room today, and I would also like to identify them, is Jim Cason, who is the Associate Deputy Secretary, and he is the one who has been working night and day to address our Internet shutdown issues.

Ross Swimmer is here. He is the Director of the Office of Indian Trust Transition.

Deputy Secretary Griles was planning to be here today, but he is testifying in the Cobell litigation this morning.

I have asked Mr. McCaleb, Mr. Slonaker, Mr. Swimmer, and Mr. Cason to remain for the balance of the testimony today because I think it is important for us to hear the perspectives that are being offered to the Committee and to continue our listening and understanding of this issue.

Last year, in my first hearing in front of Congress, I spoke briefly about the matter of Indian trust reform. At that time, I said, "As the Trustee, I clearly recognize the important obligations of the Department to put in place those systems, procedures, and people to fulfill our obligation to the trust beneficiaries, both individual Indians and tribes."

However, I also emphasized that I have grave concerns about our existing management systems. My experience of the past year has certainly reinforced my feelings from last February.

The problems that we are trying to solve have been over 100 years in the making, and I would like to share something with you today that well illustrates that. This is a newspaper front page from the Philadelphia newspaper called The Press. One of the articles is headlined, "Indian Trust Fund Losses: Funds Alleged to have been Abstracted from the Department of the Interior."

The other headline on this page says, "General Custer Killed." This is from July 6th, 1876. Obviously, the issues have gone on for a long time.

Congress has reviewed the issues of Indian trust asset management many times. As Representative Rahall pointed out, true reform has never been achieved. Many, many times we have come to the point where Congress has examined the issues, where the Department of Interior has proposed reforms, where the tribes have discussed the need for reform, and yet time after time after time, decade after decade, we have failed to actually achieve reform.

I am perhaps unrealistically optimistic, but still somewhat optimistic that the time has arrived, that we have a strong interest, from many different quarters, in seeing reform actually take place, and that is what we are working to achieve.

Let me describe for you some of the issues that we face and why this is such a complex issue. Trust asset management involves approximately 11 million acres held in trust or restricted status for individual Native Americans. Forty-five million acres are held in trust for the tribes. This is a total of 56 million acres managed by the Department of Interior, and that amounts to the combined size of the States of Maine, Massachusetts, Vermont, New Hampshire, Connecticut, Rhode Island, Delaware, Maryland and the District of Columbia.

This land produces income for about 350,000 individual Indian owners and 315 tribal owners. Leasing and sales revenues of approximately $300 million per year are distributed to more than 225,000 open individual Indian money accounts and revenue of approximately $800 million per year is distributed to the 1,400 tribal accounts.

Our management of lands for individual Indians dates back to 1887. At that time, Congress passed the General Allotment Act, which allocated tribal lands to individual members of tribes in parcels of 80 or 160 acres. The expectation of Congress was that this would continue for no more than 25 years, with that land being held in trust for the individual Indians. However, Congress kept extending that time period and ultimately made that into a permanent status.

By the 1930's, it was widely accepted that the General Allotment Act had failed. Congress stopped the further allotment of lands, but the interest in the allotted lands began to fractionate, as lands were passed from generation to generation. There are now an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracts of individually allotted lands.

The challenges related to fractional interest in allotted lands continue. These interests expand exponentially with each new generation to the point where we now have incredibly tiny ownership interests. There is a chart that is attached to your testimony, and that chart reflects the tiny ownership amounts that we have.

Here is the one I can actually read. As you will see, for example, in the first column beyond the blackened area, this is the fraction of lands that people hold. This is just in one little parcel of land. We have someone who owns 1/592nd-interest in that. Some other people own 29/77,750ths interest. These interests, obviously, are not the entire interest in the land. This is just one page reciting a few people's interests in this land.

When you get over to the last column, you see the decimal places carrying out the description of how much interest these individuals own in this tract of land, and you get into .0003 as an interest in this piece of land. In order to actually convert all of this to a fraction where we had a common denominator, we had to get into 228,614,400 as the least-common denominator for this.

As you can imagine, this is a complete bookkeeping nightmare, and it is very difficult when you are talking about a tract of land that might, perhaps, have had a $250-a-year annual income for a grazing lease. Once this is divided down to the individuals receiving their tiny share, we have many interests where the annual income is less than a penny. These are representative of the kinds of interests we manage, and these are not even reflective of the smallest interests that we see.

The Department is bound by its trust obligations to account for each owner's interest regardless of size, even though these accounts might generate such small revenues. Each is managed without the assessment of any management fees and with the same diligence that applies to all accounts. In contrast, in a commercial setting, these accounts would be eliminated because of the assessment of routine management fees.

The income that comes in from these tiny interests in land is what flows into our individual Indian money accounts, and so small interests in land lead to small accounts with small balances.

I recognize that in the last Congress you passed the Indian Land Consolidation Act Amendments of 2000, and we appreciate you grappling with the issue in that way. We are examining that now as we are implementing it, and we may find that additional incentives are needed to expedite the consolidation of these interests.

I would like to now lay out some of the other pressing interests that we see in addition to fractionation.

First, the Department is not well structured to focus on its trust duties. Trust responsibilities are spread throughout the Department. Thus, trust leadership is diffuse. The Bureau of Indian Affairs itself has a long history of decentralized management and, as a result, it does not have clear and unified policies and procedures relating to trust management. Each of the 12 BIA regional offices and 85 BIA agency offices has developed policies and procedures that are unique to that region and to each of the tribes that are within that region.

A second issue that we face is that planning systems relating to trust have been inadequate. A new strategic plan needs to be developed.

Third, the Department's approach to trust management has been to manage the program as a Government trustee, not a private trustee. The Department agrees that our trust duty requires a better way of managing than we have had in the past. However, the

current structure of the Department is not suitable for carrying out the expectations of the tribes, the Congress or the courts. To meet this level of expectation will require more funding and resources than have historically been provided to the Department, and this has led to the President's fiscal year 2003 budget request of an additional $84 million in trust asset management funding.

Fourth, the computer software system known as the Trust Asset and Accounting Management System, which we refer to as TAAMS, has been inadequate. The Department had hoped to go a long way to solving its problems, and yet this system has failed to achieve many of its objectives. Also, our information technology security measures associated with Indian trust data lack integrity and have not been adequate to protect trust data or to comply with Office of Management and Budget standards.

A current challenge that has been in the headlines is the Cobell litigation. In 1996, five plaintiffs filed suit against the Departments of Treasury and Interior, alleging breach of trust with respect to the United States' handling of individual Indian money accounts.

In the first trial, in December 1999, the Court ruled that the Department was in breach of four trust duties. The Court declared, among other things, that the 1994 Trust Reform Act requires Interior and Treasury to provide plaintiffs an accurate accounting of all money in their accounts without regard to when the funds were deposited and requires retrieval and retention of all information concerning the trust necessary to render an accurate accounting. This decision was affirmed by the D.C. Court of Appeals in February of last year.

The second trial dealing with historical accounting has not yet been scheduled. The trial about whether Neal McCaleb and myself should be held in contempt in our official capacities is ongoing as we speak.

To address the problems I have mentioned, a number of actions have been initiated in my first year as Secretary. We are developing a new strategic plan that will reflect a beneficiary approach to trust management and service delivery. Objectives will include maintaining comprehensive, up-to-date, and accurate land and actual resource ownership records, developing a robust accounting system to manage financial acts and developing a plan to attract and maintain a qualified, effective workforce.

Last July, I created the Office of Historical Trust Accounting. Its mission is to develop a detailed plan for a comprehensive historical accounting of trust accounts. We expect this plan will provide a foundation for Congress to evaluate our future funding requests.

The budget unveiled this week asked for a $9-million increase for this historical accounting. A full reconciliation of all accounts will ultimately require considerably more money. Conducting a full audit transaction-by-transaction will be difficult and very expensive, probably hundreds of millions of dollars. Without such an accounting, however, the plaintiffs in the ongoing litigation may continue to assert, as they have in the press, that they are owed tens of billions of dollars.

Turning to the reorganization of the Department. We heard from many sources, including the Special Trustee, our management consultant, EDS, the court monitor in the Cobell litigation and

through various budget reviews that one of the fundamental barriers to trust reform was the disorganized scattering of trust functions throughout the Department.

Our management consultant's review, for example, called for a single accountable trust reform executive sponsor. Last November, we proposed the formation of a Bureau of Indian Trust Asset Management or BITAM. This option envisions consolidating most of the trust reform and trust asset management functions throughout the Department into a new bureau that would report to a new Assistant Secretary. Essentially, we would separate out the service functions of BIA, like education, law enforcement and so forth. Those would remain within the Bureau of Indian Affairs.

The trust asset management functions, the financial accounting functions, would go into the new organization. It was hoped that that would consolidate things in a way that we could have consistent and coherent planning and the ability to have an organization dedicated to the high standards of accounting.

On November 20th, 2001, I issued an order to establish the Office of Indian Trust Transition within the Office of the Secretary,a need shortly thereafter I appointed Ross Swimmer to be its Director. It is currently charged with developing the new strategic plan and organizing the Department's efforts to implement that plan.

We are currently in the process of consulting with tribes to involve them in reorganizing the Department's trust asset management responsibilities. We have held a series of consultation meetings. To date, the tribes have expressed their dissatisfaction with both our consultation process and with our reorganization proposal.

A task force of tribal leaders has been formed as a way of facilitating the consultation process. I have committed financial resources to support the task force and other consultation efforts. Working with these tribal leaders, we are earnestly endeavoring to achieve progress on trust reform.

This past weekend, we held our first meeting in Shepherdstown, West Virginia. The tribal leaders who were present listened to us and also presented various alternatives to our BITAM proposal. We listened to their proposals, as well.

We are currently working through our management consultant and the task force to evaluate all of the various proposals. Overall, I was very encouraged by the meeting. I felt that we had begun developing a good working relationship and the interpersonal trust necessary to tackle a tough problem together.

Now, on Sunday, as the meeting was drawing to a close, I asked the task force members what I should say as I talked with you all about their perspectives and about our meeting together. Well, it was an hour-long discussion, so I can't begin to capture everything that was said, but I wanted to share with you some of the perspectives.

They wanted me to convey that while the tribes had rejected the BITAM proposal, they understood that I had inherited a disturbing problem for which no past administration had come up with a solution. They wanted you to know that there is more to understanding this problem than ordinary trust law. There is Indian trust law. Due to the willingness of the tribes to work together, we can address many of the longstanding problems in Indian Country. We all

agreed that we were excited about working together and that this was true because of some of the breakthroughs at least in understanding that came from that meeting.

Congress must understand that the trust responsibility comes from treaties under which tribes gave up massive amounts of their resources. I have also learned, through the consultation process and the task force, that, frankly, to my great surprise, the tribes are very strong attached to the Bureau of Indian Affairs. They may view it as dysfunctional and as a mismanaged organization, but it is the entity to which they have invested considerable time and attention, and it is their consistent point of contact with the Federal bureaucracy.

Because a number of the tribal leaders who participated in the task force meeting this last weekend are actually testifying here today, I am sure that they will also share their views of the meeting.

Let me quickly turn to our computer system, and the shutdown of our access to the Internet. Many of you have inquired about that and received inquiries from your constituents about that.

On December 5th, 2001, as part of the Cobell proceedings, the Court ordered the Department to disconnect from the Internet all of the computer systems that house or provide access to Indian trust data. The temporary restraining order came at the request of plaintiffs and was based on a report by the special master for the Court prepared on the security weaknesses of information technology security.

On December 17th, the Court ordered a consent order proposed by the Department over the objection of the plaintiffs. It establishes a process that allows the Department to resume operations of some computer systems after providing the special master assurances that the problems he identified have been resolved and the security meets a certain standard.

The December 17th consent order is the only mechanism under which the Department may use some systems or reconnect them to the Internet. Under that order, we first sought to operate the IT systems required to make payments to individual Indians. Our initial request was to operate a key Indian system, and it was made on December 17th, 2001. The special master concurred with our intent to operate this system recently.

On December 21st, we requested to operate another key system that would govern mineral receipts, and that application is still pending. It is our intent to make lease payments to individual Indians as rapidly as we are permitted to do so.

As a rough estimate, about 90 percent of the Department of Interior is currently off-line. Several other requests have been forwarded to the special master recently. We will continue to work with the Court to expedite the resumption of the many public service programs that depend on reconnecting to the Internet.

We have taken initial steps to prepare a long-term strategic plan that would deal with the security of this data. We expect that the core of this dedicated network can be installed during fiscal year 2002. There would be a phase-in of additional hardware and a shift of data from other systems expected to take approximately 3 years. The overall cost of the estimate for that is $65- to $70 million.

The actions that I have taken are only the beginning of a long, intensive effort that will be required. We will turn to Congress for help in our endeavors.

In conclusion, let me underscore a few points. Indian trust asset management is a very high priority for the Department. We need to establish an organizational structure that facilitates trust reform and trust asset management. We need to establish an ongoing effective consultation mechanism with the tribes. The Department must improve computer support and security to ensure the integrity of Indian trust data.

We are being challenged by litigation which might require significant changes in how the trust is managed. It appears that substantial resources will be required to meet the growing expectations of tribes, the courts, and Congress. The tribes, Interior, and Congress have to reconcile the competing principles associated with trust responsibility and self-determination. It is important that at the end of this process, the tribes have greater ability to govern themselves and determine their own future.

Thank you for inviting me to testify here today, and I look forward to answering your questions.

[The prepared statements of Secretary Norton and Mr. Slonaker follow:]

Statement of The Honorable Gale A. Norton, Secretary of the Interior, U.S. Department of the Interior

Introduction

Thank you, Mr. Chairman and Members of the Committee, for inviting me to testify at this hearing on the Native American Trust program being administered by the Department of the Interior, including the key elements of trust reform and trust asset management.

Comments on the trust program were included in my first Congressional testimony as Secretary of the Interior. On February 28, 2001, I told Congress the following:

> "I would like to comment on a matter of very high priority for myself and for the Department, and that is the matter of Indian trust reform. As the Trustee, I clearly recognize the important obligations of the Department to put in place those systems, procedures, and people to fulfill our obligation to the trust beneficiaries, both individual Indians and tribes. This is an enormous undertaking in correcting the errors and omissions of many decades. Coming into this position, and so early in my tenure seeing a decision from the Court of Appeals in the Cobell litigation, **I have to say that I have grave concerns about our existing management systems. It is a very high priority for me that the person who comes in as Assistant Secretary of Indian Affairs and the other people who fulfill leadership positions as to our Indian responsibilities are people with strong management backgrounds and abilities." (Emphasis added)**

My experience of the past year has reinforced the concerns I expressed last February. The problems we are working to solve have been over a century in the making. Allow me to explain the Department's role in managing Indian trust assets, the amount of land and accounts we hold in trust, the work entailed in managing these accounts, the challenges we face in trust management, the work underway to address these challenges, and areas where legislative and executive action is needed.

Background

Current Holdings—An understanding of the work that lies ahead requires a recognition of the complex issues we have inherited. Trust asset management involves approximately 11 million acres held in trust or in restricted status for individual Indians and nearly 45 million acres held in trust for the Tribes, a combined area the size of Maine, Massachusetts, Vermont, New Hampshire, Connecticut, Rhode Island, Delaware, Maryland, and the District of Columbia. This land produces income from more than 100,000 active leases for 350,000 individual Indian owners and 315

Tribal owners. Leasing and sales revenues of approximately $300 million per year are distributed to more than 225,000 open Individual Indian Money (IIM) accounts and revenue of approximately $800 million per year is distributed to the 1,400 Tribal accounts.

Trust Functions in Interior—Indian trust asset management involves many agencies and offices within the Department, including the Bureau of Indian Affairs, the Office of the Special Trustee for American Indians, the Minerals Management Service, the Bureau of Land Management, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, the National Park Service, and the Office of Surface Mining.

For example, the Bureau of Indian Affairs is responsible for the leasing of trust lands, keeping tract of land ownership, lease obligations, and appeals. The Office of the Special Trustee focuses on the management of the actual trust accounts. The Minerals Management Service handles royalty collection and the verification of those payments. The Bureau of Land Management does the official surveys of Indian trust land and tracks the status of actual lease operations on the land.

In short, these agencies must hire, train and retain personnel that:

1. Lease trust lands;
2. Conduct surveys across millions of acres to ensure leases are properly administered;
3. Keep records of leases held by hundreds of thousands of owners;
4. Record differing types of income from differing leases;
5. Review transactions within individual accounts;
6. Identify Indian heirs through complex probate proceedings;
7. Preserve trust records dating back a hundred years; and
8. Ensure the security of complex computer software housing much of this information.

This is not a simple responsibility, and there have been years of debate and litigation over how it should be carried out.

History of the General Allotment Act—One of the most difficult aspects of trust management is the management of the individual Indian money accounts. In 1887, Congress passed the General Allotment Act, which basically allocated tribal lands to individual members of tribes in 80 and 160-acre parcels. The expectation was that these allotments would be held in trust for their Indian owners for no more than 25 years. The intention was to turn Native Americans into private landowners and accelerate their assimilation into an agricultural society. Most Indians, however, retained their traditional ways and chose not to become assimilated into the non–Indian society. Congress extended the 25-year trust period, but finally, by the 1930s, it was widely accepted that the General Allotment Act had failed. In 1934, Congress, through the first Indian Reorganization Act, stopped the further allotment of tribal lands.

Interests in these allotted lands started to "fractionate" as interests divided among the heirs of the original allottees, expanding exponentially with each new generation. There are now an estimated 1.4 million fractional interests of 2% or less involving 58,000 tracts of individually owned trust and restricted lands. The Department is bound by its trust obligations to account for each owner's interest, regardless of size. Even though these accounts today might generate less than one cent in revenue each year, each must be managed, without the assessment of any management fees, with the same diligence that applies to all accounts. In contrast, in a commercial setting, these small accounts would be eliminated because of the assessment of routine management fees.

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

In 1992, the House Committee on Government Operations filed a report entitled "Misplaced Trust: the Bureau of Indian Affairs' Management of the Indian Trust Fund." That report listed the many failures of the Bureau of Indian Affairs to manage properly Indian trust funds. It pointed out that GAO audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 had found fault with management of the system. The report notes that Arthur Andersen & Co. 1988 and 1989 financial audits stated that "some of these weaknesses are so pervasive and fundamental as to render the accounting systems unreliable."

The House Report cites an exchange between Chairman Mike Synar and then Interior Inspector General James Richards in which Mr. Richards states:

> "I think the Bureau of Indian Affairs will not change until there is some political consensus in that it must change. It is the favorite * * * target of everyone who is shocked by ineptitude and its insensitivity. Yet when we try to restructure it either from a Congressional sense or from an Executive sense, there are always naysayers and there never develops a political sense for positive change."

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

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

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

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

In many ways, the problems and potential solutions remain the same as they did when this report was published.

Current Challenges in Trust Management

As you can see, the problems we are currently facing are not new ones. I would like to lay out some of the most pressing issues that are now before us.

Lack of Integration and Centralization of Trust Management—First, the Department is not well structured to focus on its trust duties. Trust responsibilities are spread throughout the Department. Thus, trust leadership is diffuse. The Bureau of Indian Affairs (BIA) itself has a long history of decentralized management and as a result, does not have clear and unified policies and procedures relating to trust management. Each of the 12 BIA Regional offices and 85 BIA agency offices has developed policies and procedures that are unique to its region and to the Tribes and individuals it serves. While BIA has developed some national policies over the past few years, its overall approach to trust management is still decentralized. The need for such clear and unified policies remains large, but very little has been done.

Lack of a Good Strategic Plan—Second, the planning systems related to trust are inadequate. The American Indian Trust Fund Management Reform Act of 1994 (the 1994 Trust Reform Act) required the development of a comprehensive strategic plan for all phases of the trust management business cycle that would ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with that Act. The court in Eloise Pepion Cobell, et al. v. Gale A. Norton, et al. (the Cobell litigation), which I will discuss later in my testimony, also requested information on the Department's plan for remedying problems identified by the court. These two responsibilities evolved into the development of the original High–Level Implementation Plan (HLIP) dated July 1, 1998. The HLIP was revised and updated on February 29, 2000. The Eighth Quarterly Report that the Department submitted to the Court on January 16, 2002 states:

> "As described in prior submissions to the Court, the Department now views the High Level Implementation Plan (HLIP), by which trust management reform progress was measured and reported to the Court, to be obsolete. As reflected in the introduction, HLIP milestones have become increasingly disconnected from the overall objectives of trust reform. The HLIP is now outdated. Many of its identified activities have been designated as being completed; however, little material progress is evident. More fundamentally, the HLIP does not reflect an adequately coordinated and comprehensive view of the trust reform process. A continuing re-examination of ongoing trust reform is needed along with clarification of trust asset management objectives."

Changing Standard of Trust Management—Third, the Department's longstanding approach to trust management has been to manage the program as a government trustee, not a private trustee. Today, judicial interpretation of our trust responsibilities is moving us toward a private trust model. The Department agrees that our trust duty requires a better way of managing than has been done in the past. The current structure of the Department is not suitable for carrying out the expectations of the tribes, the Congress, or the courts. To meet this level of expectation will require more funding and resources than have been historically provided to the Department.

Computer Problems—Fourth, the Trust Asset and Accounting Management System software known as TAAMS, which the Department had hoped would go a long way to solving trust problems, has yet to achieve many of its objectives. Interior began developing TAAMS in 1998 from an off-the-shelf program, intending for it to be a comprehensive, integrated, automated national system for title and trust resource activities. Using this software, Interior employees would record key information about land ownership, leases, accounts receivable income, and so forth. In November 2001, the Department's contractor, Electronic Data Systems (EDS), found that the current land title portion of TAAMS provides useful capabilities, but recommended deferring any further effort on the realty and accounting portions.

In addition, Departmental information technology security measures associated with Indian trust data lack integrity and are not adequate to protect trust data or to comply with Office of Management and Budget requirements. In fact, on December 5, the court ordered the Department to disconnect all computers from the Internet that housed or provided access to Indian trust data. The Department then disconnected nearly all of its computer systems from the Internet because they are interconnected.

Fractionated Heirships—Fifth, the challenges related to fractionated interests in allotted land continue. These interests expand exponentially with each new generation to the point where now we have single pieces of property with ownership interests that are less than .000002 of the whole interest. A stark example of the size of some of these interests is attached to my testimony. It is a page from a redacted 1983 Title Status Report for an allotment on the Sisseton Reservation in South Dakota. Please note the ownership percentages for each individual listed on the far right side of the sheet. The numbers speak for themselves. (See Appendix A)

Litigation

Court Decisions Related to Trust—The Supreme Court has defined the government's trust obligations towards Indian tribes in two seminal cases—United States v. Mitchell, 445 U.S. 535 (1980)(Mitchell I) and United States v. Mitchell, 463 U.S. 206 (1983)(Mitchell II). A guiding principle of the Mitchell decisions is that a fiduciary obligation of the kind that would support a cause of action for money damages against the United States must be clearly established in the governing statutes and regulations. In some recent lower court decisions, however, courts have upheld money damage claims against the United States even where federal officials had not violated any statutory or regulatory requirements. The Department has been working with the Department of Justice to determine how to respond to these decisions.

The Cobell Litigation—On June 10, 1996, five plaintiffs filed suit against the Departments of Treasury and Interior, alleging breach of trust with respect to the United States' handling of individual Indian money (IIM) accounts. The Court in this action bifurcated the issues for trial. In the first trial, in December 1999, the Court ruled that the Department was in breach of four trust duties. The Court declared, among other things, that the 1994 Trust Reform Act requires: (1) Interior and Treasury to provide plaintiffs an accurate accounting of all money in their individual Indian money trust without regard to when the funds were deposited; and (2) retrieval and retention of all information concerning the trust necessary to render an accurate accounting. The Court also ordered Interior to file a revised High–Level Implementation Plan (HLIP) to remedy these breaches. This decision

was affirmed by the D.C. Circuit Court of Appeals on February 23, 2001. The second trial, dealing with historical accounting has not yet been scheduled.

Most recently, on November 28, 2001, the Court issued an order to show cause why civil contempt should not lie against Assistant Secretary McCaleb and me, in our official capacity, on four counts:

- Failure to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project.
- Committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000 until January 2001.
- Committing a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999.
- Committing a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Cleanup.

On December 5, 2001, the Court ordered the Department to disconnect from the Internet all of the Department's computer systems that house or provide access to Indian trust data. This was followed on December 6, 2001, by a supplemental order to show cause why Assistant Secretary McCaleb and I should not be held in civil contempt, in our official capacity, for issues related to computer security of IIM trust data. The contempt trial has been underway since December 10, 2001.

Tackling the Problems

To address the difficult challenges of trust reform, a number of actions have been initiated in my first year. These include formulating a proposal to reorganize trust management; creating a new office of Historical Trust Accounting (OHTA); and initiating development of a new strategic plan for improved trust management.

Strengthening Departmental Management—A high priority for me has been to identify and recruit seasoned managers who can objectively assess the facts and problems and propose practical solutions so that we fulfill our fiduciary duties to account for the trust assets of Native Americans. The first member of my Indian trust management team was sworn in on July 4, 2001, and the most recent member came on board November 26, 2001. The team is engaged in a day-to-day decision process related to trust reform and trust asset management. Those who have worked with my new team can attest to their extraordinary work ethic, management experience, seasoned leadership and creativity in undertaking complicated tasks. (See Appendix A)

Developing a New Trust Management Strategic Plan—As I discussed above, the "High–Level Implementation Plan" (HLIP), developed by the Department in 1998, has received considerable criticism. It is a non-integrated, task-oriented set of activities related to trust reform that has failed to accomplish significant progress in improving delivery of trust management to the tribes and to individual Indian money (IIM) account holders. We are now working to create a plan to guide future Departmental activities that will provide an integrated, goal-focused approach to managing trust assets.

This new plan will reflect a beneficiary approach to trust management and service delivery. Objectives will include maintaining comprehensive, up-to-date and accurate land and natural resource ownership records, and developing a robust accounting system to manage financial accounts and transactions. An integral aspect of the plan will be the development of a workforce plan, and associated activities, to attract and maintain a qualified, effective workforce.

Creating a New Office of Historical Accounting—To better coordinate all activities relating to historical accounting—an obligation imposed by the 1994 Trust Reform Act and confirmed by the court opinions in Cobell—on July 10, 2001, I created the Office of Historical Trust Accounting (OHTA) within the Bureau of Indian Affairs. OHTA's assignment was further guided by Congressional instructions given in the Conference Report on the Department's fiscal year 2001 appropriations bill which stated the following:

> "...the managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results. This plan must be provided to the House and Senate Committees on Appropriations prior to commencing a full sampling project. Finally, the determination of the use of funds for sampling or any other approach for reconciling a historical IIM accounting must be done within the limits of funds made available by the Congress for such purposes."

The Department will deliver a Comprehensive Plan to Congress to outline the full range of historical accounting activities and to provide a foundation for Congress to evaluate the Department's funding requests. OHTA has already released its "Blue-

print for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts" and "Report Identifying Preliminary Work for the Historical Accounting."

We have requested a $9 million increase in our fiscal year 2003 Budget for this historical accounting, but as I discussed earlier, when a full reconciliation of all accounts is undertaken considerably more money would be required. In responding to the court's requirement that we do a complete historical accounting of each account by conducting a full audit, transaction by transaction, we will face challenges that will pose great difficulty and will be very expensive. Without such an accounting, the plaintiffs in the ongoing litigation will continue to assert, as they have in the press, that they are owed $60 billion to $100 billion. A comprehensive historical accounting is likely to cost hundreds of millions of dollars, and still may not be viewed as entirely satisfactory because of gaps in existing records.

Proposing a Departmental Reorganization of Trust Management—Reformation of the Department's trust responsibilities was, of course, mandated by Congress in the 1994 Trust Reform Act. In its 1999 opinion, the District Court in Cobell declared that the Department had breached certain duties found in the Act. I have heard from many sources—e.g., the Special Trustee, EDS, the Court Monitor, and through budget reviews—that one of the fundamental barriers to trust reform is the disorganized scattering of trust functions throughout the Department. In August 2001, during our formulation of the fiscal year 2003 budget, various proposals and issues were identified concerning the trust asset management roles of the BIA, the Office of Special Trustee for American Indians (OST), and other Departmental entities carrying out trust functions. During the month of September, an additional issue was identified by the Special Trustee regarding OST simultaneously performing both operational responsibilities and providing oversight. The Special Trustee indicated that such dual responsibilities represented an inherent conflict. Based on these and other areas of concern, an internal working group was created.

The internal working group developed a number of organizational options ranging from maintaining the status quo to privatizing functions to realigning all trust and associated personnel into a separate organization under a new Assistant Secretary within the Department. These options were evaluated based on the best method for delivering trust services and other functions to American Indians and Tribal governments.

While this internal review was underway, Electronic Data Systems (EDS) was undertaking an independent, expert evaluation. On November 12, 2001, EDS presented its report "DOI Trust Reform Interim Report and Roadmap for TAAMS and BIA Data Cleanup: Highlights and Concerns" in which it called for a "single, accountable, trust reform executive sponsor."

I decided to propose the formation of an organizational unit called the Bureau of Indian Trust Asset Management (BITAM). This option envisioned the consolidation of most trust reform and trust asset management functions located throughout the Department into a new bureau that would report to a new Assistant Secretary. The new Assistant Secretary would have authority and responsibility for trust reform efforts and for continuing Indian trust asset management. The proposal was reviewed by EDS and received a supportive endorsement. I chose this option because it consolidates trust asset management, establishes a clearly focused organization, provides additional senior management attention to this high priority program and retains the program within the Department to facilitate coordination with the Native American community. Under this proposal, BIA would focus on its other core functions and programs such as providing tribal services, helping tribes with economic development, and education.

On November 20, 2001, I issued an order to establish the Office of Indian Trust Transition (OITT) within the Office of the Secretary and shortly thereafter I appointed Ross Swimmer to be the Director of the OITT. The OITT is currently charged with developing the strategic plan to replace the HLIP, and organizing the Department's efforts to implement that strategic plan.

Mr. Swimmer will be working with all entities within the Department involved in trust asset management to develop the strategic plan. The immediate objective has been for the Department to identify its resources currently being applied to trust management and to try and focus those more carefully on the tasks with the highest priority, as will be set out in the strategic plan.

Fulfilling our Obligations to Consult with Tribes—We are currently consulting with Tribes to involve them in the process of attempting to reorganize the Department's trust asset management responsibilities. To date, Tribes have expressed their dissatisfaction with the consultation process and with Interior's reorganization proposal.

The Department has held a series of consultation meetings. The first was in Albuquerque, New Mexico on December 13, 2001. Six additional consultation meetings in different locations have been held and a seventh is scheduled. The meetings have been very well attended.

A task force of tribal leaders has been formed as a way of facilitating the consultation process. The task force consists of two elected tribal leaders from each region, with a third tribal leader acting as an alternate. I have committed financial resources to support the task force and other consultation efforts. Working with these tribal leaders, we are earnestly endeavoring to achieve progress on trust reform.

This past weekend I held my first meeting with the tribal task force in Shepherdstown, West Virginia. The tribal leaders present listened to us, and also presented various alternative proposals to BITAM. During the course of consultation sessions and the task force meeting, various tribal organizations presented alternatives to Interior's BITAM proposal. We are currently working through EDS and the task force to evaluate these proposals. My initial reaction is that: (1) the various proposals all recognize a need for significant improvement in trust management, and (2) the proposals contain many insightful suggestions that can potentially be merged with portions of Interior's reorganization proposal to achieve broader consensus.

A number of the tribal leaders who participated in the task force meeting this past weekend are actually testifying here today. I am sure they will share their views of the meeting with you. On Sunday, while I was meeting with the task force, I asked them what they would like me to convey to you about the weekend's task force meeting. They wanted me to convey to you several items, including:

- we are confident that together we can solve problems,
- while tribes have rejected the BITAM proposal, I have inherited a problem that is very disturbing, and for which no past administration has come up with a solution,
- there is more to understanding this problem than trust law; there is Indian trust law,
- due to the willingness of tribes to work together, we can address many of the long-standing problems in Indian country,
- we are optimistic that reorganization will set the direction to address many of the issues facing us all,
- Congress must understand that the trust responsibility we all bear comes from treaties under which tribes gave up massive amounts of their resources.

Reconnecting Departmental Computers to the Internet—As I mentioned, on December 5, 2001, as part of the ongoing Cobell v. Norton proceedings, the Court ordered the Department to disconnect from the Internet all of the computer systems that house or provide access to Indian trust data. The interruption in service occurred when the Court issued a temporary restraining order directing the Department to disconnect computers from the Internet. The temporary restraining order came at the request of plaintiffs and was based on a report the Special Master for the Court had prepared on the security weaknesses of information technology security involving individual Indian trust data. The Department is committed to complying strictly with the orders of the Court. Computer systems have been completely shut down where the Department has not yet been able to verify complete, immediate termination of access to individual Indian trust data.

On December 17, 2001, the Court entered a consent order proposed by the Department, over the objections of the plaintiffs. It establishes a process that allows the Department to resume operations of some computer systems after providing the Special Master assurances that problems he identified have been addressed and that security meets a certain standard. The December 17 consent order is the only mechanism under which the Department may utilize some systems or reconnect them to the Internet.

The Department prioritized its requests under the Consent Order to seek first the Special Master's concurrence to operate the information technology systems required to make payments to individual Indians. For example, our initial request to operate a key Indian system was made on December 17, 2001. The Special Master concurred with our intent to operate this system recently. Our December 21, 2001 request to operate another key system (governing mineral receipts) is still pending. It is our intent to make lease payments to individual Indians as rapidly as we are permitted to do so.

To date, we have received concurrence to permit Internet service to the United States Geological Survey and the Office of Surface Mining, Reclamation and Enforcement, along with a few isolated computers located at the National Interagency Fire Center and the Department of the Interior Law Enforcement Watch Office. As

a rough estimate, approximately 90% of the Department is still prohibited to use the Internet. Several other requests have been forwarded to the Special Master recently. We will continue to work with the Special Master to expedite the resumption of the many public service programs which depend upon reconnection to the Internet.

The Department has taken initial steps to prepare a long-term strategic plan to improve the security of individual Indian trust data. The Department intends to bring relevant individual Indian trust information technology systems into compliance with the applicable standards outlined in OMB Circular A–130.

We expect that the core of the dedicated network can be installed during fiscal year 2002, with the anticipated phase-in and shift of data from other systems expected to take approximately three years. The overall cost estimate could be $65–70 million. The final estimate will be determined as we develop a capital asset plan.

Areas Where Interior Needs Help From Congress

These actions are only the beginning of a long, intensive effort that will be required of the Administration, Congress, and the Courts. Significant work needs to be done.

FY 2003 Budget—The President released his fiscal year 2003 budget this week and it includes my recommendations for $83.6 million in spending increases for trust management and accounting. Increased spending for improved trust management is one of the major initiatives of the Department's proposed fiscal year 2003 budget.

Trust Management Expectations—As I mentioned above, the courts expect the Department to deliver trust services based on a very high standard. Congress must recognize that meeting these expectations will require significantly more funding and resources. The courts first look to Congress for its expression of intent as to how the trust program should be managed. Congress must make clear what it envisions the responsibility of the Secretary to be, and provide the resources necessary to carry out those responsibilities, while recognizing the other financial responsibilities and mandates of the Bureau of Indian Affairs and the Department as a whole.

Land Fractionation—The last Congress enacted the Indian Land Consolidation Act Amendments of 2000 in order to prevent further fractionation of trust allotments made to Indians and to consolidate fractional interests and ownership of those interests into usable parcels. As we begin to implement ILCA, we may find that additional incentives are needed to expedite the consolidation of these interests.

Conclusion

I began this testimony by quoting from last year's testimony. As I stated earlier, my concerns are reinforced now that I have completed one year in office.

In conclusion:

- Indian trust asset management responsibility is a very high priority for the Department.
- The Department needs to establish an organizational structure that facilitates trust reform and trust asset management.
- The Department needs to establish an ongoing effective consultation mechanism with tribes.
- The Department must improve the computer support and security to ensure the integrity of Indian trust data.
- The Department is being challenged by litigation which requires significant changes in how the trust is managed.
- It appears that substantial resources will be required to meet the growing expectations of the tribes, the courts, and Congress.
- The tribes, Interior, and the Congress have to reconcile the competing principles associated with trust responsibility and self-determination.

This concludes my testimony, Mr. Chairman. Thank you again for inviting me to testify today.

REPORT-ID: [redacted]
REQUESTOR: [redacted]

BUREAU OF INDIAN AFFAIRS TITLE STATUS REPORT
TITLE INTERESTS HELD IN FEE OR TRUST

DATE: 01/28/98 PAGE: 3

TRACT ID RES PFX NUMBER SFX: [redacted] | TITLE PLANT | STATE | MERIDIAN | RESERVATION NAME: [redacted] | RESOURCES BOTH | EXAMINATION / DATE OF LAST VERIFICATION 10/24/83

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REPORT CONTINUED

APPENDIX B

THE SENIOR MANAGEMENT TEAM

J. Steven Griles, Deputy Secretary and Chief Operating Officer of the Department of Interior, who was confirmed on July 17, 2001. Prior to his appointment as Deputy Secretary, Mr. Griles had eighteen years of senior management experience at the Department of Interior and with the Commonwealth of Virginia. This service included directing national programs for the management of public lands, mineral resources and collection of royalties from federal mineral leases.

Neal McCaleb took office as the Assistant Secretary for Indian Affairs on July 4, 2001. Mr. McCaleb is a member of the Chickasaw tribe of Oklahoma and the former chairman of the Chickasaw National Bank. He is also a civil engineer by profession who served as the Secretary of Transportation for the State of Oklahoma. Mr. McCaleb was also a member of the President's Commission on Indian Reservation Economies and has served eight years in the Oklahoma State Legislature.

William Myers, the Solicitor of the Department of the Interior, took office on July 23, 2001. Mr. Myers is a former Assistant to the United States Attorney General, Deputy General Counsel at the Department of Energy, and has been in private practice with the law firm of Holland & Hart.

James Cason, Associate Deputy Secretary, began his service with the Department on August 13, 2001 and serves as the principal manager of the Office of the Deputy Secretary. Mr. Cason has 11 years of federal experience managing complex public lands, agriculture, and mineral programs, including service as the Acting Assistant Secretary for Lands and Minerals Management. He also has seven years experience as the Vice President for Risk Management of an international technology company. He is currently overseeing a range of trust management projects, including analysis and development of the Department's security systems for our computer and data networks.

Ross Swimmer, appointed as Director of the Office of Indian Trust Transition on November 26, 2001, is a former Assistant Secretary for Indian Affairs. Mr. Swimmer is also the former General Counsel and Principal Chief of the Cherokee Nation of Oklahoma. In addition, he has served as president of the First National Bank of Tahlequah, Oklahoma and Chairman of the First State Bank in Hulbert, Oklahoma. He was most recently the President and CEO of Cherokee Nation Industries, and of counsel to the law firm of Hall, Estill, Hartwick, Gable, Golden and Nelson, PC.

Wayne Smith, appointed Deputy Assistant Secretary for Indian Affairs on October 23, 2001. Mr. Smith is the former Chief Counsel to the California Assembly Republican Caucus and served as Chief of Staff for the California Attorney General.

Phil Hogen, the new Associate Solicitor for the Division of Indian Affairs at the Department, took office on October 25, 2001. Mr. Hogen is an enrolled member of the Oglala Sioux tribe of South Dakota and served as the former United States Attorney for South Dakota. He has also been the Director of the Office of American Indian Trust, and Vice Chairman of the National Indian Gaming Commission.

Bert Edwards, the director of the Office of Historical Trust Accounting (OHTA), took office on July 10, 2001, when OHTA was created by Secretarial order. The OHTA is charged with planning, organizing and executing the historical accounting of Individual Indian Money (IIM) accounts. Mr. Edwards served three years as the Chief Financial Officer for the Department of State, where he oversaw financial, accounting and budgeting operations for a $4 billion budget, 25,000 worldwide employees and 260 embassies and consulates in 130 countries. Prior to that, Mr. Edwards had 24 years experience as an audit partner for Arthur Andersen LLP.

Bill Roselius, who became IT Systems Consultant for Indian Affairs on September 11, 2001. Mr. Roselius has a 42-year career in information technology, working for the Oklahoma Department of Transportation, a number of hardware and software computer firms and major corporations including IBM and Chromalloy.

[The prepared statement of Mr. Slonaker follows:]

Statement of Thomas N. Slonaker, The Special Trustee for American Indians

Mr. Chairman, as the Special Trustee for American Indians, I am pleased to have this opportunity to discuss with the Committee issues pertaining to the reform of the trust responsibility within the Department of the Interior. It has now been 20 months since I was confirmed by the Senate as the Special Trustee. During that time I have reached several conclusions that I would like to share with you regarding the capability of the Government to manage appropriately the Indian trust as-

sets it holds as trustee for specific Indian beneficiaries, comprised of some 300 tribes and nearly 300,000 individuals.

Trust reform, as well as the ongoing delivery of trust services to these individual and tribal beneficiaries, has reached a point where radical measures need to be undertaken now.

Specifically, the Department's discharge of its trust responsibilities, as it is now organized, is inadequate to the demands placed upon it.

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

It is self evident that the nature and scope of the Federal Government's trust obligations in the area of Indian affairs is complex and reflects a history dating to the establishment of the Federal Government. The American Indian Trust Fund Management Reform Act of 1994 addresses itself to a discreet part of those Federal obligations: the physical assets the Government holds or controls as trustee for some 300 tribes and approximately 300,000 individual Native Americans. Like a private trustee or commercial bank's trust department, the Department is responsible for identifiable assets, in this instance primarily land and investable cash, and is required to manage those assets, make fiducially responsible investment decisions, account for the income produced and report fully to the beneficiaries about its stewardship of these Indian trust assets. Like every other trustee, the Government trustee is required to know at every moment what assets are held in trust, how those assets are invested and managed and to whom the proceeds of that management belong and are to be paid. The Reform Act has erased any doubt that those traditional trust duties are Federal trust duties.

The problems that trouble the Department are management problems. The lack of management capability is signaled by the evident need for senior managers with experience in delivering trust services and operating trust systems. Additionally, there is a critical need for senior level, project management skills applicable to large trust reform projects.

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

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

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

I also believe that the trust organization needs to be detached from the Bureau of Indian Affairs and placed on its own footing.

It has been proposed by the Special Trustee's Advisory Board on December 7, 2001, a group created by the 1994 Reform Act, that the entire Indian trust function be removed from Interior and lodged in a self contained organization to be created by Congress. This thought was an initiative of that Board. It is based in large part on the Department's inability over the many years to identify and cure its management problems, and is a suggestion that has merit.

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

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

For instance, the Office of the Special Trustee receives appropriations for trust reform activities, no matter where in Interior the reform project is managed. OST

then initiates the funding of projects when and if adequate plans and management appear to be satisfactory. In some instances, we have found it necessary to interrupt funding when expected project success is not being achieved. This process has proven helpful to the reform process and has given the Special Trustee a useful and independent voice in that effort. I believe this budget control over the reform of the trust function should continue to be a part of OST's responsibility. The independence and informed objectivity of the OST, I believe, is essential to achieving lasting trust reform.

Reform can be done with the right leadership, the necessary accountability, and consequences for non-performance.

Thank you.

[The Department of the Interior's response to questions submitted for the record follow:]

RESPONSES TO SUPPLEMENTAL QUESTIONS FROM DEMOCRATIC MEMBERS OF THE HOUSE RESOURCES COMMITTEE

Question (1): Are you committed to full disclosure of all the problems with Bureau of Indian Affairs management of the trust assets regardless of any settlement that may or may not be negotiated? Please explain.

Answer: Interior is committed to the full disclosure of all problems related to the management of Indian trust assets. The Department is equally committed to seeking out, addressing, and resolving trust asset management problems in all our relevant bureaus and organizations.

Question (2): Without a full disclosure and acknowledgement of the scope of the problem, do you expect any proposed solution to work? Without a full disclosure, how can you expect Indian tribes to trust the federal government?

Answer: Interior is committed to full disclosure. We will continue to search for and disclose problems. Our disclosure and acknowledgment of the scope of the problem to date explains why we are pursuing a reorganization of trust functions within the Department.

Question (3): Are you committed to cleaning up the backlog of incorrect and missing data about trust assets, and doing so in cooperation with tribes? Please explain?

Answer: Yes we are committed to the cleanup of the backlog and a major effort is already underway. Government subject matter experts are working with Electronic Data Systems (EDS) on determining the data validation universe and priorities for corrective action. The Tribal Task Force work group will be incorporated into this effort. It is important to recognize however, that no one expects that all data since 1887 can be found and validated by records. Interior realizes it will need to address how to manage the problem of missing information.

Question (4): As a possible solution to conducting a historical accounting of trust accounts, would you be willing to grant money to tribes, rather than the BIA, so tribes can go through the backlog?

Answer: Considerations regarding the Privacy Act and fiduciary requirements may limit the role tribes can play in accounting or with the data validation effort, but all options will certainly be considered in determining how to effectively and efficiently fulfill the requirements of the accounting. If tribes have access to individual account information or have proposals for supporting such an accounting, they are encouraged to contact the Office of Historical Trust Accounting.

Question (5): What immediate improvements do you think are needed in the Department to properly manage tribal trust assets?

Answer: A single responsible and accountable agency or division within the Department of the Interior with a high level manager dedicated to the task of managing Indian assets is needed. This conclusion is supported by an EDS recommendation that the Secretary have a single, executive sponsor in charge of trust reform and management. If this work continues to be one of many responsibilities within the Bureau of Indian Affairs, we believe it will be difficult to get the attention needed for trust asset management and accountability. We are also working with IT experts and the Court to improve security of trust data. Other necessary improvements are explicated in the Status Report to the Court number Eight dated January 16, 2002.

Question (6): As you may know, the Navajo Nation Council voted on January 26 to disburse $537,000 to hundreds of financially distressed Navajo families who have not been paid their gas and oil royalty checks by the De-

partment of the Interior since November. Do you believe that the Navajo Nation as well as other tribes are entitled to be reimbursed for the grants they have distributed and will you work to see that these tribes are properly reimbursed?

Answer: Our responsibility is to make payments to the individual Indian beneficiaries. We assume that the Navajo Nation has an agreement with its members with regard to reimbursement once the Department is able to make payments to individuals.

Question (7): Did the Department of Interior approach Judge Lamberth and indicate that a shut down of the computer system would create an economic hardship on those who are dependent on their royalty checks to survive? A simple yes or no answer will suffice.

Answer: A simple yes or no answer, in this case, does not suffice. The plaintiffs filed a motion requesting that Interior disconnect systems from the Internet on the night of December 4, 2001. At the December 5, 2001 hearing before the Court, Interior, through the Department of Justice, advised that it had not had adequate time to assess fully the impact of disconnection. Counsel requested two days in which to complete the assessment and report to the Court. Notwithstanding the Department's request for additional time, the Court ordered that all computers housing Indian data or having access to Indian data be disconnected from the Internet. Because of the interconnectedness of Interior's systems, this resulted in an immediate shutdown.

Under the Indian Self–Determination and Education Assistance Act tribes have assumed responsibilities for trust management through agreements with the BIA and are managing those assets and accounts effectively.

Question (8a): How does your proposal preserve the viability and validity of contracts and compacts negotiated to date?

Answer (a): Many Indian tribes are doing an effective job of managing trust assets and administering federal program money. The goal of the Department is to continue extending self-determination and self-governance contracts to tribes with the expectation that some tribes become their own resource managers to the greatest extent possible.

The proposal for a trust asset management bureau is not intended to interfere with any tribal contracts or compacts. Oversight and monitoring of tribal contractors will continue through any new agency. This level of oversight is necessary because the Secretary remains ultimately responsible under the law for trust management and can not contract that responsibility away.

Question (8b): Given the success of tribal management of trust functions, why does your proposal not specifically call for further technical support and funding in order to expand tribal management of trust functions? Isn't this one clear example where trust management is already working effectively?

Answer: The BIA currently provides technical support and funding to tribes for tribal management of trust functions. The Department oversees tribal management of trust assets and functions under self-determination and self-governance agreements. Our proposal continues that support and oversight. We will consider the need for additional technical support as tribes expand their management of trust assets and functions.

Question (8c): What will the role of the tribes be in managing trust assets in the future?

Answer: Management of trust assets by tribes should continue in the same manner as is currently done. Before contracting with the tribe, the Department reviews and determines that the tribe has the ability to account for funds and assets and has expertise in the management of trust assets. Tribal management of individual Indian trust assets needs different consideration. Trust services for individual Indians may be provided by a tribe, when appropriate, as long as the contracting tribe is able to exercise the same level of fiduciary duty and maintain the same level of service that the Secretary provides. These issues will continue to be addressed regardless of the reorganization initiatives.

The BITAM proposal suggests that "trust" and "non-trust" functions be separated.

Question (9a): Can such functions really be separated as a matter of law or policy?

Answer: "Trust" functions refer generally to assets of land, natural resources and money. "Non-trust" functions refer generally to service areas such as law enforcement, health, housing, education, economic development and general welfare. Separating the two functions is not intended to diminish the importance of either. However, separation does recognize that certain assets are held by the United States for the benefit of individuals or tribes while other items are more in the nature of serv-

ices or federally funded programs. While the Federal government has a trust obligation for both functions, we believe these "trust" and "non-trust" functions can be separated for management purposes.

Question (9b): Do not all Indian programs within the BIA reflect the government's approach to fulfilling its responsibilities under its trust relationship to the Indian tribes?

Answer: Yes

Question (9c): As a practical matter, is it not true that BIA personnel at the local level perform a range of duties, which cut across your BITAM proposal's dividing line between "trust" and "non-trust" functions?

Answer: In many instances, employees at all levels of the BIA and in particular at the local levels do perform duties that cross over many functions. This can create problems of accountability, confidentiality and conflict of interest. For the same reasons that a commercial bank and its trust department must be independent from one another, there is value to having trust officers at the agency level who are separate from other staff.

Question (9d): By creating a new bureau, are you not duplicating the federal bureaucracy assigned to these intertwined matters?

Answer: It is believed that there will be little duplication of effort. In fact, many of the trust employees can be co-located at BIA Agency offices as well as some of the Regional offices. The work performed by trust employees should complement other activities of the BIA. Administrative overhead (such as personnel, procurement, etc.) could be shared.

The Department recently began a consultation process with tribes regarding the restructuring of the Department's trust account and trust asset management. Despite unanimous, unequivocal, nationwide condemnation by tribal leaders of the BITAM proposal to restructure the Department by creating a new agency within the Department, that proposal is still on the table.

Question (10a): Why has it not been withdrawn?

Answer: The concept of an independent bureau within the Department was developed for discussion with tribes after considerable thought and analysis. The Secretary, the Special Trustee for American Indians and the Assistant Secretary for Indian Affairs support the concept. The concept was further endorsed by the consulting firm of EDS, which was hired to perform an analysis of the progress of trust reform.

The Department's proposal has not been withdrawn because it addresses the problems identified with the way the trust functions are currently managed in the Department. In addition, most of the criticism we have received to date has been directed at the process of consultation rather than the proposal itself.

The Secretary appreciates tribal input and alternatives and is open to the different plans currently being submitted. At the same time, the BITAM proposal will remain on the table as what we expect will be one of many options for the Secretary to consider. The Department is committed to trust reform and looks forward to working with the tribes and in particular the joint task force on BIA Trust Management Reform, on developing a reorganization that will accomplish the goal of better trust asset management and accountability.

Question (10b): What role will the new tribal task force have in developing a plan?

Answer: The tribal task force will review all proposals and will help develop the criteria against which all proposals will be evaluated. We have asked EDS to perform the actual evaluation according to those criteria and those results will be presented to the task force.

Question (10c): To what extent have you and your staff considered alternatives prepared by the tribes and what process will be used by the Department to consider the alternatives?

Answer: A two-day review of tribal concerns and proposals was held at the Department's training center in Shepherdstown, West Virginia, with the tribal leaders task force. The Secretary was in attendance during a review of tribal proposals. The Department continues to receive input from tribes and from the tribal leaders task force. As stated above, criteria for evaluating the various proposals will be developed with the tribal task force, and EDS will present an evaluation of all proposals using those criteria.

Question (10d): Will you accept an alternative to your proposal developed by tribes if it addresses all of the underlying concerns that BITAM seeks to address?

Answer: The Secretary has told the tribes that she would accept an alternative proposal if it accomplishes the objective of improving accountability of trust management and satisfies the concerns that led to the development of the BITAM proposal.

Your consultant, Electronic Data Service (EDS), determined that no matter what structure is implemented to handle trust management, significant resources are needed to hire additional staff and to train existing and new staff.

Question 11: How do you propose to fund such needs?

Answer: Trust asset management is a unique function within the federal government. The Secretary has requested additional funding for the trust reform and management functions and will continue to be supportive of efforts to obtain funding from Congress as appropriate.

Judge Lamberth in the Cobell case will be deciding sometime over the upcoming weeks whether to appoint a receiver as the plaintiffs in that case have requested.

Question 12: How will the Department's BITAM proposal be affected by the appointment of a receiver?

Answer: A receivership of this kind is unprecedented. We would need to review the type and duration of any receivership that may be created by before we can answer this question.

The President's fiscal year 2003 budget proposal contains language that states "the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds which the beneficiary can determine whether there has been a loss."

Question (13a): Do you believe this language is adequate enough to revive claims of tribes that might otherwise be time-barred from filing claims against the United States for mismanagement of tribal trust funds?

Answer: No, it is the Department's position that the language in the President's fiscal year 2003 budget proposal does not revive claims of tribes that were or are time-barred. The appropriations language has been read very broadly by at least one court, which interpreted the appropriations language to revive claims that had already become time-barred before the appropriations language was adopted, and to apply to claims beyond trust fund claims. In other words, the appropriations language has been misconstrued to make the United States liable for claims far beyond the claims at which it was directed.

Now that Congress has passed S. 1857, a pending enrolled bill encouraging the negotiated settlement of tribal claims by establishing December 31, 1999, as the date on which tribes are deemed to have received the Andersen reconciliation reports, and assuming the bill is signed into law, the appropriations language quoted above no longer appears to be necessary. The Department believes that S. 1857 fully addresses the tribes' legitimate statute of limitations concerns and therefore obviates the need for the 2003 budget language. S. 1857 would allow tribes to postpone filing claims and facilitate voluntary dismissal of those already filed, enabling the United States to engage in negotiations concerning tribal trust accounts with interested tribes to resolve their claims.

Question (13b): Do the "Reconciliation Reports" conducted by Arthur Andersen and provided to tribes in 1996 constitute a full accounting of tribal trust funds?

Answer: The reconciliation was undertaken in response to Congressional directives in 1988, 1989 and 1990, that BIA take steps to reconcile Indian trust fund accounts as accurately as possible back to the earliest practicable date. Pursuant to these directives, BIA commenced planning and preparation for the reconciliation project in 1990. As part of the planning process, reconciliation procedures were agreed upon by the Department, OMB, and tribal representatives as the best approach, and incorporated into the contract with Arthur Andersen. The Department spent over $20 million on the Andersen reconciliation of tribal accounts; however, the Department was not able to obtain an independent certification of the work as directed by Congress. Further accounting for the tribal accounts will be very costly and will require that Congress provide supplemental appropriations for that purpose.

Your testimony highlights the problem of fractionation of trust allotments and suggests the need for incentives to expedite the consolidation of these interests. The President's budget states that consolidation is "expected to reduce the Government's costs of managing Indian lands." The President's plan, however, proposes a decrease of $3 million for the Indian land consolidation account.

Question 14: Can you identify for the Committee the increases and decreases in the President's budget proposal for trust management programs throughout the Department of Interior and include a description of those programs?

Answer: The 2003 OST budget includes program increases of $50.3 million for trust reform initiative projects, including $30.3 million for special work projects,

$2.0 million for breaches projects, and $9.0 million for historical accounting activities, and a one-time decrease of $3.0 million for Indian Land Consolidation activities.

Program increases for special work projects include $2.5 million for OST Data cleanup, $5.0 million for BIA Data Cleanup, $6.0 million for TAAMS, $4.0 million for Records Management, $4.0 million for Policies and Procedures, $6.0 million for Risk Management, $5.1 million for Trust Improvement Coordination. Increases for breaches projects include $300,000 for Workforce Planning and $1.7 million for Systems Architecture. The increase for historical accounting includes $9.0 million for records collection and reconciliation of IIM accounts. A $2.2 million budget reduction is requested for training due to completion of some phases of training. The Indian Land Consolidation program is funded at $8.0 million, a one-time reduction of $3.0 million. In addition to appropriated funds, it is expected that carryover funds will be available in 2003 to maintain on-going program activities.

To ensure that trust management improvements are sustained, the BIA budget for 2003 includes a program increase of $34.8 million. Trust activities within BIA focus on sound management of natural resources, accurate and timely real estate transactions, and sound leasing decisions to preserve and enhance the value of trust lands. Program increases include $15.8 million for trust services to provide real estate appraisals, surveys, and other services, probates, and land titles and records processing; $4.5 million for natural resources programs to manage lands that generate revenues; $6.0 million for tribal courts and social workers; and $8.5 million for trust reform oversight ($3.0 million) and information technology improvements ($5.5 million).

These activities are discussed in greater detail in the OST and BIA Budget Justifications that are provided to the Committee under separate cover.

Question 15: why characterize BITAM proposal as a consolidation of trust functions when the plan really only consolidate trust function of the BIA?

Answer: All trust functions within the Department are being considered for consolidation in the new organization. This would include trust services from other bureaus such as the Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, Office of the Special Trustee for American Indians, Minerals Management Services as well as BIA. The Department is seeking advice from tribal leaders regarding the best organizational approach on how to do this. Until advice and recommendations are received, the Department is remaining open to alternative organizational approaches that will accomplish the goal of satisfactory trust management and accountability.

Question 16: With respect to the Department's reprogramming request to tap into fiscal year 1902 funds, will the Department notify the House and Senate Appropriations committees of its ongoing dialogue with the tribal task force?

Answer: Yes. We will make every effort to keep the Committees informed of the status of the reorganization effort.

Question 17: Will the Department refrain from submitting future reprogramming requests regarding trust management reform until an agreement is reached with the tribal task force?

Answer: It is not known whether an agreement/consensus will be arrived at with the task force. We are hopeful that can occur. If we cannot arrive at an agreement the differences will be well documented. However, trust reform is also under the jurisdiction of the District Court and Court orders must be complied with as well as acts of Congress and regulations. Reprogramming requests will be made only when necessary to carry out the responsibilities of the Department and the tribes will be made aware if any reprogramming requests are made.

Question 18: Can you explain how the management of an Indian trust differs from a trust in the private sector, particularly with regard to the rights of a beneficiary?

Answer: Trusts in the private sector are managed according to the instrument establishing the trust and by state law. However, Indian trusts do not have a single instrument that establishes the trust and provides guidance for managing it. Instead, the trust is governed by statues, treaties, and executive orders that have been enacted over a period of time. The rights of the beneficiaries are similar in some respects but vary in others. The rights are the same in that the trustee should manage the trust corpus with a high degree of care, skill, and loyalty. However, the rights of the beneficiary are different when it comes to integrating the other roles of the Secretary. For example, courts have recognized that the Department, as trustee, can represent conflicting tribes on the same issue because of her overall duties as Secretary. Whereas, the private trustee does not have these other duties and would not be called upon to represent two conflicting beneficiaries. Also, Congress

has enacted statues, such as the Indian Self–Determination and Education Assistance Act which provide specific instructions to the Secretary to allow tribes to manage the trust corpus while retaining the Secretary as the trustee to approve of commercial uses such as leasing. Finally, in determining whether the beneficiary is entitled to damages for breach of trust, courts must look to statutes to determine whether Congress intended to subject the United States to money damages for breach of trust. Some actions which may be breach of trust in a commercial setting may not entitle the beneficiaries to money damages against the United States.

Question 19: It is true that the Interior Department will be requesting that a new trust asset management business model be conducted of the Department's trust reform efforts?

Answer: Yes, EDS has been engaged to examine and document the current, or "AS–IS" business practices. The Department will then examine the documented AS–IS processes and determine what future changes need to be made, or the reengineered TO–BE processes. The Department will incorporate applicable laws, regulations, and policies into the analysis. An independent validation of these reengineered processes will take place.

Question 20: Currently, how many outstanding prime contracts does the Department have on trust reform efforts? Of these, how many are with businesses that are Native American Indian owned Small Disadvantaged Business Owned, 8(a), or women and Service Disabled Veteran Owned?

The Office of the Special Trustee and the Office of Historical Trust Accounting have contracts with:

- Arthur Andersen, LLP
- Bankers Trust
- Bloomberg, Inc.
- Booz Allen Hamilton
- Chavarria, Dunne & Lamey, LLC
- DataCom Sciences, Inc.- Native American owned, 8(a)
- Deloitte & Touch LLP
- Electronic Data Systems, Inc.
- Ernst & Young LLP
- Grant Thornton, LLP
- Gustavson Associates
- Hughes and Bentzen PLLC
- Iron Mountain
- KPMG
- L R Compton—Native American owned, 8(a)
- Los Alamos Technical Associates
- Millican & Associates
- NAID, Inc.—Native American owned, 8(a), Disabled Veteran
- National Opinion Research Center at the University of Chicago
- Science Application International Corporation
- SEI Investments. Inc.
- Upper Mohawk Inc.

The Bureau of Indian Affairs currently has six trust reform contracts:

- ATS—small business.
- NATEC—Native American, woman owned
- Data Com—3 contracts which consist of data cleanup, probate file processing, and posting and recording. These contracts are with Native American and small business owned companies.
- NAID—Native American, Disabled Veteran, 8(a) owned.

The Minerals Management Service currently has 11 Prime Contracts:

- Accenture—One currently active contract for development, operations and maintenance of automated systems that manage and store trust asset data.
- Peregrine Systems, Inc,—One currently active contract for the management of minerals revenue and production data submitted by revenue and production reporters. The data is associated with mineral leases on Indian Tribal and Allotted lands and Federal land.
- Cooperative Agreements with Indian Tribes—Eight currently active contracts with Indian Tribes to conduct audit and compliance work related to mineral revenues associated with leases located on Tribal lands. These agreements are authorized under Section 202 of the Federal Oil and Gas Royalty Management Act.

Navajo Tribe	Southern Ute Tribe
Shoshone/Arapaho Tribes	Ute Mountain Tribe
Jicarilla Tribe	Blackfeet Tribe
Ute Tribe	Crow Tribe

- Wyandotte Net Tel——One currently active contract was awarded under the Franchise Authority of MMS to Wyandotte Net Tel on August 18, 2001. Wyandotte Net Tel is tribally owned by the Wyandotte Indian Tribe. The five year Indefinite Delivery, Indefinite Quantity type contract has a not to exceed ceiling of $100,000,000 and was awarded under the Small Business Administrations 8a program. The contract is for telecommunications and information technology supplies and services for various government agencies. White Sands Missile Range and the Army at Ft. Monmouth New Jersey are the major users of the contract.
- Other Agreements—One currently active Intergovernmental Personnel Act Agreement with the Shoshone/Arapaho Tribes for a tribal auditor to work in the Farmington Indian Mineral Office.
  *Memoranda of agreement with the National Archives and Records Administration regarding the storage and inventory of records.
  *Memorandum agreement between MMS and the Office of the Special Trustee (OST) under which the MMS Minerals Revenue Management provides cost-reimbursable services to the OST.

Question 21: For the future, how does the Department plan to ensure that it remains in compliance with the "Buy Indian Act", Small and Disadvantaged Business Owned Act, 8(a), and the Women and Service Disabled Veteran Owned Act?

Answer: All contracting officers within the Department are knowledgeable of the procurement laws including those listed in the question. Every effort is made to ensure that laws and regulations are followed and this will continue to be the practice of the Department in the future.

Question 22: Pursuant to a question from Mrs. Christensen, you agreed to provide the Committee with information regarding the amount of money being spent this fiscal year on the Office of Trust Transition.

Answer: The Office of Indian Trust Transition anticipates expenditures for its planned activities will approach $200,000 by the end of the current fiscal year.

The CHAIRMAN. Thank you, Madam Secretary. We appreciate you being here and appreciate your testimony.

This is the first time we have ever had a full hearing in this room, so we are just asking people, as they come in, to sit down. We are going to take the rules of the Committee, and we will recognize people as they came in, except for Mr. Rahall.

Let me caution the members to stay within your 5 minutes. This is going to be a long hearing. I am not going to call on everyone, but what I will do, if you want to speak, will you just raise your hand, and then we will give you that opportunity.

Mr. Rahall, we will turn to you.

Mr. RAHALL. Thank you, Mr. Chairman. I will be very quick. I want to thank Secretary Norton for taking the time to be here today, along with the gentlemen on either side of her.

You mentioned that you will be leaving after your testimony, so you will not be hearing the tribal leaders' testimony or panels that are coming next; is that correct?

Secretary NORTON. That is correct. Unfortunately, I need to leave today.

Mr. RAHALL. I understand. But you will have somebody here during the whole rest of the panel?

Secretary NORTON. My top people who are involved in this will be here to listen to the remainder of the panels.

Mr. RAHALL. Thank you. I must say it was very good testimony, a good presentation of the problem here, and a good history of the problem, and there is not much of your testimony with which I could disagree, of course.

But the central issue, I think, is rather each individual Indian and tribal account accurately reflects, of course, the amount of money that it should contain. As you have said, and as we all know, you are under a court order to conduct an historical accounting of the individual Indian money accounts. So my question is can the Department accomplish that task? And, if not, what is the alternative to conducting such an historical accounting?

Secretary NORTON. Our Office of Historical Trust Accounting is currently formulating a complete plan for how that might be accomplished, and it is a fairly complex task. There are some aspects of accounting that can be done fairly quickly and in a fairly straightforward way.

For example, some of the tribes received large payments as a result of lawsuits, and that money came in in a large amount. It has gone out to people in specific amounts. We can trace those and verify those in a fairly straightforward way.

There are other records that have been lost through time, that have been destroyed, fires or other decay of records is unavoidable when you look back over many years. Unfortunately, there are some things we may never be able to piece together, and so we are laying out exactly how the task would look to go back and try to identify as much as we can. We think it's going to be important to present that to Congress and to seek the funding that will be necessary to do an accounting. We are moving forward with undertaking a complete accounting.

Mr. RAHALL. So you cannot categorically state here today that you are capable of doing the historical accounting that is necessary.

Secretary NORTON. I am not sure what I have not answered here.

Mr. RAHALL. You cannot do a full historical accounting. You have mentioned the documents that may have been burned or destroyed for one reason or another. So the answer would be, no, you cannot do a full historical accounting.

Secretary NORTON. We have the initial—we have, essentially, our bank records. The Historical Accounting is essentially trying to find external sources to verify what is in our records. So we have essentially the bank's records. Now we are trying to find canceled checks or invoices that would be the second check on what is in our records, and it is the canceled checks or the external invoices, those are the things that are the challenge in trying to piece together.

And so we have a great deal, well, we can certainly say with assurance that not every piece of paper is out there—

Mr. RAHALL. And a lot is not—

Secretary NORTON. So it would be possible to find every piece of paper because there are pieces of paper that just simply do not exist today.

Mr. RAHALL. Some of that could be rather substantial and of major consequence.

Secretary NORTON. At this point, I don't know what the universe of that is. Part of what our office is doing is just checking to see how much of that information still exists. There are fairly extensive

records, for example, that cover a number of time periods. There have been audits done in the past that are fairly complete. There are other time periods where it is not as complete.

One of the things that we need to assess is just how much information is out there and available.

Mr. RAHALL. Thank you, Mr. Chairman.

The CHAIRMAN. Madam Secretary, Mr. Rahall talked about this accounting thing. What period of time, to the best guess you can give us, will this cover?

Secretary NORTON. That, Mr. Chairman, is still an unresolved question. The Court has asked for an accounting that would cover the funds regardless of when they were put into the system. There is still a question as to whether there is a statute of limitations and how that might affect the accounting, but we are proceeding to gather documents at this point that would cover the entire range.

The CHAIRMAN. The Committee has been under the impression that we can go back all of the way to 1887.

Secretary NORTON. That is certainly, you know, we are trying to acquire all of the historical documentation.

The CHAIRMAN. What kind of money are you looking at to do an accounting reconciliation all of the way back to 1887? Have you projected the cost of this?

Secretary NORTON. We, as part of our planning process, are trying to do some cost estimates. It is certainly in the hundreds of millions of dollars range.

The CHAIRMAN. The tribes feel that consultation was an afterthought, that you conducted it subsequent to a decision rather than concurrent with it. Why did you send up a reprogramming request before you even started consultation?

Secretary NORTON. Under the consultation requirements, we are essentially to begin consultation once we have a plan that is capable of having an intelligent discussion, and we felt that we began consultation at that point. We also sent a reprogramming request that was fairly open-ended, that was something that would give us the opportunity to begin the reorganization and the transition process and would allow those things to be fleshed out as time went on.

It has been a process of learning about the consultation approach. We wanted to move forward on our proposal. We felt that we had received fairly consistent feedback on the weaknesses within our organization. It is very important that we move forward quickly with fairly dramatic change in order to have significant reform. We want to work with the tribes to be sure that what we are doing is appropriate.

Although we have asked for the reprogramming, although I continue to push forward with our proposal, that is because I want to see something actually materially achieved from this. We believe that there is a lot we can learn. There are ways of improving our proposal, and we are open to doing that. What we don't want to do is miss the opportunity to move forward quickly.

The CHAIRMAN. How will you ensure that trust management is undertaken constructively with tribes and IIM accountholders in a

manner that is directed toward developing a true relationship based on transparency and honesty?

Secretary NORTON. I think our task force has provided a good building block for that, and it gives us the opportunity to reach out further to tribes because of the leaders that are involved in that. We are building our relationship with the tribes and want to obtain input from them.

The CHAIRMAN. Thank you very much.

As this Committee knows, I normally hold my questions to the last, but I am going to be turning this over to J.D. Hayworth in a short time, so I wanted to ask my questions.

Now, on the minority side, those who want to speak, would you raise your hands.

All right, we are going by who came first then. Why did I even ask?

[Laughter.]

The CHAIRMAN. Mrs. Christensen, you were the first one here, and then Mr. Kildee.

Mrs. Christensen, you are recognized for 5 minutes.

Mrs. CHRISTENSEN. Thank you, and I will try to be brief.

Thank you, Mr. Chairman, for this hearing. It is not the first hearing on this issue that I have been to, and I hope that as we leave here we are going to see more of the change that the Secretary talked about.

I want to welcome the Secretary to the hearing. We appreciated your testimony. Like our Ranking Member Rahall, it is very complete. I have really no quarrel with it and will begin by taking you at your word.

I have a question because there is an issue that whenever we have hearings that involve the Native American tribes, one of the issues that is always in question, that always seems to be at the crux of the problem is the respect for the sovereignty of the tribes.

So I wanted to ask you, as the current Secretary, can we proceed on the principle that your office fully respects the sovereignty of the tribes as a principle that will guide the future deliberations on this subject? Especially in light of the fact that consultation did not take place as the plan was being developed?

Secretary NORTON. We certainly do respect that sovereignty, and one of the things that led to concern on the side of the tribes was a misperception that we wanted to take back the management of assets that many of the tribes had already assumed. Quite the contrary. I think that it is best for the tribes to be actively involved in managing their own assets, and I want to encourage that and see that whatever we do is not an obstacle to the tribes' ability and initiative to do that.

Mrs. CHRISTENSEN. Thanks. Just two more, I think, brief questions.

How much is being spent in this fiscal year on BITAM. And related to that, there as a question that your proposal weakened the BIA. If you would comment on that or there was some concern about that.

Secretary NORTON. At this point, BITAM itself does not exist. We have an Office of Trust Transition that is focusing on our strategic planning and figuring out how we move to the future, whatever

that future is, and there is a lot of common work that needs to be done, whichever course of action we take. So there is nothing specifically on BITAM in the President's fiscal year 2003 budget request. We continue the budgeting under the Office of Special Trustee and the BIA, so we do not assume the existence of BITAM in the President's budget request.

Nevertheless, we are moving forward on the trust reform issues, and I can provide you with the dollar figures.

Mrs. CHRISTENSEN. But how much is being spent in this fiscal year?

Secretary NORTON. Let me get that information—on BITAM itself?

Mrs. CHRISTENSEN. Yes.

Secretary NORTON. Technically, zero.

Mrs. CHRISTENSEN. On the Office of Transition? If you don't have those figures, if you could—

Secretary NORTON. I would be happy to provide that for you.

Mrs. CHRISTENSEN. It is my understanding that some tribes receive services directly from BIA, and others manage some of the programs through 638 contracts, and others manage them through self-governance compacts. How does the plan for the new trust agency affect the different styles or deliberately reduce services to the tribes or does it not?

Secretary NORTON. One of the difficult issues we need to grapple with, whatever the organizational structure looks like, is the sometimes conflicting issue of the standard to which the Department is held in its trust responsibilities and our ability to have the tribes do their own contracting through 638.

If we are held to a financial accounting standard that is the same type of accounting standard that applies for any major financial institution, then we may perhaps also have to hold the tribes to that standard in their own administration of their contracts. Now I don't know that that is what the tribes want to see, I don't know that that is what Congress wants to see, but that is one of the issues that I think we need to grapple with is how we allow the tribes to go forward with their own handling of their own affairs, have a high standard for that, without making it so high that nobody but a huge financial institution could meet it.

The CHAIRMAN. The time of the gentlelady has expired.

Mrs. CHRISTENSEN. Yes, my time is up. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Arizona, Mr. Hayworth?

Mr. HAYWORTH. Thank you, Mr. Chairman.

Madam Secretary, welcome. Thank you for complete testimony in a problem, if we call it vexing, that is probably the understatement of two centuries. I recall a task force that the gentleman from Michigan and I co-chaired back in the 104th Congress dealing with this particular challenge. As has been pointed out by both the Chairman and ranking member, this is something that has involved so many prior administrations. We appreciate the efforts being made to deal with it.

I think it is important to amplify portions of your testimony. So, for the record, let me ask you, Madam Secretary, what is the current standard of accountability for dealing with Indian trusts?

Secretary NORTON. It is a much more complex issue than one might think. We have a fiduciary responsibility. The courts have expressed it in that way. At some point, we have been held to something that is like a profit-maximizing-type of standard. In other ways, I think we have a standard that is too—it allows the tribes, for example, to have self-governance to take over contracting, where it appears that what Congress wants is something a little less than the rigorous financial management structure. It is an evolving standard, and we have the statutory standards that are set out. The courts have, at times, looked to common law to amplify those statutory standards. It is also dependent upon the treaties that we may have with particular tribes, so it is not an easy, clear answer.

Mr. HAYWORTH. Well, following up on that, I am interested in your perception and opinion. As we have noted, this has carried into the third branch of Government, with the judiciary being involved, court cases continuing, you under a court order, testimony going on today. Based on that, your training in the law and upon your assumption of this role, as Secretary of the Interior, in your opinion, what standard does the court believe should be applied to managing Indian trusts?

Secretary NORTON. Well, I don't want to reflect on the particular litigation in which we are involved, but in general I think the courts are moving closer to a financial accounting standard, something that would be similar to the standard for a major bank or trust company, and that is what has come out as particular types of issues have been litigated. That, again, depends on the individual statutes, and treaties and so forth.

Mr. HAYWORTH. Thank you, Madam Secretary.

If I could, I realize I have about a minute and a half left, just to address a couple of questions to our special trustee, Mr. Slonaker. I thank you for being here today with the Secretary.

Just to make it part of the record, in your role as Special Trustee, do you report directly to the Secretary?

Mr. SLONAKER. I do.

Mr. HAYWORTH. And what are your performance criteria for progress for trust management?

Mr. SLONAKER. Basically, the 1994 Reform Act, and the accounting, and the accountabilities that are embodied within that plan.

Mr. HAYWORTH. Have you submitted a plan in this regard?

Mr. SLONAKER. Well, the first Special Trustee submitted a strategic plan, which was partially rejected by the then-current Secretary. That evolved into what I recall more of a tactical plan known as the High-Level Implementation Plan. That evolved into an HLIP-2, if you will. At this point, in my personal view, we see ourselves as a Department evolving yet another plan which will be what I recall more strategic. It will be based, in large part, not only on the analysis of the Department itself, but also on the assistance we have gotten from some outside consultants who have looked at this independently.

Mr. HAYWORTH. With this evolution in plans, do you feel safe in saying you are making progress? Are you able to gauge any type of progress in this regard?

Mr. SLONAKER. I think there is progress around the edges. My concern is that the progress that has not been made by the Department, in terms of the major systems and the major projects which are the heart of trust reform, if you will, and the heart of our obligation as a Government to the beneficiaries, and that would encompass such things as the accounting system which the Secretary referred to earlier, it would also include the probate process, and it would include, very importantly, what is commonly known as the data clean-up aspects of this reform.

I don't believe that there has been sufficient progress on those areas which, as I say, are really the heart of trust reform.

Mr. HAYWORTH. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Michigan, Mr. Kildee? Mr. Kildee has been a champion on Native American issues for many, many years. We appreciate it.

Mr. KILDEE. Thank you, Mr. Chairman. Thank you, Mr. Hansen.

I look out, I have been here in Congress now this is my 26th year, and I recognize the majority out there. I have worked with some of you. Some of you have worked for me, and hopefully I am working for all of you. But it is good to see all of you. We have known each other for many, many years.

I cannot say, you know, who is on which side of this issue because I think we are all on the side of justice, and I think that was we work closely together to achieve the maximum, the optimum justice, the better we will serve the Indians who deserve this justice so much.

I read the Constitution regularly, and it says the Congress shall have the power to regulate commerce among foreign nations, several States and with the Indian tribes. So, ultimately, Congress has to be involved in this, and we want to be deeply involved.

You have received an order to come up with a plan, and in that order, you were told to consult with the affected Indian Nations and individuals. To what degree was that consultation concurrent, as you developed the plan, and to what degree was that consultation subsequent to your development of the plan, Secretary Norton?

Secretary NORTON. In terms of our reorganization proposal, there was nothing that specifically required us to do a reorganization. It was in response to the need for unified management and to answer a persistent question of who is in charge of trust reform.

We anticipated proposing an idea that was a general idea and a general reorganization proposal, and then moving forward to flesh out the details of that through a consultation process.

Mr. KILDEE. It seems to me, from my own unscientific methods, that the majority of the Indian Nations and the individual Indians do not agree with separating those fiscal trust responsibilities out into a separate agency from BIA. That would seem to indicate that the consultation with the Indian tribes and individuals was only subsequent to your work, rather than concurrent with your work.

Could you comment on that?

Secretary NORTON. Our work is still in progress, and we are learning things all the time about how we can improve our proposal. We have, essentially, two conflicting major pieces of information. One of those says that the BIA system is broken, that BIA

has not successfully managed these assets, and after years and years of trying to improve the BIA management, we still haven't seen results.

The other aspect of it is largely coming before the tribes saying continue to have BIA do the same thing. And so we get some very strong indication that BIA ought to be out of the picture of doing the management, other very strong feedback that BIA needs to continue to be at the center of this process. And, frankly, we are still trying to figure out how we get the best of both worlds.

Mr. KILDEE. Since it is a work still in progress, how wed are you then to the idea that you must separate out these fiscal trust responsibilities into a separate agency from BIA?

Secretary NORTON. I think that at some level we need to have leadership separate from BIA. We need to have a system that is going to be able to look at this in a fresh way and really move forward with reform. It needs to be outside of the old structure. Now, whether that is a different part of BIA or whether that is a parallel agency with BIA, there are other proposals to have it entirely outside of the Department of Interior, and those are things that you all should consider. But, at some point, we need to have enough departure from the current organization to have real reform.

Mr. KILDEE. But it could be, as you indicated, maybe still within the BIA as a separate entity within BIA?

Secretary NORTON. That is what a number of the tribes have proposed. I still believe that our separate organization is superior and is more likely to bring needed change, but I have not entirely closed my mind to the opinions I am hearing from other people. Perhaps they can offer some way that we can get that reform. At this point, I do still remain convinced that a separate organization would be stronger in bringing the kind of reform that we would like to see.

The CHAIRMAN. The time of the gentleman has expired.

Mr. KILDEE. Just one final. There is a very obscure agency in this city, which is very important. It is called FASB, the Federal Accounting Standards Board, which has come into prominence now because of Enron. When you went through all of your work on these accounts, did you follow all of the standards of the FASB, the Federal Accounting Standards Board?

Secretary NORTON. Let me defer to Mr. Slonaker on that.

Mr. SLONAKER. I was tangentially involved with some of the thinking on what the organization should be. I don't believe that FASB's standards would apply to the creation of an organization, unless I misunderstood your question, sir.

Mr. KILDEE. No, that was my question. So you did not necessarily apply FASB to this accounting system.

Mr. SLONAKER. Well, let us be clear on what we are talking about here. We are really talking about two things. You are talking about, I believe, sir, FASB accounting standards, on the one hand. I think the Secretary and I are addressing issues having to do with the accounting system per se. Obviously, there are certain accounting standards that will apply to accounting that is done for the beneficiaries, but I think the thrust of the Secretary's comment here has to do with the organization to create and run that system, if I am making myself clear.

Mr. KILDEE. Not entirely, but I will pursue that later.

Thank you.

The CHAIRMAN. Thank you.

The gentleman from Montana, Mr. Rehberg?

Mr. REHBERG. Thank you, Mr. Chairman.

I am struck by the opportunity to follow Mr. Kildee. Between us, your 26-year tenure and my 1-year, we have 27 years between us to solve this problem.

[Laughter.]

Mr. REHBERG. And what I have come to the conclusion, Mr. Kildee, in serving here for a year, that a lot of people support reform as long as it doesn't change anything, and I find that unique and ironic that we would be talking about a problem that has existed for so long and perhaps been on the back burner. And I thank some of my constituents for bringing the case forward. Perhaps it takes the Court to—

Mr. KILDEE. I might say to the gentleman that, in fairness to you, there is 26 years' experience and that is 1 year repeated 26 times. I am not sure what I have.

[Laughter.]

Mr. REHBERG. Let me begin by asking the question of you, Madam Secretary, you made the point that a lot of these trust responsibilities were created by treaty. Were those done by tribe, by reservation or as a whole? And where I am leading with this is, trying to think outside the box, is there any reason why all tribes, it is all or nothing? Is there an opportunity within the Congress to make a determination that if there are tribes that don't like the way the BIA has handled it, that they would have the opportunity to separate themselves and go out to the private sector and have a private sector trustee responsibility?

Secretary NORTON. I would certainly like to see the opportunity for tribes to be able to do that. I think that that might be very beneficial for tribes, and I certainly personally would like to preserve that option.

Our problem is essentially our needs to have a unified computer system, for example; to have one data base where we can look to find the information on who owns which pieces of property, what the leases are on those property, what the accounts receivable are, and so on and so forth, to have a basic financial accounting system that meets 21st century accounting standards. It is almost impossible to do that, unless you have some standardization.

And so our needs, from a management standpoint, to have standardization complicate the policy goal of letting the tribes to have their independence to chart their own way. So that is just one of the tough issues that we have to grapple with.

Mr. REHBERG. Mr. Slonaker, you have been there for how long?

Mr. SLONAKER. I was confirmed about 20 months ago.

Mr. REHBERG. And you took Mr. Holman's place?

Mr. SLONAKER. Yes, sir.

Mr. REHBERG. It seemed, in his prior statements, that he was willing to consider and, in fact, recommended to the Secretary that it be taken as one of the alternatives taken outside of the Department of Interior. Is that a position that you have tried to promote within your responsibility as the trustee?

Mr. SLONAKER. The idea of taking it outside of the Department is very appealing. I, clearly, concur with the Secretary that this ought to be this trust function, which I would refer to as a fiduciary function, as opposed to what I also would call the large trust obligation of the Government. In other words, I am distinguishing between the financial management of the land, on the one hand, for income for beneficiaries, on the one hand, and the larger trust obligation, which has to do with social services, and highways, and so on and so forth.

So I, clearly, believe and concur with the Secretary that the financial trust or the fiduciary trust, if you will, should be put on its own footing in a separate organization. I also think the idea of moving it entirely out of the Interior Department is a very appealing one. As you know, under the 1994 act, the act created an advisory board to the Special Trustee, and that advisory board, as a matter of fact, has recommended just that.

But there are many alternative plans on the table here, to which the Secretary has alluded. The central premise, I believe, is that there has to be a single organization in Interior or outside Interior that is responsible for the fiduciary trust obligations of the Government.

Mr. REHBERG. Let me ask you, then, between the two of you, do you have any indication from any tribe that they would be willing to try and be a pilot project for moving—I know you have a big bite to chew here, but it would seem like if we took smaller bites and maybe separated some and showed, perhaps, that there was an alternative or an opportunity for some of these tribes to move out on their own, giving you the time to go ahead and create your own system, but not having the responsibility for that individual entity, that that might be a way of solving some of the problems. Again, it is all for one or one for all. It seems a little burdensome to you because it is so big.

Secretary NORTON. There are some tribes that are already doing their own management, and some tribes are doing a very sophisticated job of managing their assets. Perhaps Mr. Slonaker would like to provide some details on that.

Mr. SLONAKER. Under the 1994 act, tribes do have that option. Very little that has happened so far, and I can't tell you for sure why, more hasn't happened, but most tribes have opted to stay within the Government's obligation.

The CHAIRMAN. The time of the gentleman has expired.

Does the gentleman from New Jersey have questions? The gentleman is recognized for 5 minutes.

Mr. PALLONE. Thank you, Mr. Chairman.

I have to start, Madam Secretary, by being very blunt. I really don't believe that creating a new agency for these trust accounts is the answer, and I think it is pretty clear that most, if not all, of Indian Country has pretty much said the same thing.

I listened to what you said today, and I know this is, as you say, just the beginning, but I don't really see that you have made the case that we need a new agency. You talked about how we need more funds, we maybe need a change in the workforce, we need new computers, new accounting methods, but I don't see how that problem is solved or necessitates creating a new agency. It seems

to me that you need to reform the existing agency and making those changes within the existing agency, not just transfer everything from Hall A to Hall B.

The other problem I have is that you talked about how the, when you had the meetings this weekend, that the tribes felt, not that they agree with everything at the BIA, but they felt some sort of affinity to the BIA, and I think that kind of goes to the heart of the matter.

I think that your approach, and as Mr. Kildee said, of basically coming up with the separate agency idea and then going later for consultation, is a kind of a patronistic approach. That is the basic problem here. In other words, this is money that belongs to the Indians. This is their trust. This is their accounts.

I think that essentially what they are saying is that it should have been left to them, at least initially, to come up with the idea about how to go about handling this, rather than coming up with your own idea and saying we need a new agency and then saying, OK, we will consult with you and see if you can somehow merge your ideas into what we are already doing.

My questions really go to the consultation process. If this task force that has been set up now that you mentioned is really going to be effective, it seems to me that you should just start from scratch. You should not assume that your proposal is the way to go and that you are just taking some ideas from them. You should just say, look, we are starting from scratch, you know. I have this proposal out there, but you come up with the idea, and you tell me what you think, and then we will give our input.

I would ask you to comment on that, but two or three other things to comment.

Second, I would say give them enough time. I mean, it is not clear at all to me that this isn't something you are trying to wrap up in a few weeks or a few months. I think that this is something that needs some time for this task force to be successful and to be able to come up with a recommendation that is, essentially, a consensus approach.

And then the third thing I would ask you to comment on, a larger issue, is what is consultation all about? In other words, I know there were executive orders in place under the Clinton administration that said that you had to consult. Is this administration taking the position that those executive orders are still in effect and that there is a requirement of consultation from the beginning on this or even other issues?

First, why not just start from scratch, scrap everything; second, what kind of time period are you going to give them; and, third, comment to me about the consultation process and how this administration sees the existing executive orders or whether they need to be repromulgated or they are still in effect on the consultation issue.

Secretary NORTON. Those are some very good questions.

First of all, as to the idea of just sort of taking everything off the table, and just starting from scratch and just, you know, letting this all bubble up slowly through the process as we get consensus, the problem is that my trust responsibility doesn't get put on hold for several years until we reach an end result. I have a trust re-

sponsibility that exists right now, and I need to do what I think is best to improve our provision of services.

And the proposal we put on the table was done from my perspective as a manager. As a manager, I am convinced that the best way and the most straightforward way of achieving an improvement in our management would be the create a new organization, to give clear direction, to start moving things into a process that is organized, makes sense, very directed and really oriented toward financial management.

I, also, recognize that that has been a fairly consistent theme over decades of looking at reform proposals. Every time something that has been put on the table that would really be a dramatic reform proposal has been offered, it has always failed to materialize because it is not often what the tribes want to see. It is a change that has been difficult to get.

I want to push forward to make some changes and to make changes in a short timeframe. For those changes to be successful, though, it is going to have to reflect the needs of the beneficiaries, and to best get that reflection of those needs incorporated into the process, we need to be doing very intense discussions with the tribes. That is what we have begun to do through this task force.

Neal McCaleb has been in days and days of consultation meetings with the tribes. I have attended consultation, a couple of the consultation sessions and spent some hours with tribal leaders discussing these issues. Clearly, we have a lot more to do, but I would rather do that in a concentrated timeframe, to get that input, to get those decisions made, than let this just go on, and on, and on and not reach closure.

Mr. PALLONE. About the executive orders, do you consider those in effect—

Secretary NORTON. Oh, I am sorry. We are abiding by those executive orders. We have been working to get our process to meet those executive orders and to work with the tribes on that.

Mr. HAYWORTH. [Presiding] The gentleman's time has expired.

Mr. PALLONE. Thank you.

Mr. HAYWORTH. I thank the gentleman from New Jersey.

My friend from Utah, 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman.

Madam Secretary, I couldn't help but think, as you spoke, of the first time you appeared here before us, where I think I expressed my approval at your appointment, and perhaps even gushing approval. I was hopeful, at that time, that you would have the ability to come into the Department and solve some of the problems, a culture which resulted in lying to the representatives, the elected representatives of my State, before the announcement of a huge monument, the kind of culture that resulted in the planting of lynx hair and hundreds of other problems that you have seen in that Department, but you have had some difficulties in doing that.

Our good friend, your Under Secretary, Steve Griles, was not appointed for some time. When was he actually confirmed by the Senate?

Secretary NORTON. He took office in late July, and so his appointment or his confirmation was about that time.

Mr. CANNON. And Cathleen Clark, who is your Director for the BLM, finally got her confirmation when?

Secretary NORTON. Oh, just right as the Senate was leaving town in December.

Mr. CANNON. We really do appreciate the other bodies acting on that expeditiously before leaving town, I might point out. These are great people, and I appreciate the quality of people that you have chosen to surround yourself.

May I ask how much of your time are you spending on this issue now?

Secretary NORTON. I am spending, well, certainly, more on this issue than any other single issue. For the last few months, perhaps more than all other issues put together.

Mr. CANNON. Like, say, 60 percent of your time; is that where you are going?

Secretary NORTON. That would be a rough estimate, yes. I haven't obviously kept track of the hours, but—

Mr. CANNON. This is just ballpark.

Secretary NORTON. It is a predominant issue for us.

Mr. CANNON. It is a lot. And how much of the time of Under Secretary Griles is he spending on this issue, do you think?

Secretary NORTON. He is probably spending about 12 hours a day on this issue, and then the rest of the Department is in addition to that.

Mr. CANNON. So we have a something that advertises 110-percent effort, he is doing something more than 110 percent.

Secretary NORTON. About 150 percent, I think.

Mr. CANNON. And you have an Assistant Under Secretary, Jim Cason, who is, essentially, spending full time on this issue, as I understand it.

Secretary NORTON. Full time for Jim Cason is 18-hour days. He has been putting those in consistently. It is amazing, you know, no matter how early you come in, no matter how late you are there, whether it is a Saturday or a Sunday, we have those people and some others working on our trust reform issues.

Mr. CANNON. And if I seem approving, Mr. Chairman, of the team at Interior, it is because I worked with them when I was at Interior, and I can attest that what the Secretary is saying probably understates the magnificence of what they are capable of doing.

On the other hand, if I can get back to one of the issues at hand here, a number of checks have not been mailed out to people who depend on those checks. Do you have a sense of the number of those checks that haven't been mailed out or the amount of money?

Secretary NORTON. Let me see if I can get that information. We do have some information on what has been mailed out. Neal, let me defer to you on that.

Mr. CANNON. What I am really shooting at here, and Mr. McCaleb, if you could help us, it seems to me that a whole lot of people are suffering a huge amount of pain because checks are not going out from the Department, which they have depended upon to make their house payments, and their car payments, and to buy groceries; is that the case or not?

Mr. MCCALEB. Indeed, that is true. And in response to your specific question, it is hard for me to quantify how many checks have not been mailed out because they are not uniform each month. I can't tell you how many checks have been mailed out since early January, when we began to bring some of the systems up.

Mr. CANNON. But it is fair to say that we have got a lot of people who are suffering because they don't have a check they depend on.

Mr. MCCALEB. Absolutely. We are not sending out any oil and gas mineral lease checks that are the preponderance of the—

Mr. CANNON. Madam Secretary, I want to just touch on another issue before my time runs out.

You are a lawyer, and I suspect you talked with the solicitor after you received the order that affected what information you could have on the Internet, did you consider that and did you consider alternatives to shutting down your Internet systems?

Secretary NORTON. Our systems are interconnected. The court order says that anything that is connected to the trust data, where someone, an outside hacker, could gain access to trust data, has to be shut down. As a consequence, we saw no alternative but to shut down every aspect of our system. We are now working to bring those things back up.

Mr. CANNON. It is hard for me to imagine how a Federal judge could have a greater effect on slowing down the processes which the American people elected a President, who nominated you and who confirmed you and your fellows at the Interior Department more than has happened here and caused such a retardation of what I think are important issues for Americans and which are painfully important to those individuals who haven't gotten their check. I hope we can get this problem resolved in a way that the Department, and the American people and the recipients of those checks can move forward, and we can get back—my office has a problem and I know the Committee has a problem getting information from your Department because of your being off-line. I hope we can get that resolved soon.

Thank you.

Mr. HAYWORTH. The gentleman's time has expired. We thank the gentleman from Utah.

Our friend from American Samoa, Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

I do, also, want to welcome Madam Secretary for appearing at our Committee this morning.

Madam Secretary, I know this position may not be considered very important probably among your peers. It doesn't even require Senate confirmation or not even a top security or crypto clearance, but, Madam Secretary, when are we going to get a Director for Territorial Affairs? It is almost one-third of this administration's term, and for half a million people's needs and welfare, and we don't even have a point person for this within the Department.

Can you take this to President Bush? What can we do to assist in this effort? I really think it is very disappointing that we still do not have a Director that should oversee the needs of the territories.

Secretary NORTON. We are frustrated by that as well. We have been in the process of trying to identify the right individual for

that position, and even just within the past week I have heard some additional efforts in that regard, but we do not yet have that final decision made.

Mr. FALEOMAVAEGA. I was told 3 months ago that the appointment was going to be made in 2 weeks. Now it is the year 2002, and we are about ready to go to the month of March. Maybe we might as well not even have a Director for Territorial Affairs.

I do want to second the concerns that have been expressed by the previous members of the Committee, especially of our Chairman and also our ranking Democrat, Mr. Rahall. This issue is not a new issue, as you well are aware of. I believe the late Congressman Mike Synar, from Oklahoma, for 5 years he conducted extensive hearings, and research and study of this issue of trust funds. And now, at this point, perhaps the only reason why we are moving on this is because the Federal courts are on our backs now in trying to find a solution to this.

In the 1990's, we enacted or authorized some $20 million even to conduct an auditing, and I guess we were not even successful in doing that, expended $20 million just to audit the accounts. In 1994, we passed the American Indian Trust Fund Management Reform Act, hopefully, to resolve the issue. I would like to ask you, Madam Secretary, is this law that was passed in 1994, there is no teeth whatsoever in helping reconcile the records or whatever the responsibilities that Mr. Slonaker is to take up?

Are we short of any enactment on the part of the Congress to give you more authority to address the issue so we don't have to go to the Federal court?

Secretary NORTON. The 1994 act sets out some specific standards that we are to meet in our trust responsibilities, and that is what we are implementing as we go through this process, and that is what has formed a large part of the court's decisionmaking process as well.

The issues have largely been ones of implementation, and clearing out the—

Mr. FALEOMAVAEGA. I would like to ask Mr. Slonaker, since he is the Special Trustee, are there any deficiencies in the law that we passed in 1994, Mr. Slonaker, so that we can give you the necessary authority to do what you need to do to reconcile the accounts. It seems to me that is the most fundamental problem that we have here. I hate to make it sound simple, but if we have got problems since we passed this last 6 years or 7 years ago, tell us how to improve the law so we can give you more teeth in the process.

Mr. SLONAKER. Very interesting question. I don't think the 1994 act, the way it was set up, has been terribly successful, and I guess the problem that I perceive is that as I have looked at the whole process of trust reform, what is really needed—which the Secretary has alluded to—is stronger organization, and I would add one very important thing to that, and that is stronger management.

Mr. FALEOMAVAEGA. Even from the previous administration, they kept telling us, We are going to reorganized the BIA, we are going to reorganize the BIA, and we never got any reorganization plans for the BIA. So my question is: Rather than going through this ex-

ecutive procedure and reorganizing the BIA, perhaps we need to make improvements in the law that we passed in 1994.

What do you think of that, Madam Secretary?

Secretary NORTON. The court found that the Department was in breach of the responsibilities created under that act, and so our efforts have been to cure those breaches and to move forward with complying fully with our responsibilities.

Mr. FALEOMAVAEGA. I have several other questions, Mr. Chairman. I know my time is up. I will wait for the second round.

Mr. HAYWORTH. I thank the gentleman from Samoa.

The gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Thank you, Mr. Chairman. And I want to thank the Chairman for calling these hearings today, and I welcome you, Secretary Norton. I know you have some very great challenges ahead, as has every Secretary of the Interior in my 15-plus years here.

The mismanagement of the Indian trust funds I believe has got to stop, and if the executive branch can't stop it, I really believe it is incumbent on this body to enact legislation which will do the job once and for all.

During the 104th Congress, I had the distinct honor of chairing a Subcommittee of this Committee which had jurisdiction over Native American legislation. At that time it came to my attention that hundreds of thousands of individual Indian money accounts had been mismanaged by the Interior Department.

The Resources Committee created a Task Force of Indian Trust Fund Management. That task force held hearings in Washington, D.C., Anchorage, Alaska, and in Phoenix. The task force heard from all sorts of Native Americans, Government, and private witnesses.

The General Accounting Office informed us that 32,901 trust account transactions involving over $2.4 billion could not be traced in an audit, which couldn't even be called an audit because there weren't enough documents to audit. Things were so bad that the auditors dropped the word "audit" and adopted the word "reconciliation."

The GAO has also informed us that only 10 percent of the Indian mineral leases selected to be reconciled could even be verified as having been acted upon. We were told of discoveries that trust management systems did not exist, that an accounts receivable system did not exist, and that an adequate records retention or archive systems didn't even exist.

Of course, the Bureau of Indian Affairs assured us that these problems were being solved and that a new fancy accounting system was being put into operation and more funding was needed, and that mismanagement of Indian trust funds would end. In May 1996, the Cobell suit was filed in the Federal district court. Next we heard that Secretary Babbitt and his colleague at the Treasury Department were being held in contempt of court and fined $600,000.

Meanwhile, Congress continued to appropriate millions and millions and millions of dollars in what appears to have been a futile effort to straighten out this mess. And now President Bush has

sent us a proposed budget for fiscal year 2003se 004, which includes continued funding of these activities.

I applaud the Chairman for holding the hearings. I applaud you for being here, Madam Secretary. It is very, very hard for me to be optimistic, even with all the words we have heard this morning.

I look forward to us moving ahead. I believe that the Native Americans have put up with this charade long enough, and I hope that we can do something once and for all, and I hope that if the administration can't do it, that the Congress will act on it.

On your plan, Madam Secretary, before implementation, is it your intent to look for a comment from the Native American community before any form of implementation takes place?

Secretary NORTON. Yes, Congressman, we are very actively involved in getting comments and consultation and input from the Native American community, both formally and informally. So we are very actively engaged now in that dialogue.

Mr. GALLEGLY. How optimistic are you, Madam Secretary?

Secretary NORTON. I am fairly optimistic that we have good discussions taking place and we are getting a lot more understanding in the last few weeks than we began with. So we have made tremendous progress, I think, in a couple of months in getting better understanding from both sides.

On the other hand, there is a tremendous resistance to change. As we have become more and more familiar with the management challenges, every time we unpeel a new layer of the onion we find more challenges. We just put out an eighth report to the court that is a very detailed analysis of where we are, to the best of our understanding, on each of the various management issues in front of us. And we would be happy to provide you with a copy of that. It is a very pervasive management problem, and almost everything that we are doing can be improved. We are just, you know, in the process of learning how to do those improvements.

Mr. GALLEGLY. I thank you, Madam Chairman. I thank you, Mr. Chairman. When I was first named to chair the Subcommittee on Native American issues, I had someone come to me and say, Mr. Chairman, a few years ago when General Custer left for Little Big Horn, he gave the order: Don't do anything—gave the order to BIA: Do not do anything until I return.

There are a lot of folks that believe that that order was complied with.

[Laughter.]

Mr. HAYWORTH. I thank the gentleman from California.

We have heard the bells ring, and we have a vote, 15 minutes for the first vote, followed by a 5-minute vote. But I believe we do have time to turn to my friend from New Mexico for his 5 minutes of questions before we adjourn to walk over for the vote.

Mr. Udall?

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman. And welcome, Madam Secretary. Good to have you here today.

Mr. Chairman, I would ask that my statement be put in the record.

Mr. HAYWORTH. Without objection.

[The prepared statement of Mr. Udall of New Mexico follows:]

Statement of The Honorable Tom Udall, a Representative in Congress from the State of New Mexico

Mr. Chairman and Ranking Member Rahall:

In the 1800s the United States Government entered into a trustee relationship with the Indian Nations. Over the last century, the trust relationship has developed and has been defined, by our Constitution, statutes, federal agency rules and practices, executive orders, and through numerous court rulings. In addition, this unique trust relationship and responsibility has helped to preserve the cultures, traditions, values, and inherent sovereign rights which has led to support Indian tribal self-determination and self-governance and paved the road for the federal government to work with Indian tribes on a government-to-government basis.

So why are we here today? We are here because for more than a century———-as the federal government has been the trustee of funds for Indian tribes and individual Indians——Congress, as well as previous Administrations, continue to work on addressing the issues of the mismanagement of Indian trust fund accounts. However, the last several Administrations have put proposals on the table for discussion, but little success has come from those discussions and the efforts to address the problems.

Today's oversight hearing, which I am glad to see Secretary Norton attending, will focus on the status of individual and tribal trust fund accounts and how the Department of Interior is responding to issues raised in the class action lawsuit Corbell v. Norton. These responses range from the Department's restructuring proposal and the Tribal opposition it faces to the lack of effort, on the part of the Secretary of Interior, to work with the court and special master to stress the potential "economic" hardships the Internet shutdown, which holds the Indian trust data, could create for the more than 40,000 Native Americans who receive royalty fund checks. These funds are generated from rights and leases, including grazing, quarrying, timber, agriculture, oil, natural gas, and minerals, on lands held in trust for tribes and individual Indians.

At issue for me and the members of the Navajo Nation, Jicarilla Apache, and Pueblos—-from the congressional district I represent—-is that over 40,000 Native Americans have not received any royalty checks from the federal government since December 6, 2002, when U.S. District Judge Royce Lamberth ordered the Department of Interior to shut down its Internet links. Judge Lamberth issued the order after he concluded that inadequate computer security left the trust accounts vulnerable to outside hackers.

Mr. Chairman, as a result of this order Native Americans from throughout our country, who depend on and have regularly received check payments prior to December 6th, have been left out in the cold. Many Native Americans depend on these checks to pay their rent, purchase food and clothing, as well as purchase other basic necessities. Everyone seems to be doing something to assist Native Indians and tribes who are waiting for their checks from the federal government. In the Navajo Nation for example, the Navajo Nation Council voted on January 26th to disperse over $500,000 in grants to hundreds of financially strapped Navajo families on the east side of the reservation who have not been paid their gas and oil royalty checks by the Department. I'd like to remind Secretary Norton that the issuance of royalty payments to Tribes and individual Indians are done monthly, some quarterly, and some annually. With that said, I believe that the federal government should pay back the Navajo Nation for their efforts to help their constituents and the federal government should also pay those who are awaiting their checks with interest.

What is an insult to the tribes across the country is the "rhetorical spin" that the Department of Interior is putting out, and I quote, "Royalty payments will be made eventually as soon as we can work out with the [court's] special master to bring some of our systems back up that relate to this lease information." This quote appeared in a January 8th article in the Washington Post and almost a month later we are still waiting. I believe neither the Department nor you, Madam Secretary, realize the gravity of the situation which weighs heavily upon our tribes and individual Indians day-by-day as the Department continues to work at a snail's pace to get these checks out.

Mr. Chairman, I find it hard to believe that the Department did not—-nor currently has—-safe guards in place to administer the distribution of checks should the Department's computer system crash or go off line in the future. What I find particularly disturbing is that the Department—-realizing that without their computer system they could not issue checks—-didn't make a strong or convincing argument to Judge Lamberth or the Special Master that a shutdown would create economic hardships on those who are dependent on the checks to survive.

I believe that the Department needs to reassess the steps they are taking to respond to the issues raised in Corbell v. Norton. When the 193 tribes of the National Congress of American Indians unanimously adopted a resolution opposing the Secretary's Plan, similar to actions taken by other tribes and pueblos throughout the country, they sent a clear message that they oppose the Department's restructuring plan.

I don't think coming up with a plan, taking that plan across the country to so-called consultation meetings, asking the Congress to allow for the reprogramming of funds to create a new Agency to handle trust assets management, and doing all of this in haste is the right path to take. The path that the Department has taken and which we continue to travel I have not doubt will result in a future Congress and Administration having to address this very same issue with little to no success.

Thank you Mr. Chairman. I look forward to hearing today's testimony from Secretary Norton and our two other panels.

Mr. UDALL OF NEW MEXICO. Madam Secretary, I think you have done a very good job at telling us that this is a very difficult problem, but I would like to emphasize what my colleague Chris Cannon from Utah said and put a human face on this issue.

Many of my constituents are impacted enormously by these IIM accounts. I mean, we have had chapter meetings wherein, as you know, the Navajo reservation is very rural, and so if somebody has to leave their piece of grazing plot and coming into a chapter meeting, it is a big deal. And when you have 400 people show up to a chapter meeting and all of them very upset that they are not getting royalty payments, it is a huge deal. And when you look at the human consequences, which what we are talking about is many of these elderly people that have survived on these checks for many, many years, and now the checks aren't going out, as you and Mr. McCaleb have just acknowledged.

And so I can't quite understand how this all happened if somebody knew that this was going to be the impact, and I guess my first question to you is—I know you are a former State Attorney General. I know you know about representing big agencies in front of the courts. I can't believe that a Federal judge would enter an order like this if he was told of the impact that this was going to have. And what I want to know is: Did your attorneys tell the judge in a very concrete way that constituents of mine, constituents, I think, of other members here on the panel—Mr. Cannon obviously has people in that situation—that these people weren't going to get check, that they were going to have some of their homes foreclosed, that they were going to probably have cars repossessed?

This is something that is having a devastating impact on the reservation, and I don't understand how a judge would do this. So can you tell me that your lawyers laid this all out for him?

Secretary NORTON. The plaintiffs moved for the restraining order and the injunction to protect the Indian trust data from hackers who might come in and harm that data. The primary focus has been in trying to protect that information. Obviously, the impact is one that we are realizing more and more as time goes on.

It was my hope that we would be able to get those systems back up online more quickly than we have been able to do so. And we put our initial emphasis on getting exactly those systems up and running. The first requests that we put forward were for those systems that would provide payments to Indians before any of the

other aspects of the Department's Internet system, except for a few that were critically important for public health and safety.

Other than those very small parts of our Department's network, the first ones we have dealt with have been the most difficult ones, and those are the Indian financial processing aspects of the system. So we are put that as our highest priority, and we are moving forward.

We have been compiling the impacts and presenting—you know, putting all of that information into a report. We have been submitting that information to the special master and working with the special master to keep him apprised of the impacts of each of those systems.

Mr. UDALL OF NEW MEXICO. Madam Secretary, with all due respect, I don't think you—either you didn't understand my question or you didn't focus on it, and my question was not what you have done subsequently. I know that a court order has been entered, and I know that you and your people are very upset about it, and you know the consequences and you have tried to take actions to remediate it.

But did your lawyers tell the judge at the time there was discussion of the plaintiffs' order, did they say this is going to be the result and argue that vociferously? Your counsel's job is to represent the trust responsibility, to represent the Department, to do everything that they can to let the court know the consequences of entering an order like this. And I am mystified as to how this happened.

Mr. HAYWORTH. The gentleman's time has expired.

Mr. UDALL OF NEW MEXICO. No, I understand, and we have a vote on.

Mr. HAYWORTH. And I thank you. I am trying to be indulgent with the time. If the Secretary wants to respond briefly?

Mr. UDALL OF NEW MEXICO. And I will stick around, like my colleague here, for a second round, also.

Mr. HAYWORTH. Great. If you want to respond, we can. I am trying to be accommodating to members. The gentleman from Idaho has to be three places at once, too, and he asked to go ahead with his questions. So I recognize him for 5 minutes.

Mr. SIMPSON. Thank you, Mr. Chairman. Thank you, Secretary. I appreciate you being here today to testify on this, and I appreciate the fact that during your confirmation hearing in the Senate, this is one of the issues that you brought up at that time that needed your attention. It is a difficult issue.

I have before me a press release, I guess, that is found on the Cobell website on "Judge suggests game playing by Interior may hurt"—"may be behind Internet shutdown." And as Mr. Udall mentioned, did the plaintiffs' attorney object to—I mean, as I understand it, you have tried to put back online those things necessary to get the payments out to the Native Americans as quickly as possible. Has the plaintiff's attorney objected to that?

Secretary NORTON. Yes.

Mr. SIMPSON. OK.

Secretary NORTON. It's my—let me verify.

Yes.

Mr. SIMPSON. Thank you. On another issue, underlying your reorganizational proposal, is it driven more by the Cobell litigation

or is it driven by the trust fund responsibility that is entrusted to you?

Secretary NORTON. It is twofold. The court has in many respects provided the impetus for moving quickly. The responsibility is one that is—as everyone has said, almost every Secretary of the Interior coming in has recognized the need for reform and has tried to move forward with some sort of reform. But at this point, I think having the three branches of government all focused on reform may be a unique time period.

Mr. SIMPSON. I appreciate that. On the board that you had up here, we were looking at the administrative costs, $800,000 for those accounts that had 20 transactions or more, $9.76 million for those that had 20 transactions or less. Does that money come out of the trust fund, the Native Americans trust fund?

Secretary NORTON. No. The administrative costs are entirely appropriated money.

Mr. SIMPSON. Should they come out of the trust funds?

Secretary NORTON. That is a question that Congress can look at.

Mr. SIMPSON. In the historical account proceedings, trying to recreate that, you have mentioned that it is going to cost in the hundreds of millions of dollars to do that and do it as accurately as possible. And we all know it probably won't be totally accurate because of the loss of records as they get older and older.

The plaintiffs have indicated $60 to $100 billion in settlement costs. Is that reasonable, or are they out of left field?

Secretary NORTON. I at this point don't want to speculate on that number for obvious reasons. It, I think, is worthwhile for us to move forward on trying to more accurately look at the information that is available to us, to look at data to assess what the real discrepancies might be.

Mr. SIMPSON. One final question. Under this, for lack of a better term, mess that is created there, that is there in these trust fund accounts, they are going to get worse over time, aren't they, with fractionalization?

Secretary NORTON. Absolutely.

Mr. SIMPSON. So, I mean, it is not only something that needs to be dealt with from the historical perspective of making sure that we have it right, but dealt with so that it doesn't get worse into the future in one way or another. And somehow we have to deal—

Secretary NORTON. That is correct.

Mr. SIMPSON. —with this fractionalization and other things.

Secretary NORTON. Yes, that is correct.

Mr. SIMPSON. I thank you for your work on behalf of the Department of Interior, the people of the country, and the Native Americans. I know you are trying to do a good job, and it is a difficult task you have got there. We look forward to working with you on it.

Secretary NORTON. Thank you.

Mr. HAYWORTH. I thank the gentleman for is questions.

The Committee will stand in recess until the votes are completed. Then we will return.

[Recess.]

Mr. HAYWORTH. The Committee will come to order, now that the power switch has been turned on for amplification.

Madam Secretary, and those who join you, we thank you for your indulgence and spending time on this. It lends credence to your point that you have been concentrating on this, and we thank you very much for your patience as we continue.

A couple of notes. Some people have expressed an indication they would like to do some follow-up questions, and we will try to get there. But what I would stress to the Committee members, if we can get to some new and substantive information rather than covering old ground—we understand the challenges of time and being in so many different places because we have any number of folks who have a variety of perspectives. But the Secretary and the Assistant Secretary and the Special Trustee have graciously said they would remain for part of the day, and we are very appreciative of that.

That is right. I would also point out that we can submit questions in writing as well.

With that in mind, we resume the questioning, and we turn first to the gentleman from Oklahoma, Mr. Carson.

Mr. CARSON. Thank you so much, Mr. Hayworth. Thank you for staying around for the continuation of this hearing, Madam Secretary. Thank you for bringing along Neal McCaleb, a great Oklahoman as well. I know we have Chief Swimmer in the back who has a vested interest in the hearings process today as well.

Let me ask you a couple of questions. We have talked a lot about the asset side of Indian lands and what amounts to more or less an unalloyed fiasco over the last 100 years and accounting and for them.

There is also in many places across the country significant liabilities associated with the exploitation of the natural resources on Indian land. In my district alone, we have the former center of lead and zinc mining in Ottawa County, now a massive Superfund site.

Under your proposal, with BITAM taking over responsibility for some of the trust assets, what would happen to the BIA, for example, in that Superfund site as a PRP, a potentially responsible party, what would happen to environmental liabilities associated with some of the Indian land?

Secretary NORTON. Congressman, that is a level of detail that we have not contemplated in our proposal yet.

Mr. CARSON. OK. Very good. Do you have a sense of at what point in time whether discussion will be had on establishing those kind of details and what kind of timeframe we can expect kind of those details to be unveiled?

Secretary NORTON. That is an ongoing process, and we will be working with the tribes and consulting as we go along on those things. That is something that is obviously not at the forefront of our financial management concerns, and so I would anticipate that that would be something that would remain in its current posture for quite a while. And I just am not sure that we would ever contemplate a change for that.

Mr. CARSON. One of the concerns of people who will testify subsequent to you is that asset management is an extraordinarily complicated matter, something outside the expertise of any one of those people who are spending their lives devoted to the subject, and that the Department of Interior and the BIA do not have adequate per-

sonnel to deal with this issue, with all the latest developments with this, that we have some very fine managers and extremely dedicated public servants, but not the level of specialized expertise it takes to follow the funds and get to the bottom of all of this.

Can you tell us if you would agree with that statement? And, second, is the BIA, is the Department of Interior under your proposals, you know, planning on hiring folks, you know, perhaps from the private sector with the kind of expertise in these complicated transactions that are routinely being done in the commercial world but don't yet seem to have infiltrated the Government?

Secretary NORTON. Having a workforce plan is part of our strategic plan to make sure that we do have the kinds of expertise that are necessary. That is something that is still to go into our strategic plans. We don't have the specific answers.

I have seen some of the tribes handle very sophisticated oil and gas operations, for example, and they have done that either through the tribes themselves or through outside contracting beyond the BIA responsibilities. And I think that has functioned very well, and we certainly would not want to interfere with the tribe's ability to draw on that kind of expertise.

Mr. CARSON. Let me ask—because my time is limited, as is yours, I know. There are two other areas I would like to inquire about rather quickly.

First of all is the entire scandal involved in taking down the Internet and the failures and no checks as a result of that. There has been—it is my understanding the Department of Interior was informed about potential security problems with the accounts years ago and that this is something that has been long in brewing, but is only recently coming to public attention. Could you tell us when you were personally informed of any potential security problems there? And also with this, there seemed to be basic problems that do not require computer expertise to appreciate for all of us, and that is, you had multiple vendors, there are no performance reviews being done, no routine security checks, I understand, to make sure—see how difficult it would be to hack into the site, things that are just standard fare for people who are operating secure systems.

Can you tell us when you were informed about this and, you know, kind of what is being done to address—you know, what seem to be some obvious management failures in the administration of these accounts?

Secretary NORTON. Government computers nationwide across all departments have received poor marks for IT security, and that is something that has been reported on by many different audits that have been done for many different systems.

I don't recall when I first heard about these issues. It is something that has really been brought to a focused attention for us much more recently. We have now recognized that we need to make changes and need to make improvements, that our systems were not adequate, and we are now working hard to get those up to being adequate.

Mr. HAYWORTH. The gentleman's time has expired. I thank the gentleman from Oklahoma.

The gentleman from Montana has indicated that he had a couple of other questions. The Chair would ask for a show of hands of those who have additional questions. Fine. We will take that into account.

We will turn first to the gentleman from Montana.

Mr. REHBERG. Thank you, Mr. Chairman. In preparing for the hearing today, I was reading over the briefing material and looked with some anticipation at the report by Ernst & Young. I don't see it anywhere in here. Is there a problem with presenting that to Congress? It seems like we paid for it and it has some information that may be conducive to solving this problem. And I was hoping that it would be made available. Can you explain where it is, how we get it, and why it is not here today?

Secretary NORTON. The Department received requests for the Ernst & Young report informally, and a formal request from Chairman Skeen and Ranking Minority Member Dicks of the appropriations side on November 20th.

We submitted a request through the Justice Department to have the court release that report from a protective order. The courts yesterday denied our request. We felt it was appropriate, given that, to read from the letter from the Appropriations Committee: "Access to the Ernst & Young study of the five named plaintiffs is critical to allow the Committee to evaluate how a transaction-by-transaction review was accomplished and whether it produced the information needed to reconcile plaintiffs' accounts and was it a cost-effective method."

Skipping a few things, "It is imperative that the Committee be provided with the Ernst & Young report in order to prepare for a hearing in consideration of the fiscal year 2003 budget request."

We need to work with appropriators to obtain the hundreds of millions of dollars necessary for a financial accounting, for a historical accounting, and our request to have the Ernst & Young report made public was submitted to the court in that spirit.

At this point we are prevented by the court from providing that information tot he Committee.

Mr. REHBERG. One of the best decisions I made as a youth was not to become an attorney, so forgive me if I ask you some basic questions. I thought I had a future, so I stayed out of the law.

Is there an appeals process? Can we get that report? You know, as Chairman of appropriations of the Montana Legislature, the Supreme Court one time didn't agree with something we did, and we just cut their funding for two of their justices. We did catch their attention. How are we going to catch the attention of this judge? He seems to be doing everything in his power to make life miserable, as Congressman Cannon said, for people within the tribes. He seems to make life miserable for Congress in our sincere attempt to try and solve a problem that has been sitting around for a long time. How do we send the message that we want this information? We paid for it. With all due respect to his legal expertise, he is flat out wrong.

Secretary NORTON. Let me respond to that by quoting from the court's order. "Either Committee of Congress is free to seek to have this court modify its protective order to allow disclosure of this report. Should such a motion be filed, the court will be obliged to con-

sider the relevant legal questions surrounding possible release of the report, including whether release is in the public interest."

So the court has invited Congress to contact it directly to seek release of the report.

Mr. REHBERG. Mr. Chairman, through the Committee authority, I hope we do everything we can to get the information that is relevant to solving this problem.

Mr. RAHALL. Would the gentleman yield?

Mr. HAYWORTH. The gentleman controls the time, if he will yield.

Mr. REHBERG. Certainly.

Mr. RAHALL. I appreciate it, and just to put on the record, I did write a letter to Secretary Norton disagreeing with the request that was made by Chairman Hansen. To me, to have this information released to the public is like asking one to reveal their entire checking account. And I don't think many Americans would sit still for a request by any bank to have their full checking account details made public. So for that reason, I view the attempt to release this Ernst & Young report in that same vein, and I have opposed its release, as did the court yesterday, I see.

Mr. REHBERG. Mr. Chairman, reclaiming my time, I look at prior testimony from Madam Secretary that has quite a bit blacked out. I would assume that same opportunity exists—is that not correct?—for receiving information that would block out the appropriate personal areas but still give us the opportunity to make a logical decision on how to solve the problem.

Secretary NORTON. That is a possibility that might be pursued.

Mr. RAHALL. Would the gentleman yield?

Mr. HAYWORTH. The gentleman's time has expired. If the ranking member seeks time—

Mr. RAHALL. Just real quick to say it is my understanding that the information blocked out to which you referred was not a part of the request that was made by Chairman Hansen.

Mr. REHBERG. If I may take part of your time, I am just suggesting that perhaps it could be done similar to the information that we received so we could still use that information to make decisions.

Mr. HAYWORTH. The Chair would point out there is always time to modify and amend. That seems to be a part of the process we have here.

The gentleman from Michigan?

Mr. KILDEE. Just briefly, Mr. Chairman.

Madam Secretary, I commend you for recommending an increase of $84 million to remedy deficiencies in the trust management. But I notice that the President proposes a decrease of $3 million for the Indian land consolidation account. Can you tell us why? And can you identify, perhaps not now but send to the Committee, identify for the Committee the increases and decreases in the President's budget proposal for trust management programs throughout the Department, and include a description of those programs? Could you specifically tell why he has a $3 million decrease and then if you could supply for us other increases or decreases within that?

Secretary NORTON. Yes, we would be happy to provide you with the additional detail on that in written form.

The decrease in the amount of land consolidation money is because there is a carryover amount from the previous fiscal year, and so it is anticipated that we will be carrying some money for this year into that future year.

Frankly, however, we are looking at our approach to that land consolidation to see if there are some things we can do to move that along. I just had a meeting earlier this week to discuss with my staff whether there are some things that we can do to make that process operate more efficiently and make sure that we are acquiring as much land as possible with the funds that are available to us.

Mr. KILDEE. Do you feel that the carryover will be sufficient to allow you to do your job properly in that land consolidation? The carryover amount of money from previous years will be enough, despite the $3 million decrease?

Secretary NORTON. Frankly, we are still looking at that. The initial analysis is yes, that should be sufficient. I am looking at whether there is more that needs to be done over the longer term to really get ahead of the curve on that problem. And so I want to continue working with you all to see whether what we need are some statutory changes or just more funds going into that process.

Mr. KILDEE. If you could do that, I hope that you would ask for a supplemental, if need be, because that is very important, that consolidation. And if you could give us a breakdown as I asked of the various parts of the President's budget in this area.

Thank you.

Secretary NORTON. I would be happy to do that.

Mr. KILDEE. Thank you very much.

Thank you, Mr. Chairman.

Mr. HAYWORTH. Thank you, Mr. Kildee.

From the Chair's purview of round two, I believe the gentleman from New Jersey had some questions.

Mr. PALLONE. Thank you, Mr. Chairman.

Madam Secretary, you mentioned that in your executive order, I think, on November 21st with reference to this new agency, you also mentioned that Mr. Swimmer would be the head of it. Now, I listened before when you talked about how you needed all these reforms and changes and you needed a separate agency. But my understanding is that he was the BIA Director under President Reagan for, I guess, 8 years and I guess—you know, I have two questions. Why would you take somebody or suggest somebody who, you know, was there before and the Director of the agency if you are actually trying to do something very different? And, second, to what extent—going back to the consultation issue again, to what extent were the tribes consulted with regard to his appointment?

Secretary NORTON. Ross Swimmer proposed some changes when he was Assistant Secretary that, had they been adopted, we would not be in the mess we are today.

There is some disagreement with that.

Mr. HAYWORTH. The Chair would ask for the gallery and those guests who join us to please contain themselves. We are not here at a television show. Thank you.

Mr. PALLONE. What about the second part, though? Again, you know, the concern was that they weren't consulted when the idea

came out in the executive order on the 21st. Were they consulted at all about him?

Secretary NORTON. No one has been consulted about the appointments process. That is just not ordinarily something that we do—the consultation process is not well suited to having public meetings to discuss the merits of individual people who are job applicants.

Mr. PALLONE. Well, again, you know, I am not suggesting that, you know, you would nominate him and he would be confirmed in some way by tribal leaders. But I just think in the same way that there wasn't any consultation, or at least it hasn't been mentioned, when the proposal was made on November 21st, there should have been some consultation as well about who would be the head of it, or even now at this stage. I don't understand—you know, I mean, there is not an official agency yet, so I guess there probably hasn't been an official appointment yet. And that could still—you know, I would ask that you take some input from some of the tribal members at the time when he is—you know, if at some point there is some action here.

Secretary NORTON. Ross Swimmer is tremendously well qualified. He is a lawyer. He is a banker. He is a former tribal leader. He is a former Assistant Secretary. He brings to this an incredible understanding of these issues and a background that is uniquely well suited to solving these problems. And I have been very impressed with the work that I have seen him do on these issues. He has been part of our consultation process to listen to the tribes and to understand their concerns.

Mr. PALLONE. Well, thank you. I don't want to continue, Mr. Chairman. Thank you.

Mr. HAYWORTH. Thank you, Mr. Pallone.

The gentleman from New Mexico?

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman. And thank you, Madam Secretary, for staying around for an additional round here.

Before you became Secretary, the Navajo Nation filed two lawsuits against—one against the United States and one against Peabody Coal, Salt River Project, and Southern California Edison. And the basis of those lawsuits was that the Department breached its trust to the Navajo Nation, and the operative set of facts involved in those cases revolves around former employees, Ross Swimmer, Mr. Griles. They were involved in this set of facts.

My understanding, at least I am informed that one of these cases is already in the Court of Claims and a breach of trust has been found. So I am asking you, have you looked into these conflict of interest issues, the fact of having employees that are in—or future employees that are in a lawsuit situation, have you looked into that? Or do you intend to look into that?

Secretary NORTON. Without going into the specifics of this particular case, what you are saying is that someone who has been a Government official in the past and has been sued should not be a Government official in the future. And I don't think that is really the position that you want to be advocating.

Mr. UDALL OF NEW MEXICO. I don't think that is what I am saying. I am saying that there are facts here that give rise to conflict of interest questions, and I am asking, have you looked into them?

Secretary NORTON. I am not aware of anything that raises a conflict of interest, and so I would be—

Mr. UDALL OF NEW MEXICO. Well, I think—

Secretary NORTON. —happy to hear some further detail from you and to discuss a potential conflict of interest. But I am not aware of anything other than their previous actions as Government officials having been the subject of litigation.

Mr. UDALL OF NEW MEXICO. Subject of litigation, and one of those suits has, in fact, found a breach of trust, hasn't it? And they were both a part of the facts and employees at the time.

Secretary NORTON. I would like to defer to the Solicitor's office to provide you with the information about that.

Mr. UDALL OF NEW MEXICO. That would be great.

As you know, for 2 months now, checks have gone out to trust beneficiaries, individual—they have not gone out to individuals or tribal. But we are informed that as of 12/17 the court entered an order that allowed you to temporarily turn on computers to get these checks out. In fact, the language of the order says on page 6, "Interior may reconnect to the Internet for specified periods any information technology system that houses or provides access to individual Indian trust data for the limited purpose of performing those functions necessary to receive, account for, and distribute trust funds or appropriated funds or to provide other necessary services."

Can you tell me when was the first time the Department attempted to use that temporary protocol to get checks out?

Secretary NORTON. If I can just go back through some of the issues—

Mr. UDALL OF NEW MEXICO. It entered on the 17th. When was the first time that you attempted to utilize the power under that order to get checks out?

Secretary NORTON. We have felt it necessary in the context of the special master's interpretation of that consent order to obtain the permission of the special master before going forward.

Mr. UDALL OF NEW MEXICO. And my understanding is it was mid-January. So you waited an entire a month before you utilized the procedure. Is that—

Secretary NORTON. That was—the action we took in mid-January was that we obtained the special master's permission, and so we have not proceeded to open up any part of the Department's computer system without the permission of the special master.

Mr. UDALL OF NEW MEXICO. What part of that order was ambiguous that I just read? I mean, it seems to me that is for a broad, sweeping authority to the Department to hook back up and get checks out. What was ambiguous about that order?

Secretary NORTON. It is my understanding that the special master and the plaintiffs would likely object were we to reopen parts of our computer system without getting advance affirmative permission.

Mr. UDALL OF NEW MEXICO. But the—you know, you have heard today from a number of members the urgency of getting checks out.

It would seem to me the prudent thing to do would be to move forward as quickly as possible to try to get the checks out and let the court tell you otherwise rather than go off and negotiate with the other side.

Mr. HAYWORTH. The gentleman's time has expired.

Mr. UDALL OF NEW MEXICO. Could she follow up on—

Mr. HAYWORTH. If she wishes to respond, she certainly can do so.

Secretary NORTON. I was going to suggest perhaps having Jim Cason, who has been the point person on this, to respond to your questions. I can provide his opportunity to work with you and answer your questions either privately or in front of the Committee, whatever is your pleasure.

Mr. HAYWORTH. Well, Madam Secretary, you have been indulgent with your time. We do have other panels here, and we need to get to those questions. I would ask my friend from New Mexico, as is the right of all members, to put the questions in writing to the Secretary, and those who join her, and anyone whom she might identify and have them respond. We will hold open the hearing record for 2 weeks to have this information included, and it will be available in the public domain.

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman. Thank you, Madam Secretary, for your appearance here today.

Mr. HAYWORTH. Once again, I thank you, Madam Secretary, Assistant Secretary McCaleb, and the Special Trustee, for coming in and serving on this first panel. We appreciate you being very generous with your time today. We understand there are many other things, but, again, as I said earlier, I think it provides evidence as to your intent to try and work through the challenges we face. And though we may not have unanimity on every jot and tiddle of public policy, I think all of us concerned appreciate your time and attention.

Thank you.

Secretary NORTON. Thank you.

Mr. HAYWORTH. The first panel is excused—or P's and Q's or commas and question marks.

Mr. HAYWORTH. As we say good-bye to the first panel and invite up the second panel, a bit of housekeeping from the Chair. In the past, our former Chairman, Don Young, has worked with the Inter-Tribal Monitoring Association and has made a verbal commitment to continue a dialogue to develop, if necessary, further reform legislation to finalize the accounting problems with the IIM and tribal accounts. It is my privilege in the chair to take the opportunity to welcome Don Young's Alaskan on the Board of ITMA, Bill Martin, and to offer Mr. Young's continued commitment to work to resolving the trust fund issue.

I turn now to my friend, the ranking member.

Mr. RAHALL. Mr. Chairman, just a housekeeping request, that all members—a unanimous consent request—that all members be allowed to insert their opening statements, whether they were given here today or not.

Mr. HAYWORTH. Oh, indeed. Without objection, we will continue in that regard. As we welcome up panel No. 2, the Chair would first turn to my friend from Montana, who has the distinction of welcoming a couple of his constituents from Big Sky Country.

Mr. REHBERG. Thank you, Mr. Chairman. At this time I would like to introduce two distinguished guests from the State of Montana. The second person, I believe, testifying today is Fred Matt, a friend of mine, a tribal Chairman from the Confederated Salish and Kootenai Tribe, which is in the beautiful Mission Valley of western Montana. It is a 1.3 million acre reservation, and Fred has got quite a reputation of being a tremendous leader, especially in the area of forestry, and something that I want to try and present to this Committee of having him help us perhaps in a pilot project with timber salvage issues. If you look at what they have been able to accomplish on their own reservation, I think you will be duly impressed. And thank you, Mr. Matt, for being here today.

The other is another friend of mine, Elouise Cobell. Elouise is a banker, a rancher, and a member of the Blackfeet Tribe. She is also the lead plaintiff in Cobell v. Norton. Her activity in the trust reform issue is not her first foray into activism. She served as the treasurer of the Blackfeet Nation and is involved in agricultural and environmental issues in her home town of Browning, Montana, up on the eastern border of wonderful Glacier National Park. And thank you for being here today, Elouise, as well.

Thank you, Mr. Chairman.

Mr. HAYWORTH. I thank the gentleman from Montana. I thank the illustrious Montanans who join us. The Chair would also welcome as part of the panel Michael Jandreau, the Chairman of the Lower Brule Sioux Tribe. We thank you for coming, Mr. Chairman. And last in terms of introductions, but not least because the Chair is constrained to lavish special attention on our first witness, since he has the great and good sense to reside in the 6th Congressional District of Arizona, that is my long-time friend Ivan Makil, who is the President of the Salt River Pima-Maricopa Indian Community and tireless advocate on behalf of Native Americans and Indian Country. Mr. President, we will let you begin with your testimony.

STATEMENT OF IVAN MAKIL, PRESIDENT, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

Mr. MAKIL. Thank you, Mr. Hayworth. I really appreciate the opportunity to be here today, and also Ranking Member Rahall and other members of the Committee, distinguished guests.

I am Ivan Makil, the President of Salt River Pima-Maricopa Indian Community. We are located right in the Phoenix metropolitan area, approximately 7,000 members, traditionally a farming and resource-based community.

I am particularly pleased that Congressman Hayworth, whose district, as he mentioned, does include our community, is tasked with the responsibility of chairing this Committee, particularly because I know that he is very familiar, and I am impressed with the fact that many of the Committee members are well versed with this issue. So I won't take a lot of time to go back and discuss some of the history that I think we all are familiar with. But certainly the complexity of managing Indian trusts is extremely complex and certainly is something that you can't just turn over to anybody, not anybody, at least, like Arthur Andersen.

Before I propose my recommendation about this issue, I really would like to re-emphasize the complexity of this topic, because

managing of these trust issues is an issue that, as has been discussed already, is not just as simple as managing a portfolio of stocks and bonds. It is necessary to understand the importance of managing trust lands and that the land itself must be managed as an asset.

It is also important to understand that this requires record-keeping of land ownership as well as managing all the uses that generate revenue. Activities that take place on these lands can rum the gamut from resource management, agriculture, to real estate. From the tribal perspective, there is another equally important consideration. Tribes are tied to the land spiritually and culturally. We are inextricably connected to it.

There is a long history to consider and fiduciary disputes that must be resolved. Trusts to be managed not only include tribal lands that are under the authority of the Tribal Government but also in terms of allotted lands, which has been discussed as well. And I could give you a lot of examples of that, but I think there has been plenty already given.

As President for the past 12 years of my tribe, I have dealt intimately with these issues, and as to my experience not only as Chairman but on the advisory board, I am here to recommend a proposed solution based on that experience. I also have to say to you that I cannot recommend the bank trust model that has been proposed by Secretary Norton.

I think in addition it is important to say that I have yet to hear anything substantive as to the benefits of the proposed model. In fact, if asked, I think tribes would tell you that there is more that potentially could be lost with that type of model.

You all know the issues and the relationships with the Federal Government that we have, whether it is through treaties, executive orders, or Federal statutes or other regulations. The recommendation that I am proposing maintains the role of the Bureau of Indian Affairs and improves its effectiveness by focusing on the core issues of trust reform.

My proposal is an independent Indian trust commission. This independent Indian trust commission follows the lines of actually what I believe the intent of the 1994 legislation was, in which the commission, although it was set up under the Office of Special Trustee and an advisory board was set up, the advisory board was set up without any authority, only in an advisory capacity.

But this commission would develop a plan for trust reform and could recommend legislation to Congress. This commission would also include on the make-up of the commission tribal leaders with experience in these areas as well as non-members with banking, finance, and other relative experience that would be necessary.

This would have to be established by legislation, and members could be appointed in several different ways. I think the most familiar way is by the President and with the approval of Congress. It has got to be independent or at least quasi-independent of the Department of Interior, and it has to be able to provide transparent regulatory oversight.

This commission would also maintain control over the budget that would be earmarked for trust reform and would include, if necessary, an exit strategy for the commission.

I realize that my time has run out, and I will just make those comments briefly, and just say that there are examples of this type of commission. The FCC is one model, and also the RTC, or Resolution Trust Commission, offered a second model.

I thank you for the time. I realize, again, that my time is over, and I would be happy to answer any questions.

[The prepared statement of Mr. Makil follows:]

Statement of Ivan Makil, President, Salt River Pima–Maricopa Indian Community

INTRODUCTION

Chairman Hansen, Ranking Member Rahall, members of the committee, Secretary Norton and members of the Interior department, and distinguished guests, I am Ivan Makil, President of the Salt River Pima–Maricopa Indian Community. Salt River has over 7,000 members in what has traditionally been a farming and resource-based community. While I commend the Department for undertaking this monumental task and putting its proposal forward, I believe I have some concrete proposals that may better serve Indian country and the federal government.

We applaud the Committee for holding this important hearing and are particularly gratified that Congressman Hayworth—whose district includes our community—has been tasked with chairing part of this hearing because of his intimate knowledge about the Indian trust reform issue. My testimony today will focus on five main areas: (1) the proposed restructuring plan; (2) the consultation process; (3) the impact of the current state of affairs; (4) previous failed efforts to reform trust; and most importantly, (5) alternative proposals.

As President of the SRPMIC for twelve consecutive years, I possess extensive personal history, knowledge, and involvement with the lost and mismanaged Indian trust funds. At the end of my testimony, I respectfully offer my own recommendations to a solution that should, once and for all, help to facilitate a successful completion of Indian trust reform that is consistent with the federal government's trust duties and maintains the dignity and respect that America's first people so richly deserve.

PROPOSED RESTRUCTURING PLAN

As you know, Mr. Chairman, the proposed restructuring of the BIA is one of the biggest issues facing Indian country, and it has sparked a wide range of emotion throughout Indian country. Many tribal leaders have argued vehemently against the newly proposed Bureau of Indian Trust Assets Management (BITAM). As a positive and productive response, many tribes have drafted a wide variety of options that would successfully address trust reform without creating a larger federal bureaucracy. The number of alternative options offered by tribes demonstrates their own ability and depth in recognizing the core problems associated with Indian trust management.

For many years, tribal leaders have specifically requested that the Department focus on the core problems of trust asset management and to stop making politically motivated cosmetics changes that only exacerbate the issue. Moving organizational boxes around will not solve the problem. Unfortunately, many lives in our tribal communities hang in the balance. We all know that solving the fundamental problems in the BIA trust management system is what must happen programmatically regardless of changes in organizational structure.

Nevertheless, continuing the consultation process and congressional hearings are an important step toward solving this terrible dilemma that affects the very core of Indian country. I want to make it clear that the problem of Indian trust reform has lingered on for too many years and for too many years the sound recommendations of Tribal leaders have fell on deaf ears. I come here today to lend a helping hand to the members of the Committee and to the Department in solving this growing problem.

THE CONSULTATION PROCESS

As far as the consultation process is concerned, I commend the Department for extending the original deadline for the consultation period. Only with continued consultation with the tribes will a workable solution be proposed that will truly reform the trust fund process. It is my desire to see it extended yet again to ensure that all of Indian country has the opportunity to participate in this important process and propose solutions. By continuing consultation, the Department will be working in good faith and demonstrate its desire to truly work together with Indian country.

Given the fact that Indian trust reform directly impacts almost every Indian tribe in the country, it would make sense that any proposal would include the input of the actual benefactors of the trust relationship. In this regard, it is my desire to see the department provide some much-needed guidance regarding BITAM's affect on the local level before finalizing its proposal. I am also concerned that the BITAM proposal doesn't address the four breaches identified in the Cobell Court Orders. [1]

IMPACT OF THE CURRENT STATE OF AFFAIRS

Fortunately, as a self-governance tribe [2], we were not adversely affected by the recent shutdown of the Department's computer system. Through this status, we have taken over many of the services from the federal government including our own trust accounting system. While our system isn't perfect, we can account for trust assets and we continue to issue landowner lease payments in an efficient and effective manner.

Our self-governance status also presents an interesting dilemma in terms of the proposed creation of the BITAM office. With the BITAM, we are concerned about what the impact will be on "638 contract" and "self-governance" tribes. I am concerned that the current BITAM proposal violates both the spirit and the letter of numerous treaties, executive orders, secretarial orders, and federal statutes and regulations that promulgate the long standing federal policy of tribal self-governance and self-determination. [3] I urge Congress to impress upon the Secretary the importance of protecting our treaty and trust obligations in developing any proposal regarding trust assets.

PREVIOUS EFFORTS

As you know, Mr. Chairman, there have been many failed previous trust reform efforts. Congress most recently enacted the Trust Reform Act of 1994 to address the many trust management shortcomings and to provide for effective administration going forward. The "94 Act created the Special Trustee for American Indians, operating within the Department, to oversee reform efforts. It also created the Office of Special Trustee Advisory Board. As a member of the Advisory Board to the Special Trustee, I have a unique perspective on Indian trust fund management because I have been working on this issue for many years.

Over the last five years, we have advised the Special Trustee and monitored the Department's trust reform efforts. Although the advisory committee has made some pro-active recommendations, the Special Trustee hasn't followed through on our proposals. The creation of a new approach may be the impetus for real reform and solutions to the lost Indian trust funds debacle once and for all.

AN ALTERNATIVE TO TRUST REFORM

There are many sound options to the proposed BITAM office that may be incorporated into the Department's proposal. In conjunction with the Department, the National Congress of American Indians (NCAI), has convened a tribal leaders task force on trust fund reform. They have been meeting for several months now and have put together various proposals to solve the trust reform issue. I would encourage Congress and the Department to carefully review and debate these and other proposals to craft the best possible solution.

I am particularly interested in a proposal that would establish an Independent American Indian Trust Oversight Commission. In reviewing the various proposals circulating, it has become evident that this proposal, combined with two proposals, could create a viable regulatory commission that would avoid the creation of additional bureaucracy. Recommendations brought forth by the Advisory Board to the Special Trustee, the Van Ness Feldman proposal, and the Inter Tribal Timber proposal each have compatible components that are based on sound trust fund reform principles.

The Independent American Indian Trust Oversight Commission would have the following structure and purpose:

- It would be established by Congressional legislation
- The Commission members would be appointed by the President and approved by Congress

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[1] The Secretary has no written plans for either the gather of missing data; no written plan for the retention of IIM trust documents; no written architectural plan; no written plan for addressing the staffing of trust functions.

[2] The Tribal Self–Governance Act, P.L. 103–413

[3] The Indian Self-determination and Education Assistance Act (P.L. 93–638), The Indian Trust Fund Management Improvement Act of 1994, the Federal Oil and Gas Royalty Management Act of 1982, National Indian Forest Resources Management Act of 1995, the American Indian Agricultural Resource Management Act of 1995

- It would be Independent or Quasi–Independent of the Department of Interior
- The Commission would develop a comprehensive plan for trust reform
- The Commission would recommend to Congress legislation to place responsibility for the reformed trust system and for implementing a reinvention of the current archaic process
- The Commission would provide transparent regulatory oversight
- It would provide annual progress reports to the President approved by the House Committee on Resources and the Senate Committee on Indian Affairs
- The Commission would have control over the $67 million proposed by the 2003 President's budget request earmarked specifically for Indian Trust Reform
- The legislation would have a built-in sunset clause that will dismantle the Commission once it achieves it intended purpose

The Independent American Indian Trust Oversight Commission would act in a similar manner to the Federal Communication Commission or the Resolution Trust Corporation and would have the authority to effectuate real change. The Van Ness Feldman proposal provides an interesting comparison between the success of the District of Columbia Financial Responsibility and Management Assistance Authority and the Indian Trust Fund Management Reform Act. Both were enacted between 1994 and 1995. Seven years later, one was a spectacular success and the other a miserable failure. The Van Ness Feldman proposal states that, "...Congress and the President acted on the well established management principle that a system that is in bad-a-shape as the D.C. Government or the Indian trust system cannot reform itself from within. Reform must be directed from outside and that outside entity must have plenary authority to impose the reform." With input and critical participation from tribes—the benefactors of Indian trust—such a proposal could meet with similar success. Many of the other proposals have merit. All of them should be examined to help craft the proposal that will work and resolve this lingering headache for the federal government and Indian country.

SUMMARY

Mr. Chairman, the solution of the mismanaged Indian trust funds problem should be seen as a unique opportunity to right the wrongs of the past and not as an attempt to dismantle the BIA. As you know, a 1998 Department of Interior report showed that there were more than 340,000 individual Indian trust fund accounts and that more than $300 million passes through the accounts each year. Tribal leaders and members alike have lost faith in a government that was entrusted to protect their assets. To restore this trust, we must find a solution to this escalating and disturbing problem. The time is now, and I stand committed to working with the Committee, the Department, and all of Indian country to find a sound and just solution.

I believe the Department and Indian country are united in the effort to reform the trust fund system, but we must act together to achieve our goals. Only with a united front between Indian country and the federal government will we be able to bring meaningful, achievable, and necessary reform to the system. Indian country can and will work with Congress and the Department to find the solution, but the Department must work with us too.

In conclusion, Mr. Chairman, I commend you for holding this important hearing on one of the most pressing issues facing Indian country. I also thank Secretary Norton and Assistant Secretary McCaleb for putting tribal consultation on the forefront of their agenda. For too long, Congress and the Administration have let this issue drag on. With this bold initiative, Indian country is committed now, more than ever, to finding a solution to this pressing problem. Again, I encourage the Department to extend the consultation period to ensure that all tribes are able to participate in this important process and propose viable solutions in conjunction with the Department's efforts. I also hope that the Department will carefully review and scrutinize some of the alternative proposals to BITAM in the hopes of crafting the best possible solution for Indian country. I remain committed to helping Congress and the Department in this regard.

Thank you again, Mr. Chairman for allowing me to testify before the committee today. I would be happy to remain here to answer any questions you or the other committee members may have.

Mr. HAYWORTH. Thank you very much, President Makil. And the Chair would remind the witnesses, we do appreciate the effort to include these remarks within the 5-minute window, and even tak-

ing into account that sometimes we go a little bit over, the Chair will not try to cut things off too promptly.

Just one another note. Of course, your full testimony has been submitted and will be made part of the record, so it gives us a chance to have the synopsis of the bulk of your testimony. And we are very appreciate for that.

And, with that, we turn now to Chairman Matt. Welcome.

STATEMENT OF D. FRED MATT, CHAIRMAN, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

Mr. MATT. Thank you, and I also will try to be brief, because, as you pointed out, we have a more detailed copy of our testimony for you to read at your leisure.

First of all, I would like to recognize the Committee for taking the time to have us here, and you as Chairman, Mr. Hayworth, and Congressman Rahall and the other members, we really appreciate the time, as well as our Congressman from Montana, Denny. We really appreciate the honor and the opportunity to provide such important information for you to help you decipher what is going on in Indian Country. And I will try to be brief.

Congressman Rehberg described our reservation a little bit. We have 1.3 million acres. We are in the northwestern part of the State, and it is literally God's country. When you pray at night, it is a local call. And we have 7,000 members, and I really don't even know where to start. Like I said, I am glad that we have a written statement, and I am glad most of us do, because it is such an important issue to Indian Country that I don't even know where to start.

But I do feel this: You know, I have spent a week here, and I have spent some time running the Mall. I try to do exercise because that extra 20 pounds is still hanging on. And I pray during the time that I do my exercise, and I am thinking, What can I say that will help all of Indian Country, because we are so different. We are so different in the ways we do business.

What we want to do at Flathead is try to convey just a little part of what we do there, and we are very proud of it because we have taken upon ourselves some of those responsibilities and some of those things that the BIA has traditionally done, and I think we will point out through my presentation that it is working. The accounting and all those other things is working.

But I also feel like that the train has left the station and we are trying to get on it somewhere. I feel that from the rest of our tribal leaders. You know, we rally—there are probably more tribal leaders in town than there was at the Battle of Little Big Horn. And also, you know, I just can't—I feel like that I am looking at you there, you as who is going to bail us out of this, who is going to save us. And I feel like it is the fourth quarter, and I feel like that we are sitting back here—you might even call us the Washington Redskins. And we are going to throw this Hail Mary pass to you, and I hope you catch that ball, and I hope you do something for us as Indian Country.

I am really impressed with what knowledge is up there. You go from folks who have got 27 years of experience that has rep-

resented this Nation. I really appreciate that experience because, believe me, if I spend 1 week in Washington, D.C., that is 6 days too long.

But, with that, now I want to acknowledge one person that is in the room that means a lot to us in Montana, and he is here for a very specific reason. I would like to acknowledge Earl Old Chief. He is the chief of the Blackfeet Nation, and he is—Earl, would you please stand?

Didn't I say Earl Old Person? OK.

Earl has been around for 30 years, and he has represented his people for 30 years, and he has been here many times. And not only is Earl a respected leader, but he is also named as a plaintiff in the class action lawsuit by the Department of Interior.

It is important that all parties involved realize why Earl is here today. He is very concerned, as I am, that the litigation that he is a part of may well undermine the very principles of tribal sovereignty, and that he has fought so hard for to protect for so many years.

I appreciate again the Committee holding this hearing and asking the views of Indian people on the proposed reorganization of BIA. For many years, Salish and Kootenai Tribe knew that the BIA management of trust resources and other trust programs were broken. And we ourselves stated the process and made some decisions to do it ourselves. My feeling is we can do it and we can do a good job of it. And I think we have proven that.

We have compacted or contracted virtually every function of the BIA. We have a superintendent that we keep at the agency as a signature authority. We call him the Maytag man. But it is just to make a point, that we have—we have repaired dams on—we have one of the largest irrigation projects in the State of Montana—is my time already up? And we have a court system, we have law enforcement. And we manage our IIM accounts. We have a utility there that services 2,200 Indian and non-Indian recipients. And we want a health care system.

It goes on and on, and we are very proud of that, but knowing very well that each tribe that sits behind me and that is out there has their own way of doing business. I am not up here to say that that is the only way. But I just think bigger is not better. I think we, if you ask, if you give us the opportunity to offer suggestions, offer comments, offer our solutions that we have on the ground dealt with day in and day out, we have answers for you. We have professional staff.

There have been reports that have been referred to, and it is made available to all of you to go through. They have spent 20-some-odd meetings, and there is some good stuff here. Why reinvent the wheel? Why don't you just borrow some of the good suggestions that are in these reports and go forward? Why create a whole new agency that might know something about balancing a checkbook, but doesn't necessarily know anything about trust responsibility when it comes to timber, as you mentioned, and other natural resources.

So, with that, again, I apologize. My staff that comes with me, Anna Sorel and Randall McDonald, they are probably thinking that I once again have gone long-winded. But I think the real fruit of

what I have to say today is in our prepared statement for the record.

[The prepared statement of Mr. Matt follows:]

Statement of D. Fred Matt, Chairman, Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation

Chairman Hanson, Ranking Member Rahall and honored Members of the House Resources Committee, my name is Fred Matt, and I am Chairman of the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation. On behalf of my Tribal Council, I am pleased to provide these comments regarding the Department of the Interior's proposed reorganization of the Bureau of Indian Affairs for the purposes of Trust Reform. My comments will focus on the potential impact the proposed reorganization may have on tribes like CSKT that have exercised the opportunities afforded them by P.L. 93–638 the Indian Self–Determination and Education Assistance Act. I will conclude my testimony with an alternate proposal for reorganization, which addresses the concerns I have identified.

CSKT joins with other Tribes in recognizing that Individual Indian Money (IIM) trust fund accounts have been historically mismanaged. For many years, we have called for a complete reconciliation of trust fund accounts and continue to make that request so that there may finally be justice for the over 300,000 IIM accountholders. We look to the Cobell v. Norton court case to ensure that accountholders' rights are protected, to the fullest extent of the law. However, the future management of Indian (including tribal and individual Indian) financial trust accounts and trust asset management must be determined through the thoughtful development of applicable business standards and consultation with Tribes, not as a response to an on-going court case. Many tribes, mine included, have for many years operated BIA programs and through this experience can provide meaningful input toward effective and long-standing trust management reform. The Department of the Interior's proposal to create the Bureau of Indian Trust Asset Management (BITAM) does not achieve this result. It is reform for the sake of reform and will create far more problems than it will solve.

Over a decade ago, my Tribal Council recognized that one of the primary responsibilities of tribal government was to ensure tribal self-sufficiency. Our Tribal Council has held a steadfast commitment that it is the responsibility of our government to understand the needs of our people, and further, to ensure the needs of our Tribes and people are met. This approach is the realization of the principles of self-determination and self-governance, and results in programs that match my people's needs in a way that programs designed in Washington D.C. could never do. The CSKT commitment to Tribal self-sufficiency is also fulfilled through our efforts in self-governance. We have fulfilled this responsibility by exercising the opportunities provided in Public Law 93–638, the Indian Self–Determination and Education Assistance Act of 1975, as amended. CSKT is one of the original ten tribes selected to participate in the Self–Governance Demonstration Project of the DOI. Since that time, we assumed the management and operation of all of the services, programs and functions previously provided by the Bureau of Indian Affairs at the Flathead Agency except for the irrigation division of the Flathead Indian Irrigation Project (FIIP). We are extremely proud of our P.L. 93–638 contract for operation of Mission Valley Power, the power division of FIIP that provides electricity to over 22,000 Indian and non–Indian consumers throughout the reservation area. Under our administration, MVP has kept power rates low and has won numerous management awards.

CSKT has also assumed the management of the BIA Real Estate Services including appraisals. Although this is clearly a trust function, we have developed a streamlined approach for the Tribes to provide this function. Our Tribal appraiser produces appraisals for review and approval by the federal official for the Region. The Regional official reviews the appraisal to ensure that all federal standards and requirements are met. Once the official is confident the appraisal is correct, he then signs off on it.

There are many other examples of our quality management of federal programs. We operate the Land Titles and Records Office (and are one of the few tribes in the country to do so), the entire Indian Health Service health delivery system for nearly 10,000 beneficiaries and provide law enforcement within the exterior boundaries of our 1.3 million acre reservation that includes portions of four Montana counties.

Unlike DOI accounts managed by the Federal Government, each year our Tribes' accounting management undergoes an intensive external financial audit according to standards developed by the Federal government. I am proud to report our Tribes'

audits over the past years are clean with no material weaknesses identified. Furthermore, each year the Department of the Interior's Office of American Indian Trust conducts a trust evaluation on all BIA programs our Tribes have assumed. Again, I am proud to report our Tribes' operation meets or exceeds the standards set forth in their evaluation.

The proposed DOI BITAM reorganization of the trust functions, including the transfer of all trust programs such as natural resource and realty programs, is alarming because it poses a threat to our Tribes' ability to manage and operate programs. Our experience is that it is extremely difficult, if not impossible to access programs not located in the BIA (which will include programs in BITAM if transferred). It is critical to recognize that P.L. 93–638 applies to BIA programs differently than it applies to DOI programs located outside the BIA, which are referred to as "non–BIA programs." We have experienced that non–BIA programs are zealously guarded by the agencies operating them. The effect is that Tribes have been stymied in their endeavors to manage federal functions not located in the BIA. This is demonstrated by the few number of non–BIA Self–Governance agreements successfully negotiated by Tribes and DOI.

For example, CSKT has attempted to manage two programs located outside the BIA. The first is the National Bison Range. It is a refuge managed by DOI U.S. Fish and Wildlife Service. Under federal regulation, for a Tribe to assume operation of a non–BIA program, the tribe must demonstrate a geographic, historic and cultural connection. In our case, CSKT clearly exceeds the burden required by the federal regulation. First, the refuge is completely located in the heart of the Reservation, on land taken from the Tribes after the reservation was established. Second, history credits our late Chairman Michael T. Pablo's family with saving the buffalo from extinction as they raised the herd of buffalo eventually bought by the United States government as the foundation stock on the National Bison Range. And finally, there is clear cultural connection between bison and tribes. Yet our effort to manage the National Bison Range under a Self–Governance agreement, which began immediately after the Tribal Self–Governance Act of 1994 (Title IV of 93–638) was enacted, has been continually thwarted by DOI.

Another CSKT experience in assuming operation of a non–BIA program was the Financial Trust Services (FTS) including the Individual Indian Monies Program (IIM) from the Office of Trust Fund Management (OTFM). Although the FTS program is clearly for the benefit of Indian people and formerly administered in the BIA, it is now considered a non–BIA program and guided by the federal regulations for non–BIA programs. Unlike Title IV regulations for the BIA, the Title IV non–BIA regulations allow the bureaucracy to determine if and how a program will transfer to a Tribe. Unfortunately when the decision arises to transfer a federal program to the Tribes, it is the federal government that retains final authority, not the Tribes. Faced with the non–BIA regulations in negotiating, CSKT decided to set aside important principles of Self–Governance in order to reach an agreement to operate the FTS program locally when it became clear that OTFM would not otherwise agree.

Since the first agreement was signed between CSKT and OTFM to operate the IIM program, there has been a continual erosion of tribal opportunity to manage the program. During the first years of operation, our IIM program was able to make changes, such as address changes to the accounts. Now, all changes, including simple address changes, must be forwarded to Albuquerque, NM for processing at a central location. Changes to accounts that require the signature of a federal official that formerly were signed off by the Agency superintendent must now be sent to Portland, OR and then to Albuquerque, NM. CSKT has become a paper-processing program and any meaningful work has been transferred to the OTFM Central Office. CSKT has every reason to believe the same thing or worse will occur should BITAM be implemented. In the name of trust reform, programs will be centralized instead of being delegated to the local level where we have expertise in implementation. This would be devastating to our Tribes and the effective tribal operation we have put in place.

Nowhere in Secretary Norton's proposal to create BITAM are these concerns addressed. Representatives from my Tribal Council have attended four of the consultation meetings the DOI has conducted on this proposal. Each time the tribes in attendance have asked DOI to explain the impact this proposal will have on tribal contracting or compacting of BIA programs, but to no avail. There is no answer because when the proposal was made this critically important question, among so many important issues, was not considered. This is not acceptable. Assurance must be made that federal regulations governing BIA programs for contracting and compacting purposes will remain the same. Tribes have not created this problem and should not be punished for DOI's mismanagement. The Cobell case should not be

used by either the plaintiffs or the Department to gut the great legacy left by President Richard Nixon to the Indian people: the Indian Self–Determination Act.

There are going to be major problems between the BITAM and the BIA and Indian tribes if this reorganization is allowed to proceed. There will be finger pointing between the BITAM and the BIA unless the BITAM is given almost all jurisdiction now retained by the BIA. If that is the plan, why not simply clean up the BIA? Merely transferring programs from one box to another will not lead to substantive change.

I have explained our Tribes' self-governance experience to demonstrate the capability of tribes to manage trust programs to a high standard and this must be allowed to continue.

As the Committee has requested, the Tribes have developed an alternate proposal to BITAM even if it might be somewhat premature since BITAM has generated more questions than answers. CSKT submits the following as one option available to meet the objectives set forth in the EDS Report commissioned by the DOI including the primary objective to consolidate trust functions under a single individual for accountability purposes. Our proposal uses the final Report of the Joint Tribal / DOI / BIA Advisory Task Force on Bureau of Indian Affairs (BIA) Reorganization, which was chartered by Mr. Manual Lujan, Jr., Secretary of the Interior on December 20, 1990. The final Report of the Advisory Council was submitted in August 1994. The Task Force included three tribal representatives from the 12 BIA areas, two representatives from the Department of the Interior and five BIA employees. The Task Force met 22 times over a four-year period and throughout the United States. At each meeting, they made an effort to incorporate the views of the tribes of the local area into their final recommendations. All meetings were open to any tribal representative, regardless of whether they were officially on the Task Force.

We propose, as the Task Force's final Report recommended, the creation of three separate tiers in the BIA. The first tier is the Office of the Assistant Secretary including a number of administrative support offices. It is in this tier that uniform standards would be developed for all trust functions. The second tier would combine the current Central Office functions and the regional offices that would be restructured to provide integrated operational and technical services. To meet the objectives of trust reform, CSKT recommends this tier have three Branches, each headed by a Commissioner who would be nominated by the President and approved by the United States Senate to ensure continued Congressional involvement in this issue. The Branches would have the following responsibilities: The first Branch would be responsible for the Financial Trust Accounting. The second Branch would be responsible for the management of tangible trust assets that generate revenue for the Tribes and individual allottees, such as natural resources. The third Branch would manage all remaining programs within the BIA. Most importantly, this approach consolidates the financial accountability under a single high-level individual, the Assistant Secretary of Indian Affairs. It is in this tier that the monitoring and evaluation of implementation of uniform standards would occur. The third tier would be the agency / field office level where the operations according to the uniform standards would be delivered, with proper delegations of authority to fulfill the trust responsibilities of United States government.

The foundation of our proposed organization is the development of uniform standards for the delivery of trust standards. The tribes and DOI would mutually develop these standards but in accordance with trust law principles while taking into account the uniqueness of tribal trust law and cultural concerns. All BIA services would be provided according to these standards regardless of whether they were provided by the BIA or contracted or compacted by tribes. Monitoring and financial auditing will be essential components of the new delivery system. I have attached an organizational proposal for your consideration.

Thank you for allowing me to testify and for understanding the perspective of the Confederated Salish and Kootenai Tribes of the Flathead Nation.

Confederated Salish and Kootenai Tribes – DOI Trust Reform Organizational Proposal

The three tiered approach is based on concepts of the 1994 Joint Tribal BIA / DOI Advisory Task Force Report after 22 consultation meetings. 02.04.02

Office of the Secretary of the Interior	
Tier 3 Office Ass't Secretary - Indian Affairs +Intergovernmental Affairs Office +Self Governance Office +Personnel Management & Training Office[A] + Uniform Standards, Protocols, Eval[B] -Trust Policies & Proc -Inherent Fed. Functions -DOI Tribal Trust Evaluation (As required for Trust Reform, Tier 3 through the creation of a "single point of accountability"[C], will emphasis the application of **consistent** trust standards that will apply to P.L. 93-638 contracting and compacting and the services directly provided by BIA.)	**Primary Functions** Focus on budget, intergov relations and policy formulation Tribal Advocacy Administration/Cong. Initiatives Public Information Beneficiary services
Tier 2 (Central Office with branches headed by commissioners, will include the Regional offices, which will be restructured to create an integrated operational and technical services tier in BIA.) Branch of Financial Trust Mngt. +Trust Record Mng +Historical Trust Accounting +Audit +Trust Accounting IIM Tribal Trust Branch of Trust Asset Mngt. +Real Estate[F] Probate Leasing LTRO +Timber +Minerals/Mining +Resource Mng +Resource Compliance +Appraisal Branch of Other Indian Trust Programs[D] Service Program[E] Education +Housing +Operation +Economic +Construct Development +Social Services +Roads +Law Enforcement + Courts (As required for Trust Reform, Tier 2 will emphasis the **separation** of financial, trust asset and other trust program management while remaining within the BIA. This eliminates a major obstacle in DOI's proposed reorganization, as BIA programs relationship to P.L. 93-638 remain unchanged.)	**Primary Functions** Administrative oversight Provide TA to Agency/Field/Tribe Flexibility determine role Tier 2 on Direct, 638 contract/compact. Eliminate service fragmentation between CO and Regions Eliminate duplication @ CO and Regions Clarify line authority
Tier 1 Agency / Field Offices (Tribal Operation of contractible and compactable functions, with Agencies / Field Offices retaining federal functions with delegated authority for consistent application.)	**Primary Functions** Carry out operational functions Delegated authority w/ TA Tier 2 Retain IFF while maintain Tribal S Gov.

[A] Fulfills EDS' recommendation for staff recruitment and training.
[B] Fulfills EDS' recommendation for minimum standards consistent with a commercial bank trust with recognition of the unique Tribal trust relationship and that are jointly developed between the Tribes and DOI.
[C] Creates "single point of accountability" as recommended in the EDS November 13, 2001 letter with the authority to direct all trust reform efforts and with line authority and control over budget, subject matter expertise, staffing and training. Furthermore, it fulfills the federal commitment to return the trust funds functions to the BIA when the Office of the Special Trustee was created in the Trust Reform Act of 1994.
[D] Fulfills EDS' recommendation to separate staff from providing financial trust functions and other trust functions.
[E] Protect other Indian trust programs from devolution to other federal agencies and the states.
[F] This branch may need to be divided in to a section for "Tribal Trust" and a section for "Individual Trust" management.

Mr. HAYWORTH. Thank you, Mr. Chairman. I wouldn't worry too much about that. That seems to be kind of a common affliction in Washington, D.C., to have a bit of verbosity. I know whereof you speak, so I appreciate the spirit in which you offer those remarks.

Chairman Jandreau, welcome. We look forward to hearing your thoughts.

STATEMENT OF MICHAEL JANDREAU, CHAIRMAN, LOWER BRULE SIOUX TRIBE

Mr. JANDREAU. I thought he wasn't going to share this mike with me.

Mr. Hayworth, Ranking Member Rahall, it is a pleasure that I come here before you today. My name is Michael Jandreau. I am the Chairman of the Lower Brule Sioux Tribe, and I am Chairman of the United Sioux Tribes. I am also a member of the task force that has been recently created. I also was a part of the original task force for the reorganization of the Bureau back in 1990, in that era.

I have a statement that has been submitted to the Committee, so I will speak of some things that affect me and affect our region of the country.

I spent a weekend with a group of people who were very intensely concerned about the problem that we have before us. I had spent the previous week with our delegation, our entire delegation, attempting to get a seat here to speak to you today. On Monday morning, I was called and told my only living blood uncle had passed away, and my family wanted me back home because I am one of the older ones in the family.

Because of the difficulty, I wasn't able to go right away, and so, you know, preparations were made for me to be able to leave today and to return home.

My uncle also served as a chairman of our tribe and as a council member. He dealt with many of the things that I find myself dealing with today.

My statement will talk to you about our concerns, about the many attempts to do things with the Bureau of Indian Affairs, to make services more appropriate and more accessible to our people.

My statement will also tell you that we don't need Committees making decisions with the Office of the Special Trustee or anyone else about the future of Indian Country.

My statement will also tell you about the hardships that our people are enduring, in the Aberdeen area, the highest death rate, where diabetes and alcoholism is prevalent.

My statement will tell you that we want to be a part of the process to deliver services, that we want to be a part of the process to correct the wrongs, to correct the inadequacies.

My statement will tell you that we want the Bureau of Indian Affairs left intact, that we feel under the treaties that were made with most of the tribes of my area, that those treaties created this trust obligation.

We know that the treaties have not been honored to the extent that they have been passed. But we know that we still believe in the content.

My statement will tell you that our tribes are trying to survive. Our tribes are dealing with those resources. On an individual level, my particular tribe has the largest irrigation project. We have a full-blown hunting and fishing project. We are doing things with the computer industry to create jobs. We are trying to take care of ourselves. We believe in what we are doing, but we also believe not only in the real but the moral responsibility that this country owes to us, not from the point of being just a victim, but being a victim whose real desire is to make life better for those people on our reservation and reservations.

Again, thank you very much for giving me this opportunity.

[The prepared statement of Mr. Jandreau follows:]

Statement of Michael Jandreau, Chairman, Lower Brule Sioux Tribe

I would like to thank you, Chairman Hansen, and Ranking Member Rahall for providing me with the opportunity to testify before this committee on this extremely important issue. My name is Michael Jandreau and I am the chairman of the Lower Brule Sioux Tribe in South Dakota. I am here today representing the Great Plains Region, which include the 16 tribes in North Dakota, South Dakota, and Nebraska.

Indian Country is facing many pressing issues that would be excellent topics for a Congressional hearing. Indian health care is one example. The Great Plains Region leads the country in almost every negative health statistic available. We have the lowest life expectancy of any group in the country, and alcoholism and diabetes are ravaging our communities. There are also pressing economic development needs. According to 2000 Census figures, South Dakota Indian Reservations are home to five of the poorest counties per capita in the entire United States. We have an average unemployment rate of 75% on reservations throughout the Great Plains.

While these are issues that we look forward to working with this committee to address, we are here today discussing BIA reorganization, trust reform, and our concern about losing the already scarce resources we have available to us at the local government level.

The issues of trust reform and reorganization within the BIA are nothing new to us in Indian Country. We have endured many efforts—some well intentioned and some clearly not—to fix, reform, adjust, improve, streamline, downsize, and even terminate the BIA and its trust activities. We have endured these efforts through both Republican and Democratic administrations. Unfortunately, they have rarely sought meaningful involvement from tribal leadership, nor recognized the federal government's treaty obligations to tribes. These are both critical if we hope to find a workable solution to this very real problem.

The Bush Administration recently announced the latest effort to reorganize these structures and shuffle responsibilities—this one mandated by a federal court. The Administration responded to the demands of the court by quickly drafting a plan to fix the trust mess. However, it did so without consulting the very people who would be affected by such a massive restructuring—Indians. Not surprisingly, this proposal has been met with concern, suspicion, fear, and even outrage from Indian people across the country. BIA reorganization has become the most important issue on our reservations.

As in the past, this proposal did not seek early input from elected Indian leaders. In fact, we were not consulted until the Administration had devised and released a plan. It was only in response to our unanimous rejection that a consultation process was devised and instituted.

Open listening sessions have been held across the country, and now a Tribal Task Force has been formed to meet with Interior Department officials to discuss trust reform and the reorganization of the BIA. I sit on that task force. This should have been the first step in the process, not the last.

I am very concerned because the Court Monitor, Joseph S. Keiffer, III, in his most recent report to the U.S. District Court for the District of Columbia, stated that the Office of Indian Trust Transition (OITT) will continue to pursue trust reform activities while the consultation process continues. How can the Department of Interior be meeting with tribal leaders to discuss the reform of the BIA, while the OITT is simultaneously working implement trust reform measures that have not been (and will not be) discussed with tribal leaders? Mr. Chairman, if this is consultation then we are doomed even before we start.

Another group, the Special Trustees Advisory Board has recommended and supported the creation of an entirely new agency to be solely responsible to manage the federal government's "trust responsibilities." It recommends that the new agency provide a historical accounting of assets of individual Indians and tribes, data clean-up and future management of these activities out side the BIA.

While these are not unimportant steps, they miss the bigger picture. Tribal leaders have stressed that trust responsibility goes much deeper than finding and implementing certain management tools. The federal government must act in light of the moral obligation to tribes that it has voluntarily assumed. This obligation is reinforced by the fact that the federal government signed treaties with sovereign Indian tribal governments, not individual Indians or members of any advisory board. During the listening sessions and other dialog, this strong belief has resonated throughout each conversation that tribal leaders have with the administration and Congress.

If we want a solution that works, I feel all of the OITT's ongoing activity must be stopped. Furthermore, it is not enough that a plan simply be agreed to or endorsed by the Special Trustee's Advisory Board. Elected representatives of tribal nations must be consulted throughout the entire process, and their ideas must be incorporated into any solution. Without this, we will end up with another reform attempt that costs taxpayers millions of dollars, undermines local tribal self-determination, and does nothing to solve the problem. Let's not forget that we are here today because similar reform attempts have failed in the past.

It is no secret that the federal government has failed in its mission to correctly manage the assets of our Indian people. We need an accountable entity that will find a solution and resolve the past mismanagement problems. But any effort to find a solution should not be at the expense of Indian people across this country. The lives of our people are difficult on a good day. Our people must deal with poverty, alcoholism, shortened life expectancy, inadequate housing, lack of transportation, and other challenges. They look to tribal governments for assistance, and we look to all levels of the federal government for the resources we need to deal effectively with these problems. We will only be successful if the lives of these people are bettered by the outcome of this process. We are very concerned that taking responsibilities, manpower, authority, prestige and massive resources away from the BIA, while creating an entirely new, expensive, out of reach bureaucracy, does nothing to better the lives of our Indian people back home on our reservations.

For these reasons, we cannot support the idea of stripping the "trust responsibilities" from the BIA to create a new agency. For Indian people, the BIA is synonymous with trust responsibility. We know that trust reform management must be reorganized and consolidated under one entity, but that entity should remain under one assistant secretary within the BIA. This will drive a solution to the problem, but will not pillage the resources that tribal governments need to govern effectively and provide efficient services to their people.

You cannot take the heart out of a man and expect him to live. If you take away the "trust" then we, as Indian people, will eventually die. That is how we are viewing the reorganization plan by this Administration. It takes our elders back to that dark time prior to the Reorganization Act of 1934, when their land and assets were disappearing because the government was not upholding its treaty obligations. It is our hope that this administration does not seek to destroy the reservation system as we know it and terminate of their treaty responsibilities to tribal governments. I stand ready to work with this committee and with all parties who are interested in finding a solution to this problem that will help those who need it most—Indian people.

Thank you and I am ready to answer any questions that the committee may have.

Mr. HAYWORTH. Chairman Jandreau, we thank you very much for your testimony here today.

Now we turn to our friend, Congressman Rehberg's constituent, Ms. Cobell. Welcome once again.

STATEMENT OF ELOUISE COBELL, IIM TRUST BENEFICIARY

Ms. COBELL. Thank you for this opportunity to address the Committee on the issue of reform of the Individual Indian Monies, and I would like to state at the outset this is different from the tribal trust monies.

I would also like to thank Congressman Rehberg for that wonderful introduction, and I would also like to recognize members of my tribe that are here with me today: Chairman Old Person, Councilman James Sankador, and Councilman Irvin Carlson.

The history of mismanagement of the IIM trust is long and tortured, but it boils down to three must-do's: The IIM trust system must be fixed; the IIM beneficiaries must be provided an accounting; restitution must be made. The true trust reform will require a restatement of individual Indian trusts. More than $100 billion in trust deposits, interest, and accruals remain unaccounted for. A senior trust official testified last month in a court, stating that not yet have the Department of Interior been at the starting gate as far as it goes for an accounting.

Trust funds are not a handout or an entitlement program. It is very important to keep in mind that this is our money—revenue from leases for oil, gas, drilling, grazing, logging, mineral extractions on Indian lands. This individual Indian trust was devised by the U.S. Government and imposed on Indian peoples more than a century ago. As trustee, the United States and each branch of the Federal Government has the highest legal, fiduciary responsibility to manage the individual Indian trust in a professional manner, exclusively for the benefit of individual Indian trust beneficiaries.

Unfortunately, this has been and remains a severely broken trust. Hundreds of thousands of American citizens, the individual Indian trust beneficiaries, have won decisively at every stage of our litigation. Now we are in the middle of a contempt trial for Secretary Norton and Assistant Secretary of Indian Affairs Neal McCaleb for violating court orders and for perpetuating a fraud on the court. I have no doubt that they will be held in contempt. Meanwhile, tens of billions of dollars have been appropriated by this Congress to defend the fraud, deceit, and malfeasance of the Interior Secretary and the Treasury Secretary.

Only yesterday the judge chastised Secretary Norton for her totally improper request to circumvent a court order in order to try to provide confidential financial information to this Committee. The judge said, "Secretary Norton has demonstrated once again her total inability to understand the role of a trustee in relationship to a beneficiary by seeking release to Congress, knowing that it would be made public, the confidential financial information of these beneficiaries." I certainly agree with Congressman Rahall that nobody of this Committee would like to have all their financial transactions provided to the general public.

Despite being ordered by Congress and the courts to reform the trust and provide a historical accounting, testimony in the contempt trial going on now shows that the Secretary of Interior has done nothing—nothing—to comply.

The administration's mindless battle to prolong this case in the face of certain defeat is an indefensible waste of judicial resources and an assault to the Native Americans, taxpayers, and anybody with integrity.

Mr. Chairman, the individual Indian trust beneficiaries have asked Judge Lamberth to strip control of the trust away from the Secretary of Interior and place it in the temporary hands of a receiver. The bottom line is that the Bush administration is under a

court order to account for more than $100 billion in individual Indian trust monies and as utterly refused to do so.

Judge Lamberth has appointed both a special master, Alan Balaran, and a court monitor, Joseph S. Kieffer III, to help force compliance with the court orders and to assess Interior's true progress on trust reform and the validity of its quarterly reports to the court. Four scathing reports by the court monitor formed the basis of four contempt charges against Norton and McCaleb. A separate report by the special master on the utter lack of computer security for IIM accounting data let the fifth court of contempt. Altogether, Mr. Kieffer has issued six reports that amount to a searing indictment of Secretary Norton, Secretary O'Neill, and Attorney General Ashcroft in this matter.

Secretary Norton and her inner circle of senior officials have now proposed a drastic reorganization of trust responsibility into a new Bureau of Indian Trust Asset Management. Because she has done this so late in the day and suddenly and without proper consultation with tribes, as required by law, her actions appear to be a desperate attempt to stave off contempt. The proposal has met with very strong opposition throughout Indian Country. Among its flaws, it would merge the tribal trust with the IIM trust under one entity, ignoring the trusts' two distinctly different functions, constituencies, and histories. This plan will undermine not protect tribal sovereignty. It will violate IIM account holders' own direct relationship with the Federal Government, established by law.

The most critical defect in the Secretary's proposal is that it would leave the trust in the Interior control at the mercy of the same inept managers. Mr. Chairman, it is our hope that this Committee and Congress will terminate all appropriations needed by Interior Secretary, the Treasury Secretary, and Attorney General to continue their bad-faith legal defense. Instead, we ask you to support the individual Indian trust beneficiaries' request for appointment of a receiver under the supervision of the judiciary as the only rational solution for the Government to fix individual Indian Trusts. Congress has appropriated more than $614 million for trust reform since 1996, and it has gotten virtually nothing—no accounting of individual Indian trust monies, no rehabilitation of a woeful system, no improvements in information technology.

As the court monitor stated, "Who within the Department of Interior will hold these officials accountable for past and present harm caused to the IIM account holders for their unprofessional conduct and misleading reports that covered up and hid the most serious of their failures?" Apparently no one, because they remain in leadership positions, involved with trust operations, and related management and legal activities, or have moved on to equivalent senior positions within the Department of Interior.

I believe strongly that further appropriations for trust reform should be fenced in to be used by a receiver and not the failed programs of the past defense of the indefensible litigation. The individual Indian trust should be put in the intensive care of a receiver supervised by Judge Lamberth until it has been rehabilitated fully and restored to health.

In summary, instead of underwriting non-existent trust reform, a skilled trustee for individual Indian trust—protected from politics

and funded with permanent and indefinite appropriations—could hire proficient managers desperately needed to ensure prudent management of the multi-billion dollar trust. The goal here is simple: Stop playing politics with our money and our people.

Our litigation has exposed an ugly story about arrogance and ineptness. But with the help of this Committee, we can begin to write a new chapter. I appreciate this chance to testify before you.

[The prepared statement of Ms. Cobell follows:]

Statement of Elouise Cobell, IIM Trust Beneficiary

Thank you, Mr. Chairman, for this opportunity to address the Committee on the issue of reform of the Individual Indian Monies (IIM) trust.

The history of mismanagement of the IIM trust is long and tortured, but it boils down to three "must-do's":

- The IIM trust system must be fixed. The Secretary of the Interior has ignored the will of Congress and misled Congress for decades. Since December 1996, the Interior Secretary has ignored orders entered by Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia. Nothing has changed. Since the Interior Secretary continues to breach the trust duties owed by the United States government to individual Indian trust beneficiaries and Congress clearly is unable to compel an obdurate member of the President's Cabinet to obey the law and discharge the trust duties conferred on her by Congress, it is time for Judge Lamberth, with the support of Congress, to place the IIM trust in receivership.
- The IIM beneficiaries must be provided an accounting. Reportedly, at least $500 million a year in trust revenues is generated from individual Indian-owned lands. Where is the money? The Interior Secretary has demonstrated through the fraud she has perpetrated on the United States District Court and the United States Court of Appeals that she no longer should be trusted to manage or account for Individual Indian Trust funds.
- Restitution must be made. True trust reform will require a re-statement of the Individual Indian Trust. More than $100 billion in trust deposits, interest and accruals remains unaccounted for. We hope that this year, Judge Lamberth will set a trial date to determine the full amount due to the individual Indian trust beneficiaries.

Mr. Chairman, the 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 people depend on these payments for the bare necessities of life. These trust checks are not a luxury. Trust funds are not a handout or an entitlement program. It is very important to keep in mind that this is our money—revenue from leases for oil and gas drilling, grazing, logging and mineral extraction on Indian lands. This Individual Indian Trust was devised by the United States government and imposed on Indian peoples more than a century ago. As trustee, the United States and each branch of the federal government has the highest legal and fiduciary responsibility to manage the Individual Indian Trust in a scrupulously professional manner, exclusively for the benefit of Individual Indian Trust beneficiaries.

Unfortunately—as you and many of the members of this Committee are well aware, Mr. Chairman—this has been, and remains, a severely broken trust. The mismanagement of the Individual Indian Trust by the United States government for more than 120 years is a national disgrace. The refusal of the Executive Branch to fix it is appalling. The failure of Congress to act decisively to hold the Interior Secretary accountable for her malfeasance is disturbing and indefensible. Since we initiated class action litigation in 1996 to enforce the trust obligations owed by the United States to individual Indian trust beneficiaries, I have said many times to our legal team that the government's bad faith and misconduct simply cannot get any worse. And each time I've been wrong. It gets worse and worse and worse—in spite of humiliating courtroom defeats, in spite of scathing reports by court-appointed watchdogs and the government's own consultants and experts, in spite of shameful news coverage and editorials in the media, and in spite of repeated warnings and admonitions from the Congress. The Interior and Treasury Secretaries' malfeasance

strains the limits of our language. The courts and Congress have used some of the strongest rhetoric I have ever seen to describe the injustice being done to the individual Indian trust beneficiaries, and still the Secretary of the Interior, the Secretary of the Treasury and the Attorney General fight on against us and defend the legally and morally indefensible. Why? Where has Congress been while this mugging has gone on for nearly six years a few blocks away from this hearing room? Where is the outrage from this body? Why has Congress turned its back on Indian people again?

Mr. Chairman, I would like to make this clear at the outset to the members of the Committee: Hundreds of thousands of American citizens—the individual Indian trust beneficiaries—have won decisively at every stage of this litigation. More than two years ago—in December 1999—we won a landmark decision at the U.S. District Court. The Justice Department appealed that decision, and we won unanimously at the appellate level a year ago—in February 2001. Two members of President Clinton's Cabinet—Messrs. Rubin and Babbitt—were held in contempt of court in February 1999 for violating court orders and covering up their violations, and the taxpayers paid their $630,000 fine. Now we are in the middle of a contempt trial for Secretary Norton and Assistant Secretary for Indian Affairs Neal McCaleb for violating court orders and for perpetrating a fraud on the court, and I have no doubt that they, too, will be held in contempt. Tens of millions of dollars have been appropriated by this Congress to defend the fraud, deceit and malfeasance of the Interior Secretary and the Treasury Secretary.

Judge Lamberth already has ruled that the Secretary's abject failure to provide even minimal computer security protection for individual Indian trust data and trust funds is contemptible on its face. She also faces charges of failing to begin to provide an historical accounting to the individual Indian trust beneficiaries (more than seven years after Congress ordered them to do so and more than two years after Judge Lamberth ordered them to do so), and submitting false report after false report to the court. Despite being ordered by Congress and the courts to reform the trust and provide the historical accounting, testimony in the contempt trial going on now shows that the Secretary of the Interior has done nothing—nothing—to comply. The Administration's mindless battle to prolong this case—in the face of certain defeat—is an indefensible waste of judicial resources and an insult to both Native Americans, taxpayers and anyone with integrity.

Mr. Chairman, the individual Indian trust beneficiaries have asked Judge Lamberth to strip control of the trust away from the Secretary of the Interior and place it temporarily in the hands of a receiver. If Judge Lamberth finds Secretary Norton in contempt, as we hope he will, it will clear the way for the judge to do just that. The judge has said in court recently that he is proceeding carefully in this contempt trial—giving the government all the rope it wants—because no court has put an agency of the Executive Branch into receivership the history of this nation. But that is exactly where we are headed. And it will be a fine day when it happens, too. I would like to return to this subject in a moment to explain why we have asked for receivership, why a receiver is immensely preferable to Secretary Norton's ill-advised, last-minute reorganization plan for the BIA, and why the support of Congress for receivership is important.

If the Secretary is found in contempt and the Individual Indian Trust is placed, at last, in the competent hands of a receiver, I hope we can move to trial on the final issue—a restatement or correction of the Individual Indian Trust balances—before the end of the year (subject, of course, to the court's discretion and schedule). In 1999, Judge Lamberth and the U.S. Court of Appeals ordered the Secretaries of Interior and Treasury to provide individual Indian trust beneficiaries with an historical accounting of "all" trust revenues, withdrawals and accruals. However, Mr. Chairman, Interior has done nothing. A senior trust official testified last month that Interior "is not yet at the starting gate" on an accounting. In fact, he testified that Interior officials are still debating internally what the term "historical accounting" means. Secretary Norton's most recent Quarterly Report to the court acknowledges that her department's trust reform master plan has been shelved. A $3 million consultant's report to Interior advises starting over. Even if Interior and Treasury were acting in good faith, they are unable to provide an accounting because they have destroyed, and continue to destroy, the individual Indian trust records (making the Enron debacle seem to be trivial in comparison). They also have spent $36 million "so far" on a new trust accounting computer system that does not work and will have to be scrapped.

The bottom line is that the Bush Administration is under court order to account for more than $100 billion in Individual Indian Trust monies and has utterly refused to do so. Judge Lamberth will decide in the upcoming trial how much of those funds must be restored to correct the stated IIM trust balances. That figure is yet

to be determined finally, but if we go to trial it likely will be much more than $100 billion. Despite this impending financial train wreck and continuing legal humiliation—despite the oaths that the government's lawyers take as officers of the court—the Interior Secretary, the Treasury Secretary and the Attorney General march on, too arrogant to enter into good-faith settlement discussions that could cut this fiasco short, spare the court's time and energy and somewhat soften the Executive Branch's dishonor.

Mr. Chairman, I believe it would be helpful at this point to summarize very briefly the history of the Individual Indian Trust and how the Executive Branch has arrived at this state of disgrace while Congress has turned its back on Indian people.

The IIM trust derives from the 1887 General Allotment Act (the "Dawes Act"), which, as Judge Lamberth has noted, was "driven by a greed for the land holdings of the tribes." [Judge Lamberth's Dec. 21, 1999 decision in the Cobell case contains a concise history of the trust. It is posted on the Cobell plaintiffs' web site at www.indiantrust.com, under Court Rulings.] Under Dawes, tribes were paid for their land and each head of household was allotted property, usually 40-, 80- or 160-acre parcels. The land left over was opened to "non–Indian" settlement. The allotted lands were held in trust by the United States for the individual Indians. For more than 120 years, the Interior Department, and specifically the Bureau of Indian Affairs, has overseen the leasing of these allotted lands on behalf of the original allottees and their heirs. Revenues from these leases have been collected by Interior and supposedly held, invested and disbursed to the trust beneficiaries by the Treasury Department.

From the beginning, this system has fallen prey to abuse, corruption, neglect and incompetence. As the U.S. Court of Appeals for the District of Columbia Circuit said in its Feb. 23, 2001 decision upholding Judge Lamberth, "The trusts at issue here were created over one hundred years ago—and have been mismanaged nearly as long." Incredibly, since 1887 the management of the IIM trust has not grown steadily better, but steadily worse. It is worse today than it was in 1996, when we filed our lawsuit. Just to quote one brief passage from Judge Lamberth's 136-page opinion:

> "It would be difficult to find a more historically mismanaged federal program than the [IIM] trust. ... The court knows of no other program in the American government in which federal officials are allowed to write checks—some of which are known to be written in erroneous amounts—from unreconciled accounts—some of which are known to have incorrect balances. Such behavior certainly would not be tolerated from private sector trustees. It is fiscal and governmental irresponsibility in its purest form."

The glaring mismanagement of the IIM trust was exposed (not for the first time, or the last) by the House Committee on Government Operations, in its landmark 1992 report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," which was spearheaded by the late Rep. Mike Synar (D–OK). Citing the trust's "appalling mismanagement," Mr. Synar likened the IIM trust to "a bank that doesn't know how much money it has."

The Synar Report led to passage by the Congress in 1994 of the Indian Trust Reform Act. In an attempt to end Interior's chronic incompetence in running the IIM trust, the act established a Special Trustee for American Indians to oversee reform. A Level 2 position filled by a presidential appointee who is subject to Senate confirmation, the Office of Special Trustee was expected to provide the leadership and accountability that trust reform had been lacking. Sadly, that has not been the case.

On June 10, 1996—after years of run-arounds from Interior and the BIA, and convinced that they would have to be forced to clean up the IIM trust—we filed our class action lawsuit against the Secretaries of the Interior and Treasury. Judge Lamberth split our complaint into two issues—reform of the trust, and a re-statement of the accounts. On Nov. 27, 1996, the judge also ordered Interior and Treasury to preserve all existing IIM trust documents and to produce relevant documents and records to the plaintiffs. In fact, destruction of records and documents, including e-mails written by government lawyers in this case, has continued throughout the life of the litigation. Secretaries Babbitt and Rubin were held in contempt by Judge Lamberth in February 1999 for ignoring the document order, and the judge subsequently appointed a Special Master, Alan Balaran, to oversee the government's compliance. Unknown to all of us at the time, Treasury had destroyed an additional 162 boxes of trust records during the contempt trial. Treasury and Justice Department attorneys waited 13 weeks to inform the court.

After a nine-week trial on the first issue—how to fix the system—Judge Lamberth ruled on Dec. 21, 1999 that the United States must provide an historical accounting for "all" IIM funds. He ordered Interior and Treasury to reform the trust, and required quarterly reports from Interior on its progress.

Testimony in the Norton–McCaleb contempt trial has shown that for more than a year after Lamberth's decision, officials and lawyers at Interior and Justice did nothing about an accounting and little about trust reform. They believed that Lamberth had exceeded his authority and hoped he would be overturned by the appeals court. What actions Interior and Justice did take were driven by their litigation strategy and in support of their appeal, with no regard for the IIM trust beneficiaries. A senior trust official, Principal Deputy Special Trustee Thomas Thompson, testified that today—more than two years after Lamberth's decision—not a single IIM account has been certified as accurate. ("It really makes you wonder why I'm sitting here, doesn't it?" said Judge Lamberth.)

On February 23, 2001, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld Judge Lamberth. The same day, a senior Interior Department official sent a memo to the Special Trustee exposing the department's trust reform efforts as a sham. The department's trust reform plan, he wrote, was based on "rosy projections" and "wishful thinking." "Posturing for the court".seemed to be the primary influence on objectives and guidelines." Eventual disclosure of the memo by the Justice Department led Judge Lamberth to appoint a Court Monitor to assess Interior's true progress on trust reform and the veracity of its quarterly reports to the court.

Four scathing reports by the Court Monitor, Joseph S. Kieffer III, since his appointment in May 2001 form the basis of four contempt charges against Norton and McCaleb. (Court-ordered trust reform, said Kieffer, "is a chimera. The trust reform ship has been scuttled" A cynical observer would go so far as to say it never left dry-dock; rotting there.") A separate report by Special Master Balaran on the utter lack of computer security for IIM accounting data led to a fifth count of contempt. (It is Balaran's report that Judge Lamberth found to be a prima facie case for contempt.) This past Friday, Mr. Kieffer issued two more reports. They only add to the searing indictment of Secretary Norton, Secretary O'Neill and Attorney General Ashcroft in this matter. The Kieffer reports document a shocking pattern of misleading statements and outright lies to the court in the quarterly reports submitted by the Interior Secretary. Starting with the 3rd Quarterly Report in late summer of 2000, the Special Trustee, Thomas N. Slonaker, began to include his own independent comments, suspecting that project managers in the field were painting a false picture of their trust reform progress. By the 7th Quarterly Report last fall, Slonaker refused to verify the accuracy of the contents. Pressured by Interior lawyers to verify the report, other senior trust officials also refused because, they said, "certifying the 7th Quarterly Report would border on the foolhardy."

No senior DOI official would touch that report with a 10-foot pole," said Kieffer, who found that Norton had submitted to the judge "an untruthful, inaccurate and incomplete" report. Judge Lamberth has since ordered Secretary Norton to sign all future quarterly reports personally. (In her 8th Quarterly Report, submitted last month, Norton says her signature "reflects my belief that my personal observations in the Report are true...")

Balaran's report on the lack of computer security is equally disturbing. With court permission, he hired experts who easily hacked into the IIM trust accounting system and created a phony account without being detected. Balaran has recommended to Judge Lamberth that the system be placed in receivership.

With her credibility in tatters and faced with the virtual certainty of contempt, Secretary Norton and her inner circle of senior officials have now proposed a drastic reorganization of trust responsibilities into a new Bureau of Indian Trust Asset Management. Because she has done this so late in the day and so suddenly—and without proper consultation with tribes, as required by law—her actions appear to be a desperate attempt to stave off contempt. The proposal has met with very strong opposition throughout Indian Country. Among its flaws, it would merge the tribal trust with the IIM trust under one entity, ignoring the trusts' two distinctly different functions, constituencies and histories. This plan will undermine—not protect—tribal sovereignty. It will violate the IIM account holders' own direct relationship with the federal government, established by law.

Ironically, Norton already has hired former Assistant Secretary for Indian Affairs Ross Swimmer to head this effort. She ignores the fact that Swimmer was sharply criticized in the Synar Report for management failures involving the IIM trust. She ignores the fact that Swimmer—at best—has a "checkered" personal financial history. His BIA management included leading a misguided attempt to privatize the IIM trust, spending $1 million on the project and getting nothing in return. "BIA eventually paid Security Pacific [the bank intended to take over the trust] $934,512, but according to the Assistant Secretary for Indian Affairs [Swimmer], did not obtain any benefits for the government".Far from "excusing" the waste of almost $1 million in tax dollars, the Bureau's inept handling of the Security Pacific contract

simply underscores the reasons why it should not have been awarded in the first place," the report concluded.

Swimmer's hiring points up the most critical defect in the Secretary's proposal: It would leave the trust in Interior's control, at the mercy of the same inept managers. It is crystal clear from the long record of IIM trust mismanagement that it is time—past time—to remove the trust from Interior's grasp and place it temporarily in the hands of a receiver. The IIM beneficiaries deeply deserve a trust run by competent and experienced professionals, with commercial standards of accountability. Fixing the system is a crucial component of trust reform, and becomes even more so as we draw closer to Trial Two and the issue of re-stating the accounts. The two must go hand-in-hand.

Mr. Chairman, it is our hope that this Committee and the Congress will terminate all appropriations needed by the Interior Secretary, the Treasury Secretary and the Attorney General to continue their bad faith legal defense. Instead, we ask that you support the individual Indian trust beneficiaries' request for appointment of a receiver under the supervision of the judiciary as the only rational solution for the government to fix the Individual Indian Trust. Congress has appropriated more than $614 million for trust reform since 1996, and it has gotten virtually nothing in return—no accounting of Individual Indian Trust monies, no rehabilitation of the woeful system, no improvement in information technology. The court and the Congress have not even gotten the truth from the Interior Secretary, in part because she and her advisors do not know the truth and lack the qualifications and skill to learn the truth before they inflict more irreparable harm on individual Indian trust beneficiaries.

The Court Monitor's 6th Report to Judge Lamberth, which was made public last week, captures the lack of accountability and the arrogance that the individual Indian trust beneficiaries have experienced for decades from their government. Kieffer said:

> The Secretary's candor in the Eighth Quarterly Report is refreshing. But the exacerbation of the "ordinary human inclination" to report only good news and ignore the bad was in the context of carrying out the highest fiduciary trust duties imaginable owed to the American Indians by the United States government. Compare this comment on the human fallibility of DOI and BIA officials with the realization that their reports were at the direction of and for the consideration of a United States District Court. A District Court that had previously held two Cabinet-level Secretaries and one Assistant Secretary in civil contempt for their and their subordinates' failure to overcome this ordinary human inclination to lie or dissemble when bad news as well as good was required by Court order to be reported by Defendants and their attorneys.
>
> The Secretary's admission that activities had been designated completed when "little material progress is evident" is the most telling comment in the entire Eighth Quarterly Report. The Secretary, in attempting to prepare an accurate and complete quarterly report, has now found what the Court Monitor has reported in every single Report to this Court—the reports have been untruthful. The only problem is that nowhere can be found any indication that those who have committed or permitted these actions constituting contempt on the Court have been or will be held accountable. No indication whatsoever that they will be forbidden to continue in supervisory or project manager roles in the proposed BITAM and their conduct reviewed for disciplinary action and possible dismissal from their present positions. Who within DOI will hold these officials accountable for the past and present harm caused to the IIM account holders by their unprofessional conduct and misleading reports that covered up and hid the most serious of their failures? Apparently no one, because they remain in leadership positions involved with trust operations and related management and legal activities or have moved on to equivalent senior positions within DOI.
>
> Where also can be found the expressions of apology and remorse by these same executives, managers and attorneys that should now be substituted in the Eighth Quarterly Report for the repeated arrogant stances taken by the Defendants in the past seven false, inaccurate, and incomplete quarterly reports and their legal defenses of them before this Court?
>
> These Indian Trust duties were no ordinary responsibilities or obligations of the United States; no APA administrative functions; not a "no harm, no foul" badminton game or walk in the park. The Secretary's understanding of these human failings of her subordinates may fall on deaf hears in

> Indian Country where the effect of these unreported failures has been and is so severely felt.
>
> Reference need only be made to the present IT Security failure and Court-ordered shutdown. The resultant loss of the income stream to the most needy IIM account holders and Indian Tribes is a perfect example of the result of these ordinary human inclinations. Who will be held accountable for the TAAMS" failures or the failure to even address the IT Security lapses? Failures made aware to the Defendants months if not years ago by their own paid consultants, the GAO, and the Special Master.
>
> What also will be the human inclination of Senators and Representatives on oversight committees regarding the appropriation of more monies for the Defendants to try to correct this morass? And who will end up being harmed if the Congress might—understandably—be reluctant to trust the Defendants to perform any better in the future, further delaying trust reform until a new agency can be created and staffed? None other than those same IIM account holders who have suffered so much for so many years at the hands and tender mercies of the Defendants.
>
> Candor about your subordinates' human failings is one thing, demonstrating how you will hold people accountable for their past and future nonfeasance, misfeasance or malfeasance is quite another. This Court and Congress should require no less.

Now is the time for the Congress to send a clear signal that waste, fraud and malfeasance are unacceptable and that it wants honorable, fit, experienced managers in charge of fixing this badly broken mechanism. This is a chance for all of us to stand up for financial and professional accountability. I believe strongly that further appropriations for trust reform should be fenced in, to be used by a receiver and not the failed programs of the past or defense of the indefensible litigation. The Individual Indian Trust should be put in the intensive care of a receiver supervised by Judge Lamberth until it has been rehabilitated fully and restored to health.

After the Court-appointed receiver rehabilitates the Individual Indian Trust, it is crucial that the Individual Indian Trust remain well-managed in conformity with the duties of a true fiduciary and, therefore, is, above all, free of politics and bureaucratic fumbling. The Individual Indian Trust already is one of the very few permanently and indefinitely appropriated funds of the United States, similar to the FDIC, the Federal Reserve Board and the Comptroller of the Currency. Therefore, like the Office of the Comptroller of the Currency vis-a-vis the Treasury Department, the Individual Indian Trust—after rehabilitation by crisis managers appointed by the Court—could be recast as an independent bureau within the Interior Department. Independence within Treasury is reinforced because the Comptroller is appointed by the President for a fixed five-year term, and the Comptroller reports to the President, not the Treasury Secretary. And there is little doubt that the Comptroller of the Currency model has worked well under difficult circumstances since 1863. Instead of underwriting nonexistent trust reform, a skilled Trustee for the Individual Indian Trust—protected from politics and funded with permanent and indefinite appropriations—could hire the proficient managers desperately needed to ensure prudent management of this multi-billion dollar trust. The goal here is simple: stop playing politics with our money and our people.

Our litigation has exposed an ugly story about arrogance and ineptness. But, with the help of this Committee, we can begin to write a new chapter. I appreciate this chance to testify and I would be happy to answer any questions.

[Ms. Cobell's response to questions submitted for the record follows:]

SUPPLEMENTAL ANSWERS FROM ELOUISE COBELL PROVIDED TO THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON RESOURCES, WASHINGTON, DC

Q. You contend that Judge Lamberth should place the IIM trust in receivership. Please explain the structure of the receivership you envision and how it would function.

A. Plaintiffs' Consolidated Motion for a Receiver, filed with the Court on Oct. 19, 2001, spells out how the receivership would function. I have attached Appendix V of the motion for your review.

Q. What effect would placing IIM trust reform in receivership have on the trust responsibility the federal government has to IIM account holders?

A. We would have an IIM trust that would be under court supervision, which would give account holders honest and competent service. This type of service would reinforce the trust relationship with the trustee and the beneficiaries. Accountability will be a must and the court will enforce consequences if accountability is not adhered to.

Q. Would a court-appointed receiver have any responsibility to carry out consultation with account holders?

A. Not only would a receiver carry out consultation in a proper fashion with accountholders but for the first time ever a proper relationship with the trustee and beneficiaries would begin.

Q. If the trust functions were transferred to the court, how would the court carry out the statutory trust duties that have been established by Congress?

A. Trust functions would be carried out in the manner that Congress had intended. The management of trust functions can only improve under the court's supervision. Statutory trust duties rest with all three branches of Government. The Court Monitor's and the Special Master's reports provide a clear and honest analysis of the problems that exist and what is needed to fix this horrible mess.

Q. Where would the court obtain the funding to carry out trust functions and what standard would be applied to the relationship?

A. The IIM Trust has been set up as a permanent and indefinite appropriation. Funds that have been appropriated and will be appropriated should be utilized by the receiver to begin the task of hiring crisis managers. Congress needs to provide the receiver with the funding to fix this mismanaged trust.

Q. Please provide the Committee with a list of specific facts on which you base your charge that Secretary Norton has perpetrated a fraud on the United States District Court.

A. The six reports issued by the Court Monitor and the Special Master's IT Security Report, along with 4,658 pages of contempt trial transcripts.

APPENDIX V

THE RECEIVER

A. Background

The Individual Indian Trust has been managed with malfeasance for 114 years. For the past five years, to the detriment of individual Indian trust beneficiaries, this Court has relied on material misrepresentations of the Interior defendants and their counsel to allow them without direct Court supervision to develop and implement trust reform remedies that they claimed would ensure prudent administration of the Individual Indian Trust. To encourage compliance with Court orders and to verify the accuracy of representations made by the Interior Defendants, this Court has employed such extraordinary measures as contempt and the appointment of both a Special Master and a Monitor.

These actions have enabled this Court to understand the true nature and scope of defendants' deception and malfeasance; however, Interior defendants' contemptuous conduct continues unabated and meaningful trust reform is no closer today than when this action was brought to enforce defendants trust duties. As demonstrated conclusively by the Court Monitor and the Special Master, Secretary Norton and her counsel continue to breach the trust duties owed by the United States to individual Indian trust beneficiaries. Accordingly, to protect the Cobell plaintiffs from further irreparable harm, to ensure that the trust duties owed by the United States to individual Indian trust beneficiaries are discharged prudently, and to ensure meaningful trust reform is designed and implemented, this Court should appoint a receiver for the Individual Indian Trust as follows:.

B. Qualifications

Receivers commonly are appointed by courts to oversee trusts, bankruptcies, reorganizations and other matters where senior management is incompetent, untrustworthy, or guilty of malfeasance as is the case here. Unfortunately, the appointment of a receiver does not necessarily ensure compliance with court orders. After appointment of some receivers, the situation is not rectified—it actually becomes worse. The temptation for some courts is to appoint an attorney or a former government official with some general experience in subject matter of the case. However, appointments of this nature are generally not as effective. Successful receivers, or their Court appointed deputies, tend to be turnaround and crisis management experts who specialize in assuming positions of control on short notice, take immediate action to install management and financial controls, and commence and

implement long term solutions for the collection and creation of reliable asset and beneficiary data from which a trustee can prudently administer the trust.

C. Duties and Responsibilities

The duties and responsibilities of a receiver are straightforward: identify, account for, protect, and maximize the trust income and allocate and distribute the correct amount of trust monies to the proper beneficiaries. The mission of the receiver is to gain control of the processes, marshal the assets and take whatever corrective action is necessary to ensure that the collection, allocation, and distribution of funds is accurate, complete, and accounted for fully.[1]

D. Authority

This Court may wish to retain the title and authority of receiver or confer this title and authority on a court officer (e.g., the Court Monitor or Special Master). Therefore, the appointed expert may take the title of deputy receiver. In either case, the receiver should be vested with the authority of a chief executive officer. As a chief executive, he should immediately employ other qualified managers, attorneys, and other professionals. One of the most critical aspects of the receiver's authority is his ability to have the authority to hire and fire personnel administering the trust. Therefore, the receiver, as trustee-delegate, should be assigned Department of Interior personnel engaged in IIM-related trust operations on a temporary duty basis. However, as he identifies the dishonest, weak, or unproductive senior managers, counselors, and other employees involved in the administration of the Individual Indian Trust, he must have the authority to relieve them of their temporary duty assignment and return them to the department. The receiver must then have authority to retain qualified professionals from the private sector who report to him directly.

The court should hold status conferences with the receiver and plaintiffs monthly to review most decisions post facto and justify major decisions in advance. A written report by the receiver should follow each such meeting.

E. Contract of the Receiver

The Court should accept proposals from leading turnaround management firms. Obviously, the lowest bidder may not be the most effective manager. Conversely, the highest bidder may only be that—the highest bidder. Large multi-disciplinary firms, such as the Big Five accounting firms seem to have no inhibition on amounts they charge. Therefore, proposals should be prepared on a time and materials basis, including the hourly rates of the various levels of professionals who are anticipated to be required for the assignment. However, with a case of this magnitude, the court may wish to consider only accepting bids on a fixed fee per month or year. A reasonable proposal is expected to be in the range of tens of millions of dollars annually.[2] The contract term should be at the pleasure of the court with a modest termination fee. The court should also consider a success fee, which is common, to encourage the most timely and effective rehabilitation. The goal of receivership is to protect the trust assets, rehabilitate the trust, and, ultimately, restore management of the trust to the executive branch. Such action should occur only after the Court determines that honest and competent trust management is in place permanently and that all trust systems are operating properly.

F. Short Term Actions Necessary

While the appointed receiver should have great latitude in establishing his own rehabilitation plan, several actions need to be taken expeditiously:

- Gain control of the cash inflows. Trust income is currently being received at over 100 locations. These cash flows must be identified and redirected to lock boxes under the control of the receiver. The number of administrative cash collection centers should be greatly limited and electronic systems must be secured or taken off-line.
- Identify all sources of the cash flows (including a revenue generating lands), locate and validate current contracts under which rents, royalties, and other

[1] A judgment regarding Phase II issues will resolve the historical restatement or "correction of accounts;" therefore, the appointed receiver should avoid involvement in this regard. Issues relating to prospective management of the trust and future distributions to the proper beneficiaries will be the most problematic, and deserve the undivided attention of the receiver.

[2] While such sums are not insignificant, they must be viewed in light of the comprehensive, specialized expertise that is not now available in the government. Moreover, the complexity of this problem and the obscene, on-going waste of taxpayer monies to date ($614 million appropriated for trust reform while the Individual Indian Trust continues to deteriorate and trust assets continue to waste away) requires competence or this matter will never be resolved..

funds are paid, determine if other payments are due from the same vendor, and, if so, take action to enforce such contracts.
- Identify and contract an adequate interim trust asset and accounting management system (e.g., an established operating trust service bureau.)
- Control and verify the accuracy of all allocations and disbursements.

G. Long Term Actions Necessary

Longer-term actions are also required. Identifying and locating the proper beneficiaries and their interests is the major task:
- The genealogies of original allottees must be identified and accurately traced to the current generation. The assistance of experienced professionals from the private sector here is also essential. This process may be the most time consuming and tedious of all tasks. As accurate information is obtained, the system should be revised to ensure accurate payments are made to each and every beneficiary.
- All income flows from the land must be identified, tracked, collected and properly recorded to the trust, land records must be updated and corrected, and related contracts reviewed and updated. This will improve the data on the nexus between the sources of revenues and the proper allocations and distributions to beneficiaries.
- Identify and contract an adequate integrated permanent trust asset and accounting management system.

Long term actions may take several years.

H. Funding

- Contempt Sanctions: Inasmuch as appointment of a receiver here—similar to the appointment of a Special Master and Court Monitor—is a sanction for, or in lieu of, contempt, all costs associated with the operation of a receiver should be included within the scope of financial sanctions imposed by this Court, allocated appropriately, and paid by Interior, Justice, and the contemnors, individually and collectively.

Mr. HAYWORTH. And we thank you for your testimony. The Chair would note that a 15-minute vote is on on the floor. I will just briefly yield to the ranking member for a unanimous consent request, and then we will recess and return.

Mr. Rahall?

Mr. RAHALL. Thank you, Mr. Chairman. I have no questions of this panel. I just want to thank Elouise Cobell for taking the initiative that she has in seeking redress before the court. Being a plaintiff in a high-profile case of this nature is certainly not easy, and I am sure it has taken a toll on your personal life and on your family life. But rest assured you are involved in a noble cause. You are from Montana, but you have a friend here from West Virginia, and I certainly commend you for what you are doing.

Ms. COBELL. Thank you.

Mr. RAHALL. Mr. Chairman, just real quickly to note the presence of an individual that has been sitting motionless and quiet all day during these proceedings in the very midst of us, dressed in his travel attire, Mr. James Goddard, and I ask for unanimous consent that his statement on behalf of the Blackfeet Tribe be placed in the record at this point.

Mr. HAYWORTH. Without objection, and we welcome him as well. Thank you for coming.

[The prepared statement of Mr. Goddard follows:]

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JIMMY ST. GODDARD
HUGH MONROE
ERVIN C. CARLSON

February 1, 2002

House Resources Comm.
U.S. House of Representatives

Honorable

I come before you to ask for your assistance in the plight to do the right thing for the Indian people. The Cobell vs. Norton case has revealed that the interior is not doing the job that was intended by Congress. Trust responsibility to the Indian people cannot be dealt with in the state arena, the senate arena or the congressional arena; trust responsibility can only be dealt with in Indian country. Trust responsibility is undefined in all areas of US Government, but in Indian country trust responsibility is the future and part of an ancient culture that needs to survive.

You have been instrumental in helping and respecting our people. To reorganize the Bureau of Indian Affairs is very positive. But only if the tribes and tribal people have total participation. Our bleak history under the BIA is evident in itself. This congress has the chance to change the course of history and bad relationships it has had with the Indian people.

I demand that the IIM monies be distributed as the plaintiffs have requested and the monies be given the interest amount it deserves.

If we cheated the people on their Social Security or Income tax return this government would be overrun.

I also see a solution to reorganization of BIA, send a team of competent people to each Indian Nation for two years to gather the needs and wants of how our future should be. Not how BIA wants it. The deeper we get into the deeds of the BIA the sicker it gets ladies and gentlemen. The Blackfeet have more degrees in education per capita than the population of US self-determination and 638 was developed through the Interior and has not worked. I challenge you to challenge the Indian Nations to set their own policy for their own people. The process will take some time, but time is needed when dealing with the most sacred people on earth. We were created by the dirt of this sacred nation you call America. Give us the respect that we deserve.

The task force committees that are being set up need to go over all the evidence being presented by the tribes. It would be unlawful to have the BIA evaluate the process at this time. (Congress developed BIA to take our request to Washington, not for BIA to give us orders from Washington, when did this change?) The majority of the people agree, so agree with your constituents.

Thank you,

James St. Goddard

James St. Goddard
Blackfeet Tribal Business Council
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ERVIN C. CARLSON

February 1, 2002

RE: TRUST RESPONSIBILITY TO INDIAN PEOPLE

To Whom It May Concern:

United States trust responsibility to the Indian people and Indigenous human beings and also the nee-sit-tah-pee, original or real people. Original people gave up their sacred lands through an agreement or treaty by signing or handshake, or even an interpreter.

These lands were used to help citizens of the United State progress. Upon allowing or sometimes forced from our lands, the United States agreed or promised with the signature of the President of the United States whoever was in office at the time. These agreements or promises had to be ratified by congress first.

These promises or agreements said the United States would provide health, education, welfare, and preservation. The definition of Health and Education has stayed the same. Welfare has changed and preservation will live on. These lands that were given up by the Indian people now generate trillions and trillions of dollars each year. Just in Montana, which was known as Blackfeet territory in 1840, the income of Montana surpasses 3 trillion, budget for the state is 3 billion.

We gave up these lands for the people and also for the United States benefit. These lands provide to the wealthiest country on earth, why aren't the landlords of the country being given the resources to succeed through the trust responsibility of the great United States of America.

America justify yourself and change the disparity against the Indian people. Abraham Lincoln the greatest President of all time said; "History is not history unless it's the truth." Are we going to desecrate Abraham Lincoln and not do the right and truthful thing for the Indian people?

Thank you,

James St. Goddard

James St. Goddard
Blackfeet Tribal Business Council
Box 850
Browning, MT 59417

Mr. HAYWORTH. Thank you, Mr. Rahall, for that statement.

There are lots of questions, and we will get to them, and we thank the panel for its indulgence.

The Committee is in recess subject to the call of the Chair after we conclude the vote.

[Recess.]

Mr. HAYWORTH. We thank our guests on panel two for their indulgence, as well as others who join us today and the members of the Committee, with the business afoot on the House floor. When the bells ring, it's kind of like school. You have got to go over there and take care of that, and then return to our duties here in Committee.

I know a number of members have questions. Let me open with Ms. Cobell, especially in the wake of the testimony where you advocate a court-appointed receiver and the removal of all trust functions from the Department of the Interior. Let's amplify that a little bit. Could you tell us in a little more detail how you envision that would work?

Ms. COBELL. Actually, it is not advocating everything out of Interior. What we are asking for is somebody to be put in charge. And we feel it is very important to put a person in charge under the judiciary that would report to Judge Lamberth, the receiver; a person that would have the ability to make sure accountability is done, and make sure consequences are put in place.

That has been the issue that we have been dealing with. People get away with not having any consequences. They are mismanaging funds. They are lying to the court and the Congress about a big huge accounting system, TAMS. And so we are saying, put a receiver in place that would be reportable to the judiciary, but leave everything else in place.

Mr. HAYWORTH. So I want to really get in this concept of the receiver. It sounds to me at first blush, Ms. Cobell, that the receiver would kind of be an extension of the role of a special trustee, because if it is accountable to the judiciary, to Judge Lamberth, how does the receiver really differ from the special trustee?

Ms. COBELL. Well, I wish I could have answered Mr. Slonaker's question for him when it was asked, you know: What was wrong with the 1994 Trust Fund Reform Act, and why did it not work, and what do we need to do as a Congress to make it more powerful?

The problem is the 1994 Trust Fund Reform Act gave special powers to the special trustee, but absolutely had no teeth. So as a consequence, the special trustee had to report to the Secretary. And as you know, Secretary Babbitt just completely ignored the plans that the special trustee put in place to fix this system.

And so what happened is the 1994 trust fund did not really go all the way. It should have gone all the way, and if it did at that point in time we could have ended up with a person powerful enough to fix the system. But we do not have that now. And so that is why we are asking for a receive.

Mr. HAYWORTH. So the receiver would take this job and really—And I am not trying to be cheeky about this, but the phrase almost "imperial potentate" comes to mind. I mean, the receiver has the authority to get things done and be accountable to the judiciary.

Ms. COBELL. He would bring in crisis managers. That is what has to happen: Bring in crisis managers. Do not continue—And I think the discussion went really well from the Congressman. It is the fact that: Do not bring in the same old people that have been part of the problem. Work with crisis managers. This happens every day in the private world. It is no rocket science to fix this.

And I really want to make it clear, the receivership is for individual Indian account holders. Because I think what the Secretary has done is try to merge these two together. It just does not fit. Because we heard from council member Matt where they are contracting, and Ivan Makil, they are contracting, you know, and everything is working fine. But this is for individual Indian accounts.

Mr. HAYWORTH. There are some questions I would like to pursue with President Makil. But I am just trying to nail down the notion of the receivership, and now in terms of crisis managers.

One of the things we have to do is to come up with a plan that outlines all of this, whether it is done legislatively or whatever remedy that comes up. Do you envision how many crisis managers, as you put it, would be required to make this work in conjunction with a receiver?

Ms. COBELL. Well, I bet you could do it under $614 million. That is for sure.

Mr. HAYWORTH. Well, I understand. I am just wondering how many people would have to staff this, in your mind?

Ms. COBELL. Well, you know, I do not think that there would be probably more than ten people, crisis managers, that you would have to bring in.

Mr. HAYWORTH. So a receiver, ten crisis managers—

Ms. COBELL. Well, and then you have the entire Department of Interior. Because, you know, you keep alluding to the BIA. There is more than the BIA involved in this. There is the Minerals Management Service and there is the Bureau of Land Management, that all have their hands in this trust reform. That is why it is not working.

Mr. HAYWORTH. So all of these different lines of jurisdiction. *** start here

Ms. COBELL. Yes. And I think that Mr. Kieffer's reports that he has, and actually the EDS that has been hired by the Department, all point to the same thing: Nobody is in charge. And so that is the big issue here, is we have to put somebody in charge. And if we do it under a judicial mechanism, then we can force it.

Mr. HAYWORTH. OK. You would like the receiver to be required to consult with Indian tribes, right, in this restructuring?

Ms. COBELL. Well, this is individual Indians.

Mr. HAYWORTH. OK.

Ms. COBELL. Let me tell you, what I am talking about is the court case for individual Indians. There are two separate trusts we are talking about: the trusts that are held in common by the tribes; and there are the individual Indian trusts. And there are two separate entities, because the individual Indians have a direct relationship with the Federal Government; the tribes have a direct relationship with the Federal Government.

Mr. HAYWORTH. Just a couple of brief things, because you touched on it a second ago. In terms of the cost of how to do this

and where the funds would come from, in your mind, how should it be funded? And what type of cost would the receivership and the crisis manager scenario—Any idea how much that would be, or anything you would try to budget for it?

Ms. COBELL. Well, I certainly think it is going to be a lot less money than what has been spent so far since 1996, but I really do not have those totals. But I know that I think one area that we discussed in our written testimony is what happens to the temporary receiver? After the receivership, what happens?

There is actually a mechanism that is already in place by law. Individual Indian trusts have been permanently funded, like FDIC, the Office of Comptroller of Currency. That is already on the record.

Mr. HAYWORTH. OK.

Ms. COBELL. So I really think that in order to fix this, Congress really has to face reality, the fact that the IIM Trust should be permanently appropriated like the OCC is permanently appropriated.

Mr. HAYWORTH. Ms. Cobell, I thank you for going into more detail and amplifying. I also thank the indulgence of my fellow Committee members, as I went a bit over time. My good friend from Michigan has some questions.

Mr. KILDEE. I appreciate your questioning. I think it was very, very important. It would seem to me that there is an inherent conflict in having the Secretary representing the U.S. Government, and at the same time being the fiduciary for either tribes or individuals. There is some type of conflict, and we have to somehow resolve that conflict.

President Makil, you mentioned some type of commission, was it you called it? Could you elaborate on that? And also—any of you can answer this, too—elaborate on what you think of the separation of the Bureau of Indian Trusts assets and managements within the Department of Interior. Could you start with that Ivan, or Mr. President?

Mr. MAKIL. Sure. I think it is important because of the fiduciary responsibility to be able to have objectivity on a commission. But also, you need the expertise. Because on the financial end, as I said earlier in my comments, it is not just managing the revenue or the money. It is not managing stocks and bonds. It is also the land. So that expertise has to exist.

A separate commission that would have some authority: As also was mentioned about the '94 legislation, it did not have the teeth, did not give the authority so that it could oversee and actually implement a financial accounting system or other things. All it could do was make recommendations and if the recommendations were not followed through, nothing happened.

So what you would do—Or at least a suggestion, one idea to think about would be to have a commission that the Secretary was responsible to, as well, but keeping all of those trust responsibilities together, because they do work hand in hand.

If I could, in how a receiver relates to this, my understanding is that a receiver would be temporary, also. You still need a process or a system to be maintained. And if you have a commission that oversees all of this that everyone would report to and that has a specific task, which is the management of those funds and all of

the responsibilities along with it, that is the way to do it. And the Secretary could be responsible to that commission, as well.

Mr. KILDEE. During the consultation which was ordered by the Executive Order, were you consulted on anything like that? Or was the consultation basically subsequent to their decisionmaking?

Mr. MAKIL. It was subsequent to their decision.

Mr. KILDEE. It was not at all concurrent with their decisionmaking?

Mr. MAKIL. No, it was not. And furthermore, I am on the advisory panel for the special trustee, and the advisory panel consists of tribal leaders with experience—and not just because I am there—but tribal leaders with experience, extensive experience, on these issues, as well as people from different financial institutions. So you have a good mix of experience across the board.

Virtually, our recommendations—We have been told from time to time, or reminded from time to time, that we are just an advisory panel.

Mr. KILDEE. Just knowing your own particular sovereign tribe, you demonstrated your ability to handle finances very well out there. And that expertise could very well be tapped, could it not, by the Department of Interior?

Mr. MAKIL. There are examples across Indian country. And Salt River, we have had a model for several years. We contract through a self-governance compact for all of the services that the Bureau used to provide. We do them ourselves through the compact. And we have done it successfully.

We have offered to Interior to come look at our system, because on our system we have been asked to demonstrate it several times to other tribes. We maintain all of the records. We can get a payment on a lease and turn it around in two to 3 days, and make the pay-out, and do it accurately.

We can even through our system produce maps and documents which show where lands are located and show the fractionated interests as severely as they have been fractionated. We have that system, and we have built it internally.

Mr. KILDEE. Let me ask one final question, and any of you can answer. Should we let the Department do its own reform? Or do we need additional legislation now to do some directing?

Mr. MAKIL. My opinion is that you need additional legislation, because whether it is a commission or whatever other instrument that might be appropriate, it needs to have the ability to take the kind of action in an objective, fiduciary way that is intended. That is how you are able to eliminate those conflicts of interest.

Mr. KILDEE. I thank you.

Mr. HAYWORTH. Thank you, Mr. Kildee. Would either of the other two panelists care to respond?

Ms. COBELL. Oh, I agree that Congress has to enact legislation to force some of these changes that we are suggesting.

Mr. HAYWORTH. How about you, Chairman Jandreau?

Mr. JANDREAU. I do not necessarily agree that the idea of forcing anything is appropriate. I do believe that there is a commission necessary that is empowered to do some things that are beneficial to assuring that the Bureau is put back together in a way that is responsive to all of the problems that have been created. Forcing

people brings tension and rejection. I think if it is a cooperative effort, I believe it can work.

Mr. HAYWORTH. Thank you, Chairman Jandreau.

The gentleman from Tennessee joins us, and we thank him for his time.

Mr. DUNCAN. Well, thank you, Chairman Hayworth. And I appreciate Governor Rehberg letting me go out of order here. I have an appointment coming over here to see me in just a minute.

Miss—Is it "Co-BELL," or "CO-bell"?

Ms. COBELL. "Co-BELL."

Mr. DUNCAN. "Co-BELL"? I have a first cousin who is a radiologist, Dr. Steve Becker, in Libby, which is right next to you. But let me ask you this. In your testimony—I apologize that I was in other hearings and was not able to hear your testimony, but you say here, "The Interior Secretary has demonstrated through the fraud she has perpetrated on the United States District Court and the United States Court of Appeals that she should no longer be trusted."

I was a lawyer and a judge before I came to Congress, and I can tell you, that is an extremely serious charge. In fact, I have sat through hundreds of congressional hearings in the years since I have been here, and I do not recall ever hearing a charge quite that serious. Would you tell me specifically what you mean by that? Because you are accusing the Secretary of illegality, when you say she is perpetrating a fraud on Federal courts.

Ms. COBELL. Right. There have been several reports that validate exactly what I said.

Mr. DUNCAN. Well, like what? I want to know the specifics.

Ms. COBELL. Well, there were several court reports that were not right that were submitted to the court but were not full of the correct information that should have been.

Mr. DUNCAN. And you know that she is the one that specifically—When you say "perpetrated a fraud," you are saying that she intentionally either put false information in there or something to that effect. Is that what you are saying?

Ms. COBELL. Yes, that is what—We are in a contempt of court trial right now, as we speak, on these issues. And one of the issues, as you probably have read in the testimony, is the fact that the seventh quarterly report was not accurate. And the special trustee refused to sign it and said, "This is not accurate." But it went ahead anyway. And the Secretary, it is my understanding, was thoroughly aware of the fact that it was full of inaccuracies.

The issue that is before the court right now is the fact that—It is not only my opinion; it is the opinion of several reports that were inaccurate, it's the opinion of the court monitor's report, it is the opinion of the special master's report that is out there. This is serious, Congressman.

Mr. DUNCAN. Well, you know, I will say this. You cannot base a criminal case on somebody's opinion. You have to have facts. You have to have specifics. And what I wish you would do is provide to this Committee a list of the specific facts that you base that charge on. I cannot say that you do not have those facts. I do not know.

Ms. COBELL. Yes.

Mr. DUNCAN. But I think it is such a serious charge that I think you should have that, and not just be basing it on some third-party, hearsay type statement. You need to have that kind of knowledge yourself, because I am not sure that you understand how serious the charge is that you are making there. You are charging criminal illegality.

Let me ask all of the witnesses this. In one of the briefing papers we are told that you feel the Secretary's proposal would weaken the Bureau of Indian Affairs. Will you explain to me how you feel that would occur? This is something—In fact, Ms. Cobell, you say "Where is the money?" And I notice that there was a GAO report concerning this problem as long ago as 1955. This is a mess that has been going on for many, many years. In fact, the Secretary of the Interior had a quote from Arthur Andersen, a report in 1988 and '89, that said that some of these weaknesses are so pervasive and fundamental as to render the accounting systems unreliable, and said it would cost $440 million, or as much as $440 million, to straighten out. What do you say about that?

Ms. COBELL. Well, I think that what the Secretary herself talked about this morning is the fact that they do not have records. They do not even know where the records are. And so it seems to me that the logical—

Mr. DUNCAN. But those records were lost long before she ever came in.

Ms. COBELL. Yes, well, I know, but she went in as the Secretary of Interior, and she is our trustee. And so I think the logical thing to do is settle the case; sit down with both sides and settle. If you cannot provide a historical accounting, do not pretend that you can. Settle the case.

And Congressman, I really want—With all due respect, I want to tell you, this is serious. This is serious. And I would not put anything in my testimony that I did not feel was accurate and correct. You know, three of the four counts of the current contempt proceedings that are going on right now are the fraud on the court. And so we do have all the documentation to back up what I said.

So I really want to let you know that we have all talked about how long we have been involved with trying to reform and getting accounting for the beneficiaries, to really have the government understand what it is that you are supposed to be providing as the highest fiduciary standard to our beneficiaries. And this is very serious.

Mr. DUNCAN. And you do not believe the Secretary of the Interior is trying to straighten out this mess that she inherited?

Ms. COBELL. No.

Mr. DUNCAN. OK. Thank you very much.

Mr. HAYWORTH. Thank you, Mr. Duncan.

Let us turn to the lady from the Virgin Islands.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman. And I thank the panelists for their testimony. I guess I would ask two questions, the first one to President Makil. I think it is pretty clear that everyone on the panel agrees that the BITAM proposal would undermine the BIA, and that that is a bad proposal. I had asked the Secretary about BITAM's impact on the 638 contracts and the self-gov-

erning tribes. And if I recall her answer, she said that she thought both were compatible. But I think, President, you seem to disagree.

Mr. MAKIL. There obviously would be a concern as to how they would do that; you know, the process they would go through. Two things: One is the funding of it and the funding that they would use to support BITAM, and what that means to the self-governance process. Because the way that it looks is it would mean that it would take away not only the financial arrangement we have under the compact, but it would also take away the responsibility that we handle already ourselves quite adequately. And so now we are being asked, and that is what is even more important to us—Well, I should not say more important, but as important. It is when you take away the responsibility that we have already demonstrated we can handle and put it in another system, just for the sake of creating a new system to solve a problem.

Mrs. CHRISTENSEN. And I agree with my colleague, Congressman Kildee, that the model that you have provided, as well as some others, should be able to serve as a model for us to use as we move ahead from here.

I wanted to ask Chairman Jandreau and Ms. Cobell your opinions on the proposal that was supported by President Makil for an independent American Indian Trust oversight commission, and to ask how does that compare to the receivership. Ms. Cobell?

Ms. COBELL. I think that it would complement the receivership. I think that what Chairman Makil has outlined is something that has been discussed for quite some time with the advisory board, that we really need to have independence. And that would bring the independence of a commission outside of the Department, and there would be somebody put in place, a body put in place, that the Secretary would have to answer to.

Right now, the advisory board is ignored by the Secretary and the Department. And I think that if we put the receivership in for the individual Indian accounts, this will really complement what the tribes are trying to do as an outside commission. It certainly seems like one good idea to me, too.

I am still very hung up on the fact that we have to have a receiver put in place for the individual Indian accounts, because it is a separate situation than the tribal accounts.

Mrs. CHRISTENSEN. OK. So it is complementary. I understand now. Did Chairman Jandreau want to comment on that?

Mr. JANDREAU. That has been a request that has been in existence for at least the last 40 years that I am aware of, that there be a commission or a Committee or something driving this whole process, going back to even when the commissioner position was there. And I believe it is necessary. I believe that if that is in place and there is an allowance to recreate the Bureau in its entirety with that body in place, I believe that there would be no need for a receiver. But whatever happens will happen.

Mrs. CHRISTENSEN. Those are my questions. Thank you, Mr. Chairman.

Mr. HAYWORTH. Thank you, ma'am.

We now recognize the gentleman from Montana.

Mr. REHBERG. Thank you, Mr. Chairman. I have been asked to pass along the apologies of Chairman Matt. He had to catch a

plane back to Montana. And those of us from Montana know that if you miss that one plane, you wait until tomorrow.

[Laughter.]

Mr. REHBERG. Yes, it is like the Virgin Islands. So he has moved along.

But I would have asked him a question about his expertise in being able to manage the real estate services within his reservation. So I guess, perhaps, my question would be to Ms. Cobell. And that is, are there contracts for the individual Indian trust accounts separate from the BIA at this time, similar to what Chairman Makil does with his contract and what Mr. Matt does with his contract?

Ms. COBELL. No, not at Blackfeet. We do not have the IIMs contracted. And I think Mr. Makil's tribe and Mr. Matt's are unique. I think there are very few out there that have contracted the management of the individual Indian accounts.

Mr. REHBERG. So you are not aware of any other individual Indian account—

Ms. COBELL. I am not aware of it.

Mr. REHBERG. —separate contracts? It is all being done within the BIA?

Ms. COBELL. Right.

Mr. REHBERG. I had wanted to ask the Secretary the question, and did not, and perhaps you can answer the question from your knowledge of the individual Indian accounts. Are there situations that you know of, in looking at their numbers, where the fractionalization of the ownership was so large that the benefit was not anywhere close to the cost of administering that trust? How do you propose under the receivership concept of trying to bring that to a conclusion? Does it get to the point where you finally say, "Look, if you are 1/64th and beyond, we cannot write you a three-cent check"?

Ms. COBELL. Well, no, I think it has to start even further back than that. I think the EDS reports and all of the other reports from GAO indicate the fact that we have to go back to the land ownership originally. Because in the testimony through the court, we had learned that probates were destroyed; that nobody had actually verified the land ownership records. And I think that if you talk to Ivan and to Fred, they actually had to go back and do a lot of in-depth work before they could verify the ownerships.

And the real issue that we are dealing with now is ownership. Land ownership records are wrong. And so they really cannot tell you what should be in your account. And that is a real issue, but it is fixable.

When we talk about crisis management, I think that is where we are going, is finding out what should people—what do they really own?

Mr. REHBERG. Perhaps it is not a fair question, but can you estimate the time that the receivership would be necessary? Are we talking 5 years?

Ms. COBELL. Yes, I would think that it would probably at least be 5 years. Five years would be my estimation. I think that there is a lot of clean-up that has to be done. I think Mr. Kieffer, the court monitor, identified on the data clean-up they had not even

started. But I think that if you get it under a receivership where you have accountability and have consequences if you do not do your job, that it could be done in a shorter period of time.

Mr. REHBERG. President Makil, you might have said this and I missed it. On your trust accounting system, did you design the system, did your tribe? Or do you contract with a private entity for that system?

Mr. MAKIL. We designed it in-house, our own people.

Mr. REHBERG. And did you share that design with the Secretary or the Department of Interior and the BIA?

Mr. MAKIL. Many times we have offered.

Mr. REHBERG. You have offered it?

Mr. MAKIL. Many times we have offered. And the last time that I recall, I do not remember if it was ITMA or the finance directors group of people, but we were asked to make a presentation. And representatives of the Bureau were in attendance. They gave a presentation on TAMS. And then when we came up to give our presentation, they left. So they have missed it.

Mr. REHBERG. One final question, Ms. Cobell. And that is, you know, I do not disagree with your comments and Mr. Rayhill's comments about privacy and checking accounts and such. But I do have a problem with not getting enough information to make the right decisions. Is there not anything within that Ernst and Young report that could protect the privacy but provide us the information of the problems, and I guess more specifically with what Mr. Duncan asked, some of the fraudulent examples? Is there not a way that we can get some of that information?

Ms. COBELL. Yes, well, the Ernst and Young is not really an accounting. And I think everybody has said that through this Committee, or at least I heard; that you cannot do an accounting. There are lost records. You know, it ends up being just a ticking and tacking of the debits and credits. So I really do not think that it really shows what you want.

And I really think it is a violation, Congressman, of our privacy rights as beneficiaries, you know. This is a trust relationship, and I think that the information is just to go—I really feel it is not fair. I think that we all know what is missing here is the accounting. And this is not an accounting, Ernst and Young. And I would love to spend more time with you to talk about that.

Mr. REHBERG. Thank you, Mr. Chairman.

Mr. HAYWORTH. Thank you.

The gentleman from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. Let me just start out by thanking the panel. You know, you have really been substantive in, I think, giving us a better idea of what the problems are and what needs to be done. And I know you have been at it for a long time, but it was very helpful. I just wanted to stress that.

The other thing, I wanted to address a few questions to President Makil. First of all, I wanted to say I appreciate the fact that in your written testimony you talk about how this was an opportunity to right the wrongs of the past, because that is kind of how I see it. I guess I am a little bothered with Secretary Norton, because she seems to sort of suggest that, "We are just going to try something here, and we hope it works out," and I do not think really

understands that this is really an opportunity to show that by working with the tribes that we can really accomplish something and build sort of trust with each other.

But I wanted to ask, you talked about extending the original deadline for consultation, and you thought it should be extended again. And that is kind of what I said before. I am fearful that she is trying to wrap this up very quickly, which she kind of said. And I was just wondering if you would initially tell us how long a period of time do you think you need, and whether you think that the Secretary is spending enough time. And she says she is meeting with the taskforce, but my fear is that we are not getting enough time here and that this is going to be wrapped up very quickly. How long do you think we need?

Mr. MAKIL. It would be a guess on my part, but I think it could be anywhere from six to 18 months. That would be a guess. But obviously, if there was some form of legislation enacted to create an independent commission, then that would define a process for consultation that would be necessary to accomplish the task.

Mr. PALLONE. Now, did you comment, have the tribes and the taskforce looked at your proposal, and have they commented on your proposal at this point?

Mr. MAKIL. We have not had the opportunity because, obviously, time has been short—

Mr. PALLONE. Right.

Mr. MAKIL. —to present this idea to the taskforce. I did personally present it to the western region representative, which is representing the region that we are located in. I did present this idea to that representative. I don't know the results of that discussion over the past weekend, if it was presented and to what extent there was comment.

Mr. PALLONE. You still need time, obviously.

Mr. MAKIL. Right.

Mr. PALLONE. Now, you said in your testimony, also, you talked about how the Secretary's current proposal violates a lot of things: treaties, executive orders. But then you said even the Federal policy of tribal self-governance and self-determination. You mean what she has proposed, or just the way she is going about it? Why is the proposal a violation of sovereignty or self-governance?

Mr. MAKIL. First of all, it takes the right to decide.

Mr. PALLONE. Right.

Mr. MAKIL. For one thing. But the issue is that at least one of the issues for us has been there are examples of models out there that one ought to consider. If they are working, is there not something that can be developed similar to those models that will work on a larger scale?

Now, granted, you know, our model is specific to our tribe. But all of the components necessary to develop an adequate model that works I believe consist or exist in that model. And so there has not been that consideration of these models that are out there.

There also has not been—You know, it was obvious that there was a decision made about how things should work, and then consultation following to support that. To me, that is a severe violation, when it has been the policy of the Federal Government to consult with tribes, especially when you are talking about something

as significant as individual Indian money accounts or trust responsibilities that the Bureau has.

Mr. PALLONE. OK. Thank you very much.

Thank you, Mr. Chairman.

Mr. HAYWORTH. Thank you, Mr. Pallone.

The gentleman from American Samoa.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I certainly would be remiss if I did not express my sense of appreciation to you and the gentleman from Michigan, Mr. Kildee, as co-chair of our Indian Caucus. And I sincerely hope, Mr. Chairman, that not only the advent of the seriousness of this trust issue that has now come before us, but it is my sincere hope that our caucus will also address seriously the issues affecting Indian health, education, the problem with education, all other areas, the BIA also, in any way.

I am sorry that the Administration did not in any way at least consult with this member and members of our caucus; and hopefully, that we could have worked together on this issue.

I do not know if it was the humorist Will Rogers, who I understand was part Cherokee, who said that the Federal Government did a fantastic job by stealing land from Indians: They did it fair and square. That is supposed to be a joke, Mr. Chairman.

[Laughter.]

Mr. FALEOMAVAEGA. I do want to offer my personal and highest commendation to Ms. Cobell for her leadership, for the initiative and the tenacity to go against an 800-pound gorilla. To think that this issue has been in place now for some 100 years, and now we come to a situation—And in all fairness to the current Administration, this is not something that Secretary Norton is responsible for. The fact is that both Democratic and Republican administrations have failed miserably in addressing the issue very seriously. And now it has taken the Federal court to finally force the issue.

And for this reason, I have to offer my personal commendation to Ms. Cobell and her team in making this effort. Now we are in the square. And I wanted to ask the members of the panel, and I had raised this issue earlier with Secretary Norton, about the 1994 Act. I think Mr. Slonaker even admitted that it does not have very much teeth in it—really, to address the issue that has been on the books.

The OMB, the GAO, and I thought the fantastic work that even the late Congressman Sinar from Oklahoma—It was at his urging that we pass the 1994 Act. I wanted to ask the members of the panel, do you think that maybe this could be a route that Congress could make improvements in the current law and literally put more teeth in, as opposed to the Secretary's proposed executive order, and changing the landscape as far as BIA is concerned? I open it to any members of the panel.

Ms. COBELL. I certainly think that the Trust Fund Reform Act of 1994 could use some amendments to it to make it stronger. I feel that you could encompass what Mr. Makil has outlined in making a more powerful commission, but not to be reportable to the Secretary; that it has to be outside. Because that is what has failed.

If you remember, Paul Holman tried to implement change, and was met by total—just a real not good attitude from the Secretary; and basically took a lot of powers away from him and ended up

having the special trustee quit. So I think it is a real opportunity to enforce the law to what it was intended to be.

Mr. FALEOMAVAEGA. Please.

Mr. MAKIL. I would agree that it possibly could set up or continue to advance that legislation to create an independent commission. The intent, as we had discussed it, because many of us have been doing this for a number of years and are working on this issue for a number of years—The intent was to be able to create the advisory board that was set up for the special trustee, having that kind of expertise, the financial and the tribal expertise, so that it could offer the solutions to dealing with many of these issues.

Unfortunately, it is only an advisory Committee, and does not have any authority. That is why it is important, if it was going to be changed, that legislatively it needs to be done to create the independent commission.

Mr. FALEOMAVAEGA. Well, I think one of the problems that we were faced with when the court decision came out, there may be an estimate on individual Indian accounts, monies of some $100 billion. I think this is where everything started shaking here, as far as the Congress was concerned, as far as the Administration was concerned. Then it became a political problem.

It did not become a problem of justice and fairness. I do not think there is any question in anybody here, Mr. Chairman, that the money is there. All we have to do is account for it. And I think this is where the problem lies. The money is there, despite all the burnings and whatever, the misplaced records, all of that. But collection continues to come into the pot in the Federal Treasury, but we just cannot seem to make an accounting.

The estimates, Ms. Cobell, if I may ask the question, it has been estimated that the individual Indian account monies, that there is about $100 billion there. Has there been any estimate on the amount of monies that were used for the leases and extraction of minerals from tribal lands? Any estimates along those lines?

Ms. COBELL. No, I cannot answer on the tribal side. I have just been working with the individual Indians.

Mr. FALEOMAVAEGA. How much has this litigation cost your tribe and people that are involved in your lawsuit?

Ms. COBELL. Well, actually, I went out and fund-raised for this litigation, and was not able to get any tribal funds committed for it because they have their own initiative. They have to fight for their tribal funds, tribal trust funds. That has not even come before this Committee yet.

But I know that it has cost a lot of money. And I stated that I hope that Congress stops this frivolous litigation on the part of the Departments of Interior and Treasury, because it has got to stop. You know, we have won every single way, but they are refusing to implement the court orders. And we should not have to fight this. And if you think about it, you know, why should we have to fight for an accounting?

But it has cost a lot of money, and I have had to fund-raise to fund this litigation.

Mr. FALEOMAVAEGA. I think there have been seven consultations conducted throughout the country by Secretary Norton or her staff.

Do you consider this to be adequate, in terms of consultations with Indian country?

Mr. JANDREAU. No, it is not. But going back to your first question about changing the legislation, adding to that, I think it is very important that those areas that are not able to speak but through one representative, who control 40 percent of the account holders, who contain 60 percent of the trust assets, that at least field hearings in those areas—and I am talking about the Great Plains—be held to really allow those people to speak to what kinds of changes and what kinds of things that they would like to see happen with the legislation to make it stronger.

And as far as the commission, I think that that is so important. And, no, it has not been dealt with, a lot of the ideas about tribal trust assets.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman, my time is up.

Mr. HAYWORTH. Thank you.

The gentleman from Oklahoma.

Mr. CARSON. Thank you, Mr. Hayworth.

I would associate myself with my friend from American Samoa in his comments about the tenacity and persistence of everyone in this room in pursuing this litigation and making this issue one that is aware for the public, as well.

Just a couple of questions, because we have touched on a number of issues and you have explained your thoughts and the positions at length to a number of the other members. Ms. Cobell, let me ask you a question. I mean, much of the debate and cause of concern on this issue has been about the temporal scope of accounting, and how far back you are going to do an accounting, and what is possible to reconstruct records.

In your earlier comments, you alluded to the fact that no accounting was possible. I wonder whether you would expound on that a bit more for all of us, and tell us to what extent you think an accounting can be done, and kind of the scope of that accounting if it can be done.

Ms. COBELL. Well, I think we all understand as individual Indians that we are not going to get every penny that was owed to us from our ancestors. And from 1887 forward, there has never been an audit, or a reconciliation, or whatever you want to call it, to individual Indians. But I believe that the individual Indian account holders, we have come up with actual figures that we think that we could offer in a settlement talk. But the Department and Justice, I guess through the Justice Department, refused to sit down and have settlement talks.

And I think that that could be very constructive. And we would not have to continue, our Congress would not have to continue to appropriate money to fight this case. And so I think that that is where the resources should be spent, is sitting down and talking about a fair settlement with individual Indian account holders.

And we have had accountants working on this from day one, since we started this litigation, to come up with an idea of how much is owed individual Indians.

Mr. CARSON. And what is that number that your accountants have come up with?

Ms. COBELL. Well, it is above $10 billion, let me tell you that. And we do not know exactly where we would be as far as the—I guess I forgot about that, is that we had actually shared a model with the Department of Interior, telling them, "This is where we can start and where we can go, as far as what is owed individual Indians."

The $100 billion comes from 1887 forward, because there has not been an accounting. And of course, there will probably have to be some negotiations as far as allowance for disbursements and whatever. But the figure is in the billions of dollars, and I would say that $10 billion is a low-ball figure.

Mr. CARSON. Very good. I do not have any further questions. Let me just ask if the other panelists would agree with that basic notion, that a settlement should be pursued in this manner, rather than endless litigation about the proper scope of accounting?

And perhaps, let me ask our first panelist, as well, who brought up the idea of some alternative models for accounting that you had thrown out there, in some of the discussions on this you have talked about a Resolution Trust Corporation style model. Tell me how that would be reconciled with much of the concern in Indian country about the various rights and obligations of self-governing tribes, and the fact that we do not want to undercut the Bureau of Indian Affairs. And in many ways, the Secretary's proposal is seen perhaps as the first step in dismantling the historic trust relationship that the BIA is the most obvious symbol of.

Mr. MAKIL. Sure. Because of the historic relationship, in terms of the trust relationship, that must not be disturbed. And the reason that this makes sense is that a commission that is made up of members that would also have some tribal representation is important, the knowledge of that is important; and also, hopefully, that recommendations for appointment to a commission would be done through a process that would include recommendations from tribes or tribal governments.

One of the things that is important in this process, and I think is possible—and it goes to even part of the discussion that occurs when you talk about consultation—is that it is difficult to have consultation with tribes as a trustee for tribes and only speak about the trust responsibilities, and not be able to discuss the fact that it is not just individual Indian money accounts where there are disputes that need resolution. There are, or there will be, disputes on tribal monies, as well.

And the Federal liability, in terms of the Federal Government and its liability that exists out there in those types of disputes—And it is not just one, you know. There are 557 different tribes in the country. And maybe not all of them will have disputes, but a lot of them will.

And so the resolution of those disputes through a commission that, hopefully, would be objective, would be independent, a commission that would be—and I would like to believe that it is possible—not politically motivated, could deal with just the facts of the tasks that are at hand, and try to find resolution. Because then, on the one hand, to resolve some of these disputes you would have the tribes on one side, and then you would have the Secretary on the other side of the table. And so, you know, you cannot do that

when the Secretary has that responsibility to do it. You have to do it with someone that is independent.

Our concern about the self-governance of tribes is that if there is something that we believe can work, and works consistent with our ability, it does not mean that you take away what we are doing. It may mean that you create a model that is consistent with what we are doing. You know, because after all, the real issue here is making sure there is a proper accounting system in place so that it accounts not only for the financial side, but also for maintaining land interests and activities of the land that bring in that revenue.

And the more that tribes can take on those responsibilities themselves—Not all tribes are in a position, or have the resources to do that. But as they develop the resources to do it and there is a model out there, whether it is a commission—And that was one of the reasons I mentioned the possibility even of an exit strategy in the future. Because over time, tribes will handle those responsibilities more and more themselves, I believe.

Mr. CARSON. Mr. Chairman, I see my time is up. If I could, I would just offer, with unanimous consent, to introduce into the record the testimony of Mr. John Berrey, an Osage and Quapaw with significant expertise in these issues, that I would like to offer for the record.

Mr. HAYWORTH. Without objection, so ordered.

[The prepared statement of Mr. Berrey follows:]

Introduction

Quapaw Language Introduction.

Good morning, Chairman Hanson and Honorable Members of the House Resources Committee, my name is John Berrey. I am an elected member to the governing body of the Quapaw Tribe of Oklahoma. I am also a member of the Osage Nation. I live with my wife and two young children on my grandmother's original allotment on the Osage Reservation in Eastern Oklahoma. I am very proud to speak on behalf of my family and people on issues relating to Interior Department's Management of the $500 Million Indian Trust Fund.

We are the O-Gah-Pah, or down-stream people. Historically we were the Native People of much of Arkansas and parts of Tennessee, and Mississippi. We saved Hernando De Soto from starvation in the winter of 1541-42 and we welcomed Father Jacques Marquette and Commander Louis Jolliet in 1673. In 1682 La Salle made us inhabitants of France. The Louisiana Purchase in 1803 made us inhabitants of the United States and our first Treaty was signed in 1818. In subsequent treaties we were removed to our present location in northeastern Oklahoma and part of what became the Tri-State mining district.

The first commercial ore discovery in the Tri-State mining district was made in southwestern Missouri around 1838. By the start of the Civil War, these mines were producing so much lead that both the North and South fought to control the mining area to secure a source of lead for bullets. The fighting closed the mines for most of the war.

Production from the Tri-State peaked between 1918 and 1941. During the 1920's, more than 11,000 miners worked in the area, and perhaps three times as many were involved in support work and industries.

Many of the rock layers that were mined for ore also were aquifers--that is, water-bearing formations. Thus, water flowed into the mines

through these rock layers. To keep the mines from filling with water, as many as 63 pumping plants operated 24 hours a day. In 1947, for example, more than 36 million gallons of water were pumped from the mines every day (enough to cover one acre of ground with water 110 feet deep).

After World War II, production in the Tri-State mining district gradually declined. In 1970 the last active mine, located 2 miles west of Baxter Springs, Kansas, shut down due to environmental and economic problems, bringing to an end a century of lead and zinc mining in the Tri-State.

During the life of the district, more than 4,000 mines produced 23 million tons of zinc concentrates worth $3.5 billion and 4 million tons of lead concentrates worth $560 million. A substantial portion of the mining district was on Quapaw Lands and managed by the Bureau of Indian Affairs (BIA). The legacy the Quapaw Tribe has inherited in regards to the Management of our Trust Assets by the Bureau of Indian Affairs is the largest EPA Superfund Site called Tar Creek.

The Quapaw Tribe represents what I would describe as an 1840 type of Tribe that is totally dependent to the Interior Department and Bureau of Indian Affairs. We are working to make the administrative changes to pursue self-determination but we have not gotten to that point. The Tribe and over one hundred Tribal members own huge reserves of mining tailings that are a valuable aggregate assets with leases and sales managed by the BIA.

Because of our relationship with the Interior Department and the Bureau of Indian Affairs we, the Quapaw people, are very concerned with three main issues related to Trust Management Reform. These three issues are Present Asset Accounting and Management, Environmental issues relating to Historic Trust Asset Management and Historic Trust Asset Management Accounting.

Present Asset Accounting Management

We are concerned that best business practices are not being used in the way that the BIA currently manages the assets. The business functions relating to: Accounting, Appraisal, Sales, Leasing and Protection are inadequate and poorly managed. We have repeatedly asked:

What is the asset volume? What is the current asset value in today's market? What is the volume owned by each Quapaw Tribal Member? What was the historical asset volume? How much is gone and not properly accounted for? Will the BIA stop the assets from being stolen? I have asked the Bureau of Indian Affairs Office of Trust Responsibility these questions repeatedly and they have not provided us with any answers.

Environmental issues relating to Historic Trust Asset Management

Because the Bureau of Indian Affairs and other Departments within Interior have historically managed the mining leases for the Quapaw Tribe and the Members of the Quapaw Tribe, we believe the Environmental issues relating to the Tar Creek Superfund Site are most definitely "Trust" Issues relating to Interior. The Bureau of Indian Affairs has been named a Principal Responsible Party (PRP) at the Tar Creek Superfund Site by the Environmental Protection Agency (EPA). I have been told that the estimated remediation of the Tar Creek Superfund Site is as much as $80 billion. Where are the environmental issues related to BIA Trust Management Reform addressed in the proposed BITAM plan?

Historic Trust Asset Management Accounting

Because the Quapaw Tribe and members of the Quapaw Tribe were owners of the largest zinc and lead mining operations in the history of the United States we are extremely interested in the issues relating to Historic Trust Asset Management Accounting. The Quapaw Tribe and the Quapaw people supplied the lead and zinc used to defeat the Confederacy in the Civil War and our enemies in WWI and WWII. The Quapaw Tribe is small but mighty and we believe that there are quality records available to give the Quapaw Tribe and the members of the Quapaw Tribe an accurate Historical Accounting of Trust Asset Management. We believe that a priority

should be given to Historical Trust Asset Management Accounting in any reform and we would be more than willing to help in that effort.

Closing Remarks

In closing I want to thank you for this opportunity to speak about these important issues in Indian Country and I want to thank you personally for your dedicated service to the citizens of this great country. The men, women and children of the Quapaw people are praying that the reform of the Department of Interior's Management of the $500 Million Indian Trust Fund is handled to address the needs and concerns of the people that are being served. We are not only members of a Sovereign Indian Nation but we are proud citizens of the United States of America. We believe that there is a great need for Trust Asset Management Reform and we support the election of Chief Tillman of the Osage Nation and Governor Anoatubby of the Chickasaw Nation as our representatives to the Tribal Leadership Task Force working with Interior in the reform effort.

The beginning of true quality reform rests in the hands of the Congress of the United States of America. The United States and The Interior Department has a fiduciary responsibility based on treaties, promises and case law to manage the Trust Assets of the Native Americans using best business practices. Secretary Gale A. Norton has begun that process fostering a culture of communication, cooperation and consultation bringing experienced people like Assistant Secretary Neal McCaleb, Chief Ross Swimmer and Deputy Secretary Wayne Smith to the process. Please give them the appropriations necessary to run the BIA and to manage the Trust Assets of the Indian People using modern technology. The Interior Department and the Bureau of Indian Affairs needs more money and they needed it yesterday.

Thank you
To-Ka-Ho

John Berrey
Quapaw Tribe of Oklahoma

In addition I would like to submit a memorandum from our Tribal Legal Council Jason Aamodt to the Quapaw Tribe and the Council on Environmental Quality addressing the legal issues involved with the Tar Creek Site.

Memorandum

To: Members of the visiting committee of the Council on Environmental Quality
From: Jason B. Aamodt, Attorney, Quapaw Tribe of Oklahoma
Re: Legal issues relevant to the Tar Creek Superfund site
Date: January 29, 2002

There are a number of outstanding legal issues surrounding the Tar Creek Superfund site. First, the governments have identified the pursuit of a Natural Resource Damage Assessment (a "NRDA") as one method to address, and hopefully find solutions for the extensive pollution caused by the wastes from the Tri-State Mining District. Second, the EPA has initiated a new operable unit, which is, in part, the subject of the Council's visit to the site. Third, the prior operable units have yielded mixed results. Any future Operable Unit must be successful, and the Tribe – as the government most closely associated with the site – must play a substantial role in designing the new Operable Units.

Each of the issues set forth above involve directly impact the Quapaw Tribe of Oklahoma's lands –the impact of the Site is felt by the Quapaw Tribe and its people as it is felt by no other government or people. Approximately 70% of the site is located on lands owned by the Tribe or Tribal members that is held in trust or restricted status. Additionally, more than 95% of the site is located within the Tribe's jurisdictional area.

Clearly, the State of Oklahoma also has a significant interest in the site. The State has significant polluted land holdings, and in fact the State owns large chat piles through the "Ottawa Reclamation Authority." In total, the State's landholdings represent, I believe, about 10% of the Site.

It is my understanding that the Tribe has in the past, and is supportive in the future to undertaking joint efforts with the State. However, the Tribe must be intimately involved in, and play a key role in future solutions at Tar Creek. There is a federal policy of treatment of Indian Tribes "as States" for the purpose of implementing a number of important environmental programs, including under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. § 9626. Further, where natural resource damages impact an Indian Tribe's lands, the Tribe is to be afforded the opportunity to play the lead role administratively.

To this point, the Quapaw Tribe has in the past not been properly consulted with, nor has it been afforded the opportunity to play the lead role in a NRDA action that is

ongoing. The failed OU1 is a clear example of the result of failing to properly consult with the Tribe. A new NRDA, just involving the Tribes and the State of Oklahoma has been planned for a long time, but no action has been completed. The reason for the Tribe's non-inclusion in the past is simple: inadequate funding. The Tribe needs adequate federal resources – like those allocated to the State of Oklahoma – to be a successful partner in the resolution of issues at Tar Creek in the future.

To date, the federal government has allocated only minimal resources to the Tribe for the purpose of addressing the Site. For instance, the Tribe's environmental office, charged with addressing the single largest and worst Superfund site in the Nation, is only staffed with a few people. EPA agreed to provide additional funding for a person to address the Site specifically, but the funding provided by EPA will not allow the Tribe to attract a person with the needed credentials. Further, in the context of the NRDA that is already begun, the Fish and Wildlife Service "took over" the lead administrative duties for the action, and then allocated all of $10,000 to the Tribe for its participation in the remedy to be pursued at the site. This inadequate funding is completely unacceptable under the mandates set forth under federal environmental law, and it is, in fact, a further breach of the Federal Government's trust responsibility to the Tribe.

The Quapaw Tribe of Oklahoma stands ready to play the role that federal law provides for it in the resolution of the issues at Tar Creek. Adequate funding is required from the federal government so that experienced, capable staff can do their jobs in protecting the Tribe's, the Nation's and the State's natural resources. The Tribe hopes that a part of the CEQ's recommendations will be to increase funding levels for the Tribe.

Mr. HAYWORTH. Does anyone else have any questions for the panelists?

[No Response.]

Mr. HAYWORTH. The bells have rung. We have another vote.

Just a brief question—the Chairman's prerogative—for my constituent. President Makil, just briefly, as we listened to the receivership plan, Elouise outlined and talked some about that. And you have another thing. This is kind of an all-purpose exam question, just based on what you have: Compare and contrast. Are there any commonalities of views? Because Ms. Cobell makes it very clear that she is concerned about the individual accounts. You have done work with your tribe on the tribal accounts, and done some things. Just at first blush, is there any meeting of the minds on this, or just two alternative notions here?

Mr. MAKIL. Actually, if you look at it from the larger perspective, we are really asking for the same thing. And let me explain why. In a receivership situation mandated by a court, it would be something that has to be done. OK? I mean, that is essentially what the court would mandate. So a receiver has a responsibility to make it happen. It is not left open to maybe coming up with a plan that works. They have to come up with something that resolves the issue.

When I ask for legislation of an independent commission, it is because we need something that is going to work. We need something in place that is going to truly, truly represent a fiduciary, or act as a fiduciary, or those responsibilities that fall under the broad title of "trust," on behalf of tribes.

And it is not something that we can continue to do in an advisory capacity. Because as has been demonstrated, for the past eight, 10 years, it is that an advisory capacity does not work. It is something that has to be mandated.

So in effect, we are asking for the same thing. Now, they are two different situations, and they do respond to two distinct areas. But I think that they can work in tandem.

Mr. HAYWORTH. I thank you, President Makil. Thanks to all of the panelists. A vote is on. We will recess.

Mr. FALEOMAVAEGA. Mr. Chairman?

Mr. HAYWORTH. Yes, sir?

Mr. FALEOMAVAEGA. May I ask unanimous consent that my statement be made part of the record?

Mr. HAYWORTH. Why, absolutely. Without objection, it will be made a part of the record.

[The prepared statement of Mr. Faleomavaega follows:]

Statement of The Honorable Eni F.H. Faleomavaega, a Delegate to Congress from American Samoa

The CHAIRMAN.

I want to thank you for scheduling this hearing today on the Department of the Interior's proposal to re-structure its management of Indian Trust Fund Accounts. I very much appreciate the willingness of the Committee to look at this subject again in light of recent circumstances, including a federal court order directing the Department of the Interior to disconnect from the Internet all computer systems through which individual Indian trust data could be obtained.

As we know, the Department of the Interior's management of Indian trust assets is a complex problem with a long history. The Department of the Interior has had the trust responsibility of managing both individual Indian accounts and tribal ac-

counts since the 1800s. This is no small task. The trust is composed of 45 million acres of tribal lands, 11 million acres of individually allotted lands, and $3 billion in cash assets. Over $1 billion is received and disbursed by the Department each year through various trust accounts.

There is general acknowledgment that these accounts are not now and have never been satisfactorily managed in accordance with the fiduciary responsibility owed by the government to the trustees. By saying this, I do not mean to be any more critical of the current administration than prior administrations, and I wish to acknowledge the efforts being undertaken to reconcile the accounts by this administration and the previous administration.

Mismanagement of Indian trust funds is not a new problem. Over the years, numerous audits and reports on Indian trust funds have been published by the Interior's Inspector General, the GAO, OMB, and Congressional Committees. Former Representative Mike Synar conducted five years of investigations into the problems and published a report in 1992 entitled, "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund." The report detailed problems associated with trust fund accounts that had never been reconciled, tribes and individual Indians who did not receive regular statements detailing the activity in their accounts, checks not being credited to appropriate accounts in a timely manner, and irregular bookkeeping practices. Today, ten years later, the same problems continue to confront us.

I do not believe the executive branch of our government is solely responsible for the mismanagement of Indian trust funds. Congress has known about this problem for decades and could have provided additional funding and recourse to address this problem. To its credit, however, Congress has made efforts to get this mess straightened out.

In the 1990s, Congress appropriated $20 million and instructed the BIA to reconcile the accounts. In 1994, the American Indian Trust Fund Management Reform Act was enacted into law. This act set up new financial criteria for the accounts, created the Office of Special Trustee within DOI, and instructed the Department of the Interior to report to Congress with recommendations to resolve the accounts which were not reconciled. Despite these Congressional efforts, the Department of the Interior failed to get the accounts under control.

Now the Department has more immediate concerns. I have been following the considerable media reports on both the on-going litigation concerning mismanagement of individual trust accounts and the Secretary's proposed plan to improve the management of the trust assets. The reports are that many Indian tribes have spoken out in opposition to the proposal and want to be consulted on how trust reform might best be accomplished. Although I can understand that the Department wants to move expeditiously toward reform, I want to clearly state for the record that I believe the tribes must be given full input on how best to proceed.

I also hope to have the following questions answered today:

- What action is the Department taking today to reconcile Indian trust accounts?
- Are there any actions the Department would like to take to reconcile trust accounts but feels it cannot take without action from Congress?
- How many of the trust accounts have been reconciled over the past ten years?
- For the accounts which are not reconciled, when is reconciliation expected?
- Are there any accounts which the Department believes cannot be reconciled?
- If so, how does the Department propose to address this issue?
- And finally, what is the status of the on-going litigation?

Mr. Chairman, I again want to thank you for holding this hearing. I hope that the Committee will continue to do all it can to resolve this long-standing problem and provide the oversight necessary to ensure that the Department of the Interior lives up to its responsibility in managing Indian trust funds.

Mr. FALEOMAVAEGA. Also, unanimous consent that the Montana-Wyoming Tribal Leaders Council resolution and objection to Secretary Norton's proposal, dated—Well, anyway, it is in there.

Mr. HAYWORTH. Right, sir.

Mr. FALEOMAVAEGA. Unanimous consent, also, for the position statement of the InterTribal Monitoring Association to the Department of the Interior, dated December 11th, 2001.

Mr. HAYWORTH. Without objection.

Mr. FALEOMAVAEGA. Unanimous consent, that the tribal chairmen's position statement of proposed reorganization that was pre-

sented to Secretary Norton—This is a tribal consultation of Indian Trust assessment management, dated December 20, 2001.

Mr. HAYWORTH. Without objection, it is so ordered.

Mr. FALEOMAVAEGA. Unanimous consent, that the letter from the Northern Arapaho Business Council to Assistant Secretary Neal McCaleb, of December 18, 2001, also objecting to Secretary Norton's proposal.

Mr. HAYWORTH. Without objection.

Mr. FALEOMAVAEGA. Unanimous consent, this statement dated February 1, 2002, by the Assiniboine and Sioux Tribes, counterproposal to the BIA's proposal for reorganization.

Mr. HAYWORTH. Likewise, it is so ordered.

Mr. FALEOMAVAEGA. And unanimous consent, that the trust reform recommendations by the Chippewa-Cree Tribe presented by Alvin Windy Boy, Senior, chairman, a consultation that was conducted dated February 1, 2002.

Mr. HAYWORTH. Without objection.

Mr. FALEOMAVAEGA. And thank you very much, Mr. Chairman.

[The information submitted for the record can be found at the end of the hearing]

Mr. HAYWORTH. And thank you. And we could tell toward the end, I do not know if you grew misty-eyed, Mr. Faleomavaega, but you certainly choked up there. And we are glad we got that all worked in.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

Mr. HAYWORTH. We are happy to accommodate a variety of views, as we will with panel three when we return from the vote. So we thank you for your patience. Thanks to the second panel. And again, if anyone has anything in writing, we have 2 weeks to get that in.

The Committee stands in recess, subject to the call of the chair.

[Recess, 2:30 p.m.-2:50 p.m.]

Mr. HAYWORTH. The Committee will come to order. We have asked for any documents in writing and asked for responses. And the hearing record will be held open for those responses for 2 weeks from this date.

And so, with that, we thank panel three for hanging in. We nickname you the "Job panel," because of your patience, as we approach ten till 3 Eastern Standard Time.

And again, we turn to our friend from Montana, who has the privilege of introducing yet another constituent.

Mr. REHBERG. I thank you, Mr. Chairman. One of my colleagues was ribbing me a bit, suggesting that perhaps nobody was left in the State of Montana. I might point out that I do, in fact, represent a district that spans the distance of Washington, D.C., to Chicago, and has 902,000 residents. So the six or ten that have been here did not even make a dent in our district.

[Laughter.]

Mr. REHBERG. But I do have the pleasure of introducing another good friend, a long acquaintance of mine. Jonathan Windy Boy is a member of the Chippewa-Cree if the Rocky Boy's Reservation in north central Montana, which is where my family originally homesteaded in 1873.

In addition to serving as president of the Council of Large Land Based Tribes, he is a very active member of both his local community and, on a larger scale, across Indian country. I am pleased to welcome Mr. Windy Boy here today, and appreciate all of his efforts on behalf of his people and his community. And he is entering into the political arena, running for the state legislature for the first time this year. So we wish you well, Mr. Windy Boy, in that, as well.

Mr. HAYWORTH. And we do thank President Windy Boy for joining us, along with Charles O. Tillman, Junior, the Chairman of the InterTribal Monitoring Association; and Tex G. Hall, the president of the National Congress of American Indians; and Donald T. Gray, Esquire, affiliated with Nixon Peabody.

And with that, we will hear first the testimony of Chairman Tillman. Welcome.

STATEMENT OF CHARLES O. TILLMAN, JR., CHAIRMAN, INTERTRIBAL MONITORING ASSOCIATION

Mr. TILLMAN. Thank you very much, Congressman Hayworth. It is a privilege to be here. I did not know I was going to be first, but I am now, so I might as well get started.

A couple of days ago, I was invited out to be one of the 24 or 36 that participated in the taskforce, and in that, Dr. Williamson, University of Colorado, speaker of the Sheperdstown, West Virginia: on the origin of trust. And, sir, I think that that is where this all begins. We have to start at the beginning. And I was told by an old, old-time lawyer years ago that you start at the first, and not in the middle, or not at the last; but at the first of the thing.

And the Indians started off with treaties, trust, case law. Policies and procedures were developed from that; and then the most important part, the accountability. Trust law appeared in 1831, under Chief Justice Marshall, in the Cherokee Nation case. Marshall understood the treaty negotiations, and knew what the tribes were asking for, and that was disease protection against the white race; protection against trespass on their land; protection for their land. That was 171 years ago, and here we are today asking for protection, and living up to what Congress said 171 years ago.

But Congress realized that tribal trust law is the most direct, most private, and should be held at the highest standard of all trust law.

The moral issue has been felt since the Nixon Administration about its great importance, and hopefully to every administration thereafter. We have not forgotten what Justice Marshall said; that Congress was the ultimate trust holder. And I am here today to ask Congress to flex its authority, to abide by what our forefathers felt toward the native people of this country.

Congress needs to make sure that the trust functions are being carried out by the trustee, which is the Bureau of Indian Affairs. And Congress should have its own oversight Committee for this purpose.

Congressmen, I belong to a group called the ITMA, which is the InterTribal Monitoring Association, which was started in 1990. Right now we have 53 tribes, and those 53 tribes consist of the largest stakeholders. They are the ones like the Osage Tribe of

Indians. We have a 1.5 million acre reservation which has, I think it is, 14,000 oil wells. And it is badly mismanaged.

The ITMA represents those folks, and we oppose the Secretary's plan for the new Bureau of Trust Management, called BITAM. We totally, 100 percent, oppose that.

The second thing we do, we oppose the reprogramming of $300 million for that purpose, and respectfully request Congress to reject the reprogramming of that request.

ITMA suggests the following issues, and they must be addressed and considered in improving trust reform:

No. 1. Determine the trust duties to be discharged. And that means to me, what are the duties to be performed on accountability of our assets? That is the main and most important thing of all.

The second thing that the ITMA would request in highlighting some of the things is to disclose the known losses and theft that have happened on these reservations.

The third thing is the reconciliation of settlement.

So what I am here today to do to you is to express the proposal of the InterTribal Monitoring Association and who we represent. We are the big stakeholders. We are the ones that we look at tribal stakeholding, as well as IIM. So today that is the reason why I am here.

I thank you very much for letting me testify here. I appreciate your hearing me. But I would like to make one more comment. It is that when we take a look at our history, and we take a look at Enron, and we take a look at the S&Ls, what happened back in the '80's, that it cost this country $88 billion to fix, then we are in serious trouble. And what I call, this is our ugly baby. And if it is our ugly baby, then we need to fix it. Because these infractions go on and on and on. They are a day to day thing, Congressmen, and we have to stop it. Thank you very much.

[The prepared statement of Mr. Tillman follows:]

Statement of Charles O. Tillman, Jr., Chairman, Intertribal Monitoring Association on Indian Trust Funds

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following federally recognized tribes: Central Council of Tlingit & Haida Indian Tribes, Kenaitze Indian Tribe, Metlakatla Indian Tribe, Hopi Nation, Tohono O'odham Nation, Salt River Pima–Maricopa Indian Tribe, Hoopa Valley Tribe, Yurok Tribe, Soboba Band of Luiseno Indians, Southern Ute Tribe, Nez Perce Tribe, Passamaquoddy–Pleasant Point Tribe, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa Indians, Grand Portage Tribe, Leech Lake Band of Ojibwe, Red Lake Band of Chippewa Indians, Blackfeet Tribe, Chippewa Cree Tribe of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe, Fort Belknap Tribes, Fort Peck Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Walker River Paiute Tribal Council, Jicarilla Apache Tribe, Mescalero Apache Tribe, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Sandia, Three Affiliated Tribes of Fort Berthold, Turtle Mountain Band of Chippewa, Absentee Shawnee Tribe, Alabama Quassarte, Cherokee Nation, Kaw Nation, Kiowa Tribe of Oklahoma, Muscogee Creek Nation, Osage Tribe, Quapaw Tribe, Thlopthlocco Tribal Town, Confederated Tribes of Umatilla, Confederated Tribes of Warm Springs, Cheyenne River Sioux Tribe, Sisseton–Wahpeton Sioux Tribe, Chehalis Tribe, Confederated Tribes of Colville, Forest County Potawatomi Tribe, Oneida Tribe of Wisconsin, Eastern Shoshone Tribe, and the Northern Arapaho Tribe.

ITMA is very grateful for this Committee's invitation to share our thoughts today on the status of Indian trust reform within the Department of the Interior. We believe we have addressed those issues on which the Committee specifically requested our views. ITMA emphatically:

• Opposes the Secretary's plan for a new bureau of trust management

- Opposes the reprogramming of $300 million for that purpose
- Respectfully requests the Congress to reject that reprogramming request

ITMA suggests that the following issues must be addressed and considered in improving Indian trust reform:

- Determination of the trust duties to be discharged
- Consultation with tribal governments and Indian individuals
- Continuous, diligent oversight by Congress
- Develop policies and procedures to execute acknowledged trust duties
- Develop internal controls to detect failures to follow policies and procedures
- Develop an enforcement system to preserve integrity
- Develop an appropriate system of rewards and sanctions
- Disclose known losses and thefts
- Role of lawyers and budget officials identified
- Deal in good faith
- Avoid self-dealing or double standard
- Reconciliation or Settlement

Consultation is not a gratuitous nicety

This Committee has heard much about the Secretary's lack of consultation in developing her restructuring plan. ITMA wants to emphasize that consultation is essential to the Department's own stated goals of wanting to improve the delivery of trust services. This Committee asks our views. The Senate oversight committee asks our views, the appropriations committees in both houses have consulted with us over the years, the General Accounting Office has consulted with us over the years in the preparation of reports for the Congress, and the press has requested our views in reporting trust fund matters to the public. The Department of Interior alone, charged with the principal duties of Indian trust administration, has almost never consulted us, except to solicit our endorsement of a decision already taken behind closed doors within the Department.

Had Secretary Norton consulted us, she would have been told that her plan for an additional Bureau of Indian Trust Asset Management would face enormous opposition if she unveiled it as a surprise. Such an announcement would violate a written agreement entered into by Mr. McCaleb's predecessor on the issue of consultation. The Secretary recently attended one, and dispatched a team of Departmental level officials to attend other tribal "consultations" throughout Indian Country to convey the reorganization proposal. All these officials heard first hand that Indian Country totally opposed the plan and lack of consultation.

Her first personally signed report to the Cobell court, delivered on January 16 of this year, gives us our first indication that the present Administration just might, after all, bring that breath of fresh air to Indian trust reform we have so long hoped for and awaited. We are pleased with the report previously given us by her Director of the Office of Historical Accounting that he has agreed to adopt the approach we suggested six years ago by beginning with the judgment accounts. ITMA can be helpful to that office in suggesting ways in which the remainder of the IIM accounts can be similarly stratified for examination in manageable portions. In her report the court, the Secretary announced, among other things, her intention to adopt a few of our other long-standing recommendations to her Department.

None of this suggests that she is in a position to implement such sweeping changes as outlined sketchily in her November 14, 2001 memo introducing the reorganization and creation of a new agency to carry out trust reform successfully. We should not forget that the Department was just as confident in its ill-fated, if short-lived announcement that she intended to proceed with a "statistical sampling" of the IIM accounts. We believe the Secretary could have avoided one of the present contempt charges, had she simply chosen to confer with us, rather than taking the "statistical sampling" decision behind closed doors, which is the same way her reorganization plan appears to have been conceived.

Successive Administrations going back to 1986 have announced bold, sweeping proposals to reform Indian trust administration. None of these proposals rose to the level that could meaningfully be called a plan. Whether the proposal was to contract trust fund administration to Security Pacific Bank, or with Mellon Bank, or to the Bureau of Reclamation, or to transfer it to a whole new agency as Secretary Norton now proposes, the result was the same and was totally predictable. Indian country rose up in outrage not merely because they were not "consulted," but because they had no idea what would happen to our money or service delivery, and no one could tell us. Career employees whose principal contribution in retrospect turns out to have been to buy time reaped scores of thousands of dollars in meritorious bonuses. The failures and the losses and the national embarrassment continued. After a decade and a half, this pattern should be clear.

Progress of "Consultation" on the Department's plan for a new Indian Trust Agency

It is too early in the "consultation" process on the Secretary's proposal to make any informed observations about the results. It is not too early, however, to make some comments on the process itself, or to offer some observations about improving the process. In very significant measure, this particular consultation process has been badly undermined from the beginning by both the Administration and the Congress. Tribes and their organizations both have been admonished by congressional staff either to come up with persuasive alternative proposals or to persuade the Secretary to abandon hers. Otherwise, the Department's current plan will almost certainly be approved when she presents it again, this advice has continued. If that advice reflects the true situation, then the present consultation process is very probably not much more than a charade.

ITMA believes the consultation process should focus on the objectives to be achieved in the various areas of trust administration such as leasing, rights-of-way, extractive operations, investment, etc. These collaborative deliberations should begin with the legal duties required of the government as trustee, and the capabilities and resources needed to perform those duties. Only when there has been some consensus achieved on the nature and scope of those duties does it make sense to focus on the systems and structures best suited to accomplish their performance. Unless the Department is genuinely willing to put its opening assumptions on the table, consultation in this matter will, indeed, be simply a gratuitous nicety, to be endured by the Department as part of the cost of proceeding with a predetermined course of action.

In the Eighth Quarterly report to the court, the Secretary and her contractor indicate what we hope is a commitment to return to first principles and analyze the objectives to be achieved before turning again to the systems best suited to achieving them. We note, for instance, that in revising trust regulations, the previous Administration acknowledged the need for an accounts receivable system, but would not acknowledge any responsibility for collecting receivables until the much vaunted TAAMS system was operational. Now that system has been put on hold. Whether or not that disclaimer is effective is another matter, but the example is instructive here.

We have heartily applauded the Secretary's apparent repudiation of that systems-driven approach to performance of trust duties, but we point out that the very same mistake can be made with respect to organizational structure as with respect to systems. Her predecessor's systems-driven approach has now left Indian trust beneficiaries stuck with a regulatory regime that explicitly disclaims any responsibility on the Department of the Interior to collect their receivables. This Secretary appears to have repudiated that systems-driven approach. Instead, she has apparently elected to proceed with an organizational structure-driven approach, instead. If that is the case, we predict a similar result. In both instances, the choice made represents a decision to proceed publicly amid much fanfare with activities that require a lot of motion, transfer and expenditure of funds, and generally mesmerizing movement. This flurry of activity in the name of reform is well known to the Department as a tried and proven formula to forestall embarrassing questions from oversight Committees and eat up the calendar allotted to any Administration in large chunks.

Finally, we have to note that since this hearing was called, the Secretary and her top officials have not only agreed to meet, but have spent a week-end in intensive talks with a task force put together by tribal leadership from across the nation, and have committed themselves to seek a mutually acceptable approach to further trust reform efforts. ITMA believes that this approach offers greater promise than any approach previously taken, but this promise remains unrealized in these early days.

Interior Secretary Norton's Plans for Restructuring Trust Administration

ITMA strongly opposes Secretary Norton's plan to create a Bureau of Indian Trust Asset Management or otherwise dividing the Bureau of Indian Affairs into two separate agencies. ITMA's opposition does not stem from pique over not having been consulted. Rather, our opposition stems from the fact that this announcement fits the very pattern described above. This is the current Secretary's first sweeping proposal for reform, and it, too, was conceived behind closed doors, and no one in the Department has been able to tell us just what it means for either our money or our other trust assets. It has not been lost on us that the apparent architects of this proposal were deeply involved in some of the Department's brilliant inventions of the 1980's, when large meritorious cash bonuses were paid to career employees but no improvement resulted.

This proposal contains within it the same seeds of likely failure that attended the software acquisition called TAAMS. So far as anyone in the Department has been able to tell us, little thought has been given to the ability to state the objectives

to be achieved, beyond the catchall term of improvement. The Secretary's team has not been able to tell us just what functions, positions, resources, facilities, or other capabilities she proposes to transfer. Her team has not shared with us any of the planning, if any, that went into this proposal, or what it portends for the remaining agency and its capabilities. She has not been able to tell us why she thinks current employees could perform their duties better if they were located in a new agency. We respectfully suggest that she and her team have not given sufficient attention to the necessary first step of determining just what those duties are.

Further, we note that the BITAM proposal contains within it the explicit assumption that determining the nature and scope of those duties is solely within her purview. ITMA categorically rejects that assumption. We are aware that the Congress is reluctant to "tie the hands" of the Executive Branch officials who are charged with discharging those duties, and that deference to agency "expertise" is a longstanding tradition. In the present situation, our reluctant duty is to advise this Committee that the weight of recent history counsels against honoring either of those traditions without carefully examining the underlying assumptions.

While we take some comfort in Secretary Norton's candid concession that this proposal was driven in large measure by a desire to avoid interference in her administration of the trust by the federal court in Cobell, we simply find that explanation totally inadequate for the purpose claimed, fraught with far too many uncertainties, and more likely than not to be counterproductive even for her stated purposes. As we have noted, this proposal offers no explanation why a realty clerk having difficulties performing his duties would be better disposed or equipped to perform those duties under a new agency than under the present one. If the person is the problem, it is a personnel problem and not an organizational one. If the person is not receiving adequate supervision, it is a management problem and not an organizational one. If, as we suspect, the problem is that insufficient attention has been given to determining the nature and scope of the duties themselves, placing the person's position in a different box or the person in a different agency will contribute absolutely nothing to improving the situation. If that person is left in the same location, but transferred administratively to a new agency the Department will have created an entirely new administrative and budgetary regime that contributes absolutely nothing to achieving the original objective, which remains the delivery of realty services. The Cobell court's Special Monitor's reports abound with such examples of bureaucratic shuffling that have exacerbated, rather than alleviated, problems in Indian trust administration. A wholesale restructuring of the Department without a responsibly developed plan for what is to be achieved would be somewhat like catching air in a net. Prodigious amounts of energy can be expended. The movement can be mesmerizing. But in the end, nothing will have been changed.

ITMA respectfully urges this Committee not to ignore the lessons of recent history in carrying out is own oversight responsibilities to evaluate Secretary Norton's restructuring proposal.

Impacts of Court Order to Shut Down Internet Access for Trust Activities

More than 40,000 individual Indians went through the winter month of December and the holidays without access to their own money as a result of the court-ordered shut down of automated systems connected to the internet. Some 43,000 individuals did not receive checks that would otherwise have been written during that period. ITMA hopes that the lesson in unintended consequences from this episode is not lost on either the court or the Department, or the Congress for that matter, in considering the Secretary's reorganization plan. We have been told by tribal leaders throughout the country that Indians throughout the country are facing repossession of family vehicles, telephone and other utility disruptions, harassment from creditors and collection agencies, and other indignities they are powerless to avoid simply because their own money is not available to them. Elderly Indian people have been evicted from nursing homes. One tribe has performed a service to the government by issuing general assistance checks for eligible families throughout the Pacific Northwest because the Bureau of Indian Affairs has been unable to do so. Another tribe has drawn down hundreds of thousands of dollars of tribal money in an effort to help families weather the shut-down period. The impacts of this shut down cannot be overstated, and they have been cataclysmic for those most directly affected. Not one employee of the Department or the court has missed a paycheck during this period, however.

In addition, other unforeseen consequences of this shut down period should not be overlooked when full service resumes. We presume, for instance, that the government will pay interest to those individuals whose money it held rather than paid out during the period of the shutdown. How will the interest be calculated, or from where will it be paid? Was the money that was held rather than paid out invested

as part of the entire IIM investment pool? If it was invested as part of the pool, will others in the pool, such as minors and judgment account holders, be credited with a portion of the interest so earned? The effect on individual Indians who went without their only source of income during the winter months and the holiday seasons should not be lost on anyone.

This issue raises other questions that the Secretary's proposal to separate "trust" and "non-trust" functions seems to ignore, including the connection between the BIA's trust services and its other service delivery responsibilities. Tribes never considered the extent to which trust service delivery has come to depend on the internet. The recent shutdown has caused us to wonder how many initial lease payments were received, along with the administrative fees the BIA now charges. That situation would raise the question of whether the government was paying into its own account, but not into Indians' accounts, monies charged for the use of Indian land. We do not know whose responsibility it is in the current situation to ensure that all the payments that were withheld are paid, and paid in full, including interest. All the monies withheld, together with accrued interest, should be paid immediately, and should not take months to work through the backlog.

IIM Security

ITMA shares the concern of the Cobell plaintiffs, the court, and the Department for security of information relating to IIM accounts. We point out in passing that during the period of the Cobell litigation, the Pentagon, the FBI, and the Central Intelligence Agency have been hacked into, and none of them was shut down as a result. Nevertheless, there is probably no area of Indian trust administration that has generated more consensus among all the interested parties than that, "The security of individual Indian trust data is inadequate," in the words of the current Associate Deputy Secretary.

This issue has received detailed attention from the Special Master appointed by the court in the Cobell litigation and his contractors, as well as from the Department and its contractors. No doubt, the court-ordered shut down did much to focus the Department's attention on this matter, and this focus does appear to have resulted in a candid self-appraisal of its shortcomings in this arena.

The Department has now acknowledged, for instance, that it simply does not have in place either the comprehensive plan for establishing and continuously improving data integrity systems, or the staff required to develop one, as required by the Government Information Security Reform Act, and OMB Circular A–130. Both supervisory and technical support positions such as those for a Chief Information Officer and Information Technology Specialists for security assistance and oversight remain vacant. In the absence of an overall plan, the Department's efforts in this area continue to be driven by its immediate needs, court orders, and contractor-identified priorities.

ITMA does note in the area of IIM data security where the Department itself is in trouble and the Secretary on trial for contempt of court, the Department has adopted an approach long recommended by ITMA for the overall trust reform effort. Because the Department is in trouble for noncompliance in performing its duties, it has not charged ahead with either a huge systems procurement or a wholesale reorganization of the boxes on organizational charts. Rather, the Department has undertaken an inventory of its duties as they are found in statutes, regulations, OMB–Circulars, court orders, treaties, and directives from Congressional appropriations Committees. In the absence of qualified staff dedicated to this effort, the Department will charge one of its contractors to develop guidance in designing business models and systems specifications to perform those duties. This is precisely the approach ITMA has long insisted the Department adopt to achieve trust reform, and not just data integrity in systems designed to perform historic functions more efficiently. If the Department would exercise similar care in designing trust service delivery that is given to keeping its top officials out of jail, prospects for meaningful trust reform would be significantly improved.

ITMA Recommendations

Continuous, Diligent Oversight by Congress. ITMA believes that true reform of the administration of the Indian trust must begin with the proposition that not this Secretary nor any Secretary alone can be permitted to determine the scope of her own duties. Recent history demonstrates conclusively that those tasks that appear easy to perform will be given prominent attention, and those that will eat up large portions of any Secretary's term in office will be held forth as progress to shield against continued oversight by the Congress. We recognize the natural inclination of the Congress not to appear to be interfering with pending court proceedings, or to "tie her hands" in carrying out her responsibilities.

For the reasons that follow, however, ITMA respectfully suggests that this traditional deference has been misplaced in this context and that continued oversight by the Congress is necessary for effective reform of Indian trust administration. Even Judge Lamberth appears to have overlooked so far the Department's continued intention to violate the express command of Congress in the Royalty Simplification and Fairness Act of 1996 by implementing that Act on Indian lands, despite the plain language of the statute that it shall not apply to Indian lands.

As we have noted, in the absence of effective oversight, the Department will determine the scope of its own duties and this alone violates the first principle of the law of agency. Secondly, without the kind of oversight represented by this hearing, the Secretary would already have committed some $300 million to the expensive, highly visible, and time-consuming task of reorganizing the trust functions of the Department without having shown any evidence that it would result in improvement.

Determination of the Duties to be Discharged. Although the Secretary cannot be permitted to determine unilaterally the scope of her legal and fiduciary duties, no one disputes that existing duties as set forth in treaties, statutes, and case law have not been adequately carried out in the past. Neither is it disputed that the Secretary's trust duties extend well beyond simply the management of physical assets. To date, however, no significant effort been made even to identify those duties, except in the area of automated data security where the exercise appears to be motivated by the threat of a contempt citation. Notwithstanding that this underlying failure to perform legal duties is itself the basis for the entire trust reform effort, no one to date outside the Office of Trust Funds Management has attempted to set forth with clarity just what those duties are. ITMA believes that any improvements resulting from reorganization or successful automation of current practices would be a result of sheer happenstance if those initiatives are not driven by a comprehensive understanding of the duties to be performed. Every one of the hundreds of millions of dollars paid in settlements and judgments over the past fifteen years has been paid because of a failure to perform existing duties required by law. In presently pending litigation, the Executive Branch continues to deny the existence of those duties. Almost every conceivable avenue has been explored, except to identify them, acknowledge them, and then to design policies, procedures, and systems to discharge them honorably. No one is more familiar with the treaties and statutes affecting each tribe than the tribes themselves, and ITMA believes their participation in this effort is essential for success.

Any serious attempt to determine the duties to be performed in carrying out the nation's trust duties to Indian tribes and individuals will encounter early the Self–Governance Act of 1994 (P.L. 103–413). Under that law, some tribes have chosen to undertake many of those duties themselves. ITMA is hopeful this Secretary will find those tribes' experiences to be useful and instructive, and will not view the self-governance policy embedded in our nation's laws as simply a frustrating obstacle to her "global" approach to trust reform.

Develop Policies and Procedures to Execute Acknowledged Trust Duties. Once the duties to be discharged are determined and articulated, then the Department should develop policies and procedures designed to facilitate and promote the discharge of those duties. Such matters as segregation of duties, development of written policies and desk operating procedures, and defining job qualifications, etc., can meaningfully be addressed only when the underlying duties to be performed have been identified and articulated. BIA data cleanup provides a good example of a massive undertaking that preceded, rather than followed, a clear definition of the duties to be performed and development of policies and procedures developed to improve the performance of those duties. ITMA applauds Secretary Norton's decision to put this initiative on hold until this kind of analysis can be conducted. This is precisely the approach the government seems to have chosen when the matter at issue is the liberty of its executives. As a trustee, those same executives should be held to no less stringent a standard when the matter in issue is our property for which they hold a solemn and legal trust obligation.

Develop Internal Controls to Detect Failures to Follow Policies and Procedures. No human enterprise is immune from failures and attempts to defraud it. Indian trust administration is no exception. It is not the duty of the Secretary to achieve perfection. It is her duty to recognize this reality and to design internal controls to detect these occasional mistakes or failures and to correct them. There will be human mistakes; there will be errors in the best of systems; and there will be the occasional criminal attempt. Once appropriate policies and procedures are in place, a system of internal controls should be designed to permit managers to exercise quality control, maintain system integrity, and correct those deficiencies noted. This concept is not foreign to the Department. For many years, voucher examiners re-

viewed travel and other reimbursement claims submitted by the highest level officials of the Bureau of Indian Affairs to protect the government from overpaying for mileage or per diem rates. On the other hand, throughout this period, oil and timber companies were permitted to take billions of dollars of resources from Indian lands, and no employee was assigned to review the self-generated reports of their operations. Similarly, no one was assigned the duty of monitoring transactions in trust accounts, as the Special Master in the Cobell case has so dramatically demonstrated in recent months.

Develop an Enforcement System to Preserve Integrity. The present system of enforcing policies, procedures, and internal controls focuses on easily accomplished "successes." The backgrounds and character of lower level employees are thoroughly screened. Some with bad credit records are relieve of their duties. In the meantime, thefts from trust funds are concealed. New hires are brought in at the highest levels and given operational authority over trust reform activities with neither the civil service review given to voucher examiners or the advice and consent of the Senate. When defalcations or thefts are discovered, no publication invites other account holders similarly situated to review their accounts. No auditor is asked to pay particular attention to transactions from that location. Confirmation letters are not directed to others who were equally vulnerable to the same pilferage. The current system of enforcement, insofar as there can be said to be one, is not designed to enforce compliance, but to avoid liability.

Develop an Appropriate System of Rewards and Sanctions. As noted earlier, during much of the last fifteen years, scores of thousands of dollars have been paid to career employees of the Department for assisting one Administration after another to create the illusion of active reform efforts, while underlying problems were not addressed at all. Justice Department lawyers have received publicized rewards for the meritorious representation of the government in trust funds litigation, only to be removed ignominiously from the case months later. The government itself has been sanctioned or rebuked in trust litigation arising from California to New Mexico to South Dakota to Washington, D.C., and the attorneys responsible continue the same pattern of practice. In the Cobell case alone, the government has paid more than $600,000 in sanctions, three Presidentially appointed officials have been held in contempt of court, and another is presently on trial. In none of these instances has there been an effective incentive to alter the behavior of career employees of the Interior or Justice Departments. On the other hand, the government faces serious accusations of retiring, firing, or retaliating against employees who have disclosed failures, challenged unauthorized access, and told the truth when questioned under oath.

A system of rewards and sanctions should be designed that will effectively discourage cover-ups, falsifying records, giving false testimony, dissembling, and otherwise providing materially misleading writings or utterances. Such a system should reward those who discover problems and bring them to light. It should reward those who discover and disclose losses, waste, or thefts from the trust corpus. It should reward those who come forward with solutions. It should reward those who tell the truth. It should reward those who place problems squarely on the table for deliberation and resolution.

Under the current system, losses from nearly a generation are tallied neatly with accrued interest owed, but not made whole. ITMA respectfully suggests Congress has a responsibility here as well. The Department requested $12,668,000 for fiscal year 1996 to make good some known losses to IIM accounts, and ITMA believes the Congress declined to provide it. No Committee of Congress has so much as made an inquiry about it in the intervening years. After the Cobell case was filed, the Department has never again even intimated that there may have been losses to the IIM portfolio. Institutional memory is entrusted to career employees at management and attorney levels who reap rewards for covering up and dissembling. The entire nation and its financial press in recent weeks have raised a huge public outcry about the lack of transparency, the apparent dissimulation, the rewards to management while account holders suffered losses, and the failure of analysts to discern underlying problems associated with the collapse of Enron. All those very same issues attend the current system of Indian trust administration.

Disclose Known Losses and Thefts. Other than possibly the appearance of self-dealing, no issue arising from the travesty of the Enron collapse has received more attention than the lack of transparency in its financial statements. ITMA firmly believes that disclosure of known losses, waste, fraud, and theft is an essential underpinning of any trust operation. When such events are discovered in a commercial trust operation, the legitimate expectation of beneficiaries is that some honorable individual will step forward, disclose the event, and offer to make restitution. This attitude is conspicuously and defiantly absent in the government's administration

of the Indian trust estate. ITMA has discovered evidence of the theft of more than $7.75 million in a single episode in 1984. No Secretary of the Interior and no Assistant Secretary of Indian Affairs has ever disclosed that theft to account holders. When ITMA brought its awareness of the matter to the Department in the mid–1990's, the Department calculated the amount required to make good the unrecovered money plus accrued interest and requested appropriations to do so. Congress declined to provide the money, and the matter has not been heard of again. ITMA believes the Department does maintain a running tally of the amount presently due, but only against the day when the matter may be brought to light again. It is virtually impossible to repose trust in a system that knows, but fails to disclose and make whole, losses it has allowed to occur. ITMA believes in the adage that sunlight remains the best disinfectant known to the operation of government in a free society.

Role of Lawyers and Budget Officials. ITMA believes the failure to disclose known losses is often the result of the role of government lawyers and budget who see their role not as officers of the court, or as protectors of the integrity of government, but as defenders of the public fisc. Even those officers appointed by the President to run the Executive Branch of government are often hamstrung in their efforts by the advice of career employees who effectively direct trust operations from their unseen positions in the service of successive Administrations. ITMA believes this cloak must be removed, and the role of these officers subjected to the same scrutiny we give to those in front offices. Even a cursory review of the government's record in trust litigation over the past twenty years will convince any reviewer of the importance of this issue. But no one in a position of authority in Interior, Justice, or Congress is even aware of this record.

Deal in Good Faith. ITMA believes that neither trust reform nor consultation will be successful unless both sides consent to deal with the other openly and in good faith. ITMA notes the wildly varying explanations provided by the Interior Department to explain the genesis of Secretary Norton's reorganization proposal as an example of our concern that we are not being dealt with in good faith. Department officials have explained to us that her reorganization proposal was developed largely out of a concerted desire to avoid court intervention in her administration of the trust, and to avoid receivership. We understand from conferences with Congressional staff that she has made much the same explanation privately to Congress. ITMA notes that her explanation to the court suggests an entirely different rationale and history of the development of this proposal. Consultation on this or any other matter will be utterly meaningless unless the real reasons for her positions are put forth straightforwardly for discussion. In this matter, ITMA notes that the Secretary's recent report to the court explains tribal opposition to her reorganization proposal as centered on the consultation process itself. If she really believes that, and that there are not substantive issues that need to be addressed, and that her assumptions as well as ours are not on the table for discussion, then the consultation process is merely a procedural hurdle, and not a meaningful forum.

Avoid Self–Dealing or Double Standard. ITMA believes that meaningful collaboration in trust reform will require the Department to give as much attention to honorable trust administration as to protecting the government from liability for past mistakes or keeping the Secretary out of jail. No one expects the government to operate flawlessly. We accept that everyone wants to improve the future performance of the government in trust administration. But failures of the past that are known or discoverable should be faced squarely and dealt with honorably. Of course, those that are known should be disclosed. None of this is happening, however. The government to date, including Secretary Norton's team, has admonished us to let bygones be bygones, and to focus on the future. ITMA notes that this government has operated vigorously at the highest level and exerted pressure on dozens of governments around the world in recent years to face honorably obligations owed as a result of the Holocaust. ITMA notes that our government has paid some one billion dollars in recent years in settlement of past failures in Indian trust administration. ITMA further notes that a recent $20+ million effort to "reconcile" tribal trust accounts resulted in a major accounting firm's disclaimer of either opening or closing balances in its reports. ITMA remains convinced that the government must agree to deal honorably with past failures, even as it focuses its efforts on future reforms, if real reform is to have any meaning. Any other approach means that even future obligations may be ignored with impunity.

ITMA also notes that when Secretary Norton created the Office of Historical Accounting in her office, she provided the officer in charge with 60 days merely to develop a timetable for developing a plan of operations. She further afforded him 120 days merely to determine what he thought he could do "immediately." In light of that schedule—60 days merely to develop a timetable for developing a plan—her re-

cent abbreviated schedule for nation-wide tribal "consultation" on a vastly more ambitious undertaking is both an outrage and an insult. ITMA fears that this careful and deliberative approach where she is faced with contempt proceedings, compared to her cavalier treatment of tribes' opportunity to proceed deliberately, reflects a mentality of self-dealing and a double standard that is totally unacceptable.

Likewise, where she is also facing contempt proceedings in the matter of IIM data security, she is proceeding by carefully inventorying and articulating her duties, tracing them to treaties, statutes, case law, regulations, OMB directives, and Congressional reports. In the much larger matter of overall trust reform, however, she proposed to make a $300 million overhaul. By at least one of her accounts, her proposal to uproot all trust functions was made within two days of receiving a list of options, a list that did not even contain the prospect of beginning with an analysis of the duties to be performed.

ITMA believes that the Secretary must agree to approach trust reform by giving Indian beneficiaries the same level of consideration she is giving to her far more personal concerns.

Reconciliation or Settlement. The Department will never be in compliance with the 1994 Indian Trust Funds Management Reform Act until it can report accurate account balances. In addition, it will never be able to report accurate account balances until it deals with the issue of historic balances. If the Arthur Andersen reports of the mid–1990's demonstrate the impossibility of a global, transaction-by-transaction reconciliation of tribal accounts, then other methods must be found to achieve "accurate balances." This is neither the impossibility nor the meaningless one-quarter billion-dollar exercise it has been presented to be. It is an exercise that will require cooperation. It will require a willingness to accept responsibility for past failures, a determination to deal in good faith, and to avoid self-dealing. ITMA has suggested approaches to this matter that have been successful in litigation and negotiation for years. The Executive Branch has so far been unwilling to participate in any substantive discussions that would require it to admit the very systemic failures that it presently acknowledges in open court. Career attorneys in the Department of Justice have been able to give effective "direction" to Presidential appointees in Interior to avoid even discussions on settlement proposals. ITMA continues to recommend discussions designed to achieve negotiated or stated balances where actual reconciliation is not possible. In those instances where a full reconciliation is possible, there is no excuse for not proceeding.

Legislative Recommendations. Last month, at least three lawsuits were filed against the government, in large part to protect the tribes against possible claims that the Arthur Andersen reports provided nearly six years ago sufficed to end the Congress' tolling of the statute of limitations. Even though those reports explicitly disclaimed the accuracy of either opening or closing balances, Justice Department lawyers have indicated they will interpose those reports in any claim against the government as evidence of both any accounting that might be ordered, and as evidence of account balances. The Congress should act to eliminate the possibility of either of those uses over the objection of any tribe. A tribe that knowingly chooses to accept the report for its own accounts, of course, should be free to do so. Congress should also affirmatively address the statute of limitations issue by making it clear that no tribe is barred from bringing suit until Congress has expressed its agreement that an adequate accounting has been provided. Such a provision would likely forestall, rather than prompt, lawsuits such as those filed last month as protective measures.

No matter what organizational structure is ultimately adopted, or what systems acquired or developed, there are a number of areas where substantive legislation is needed. The present method of investing IIM monies in a pool has returned hundreds of millions of dollars in increased earnings over the past generation, and saved tens of millions in administrative costs. This method does not have affirmative authorization in law. The method of computing interest for individuals is unnecessarily complex and, in fact, has to be contracted out even by the trust accounting systems contractor. Both these matter should be addressed in legislation. ITMA respectfully suggests that Congress consider authorizing a par value fund structure for this pool.

The Congress should act to repeal the blanket authority presently available to the Secretary unilaterally to impose administrative fees on Indian trust assets to recover the costs of administering the trust. This provision has never until January of last year been incorporated into regulations, making it a duty of BIA officials now to make two collections for every lease of Indian lands, one for the government and one for the Indian landowner. When the Indian payment system was shut down in December, presumably the government was paying itself, but not Indians for any leases issued during that period. There is neither rhyme nor reason disclosed for

the "formula" now contained in regulations for computing the government's fee for processing leases, assignments, extensions, modifications, renewals, etc. ITMA believes the Congress provides resources for the discharge of trust duties and is largely not even aware that the Department is supplementing its appropriations with these fees. ITMA also thinks it is an outrage that a Department that is in so much trouble for its inability to collect for Indians should take it upon itself to double the number of transactions to be processed solely for the purpose of augmenting its Congressional appropriations. Put more bluntly, ITMA fears that the Department has dusted off this antiquated statute and wielded it in retaliation for the embarrassments and slights it feels it has suffered in trust reform.

Restore Honor and Decency. There is a moral element in trust administration. "Not honor alone, but the punctilio of an honor the most sensitive, is the standard of behavior for a trustee," Justice Cardozo wrote. President Bush campaigned the length and breadth of the nation on a platform to restore honor and decency to the highest levels of government. ITMA continues to hope the moral tone he has set for the country will filter into the administration of the Indian trust estate. We believe that control of this effort must be wrested from the career employees who have directed it, and taken firmly in hand by those officers appointed by the President under the watchful oversight of Congress and the beneficiaries themselves. Those officers must set the tone for honor and decency in administering the trust.

ITMA takes no pleasure whatsoever in our government's embarrassment. In numbers out of all proportion to our own, our men and women continue to fight for this country whenever it sends our forces upon foreign shores. We do no particular honor to their service when we rebuke the government they serve in the face of foreign shot and shell. It is our government, too. It does not belong to those who occupy its seats of power. We desperately want to be able to believe our government as much as we believe in it. We stand ready to provide whatever assistance we can offer the Department or this Committee in this important enterprise.

On behalf of all the 53 tribal members of the Intertribal Monitoring Association on Indian Trust Funds who hold individual accounts, we express our profound gratitude to this Committee for its dedication to providing oversight to Indian trust reform. Thank you for affording us this voice in the operation of our government.

[ITMA Position Statement submitted for the record follows:]

Position Paper of the InterTribal Monitoring Association on Indian Trust Funds

DECEMBER 12, 2001

POSITION STATEMENT

OF THE

INTERTRIBAL MONITORING ASSOCIATION

ON THE

DOI's PROPOSED REORGANIZATION OF BIA TRUST FUNCTIONS

THIS DOCUMENT DOES NOT CONSTITUTE OFFICIAL TRIBAL CONSULTATION WITH DOI)

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following federally recognized tribes: Central Council of Tlingit & Haida Indian Tribes, Kenaitze Indian Tribe, Metlakatla Indian Tribe, Hopi Nation, Tohono O'odham Nation, Salt River Pima–Maricopa Indian Tribe, Hoopa Valley Tribe, Yurok Tribe, Soboba Band of Luiseno Indians, Southern Ute Tribe, Nez Perce Tribe, Passamaquoddy–Pleasant Point Tribe, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa Indians, Grand Portage Tribe, Leech Lake Band of Ojibwe, Red Lake Band of Chippewa Indians, Blackfeet Tribe, Chippewa Cree Tribe of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe, Fort Belknap Tribes, Fort Peck Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Walker River Paiute Tribal Council, Jicarilla Apache Tribe, Mescalero Apache Tribe, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Sandia, Three Affiliated Tribes of Fort Berthold, Turtle Mountain Band of Chippewa, Absentee Shawnee Tribe, Alabama Quassarte, Cherokee Nation, Kaw Nation, Kiowa Tribe of Oklahoma, Muscogee Creek Nation, Osage Tribe, Quapaw Tribe, Thlopthlocco Tribal Town, Confederated Tribes of Umatilla, Confederate Tribes of Warm Springs, Cheyenne

River Sioux Tribe, Sisseton–Wahpeton Sioux Tribe, Chehalis Tribe, Confederated Tribes of Colville, Forest County Potawatomi Tribe, Oneida Tribe of Wisconsin, Eastern Shoshone Tribe, and the Northern Arapaho Tribe.

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) unequivocally:

- opposes Interior Secretary Norton's present proposals to reorganize Indian trust functions within the Department,
- opposes the establishment of a new Bureau of Indian Trust Asset Management within Interior,
- opposes the reprogramming of $300 million from appropriated funds available in Fiscal Year 2002, for the purpose of establishing the new Bureau.

ITMA requests the appropriations Committees of Congress to reject the Secretary's request of November 20, 2001 to reprogram $300 million for these purposes.

ITMA recommends that the Secretary agree, instead, to a meeting early in 2002 to discuss reasonable timelines to engage tribes in a meaningful consultation process for Indian trust reform. With her acknowledgment that her reform efforts will benefit greatly from tribal participation and that the past several years of unilateral trust reform efforts have failed, ITMA hopes that tribes and the Department might reach some agreement on a collaborative process for trust reform to report at that hearing. In the interim, ITMA insists that the Secretary designate an official with authority to ensure that essential trust functions are not interrupted, and Indian beneficiaries do not suffer unnecessarily in the name of improving services to them, by disrupting cash flow, per capita payments, timely access to funds, and payments for the use or disposition of Indian trust assets.

On November 14, 2001, Secretary of the Interior Gale Norton proposed establishing a separate agency, a Bureau of Indian Trust Assets Management, to address the debacle of federal mismanagement of Indian trust assets. For the reasons that follow, ITMA believes that such a move at this time is fraught with far more danger and uncertainty than likely benefits.

This decision presumably followed the same-day joint recommendation of the Special Trustee for American Indians and the Assistant Secretary—Indian Affairs that such an organization be created and headed by an additional Assistant Secretary for Indian Trust Assets, and based in part on a report and recommendation of the Department's contractor, Electronic Data Systems (EDS). Unfortunately, the EDS report cited for support of these plans is not available to tribes, and access to it is barred by the federal court's order to shut down the Department's internet connections.

In the first place, ITMA believes that carving a separate agency out of the single Interior agency now totally dedicated to Indian services would create great uncertainty because Indian tribes and individuals cannot know what either agency will look like, or what capabilities either will have. In fact, ITMA suggests that the Department cannot at this time even identify the programs, functions, responsibilities, or resources that would come under the new Assistant Secretary or the new agency. ITMA insists that any such effort to identify "trust functions" is emphatically not the province of the Secretary or the Department alone. There was enormous dysfunctionality caused by separating trust funds management from the Bureau, and those problems have not been resolved yet, notwithstanding the Department's promises for more than two years of an inter-agency MOU, or a BIA/OST Handbook to resolve them.

ITMA notes that the General Accounting Office, the Department's own consulting contractor (EDS), the plaintiffs in the Cobell litigation, and ITMA have roundly criticized the Department's previous, fitful starts at trust reform because boxes have been drawn and systems acquired before giving adequate thought to the duties to be fulfilled or the objectives to be achieved. ITMA suggests the Secretary makes the same mistake by proposing a new organization before giving adequate thought to the duties to be fulfilled, or the objectives to be achieved by the new organization, much less giving any apparent thought whatsoever to what such a move portends for the overall delivery of Indian services from the Department of the Interior.

ITMA suggests that before any major functions are moved, budgets disrupted, reporting regimes confused, infrastructure (building, vehicles, utility systems, hard drives, equipment and furnishings) further divided, and responsibilities shifted that the Congressional oversight and appropriations committees should demand that all interested parties be afforded an opportunity to provide the counsel that the Secretary indicated will "greatly benefit" the Department. Her view was that the Department's "refinement" of the new organization would benefit from such counsel. ITMA suggests that history, especially the Department's recent history, coupled with the Department's acknowledged timing of this announcement in an effort to

forestall court intervention, compels the conclusion that a move as startling as this not be made precipitously or without careful scrutiny.

ITMA suggests that the Department be required to identify to the Congressional committees precisely those functions, duties, responsibilities, programs, and resources that the Secretary proposes to transfer. ITMA further suggests that her effort to do so will result in surprisingly vigorous debate. If the Secretary wishes to bring in a political appointee to oversee the present reform activities that are at issue in litigation or otherwise under the supervision of the courts, ITMA does not object to that effort. On the other hand, ITMA suggests that such a move demonstrates that the Secretary and the Department are continuing to miss the real point of trust reform. ITMA suggests that the Department must begin with an analysis of the duties that are required to be performed in the management of those assets. Such an analysis has not been undertaken, and has, in fact, been strenuously resisted by the Department. ITMA insists that failures of the past, including known instances of mismanagement, loss, trespass, and theft, for instance, must be acknowledged and disclosed. It is impossible for trust beneficiaries to accept that the Department has learned from any mistakes that it refuses to acknowledge.

Once those duties are acknowledged, and known mistakes of the past disclosed, then the Department will be in a position to devise policies and procedures that are designed to correct those mistakes and to effectively and efficiently discharge those duties. Only when policies and procedures are designed to carry out acknowledged duties can the Department and its appropriating and oversight Committees of Congress make decisions regarding the organization of the agency charged with the performance of those duties. To agree beforehand to a new agency that will under any conceivable scenario result in enormous turmoil, without a common understanding of what either the new agency (or the old one) will have responsibility for, is simply to repeat the mistakes of the past dozen years. The DOI with the acquiescence of Congress has proposed one plan after another to buy time throughout the last decade. ITMA urges in the strongest possible terms that the new Century not begin with a similar, temporizing ruse. That is to say, ITMA urges tribes and the Congress not to accept one more bureaucratic shuffle as a substitute for intellectual honesty and full disclosure.

ITMA suggests the trust duties to be carried out be identified, and policies and procedures designed to achieve the performance of those duties. Then a discussion of the organization, budget, and resources required by those policies and procedures will be in order. ITMA further suggests that this organization will require carefully instituted internal controls to ensure that those policies and procedures are followed, and that the underlying duties are faithfully executed. Finally, ITMA suggests that a revised trust management regime, designed from the bottom up, beginning with the duties to be performed rather than with names in bureaucratic boxes, must include an enforcement mechanism to ensure that violation, failures, and mistakes are timely identified and corrected. ITMA further suggests a rigorous analysis of the Department's trust program from the perspective here recommended will implicate broader reaches of the government and the Department than are suggested by the Secretary's current proposal. Decisions will be required regarding rewards and punishments for concealing or acknowledging mistakes which reverse the historical pattern which has too often rewarded those who cover up and punish those who disclose the truth.

Decisions regarding the ultimate lodging of authority for trust decisions must be made that examine the current practice of allowing mid-level attorneys in the Office of the Solicitor or the Department of Justice to give orders to those senior individuals who have been appointed by the President and his officers to run the Executive Branch of our government. The duties of those other Interior agencies outside the BIA presently charged with monumental Indian trust asset management responsibilities must also be critically examined. In particular, the present role of the Assistant Secretariat for Policy, Management, and Budget must be critically examined. In addition, the Department must carefully examine the different scopes of its duties regarding direct service tribes, contract tribes, and compact tribes.

ITMA suggests that any examination of "trust assets" will necessarily be incomplete if conducted by even the most senior officers of government who have less than five years of collective experience in the arena. ITMA further suggests that this examination will be even more seriously compromised if guided by career employees of Interior and Justice who have been rewarded in the past for concealment, cover up, dissimulation, and denial of even the existence of duties that have been repeatedly declared by the courts of our land. In short, ITMA suggests that this examination is doomed to failure without participation of the beneficiaries themselves, who may well have the most to offer and certainly have the most to lose as a result of these deliberations. The Congress has recognized this for more than 20 years when

it placed such requirements into the black letter of the federal Indian laws of the United States, beginning with the Federal Oil and Gas Royalty Management Act of 1982.

ITMA urges tribes and the Congress to impress upon the Secretary the extent to which her current proposal violates the spirit if not the letter of such laws of the United States as the Royalty Simplification and Fairness Act; the Indian Trust Fund Management Improvement Act of 1994; the Federal Oil and Gas Royalty Management Act of 1982, and the Indian Self-determination and Education Assistance Act (P.L. 93–638), as well as numerous federal regulations, Executive Orders, and Secretarial orders. ITMA stands ready to be welcomed to the ensuing deliberations and to a constructive engagement with the Department and the Congress in the important, and too often in the past nationally embarrassing issue of Indian trust reform.

There will be time enough in the deliberative process ITMA recommends to determine whether or not a new Bureau of Indian Trust Asset Management is appropriate, or even whether such an agency can ever succeed in the Department of the Interior. The Secretary herself has recognized that the Department will benefit from tribes' participation. It is clear from discussions to date that the Department has given no thought whatsoever to just what it means by trust assets, that it has not considered duties attendant upon inchoate or unquantified assets such as water rights; treaty rights to hunt, fish, gather, pass over others' lands, rights to chose in action against trespassers, underpaying tenants, or thieves; duties to assert or protect rights; or any number of other trust "assets," which the government has paid billions of dollars for its failures to protect in the past. ITMA insists that any successful trust reform must begin with a collaborative effort to establish a process along the lines suggested here.

Finally, ITMA points out that the Secretary's current proposal, far from being the breath of fresh air we had hoped for from the present Administration in its first year, is simply a continuation of a long string of Secretary-level organizational proposals to buy time by rearranging boxes while leaving past wrongs uncorrected and failing to deal with fundamental issues. In this vein, ITMA points out that the Secretary's proposals and the current process by which she further proposes national "consultation" meetings within the space of two months violates the express policy of tribal consultation negotiated and executed in writing between the Bureau of Indian Affairs and Indian tribes less than one year ago. ITMA is obliged by its responsibilities to put these views on record in light of the Secretary's undisclosed plan to proceed with her plan by redirecting $300 million of appropriated funds, but vigorously asserts that this exercise does not constitute tribal consultation in any meaningful sense of the term.

ITMA respectfully urges the appropriate Committees of Congress to withhold automatic consent to this far-reaching and likely permanent proposal of Secretary Norton until it has been thoroughly examined. ITMA urges the Congress to exercise its oversight role and not to subject the nation's American Indian and Alaska Nation trust beneficiaries to a unilateral determination of the Secretary as to what her trust duties are and are not. ITMA particularly urges the U.S. House of Representatives, with an oversight hearing scheduled on trust reform on February 6, 2002, not to agree before it begins its inquiry to a $300 million, far-reaching and permanent plan hatched behind closed doors by the Department alone. More than 30 years of Congressional policy dictate that these are national decisions involving the beneficiaries themselves, and not merely Secretarial ones. There are far too many of our men and women presently on duty beyond the seas in the name of this nation for us to take lightly our responsibilities to them and their families while they are defending us.

Mr. HAYWORTH. Thank you very much, Chairman Tillman.

One housekeeping note: Since we have the lower dais clear, and I see some folks who are back here standing up, and maybe some have been standing up most of the time, you are certainly welcome. You can join us here on the lower dais. Please do not try to ask questions or count votes.

[Laughter.]

Mr. HAYWORTH. But if you would like to come up and sit and be a pseudo-Congress observer for the day, I cannot give you the Committee status, but we certainly are happy to have you come up. Or

if you want to be shy, and your legs are good and strong, then you can certainly stand in the corner.

And sure enough, just like the dance floor after some initial reticence, some folks are kind enough to come up and take chairs, and you can continue to do that.

So with that housekeeping note, and the voice of bipartisan agreement from my friend from Michigan, we turn now to President Hall, from the National Congress of American Indians.

Mr. President, welcome, and we look forward to your testimony.

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

Mr. HALL. Chairman Hayworth and Congressman Kildee, being the co-chair of the Native American Caucus. We appreciate also all of the members that are here remaining to hear this most important issue in Indian country.

My name is Tex Hall. My Indian name is Red Tip Arrow. I am the president of the National Congress of American Indians, and also the tribal chairman of the Fort Berthold Indian Reservation of North Dakota, the Mandan, Hidatsa, and Arikara Nation. I am also co-chair of the newly developed tribal taskforce. So I will try to spend part of my time talking about the taskforce and some of the work that it has done.

But I want to concur with Chairman Tillman's points about Professor Wilkenson's concept about starting from the beginning, and that is trust.

And NCAI, of course, opposes the BITAM. We call it "Bite-Em." And the tribes want to come up with their own plan. We want to call it "Fight-Em."

So I went to all of the scoping meetings. And we feel the Secretary is not following Executive Order 13175, which mandates consultation government-to-government. And we feel that it was disheartening. I just want to say this, Mr. Chairman, in all due respect. It was disheartening to hear the Secretary's comments again trying to allude to BITAM as a preferred plan.

The tribes took the time—We have had 6 days, by the way, to work on a tribal plan. And EDS took 60 days—or 6 months. EDS took 6 months. And I want to reference the Committee to page 14. This is a January 24 EDS report that talks about there must be government-to-government, a new plan, or BITAM must be beneficiary-approached. It must be beneficiary-based. And who the beneficiaries are are the tribal governments and the individual Indian beneficiaries.

So again, this is their own contractor that they have contracted and spent millions of dollars working with. And it is very disheartening, again, to not allow the tribes to come up with another plan.

The tribes have received nine proposals, and we developed a matrix. And I will forward this on to the Committee. We do have a written testimony. But we put all of the nine tribal proposals, and we put standards and principles, like maintaining trust, responsibility, separation of trust—which none of the tribes want to do. And it is all here, and it is all checked off.

So this is a great start. We also want to put BITAM, and we want to put the Cobell receivership motion on here, so we have all

of the tribes' plans, BITAM, and then the individual Indian money account plaintiffs, their motion for receivership; so we have a matrix that evaluates every single plan.

I think that is a must, and it is critical. And it is in not only the EDS report, but it is also in the January 16th eighth monitoring report that the Secretary has to provide to the judge. So all of that is in place.

I just want to emphasize, again, my disheartening of the Secretary's testimony about her preferred plan. That was the whole intent of the taskforce, made up of 36 representatives, 36 tribal leaders who took the whole weekend, from Friday to Sunday. We missed the Super Bowl, not that the Super Bowl is—It was a good game and all that. But this issue is so critical to all of us that we sacrificed a whole weekend to work with the Secretary. She spent about 4 hours working with us, and talked about her commitment to working with us. And of course, the beneficiary has to trust the trustee. And to not have them to come back and say BITAM is a better plan and all that, we think is totally wrong.

Let me just summarize some of the matrix and some of the tribal plans. First of all, the taskforce is not going to be a rubber stamp for BITAM. We will simply not be a rubber stamp, because these are our assets, these are our monies. And if we have to come back to Congress—Because we agree that Congress is the ultimate trustee and you have just entrusted the Secretary to carry that function out.

But we said that, first of all, all tribes are opposed to BITAM, but all tribes want trust reform. There is no tribe that says, "We do not want reform." I do not know where that came from, but the Secretary's comments said that. We all want trust reform.

We have nine proposals. The heart of the tribes' concerns is that they do not want land management separate from the local level, when they have no control and daily decisionmakings are taken away. This is critical. We want direct authority from the Secretary on down to the local agency superintendent.

We would like to have our own accounting system. It is like a corporation not having your CPA being right across the hall from you. We have to have our own accounting system, our access to accountants that have CPA level in the field. We feel that most of this money should be done on the field level.

There are some key differences in the proposals that the tribes have submitted. And tribes, again, do not want to separate the land, but would separate the accounting, banking, into an independent office at the local level.

And the tribes have a focus on accountability and external monitoring. That is really one of our critical points.

And we want reform, but a different kind of reform. We want land management at the local tribal level, top-quality accounting, and accountability. And that is the difference, Mr. Chairman. So I think you can draw the line.

We feel we want to work with the Secretary, if she gives us the time to work with her, in true and meaningful consultation according to 13175. But if we are not, Mr. Chairman and members of the Committee, we may have to come back to you with our preferred tribal plan, because you are the ultimate trustee.

So I realize my time has run out, Mr. Chairman, but I would refer to my written statements. And I will be happy to answer any questions later on.

Mr. HAYWORTH. And we thank you very much, President Hall. And it again goes without saying, your complete testimony will be entered into the record, as you offer your synopsis in the 5 minutes we provide.

[The prepared statement of Mr. Hall follows:]

Statement of Tex G. Hall, President, National Congress of American Indians

Mr. Chairman, members of the Committee, Tribal leaders and members of the public: thank you for the opportunity to provide testimony to you today on issues that Indian Tribes and Nations believe are of critical importance throughout Indian country. My name is Tex Hall, and I am providing testimony on behalf of the National Congress of American Indians, the oldest and largest organization representing Indian Tribes and individual Indians, founded in 1944 and representing more than 200 Tribes. I am also the Chairman of the Mandan, Hidatsa and Arikara Nation (the Three Affiliated Tribes), a Nation with an area of approximately 1500 square miles located along the Missouri River in northwest North Dakota.

Summary

1. Tribes throughout the United States are unanimously opposed to the creation of a separate Bureau of Indian Trust Assets Management (BITAM) within the Department of Interior and have strongly urged the Department to withdraw the proposal for creation of BITAM made to the court in the case of Cobell v. Norton now pending in U.S. District Court for the District of Columbia. Tribes believe that the proposal of DOI as filed with the Court goes far beyond what was necessary to comply with previous Court orders and that it contradicts the Indian Self Determination Act, including the provisions of that Act for self-governance, and that it violates Congressional intent in passing the American Indian Trust Fund Management Reform Act of 1994. Tribes further have requested that Congress take such steps as are necessary to prevent the BITAM from being created.
2. Tribes are in the process, through a 36 member Task Force selected by the Tribes, of developing alternative mechanisms for ensuring effective reform of trust asset management that will carry out the mandates of the American Indian Trust Fund Management Reform Act of 1994 without the need for a separate Bureau within the Department.
3. Tribes welcome the support DOI has expressed for the Task Force process, provided that any alternative mechanism for trust asset management that is developed by the Task Force and implemented by the Department must receive the full support of all affected Tribes.
4. Tribes recognize that in order to ensure that necessary trust asset management reforms are carried out by the Department, legislation may need to be enacted by Congress that among other things, may provide for the establishment of trust standards and provide for a permanent oversight mechanism to ensure compliance by the Department with those standards.
5. Tribes urge the Congress to appropriate adequate funds to address the issues of trust management and accounting in Indian Country. We believe that funding for tribal land repurchase programs should be seriously considered by Congress as a cost effective solution that will decrease the problems and costs related to fractionation of land title.
6. Tribes remain highly concerned about the slow progress by the Department in installing necessary security systems on the networked computers the DOI uses for accounting for the assets of Tribal members contained in Individual Indian Money (IIM) accounts. We understand that some checks have begun to be processed, but a great deal of work remains to be done while individual tribal members are suffering because income from their assets upon which they depend for everyday needs has not been paid to them since early December.
7. Tribes request that Congress pass a modest one-year extension of the statute of limitations that arguably can be used to defeat Tribal claims against the United States stemming from trust asset mismanagement that arise because of the issuance in early 1996 to Tribes of the admittedly inadequate Arthur Andersen reconciliation reports required by the American Indian Trust Fund Management Reform Act of 1994.

Background

This Nation's Indian Tribes have a special and unique relationship with the United States. The relationship is one rooted in the history and rooted in the sovereign nature of the federally recognized Indian Tribes, which all possess inherent sovereignty over their own affairs and are recognized as separate, sovereign governments by the United States through treaties and various other forms of Federal recognition. How this relationship is to be recognized and handled has been formally recognized by the President of the United States in Executive Order 13175, outlining how the executive departments of the United States government should interact with the Tribes on the basis of a "government-to-government" relationship.

Because of the great sacrifice that the Indian tribes have made to the United States of much of their homelands, by conquest, taking, or by ceding those lands through treaties and otherwise to the United States, the United States has become a trustee of much of the lands and assets that have been set aside for the tribes. See, e.g., Memorandum Opinion, Cobell v. Babbitt, Civil No. 96–1285, District Court for the District of Columbia, December 21, 1999 and the affirmance of that opinion by the Court of Appeals for the District of Columbia, February 23, 2000 for a more complete outline of the origin of the trust responsibility of the United States.

The trust responsibility of the United States to the Indian tribes within its borders is carried out on the basis of the statutory mandates of Congress, often guided by opinions of the courts of the United States. In 1994, Congress explicitly recognized these fundamental trust obligations, and also recognized the government's failure to adequately carry out its trust responsibility to Indian tribes by passage of the "American Indian Trust Fund Management Reform Act of 1994", P.L. 103–412 (the "Act"). That Act stated in Title I, Section 101 that the Department of Interior needed to act to carry out its responsibilities for discharging its trust responsibilities in an affirmative fashion, and described the functions the Secretary must carry out as follows:

> "(d) The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
>
> (1) Providing adequate systems for accounting for and reporting trust fund balances.
>
> (2) Providing adequate controls over receipts and disbursements.
>
> (3) Providing periodic, timely reconciliations to assure the accuracy of accounts.
>
> (4) Determining accurate cash balances.
>
> (5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.
>
> (6) Establishing consistent, written policies and procedures for trust fund management and accounting.
>
> (7) Providing adequate staffing, supervision, and training for trust fund management and accounting.
>
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands."

The Act further created an Office of Special Trustee (OST) whose job it was to develop a plan for the establishment or reform of all necessary systems for Indian trust fund management, and to ensure that these reforms were in fact carried out by the Secretary of the Department of Interior (DOI, or the "Department") who in general has been given by Congress the responsibility to manage assets held in trust by the United States for the benefit of Indian tribes and individuals. The Congress, since 1994, has held many hearings regarding the progress made by the OST and by DOI, and has appropriated considerable sums to ensure that the necessary reforms have been carried out.

Nevertheless, at least in the case of individual Indians, efforts were seen to be inadequate and against the backdrop of the American Indian Trust Fund Management Reform Act of 1994, litigation was filed in 1996 in the U.S. District Court for the District of Columbia by a group of individuals representing the class of all those persons who have rights to Individual Indian Money (IIM) accounts. Their complaint against the Department of Interior sought, among other things, an accounting of their assets and affirmative relief against the Department to ensure the Department's compliance with the Act. This case is known now as Cobell v. Norton, Civil No. 96–1285, still pending in the U.S. District Court for the District of Columbia.

The Court in Cobell has issued a series of rulings and orders, and has appointed a special Court Monitor who is required to report back to the court the progress the Department has made in carrying out its trust reform responsibilities, particularly in relation to the IIM accounts which is the focus of the Cobell plaintiffs' complaint.

In recent months, the Court Monitor has issued several reports highly critical of the failure of the Department to complete the required reform efforts and has cited the Department for issuing to the Court false and misleading reports about its progress in making necessary reforms to the trust management systems.

Because of these reports, the plaintiffs in Cobell have argued to the court that the performance of the Department in carrying out the orders of the Court, which incorporate the requirements of the American Indian Trust Fund Reform Act, and which have identified specific breaches of the trust responsibility, is grossly inadequate and that a receiver should be appointed to oversee trust reform efforts concerning the IIM accounts that are the subject of the litigation. The plaintiffs have also sought to have the Secretary of Interior and several other officials, and their attorneys, to be held in contempt of court for making false statements to the court about the progress of trust management reform, among other things.

On November 14, 2001, attorneys from the Department of Justice (DOJ) filed on behalf of DOI a response to the Order of the District Court for the District of Columbia in the Cobell case to show cause why the Secretary of Interior and others should not be held in contempt of court for failing to comply with the Court's previous Orders. The Court had particularly wanted to know why the Secretary had failed to comply with the Court's order of December 21, 1999 which required, among other things, that the Department carry out its High Level Implementation Plan (HLIP) as the Department had previously promised to the Court it would do in its filings with the Court, and which also identified four specific breaches of the trust responsibility that should be corrected by DOI with the assistance of the Office of Special Trustee and the Department of the Treasury, which handles distribution of earnings from trust assets to the individual Tribal member beneficiaries.

The response outlined a planned division of the functions of the Bureau of Indian Affairs (BIA), with a new Bureau to be created called "Bureau of Indian Trust Assets Management" (BITAM) to be headed by a new, as yet unnamed, Assistant Secretary of the Interior. The new Bureau would be in charge of the all trust asset management functions of DOI now handled by the BIA and would eventually handle those trust functions of the Office of Trust Funds Management (OTFM), as well, including management of Tribal trust assets, despite the fact that Federally recognized Indian tribes are not parties to the Cobell litigation and the fact that the Court does not have the subject of Tribal trust assets before it. Exactly what constitutes "trust management functions" was not defined in the response presented to the Court and to the Tribes.

The DOI response as filed on November 14, 2001 with the Cobell court has vast implications for the provision of all trust services to Tribes and their members. Yet, this response was filed without any notice to the affected Indian tribes, as required by EO 13175. Instead, DOI indicated shortly after filing its response with the Cobell court that it was beginning to conduct "consultations" with the affected Indian tribes to get their reaction to the reorganization.

In the DOJ filing, the reorganization was not presented as a proposal. It was presented as something that the Department would be implementing as soon as possible. DOI indicated that it already had appointed someone to head a "Trust Transition Office", namely Ross Swimmer, a former Assistant Secretary for Indian Affairs who served in the Reagan Administration. In other materials filed with Congress, DOI indicated that it would have to reprogram as much as $200 million for fiscal year 2002 in order to effectuate the transfer of the trust asset management functions to the new BITAM. It did not indicate that it needed any additional funds in order to carry out the reorganization.

As the reason for its reorganization effort and the creation of the BITAM, the noticed filed by with the court by DOI cited a recent report from a consultant firm, EDS, that DOI had hired to analyze its progress on implementing the HLIP. However, nothing in the EDS report had indicated that forming a new BITAM was necessary, and nothing in the Court's previous orders had indicated that forming a new agency was necessary.

Position of NCAI Concerning the Reorganization

At its Annual Meeting on November 25–30, 2001, in Spokane, Washington, NCAI passed unanimously the attached Resolution, No. SPO–01–006, which opposed the reorganization plan proposed by the Secretary on several fundamental grounds: 1) That the Secretary of Interior has made the reorganization plan without adequate consultation with the affected Indian tribes, in violation of EO 13175; and 2) That the reorganization raised many questions that troubled Tribal leaders, including whether it was authorized by law; whether it was in compliance with Court orders, whether the proposal would do anything to help manage trust assets better, the ef-

fect it would have on tribes who contract or compact for trust functions, and whether it would end up reducing the services provided by the BIA to Tribes.

Beginning on December 13, 2001, in Albuquerque, New Mexico, the Secretary of Interior began a series of meetings with Tribal leaders from throughout the United States. Her meetings, called "consultations" in the Notice published in the Federal Register were to be conducted according to a published schedule and were to allow Tribal leaders to comment on the reorganization plan, but these meetings were only to be held in selected regions of the United States, and did not include meetings in all of the BIA Regions affected by the reorganization. To date, there have been meetings, which the Assistant Secretary for Indian Affairs, Neal McCaleb, has publicly called "scoping" meetings, a term Tribal leaders believe is more consistent with EO 13175, in Albuquerque, NM(12–13–01); Oklahoma City, OK (1–3–02);Rapid City, SD (1–10–02); San Diego, CA (1–17–02); Anchorage, AK, (1–23–02), and Washington, D.C. (2–1–02).

At every meeting to date, Tribal leaders have been unanimous in their opposition to the BITAM and the Department's plan as presented to the Court. Tribal leaders protested the lack of consultation, the effect the proposal would have on provision of trust services of the BIA, the illegality of the proposal, the failure of the plan to request more funds for its implementation, the failure of the Department to provide for security in its computer programs and its slow response in fixing the problem, the possible affect the changes would have on tribes that compacted or contracted for trust services, the failure of the plan to provide for historical accounting of trust assets as required by the American Indian Trust Fund Management Reform Act, the weakening of the BIA as a result of taking trust asset management from it, the waste of time represented by such a far-reaching reorganization without establishing substantive mechanisms for reform of trust asset management, the failure of the plan to address real conflicts of interest among agencies providing some of the trust asset management and accounting functions, and the fact that the plan went far beyond what is required of the Department by the Cobell litigation, among other things.

In Albuquerque, the Tribal leaders developed a position paper outlining the basic principles that should govern any trust asset management reform effort. These principles have guided tribes as they have testified at the various "scoping" meetings that have been held so far. The principles include: 1) opposition to BITAM for the reasons stated above; 2) requiring the Department to engage in true consultation on a government-to-government basis pursuant to EO 13175; 3) ensuring that there are adequate resources to carry out trust reform; 4) establishing a mechanism for determining historical account balances; 5) doing no harm to established self-determination and self-governance programs for management of trust assets; 6) providing Tribes the flexibility to assist the Department to manage trust resources consistent and develop different systems consistent with each Tribe's unique resources and circumstances in such areas as grazing, timber, oil and gas, commercial real estate, agriculture, fisheries and hunting and fishing; 7) recognition of the need for trust assets to be managed in a way that protects and allows the continuance of each tribe's unique culture on a long term basis, consistent with Tribal control of the use and development of their lands, including recognizing a strong role for enforcement or leases by the Department.

Development of a Tribal Task Force on Trust Reform

During the initial "scoping" meeting in Albuquerque on December 13, 2001, and continuing at each of the scoping meetings thereafter, Tribal leaders have developed a Tribal Leader's Trust Asset Management Reform Task Force, composed of 2 representatives and one alternate from each of the 12 BIA Regions in the United States. Each of the Regions have now submitted names to the Task Force, and at the invitation of the Department of Interior, the Task Force has held its first formal meeting over the weekend of February 1–4, 2002 at DOI's National Conservation Training Center in Shepherdstown, West Virginia. The Task Force is committed to developing in a deliberative manner an alternative approach to the BITAM developed by DOI and has requested that the Department accept the plan developed by the Task Force instead of the BITAM. The Secretary of Interior has stated that the Department is interested in considering the proposal developed by the Task Force. The Task Force has elected from its members two co-chairs, including myself, Tex G. Hall, and Susan Masten, Chairperson of the Yurok Tribe in California. The Task Force also has developed a draft protocol of its operations

Already the Task Force has under consideration nine separate proposals for trust asset management reform as outlined by various Indian Tribes and organizations. As more proposals are received, further refinements will be made. Among the common themes of these proposals are: 1) keeping all trust management functions with-

in the Bureau of Affairs; 2) creating an independent commission to develop trust asset management standards and ensure compliance with those standards; 3) providing for all necessary trust asset management functions within the BIA; 4) ensuring complete and full consultation on a government-to-government basis on issues affecting Tribes and their members; and 5) recognition and protection of Tribal sovereignty and the ability of Tribes to manage their affairs and their resources. The Task Force has now appointed a subcommittee to review the various proposals and I am confident that the Task Force will develop a final proposal that meets the trust management needs of all Tribes, while at the same time satisfying the requirements of the Cobell court and other court decisions regarding the responsibility of the United States for trust asset management for Indian tribes and their members; the American Indian Trust Fund Management Reform Act of 1994, and the various trust asset management obligations imposed on the United States by Treaties and statutes as illuminated by the common law principles of trust management.

Task Force members are aware of the need to communicate effectively their work product to all Federally recognized Indian Tribes, and to have their meetings open to all Tribes and their advisors so that the maximum input and ideas from Tribes may be received. They also certainly expect that Task Force meetings will be held in the various Regions of the United States to make their deliberations as accessible as possible. They expect that their work will be long and difficult, and that all Tribes will have to work hard to build consensus among them for a final proposal to be acceptable to the Department of Interior, to the Courts, to Congress, and finally, and most importantly, to all of their members.

The Task Force members are well aware of the great responsibility thrust upon them. They have spoken candidly to Secretary Norton at the meeting in Shepherdstown, West Virginia this past weekend about their desire to see a Department of Interior that consults on a government-to-government basis, that takes their concerns seriously, that fully funds trust asset management reform, that will implement meaningful trust reform, withdraw the BITAM plan, that will honor the Treaties and that will respect their sovereignty.

Congressional Assistance

There are a number of steps Congress can take to assist the Department of Interior and the various Indian Tribes in this Nation achieve real trust asset management reform.

1. Congress should ensure that no funds are reprogrammed during fiscal year 2002 for the BITAM proposal and that for fiscal year 2003, all funds aimed at trust asset management reform remain within the Bureau of Indian Affairs and the Office of the Special Trustee.

This is critical because DOI has already notified Congress of it intent to reprogram funds to implement the BITAM plan. Tribes are unanimously opposed to the BITAM proposal and know it will not work because it so radically changes the way services are provided to Tribes. There is no reason to spend money on a planned reorganization that does not serve the interests of the affected Indian Tribes.

Congress should also make it clear to the DOI that it would prefer that their BITAM proposal be withdrawn and that a new alternative acceptable to Tribes be developed. DOI has committed to making the Task Force process work, but that must include an adequate commitment to ensure the opportunity for participation in the process by all Tribes, through regular communication, a sufficient number of meetings and sufficient resources devoted to this effort for it to meet all of the Task Force objectives.

2. Congress should be prepared to assist Tribes to develop meaningful legislation that will likely, among other things, establish enforceable trust asset management standards that allow the needs of all Tribes to be met consistent with each Tribe's unique resources; that will establish a mechanism for oversight of compliance with the standards; and that will provide a structure for trust asset management that balances the needs of Tribes to be involved with trust asset management with the overall trust asset management responsibilities of the United States.

Tribes, including the Tribes represented on the Tribal Leaders Trust Reform Task Force, are working hard to develop a proposal, or perhaps proposals, that will provide a superior alternative to the BITAM plan already advanced by the Department. Exactly what is to be contained in that proposal is not yet clear, but almost certainly the proposal will have a legislative component to it to ensure that the Department will enact meaningful trust asset management reform. The elements of such legislation may include the establishment of trust asset management standards and an independent commission or other mechanism to ensure compliance with those standards. This legislation must also respect the individual and unique needs of

each Tribe, consistent with the ability of Tribes and their members to manage their own assets and affairs through such things as self-governance compacts and self-determination contracts. Finally, the legislation must recognize the need for meaningful government-to-government consultation as the legislation is implemented by the Department.

3. Congress should be willing to pass legislation extending any potential statute of limitations that would affect the filing of lawsuits against the United States by the Tribes for trust asset mismanagement.

The issue of a statute of limitations defense that could be raised by the United States in any lawsuit brought by Tribes against the U.S. for trust asset mismanagement arises because of the requirements of the American Indian Trust Fund Management Reform Act of 1994 that reconciliation reports be completed by the Department of the Interior. The Department contracted with Arthur Andersen, one the big five accounting firms, to prepare the overall report and the reports for each tribe with trust funds under management of the Office of Trust Funds Management (OTFM), for the years 1972–1992. Arthur Andersen concluded that the Department lacked the necessary records and systems for a complete review and accounting of Tribal trust accounts, a fact generally acknowledged by the Department.

However, the reports were issued to Tribes beginning early in 1996, and the Department made offers of reconciliation to Tribes based on those reports. Tribes universally rejected the vast majority of these offers as being inadequate because of the inadequacy of the accounting by Arthur Anderson. To the extent the reconciliation reports provide a basis for a lawsuit being commenced by any particular tribe against the United States, the receipt of such reports by any particular tribe may start the statute of limitations on tort related lawsuits against the United States to run for that tribe. The statute of limitations can, and should be extended for at least one year for several reasons:

1) The Arthur Andersen reconciliation reports are woefully inadequate, cover a limited period of time, and do not form a good basis for indicating the extent of mismanagement of Tribal trust assets by the Department;

2) Extending the statute of limitations may well induce settlement discussions between Tribes and the United States for past mismanagement of Tribal trust assets, and may well spur discussion in Congress for settlement options;

3) The number of possible lawsuits that may be filed by Tribes is quite large and the burden on the courts and the Department of Justice will become larger than necessary.

The proposed legislation for which we would request consideration is similar to S. 1857, now pending in the United States Senate.

The Computer Shut–Down Problem

Just after DOI announced its BITAM plan by filing it with the Cobell court on November 14, 2001, the Court Monitor in the Cobell case issued a scathing report concerning computer systems security issues. The report indicated that DOI's computer systems could be breached, or "hacked", and that records of trust asset management, including the financial records of IIM account holders, could be altered by "hackers" relatively easily.

The Court issued an order that required the Department to fix the security problem on its computers before using the system again. The Court subsequently allowed the Department, on application to the Court Monitor, to use its computer systems for the purpose of issuing checks to IIM account holders representing the proceeds of their trust assets as managed by the BIA, but that process has not yet occurred and there is still no firm date when IIM account holders will receive their checks.

This situation is totally unacceptable to the Tribes and their members. While we are aware and appreciate that DOI officials are working very hard to fix this problem which was many years in the making, we also know that prior to the special effort of the Court Monitor to "hack" the system, checks had been sent out using the computer accounting system for IIM accounts for a number of years without significant incident. We are still hopeful of getting the checks issued very soon. We urge Congress to devote such resources as are necessary to make sure the problem is completely fixed and to ensure that the IIM account holders receive the funds they are owed, including interest, as soon as humanly possible. The Department and the Court Monitor must work together to find an acceptable and immediate solution to this problem.

Summary

NCAI fully supports the implementation of meaningful trust asset management reform. In rejecting the BITAM approach NCAI and its members Tribes, and indeed, Tribes nationally, are not rejecting the effort needed to make trust reform to happen. NCAI's leaders look forward to working with the Department of Interior to develop a true alternative to the BITAM proposal that meets the needs of all Tribes, is acceptable to all Tribes, and which will truly bring about the many needed changes to the Department of Interior for trust asset management reform.

We also pledge to Congress to ensure that in every way possible for us, Tribes and their leaders will be made aware of the trust asset management reform process as it goes forward. The only way a proposal for trust reform can be implemented is for it to receive broad support from Indian country.

We also urge the Congress to assist us as we develop our alternative proposal the BITAM approach, especially as we more fully develop any legislation that will be needed to fully implement the proposal. We believe that this year very well could be the year that true trust reform is put into place and this issue can begin to be brought to closure. Finally, we would ask Congress to pass legislation that will extend the statue of limitations for Tribal lawsuits that allege mismanagement of trust assets by the United States. Masehgedataz (Thank you).

[A resolution attached to Mr. Hall's statement follows:]

NATIONAL CONGRESS OF AMERICAN INDIANS

THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION #SPO-01-006
As Amended

Title: Opposing Transfer of Trust Asset Management Responsibilities to the "Bureau of Indian Trust Asset Management" in the Absence of Tribal Consultation

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, 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, 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, sovereign Indian tribes and the United States of America share a unique trust relationship, which is embodied in the Constitution of the United States, numerous court opinions, statutes, executive orders, and federal agency policies; and

WHEREAS, through the implementation of the Nixon Self-Determination Policy and the passage and implementation of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and similar legislation, the United States of America has recognized the need to work with Indian tribes on a government-to-government basis and to support Indian tribal self-determination and self-governance; and

WHEREAS, beginning with the Reagan consultation memorandum in 1984 and culminating in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" ("Consultation Order"), Executive Branch agencies are required to consult with Indian tribes when formulating and implementing policies or other actions that have a substantial direct effect on any Indian tribe; and

WHEREAS, the Consultation Order and earlier executive orders and memoranda require that all Executive agencies ensure that there is "meaningful" and "timely" tribal input when formulating policies that have tribal implications; and

WHEREAS, in a November 14, 2001 filing in the *Cobell v. Norton* class action suit, the Secretary of the Department of Interior, Assistant Secretary for Indian Affairs, and other defendants notified the United States District Court for the District of Columbia that a reorganization of the Bureau of Indian Affairs ("BIA") was already "underway" and that the BIA would be stripped of its Indian trust asset management functions; and

WHEREAS, in a sworn declaration attached to the notice of proposed reorganization, Department of Interior ("DOI") Deputy Secretary J. Steven Griles claimed that DOI had already begun consulting with Indian tribes concerning the proposal to transfer all Indian trust management responsibilities to a new Bureau of Indian Trust Assets Management ("BITAM"); and

WHEREAS, on the following day, November 15, 2001, Secretary of Interior issued a news release announcing the reorganization effort and stating that BIA Assistant Secretary for Indian Affairs Neil McCaleb had already started the consultation process; and

WHEREAS, among the many questions raised by the proposed BIA/BITAM reorganization are: 1) Whether the reorganization is properly authorized by law; 2) Whether the reorganization is consistent with or in compliance with the orders of the court in the ***Cobell*** litigation; 3) Whether the proposed reorganization will allow DOI to safely and soundly manage Indian trust assets; 4) What effect the proposed reorganization will have on tribes who compact or contract for trust functions; and 5) Whether stripping trust management responsibilities from the BIA and placing these responsibilities into BITAM will reduce the services necessary to carry out the trust responsibilities which the United States owes to Indian tribes and their members; and

WHEREAS, in violation of the Consultation Order and the principles of self-determination, NCAI-member tribes received no advance notice of the proposed reorganization and transfer of management authority over tribal lands, other trust assets, and self-determination contracting to a new agency; and

WHEREAS, at the November 19-20, 2001 Western Region Joint BIA/Tribal Budget Meeting ("Budget Meeting"), attending tribes were informed that (1) BIA regional management had received little advance notice of the reorganization, (2) regional input was not incorporated into the reorganization plan, (3) DOI officials have indicated that the Department would be more "cautious" in approving self-determination contracts in the future, and (4) the reorganization would require reallocation of FY 2002 budget monies and reformulation of FY 2003 budgets; and

WHEREAS, no Indian tribe attending the Budget Meeting had received prior notice of the reorganization or had been consulted concerning the reorganization before the federal court notice

or Secretary Norton's November 15 announcement; and

WHEREAS, Indian tribes have been offered no guarantees that, like the BIA, the new BITAM will honor the government-to-government relationship, Indian preference, or other fundamental principles that Indian tribes have worked hard to enforce within the existing BIA; and

WHEREAS, it appears that the DOI and BIA have chosen to reorganize without consulting or communicating with Indian tribes despite the fact that the planned reorganization would impact and likely reduce FY 2002 and future fiscal year funding that Indian tribes receive pursuant to their self-determination contracts as well as from other BIA and DOI funding sources; and

WHEREAS, it appears that the reorganization is scheduled to be implemented in a very short time frame without tribal consultation primarily in response to contempt proceedings brought against DOI officials in the *Cobell* litigation and without regard to the dramatic impact the reorganization would have not only on trust asset management, but on the trust relationship itself.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby disapprove of the BIA/BITAM reorganization proposal and urges that the Department of Interior withdraw the proposal due to the absence of meaningful tribal input; and

BE IT FURTHER RESOLVED that NCAI hereby urges members of Congress to prohibit the Department of Interior from spending any funds upon Interior's BIA/BITAM reorganization proposal, from any source including but not limited to: existing appropriation(s); future appropriation(s), budget modification(s), carryover(s), contract cancellation(s), reprogramming(s), saving(s), trust funds, or any other source whatsoever; and

BE IT FURTHER RESOLVED, that the President of NCAI is hereby authorized and directed to execute and forward letters to President Bush, Secretary Norton, Assistant Secretary McCaleb, Special Trustee Tom Slonaker, Native American Rights Fund Senior Staff Attorney Keith Harper, and all members of the United States Congress, including Senate Majority Leader Daschle; Senate Minority Leader Lott; Senators Inouye and Campbell of the Senate Indian Affairs Committee; Senators Byrd and Burns of the Senate Interior Appropriations Committee; Native American Caucus Co-Chairs Hayworth and Kildee; Speaker of the House Hastert; House Minority Leader Gephardt; and Representatives Skeen and Dicks of the Interior Appropriations Subcommittee;

(1) expressing NCAI's concerns regarding the reorganization,
(2) urging that the Department of Interior withdraw the reorganization proposal and that no further action be taken without meaningful tribal consultation,
(3) challenging the misleading statements of Department of Interior officials regarding the existence of tribal consultation,

(4) urging Secretary Norton, Assistant Secretary McCaleb, and Special Trustee Slonaker to provide the written BIA/BITAM reorganization plan, Electronic Data Systems Corporation's November 12, 2001 "Interim Report and Roadmap for TAAMS and BIA Data Cleanup" report, and any other reports or documents relied upon in developing the reorganization plan to the NCAI Executive Committee and all federally recognized Indian tribes no later than December 5, 2001 to commence a meaningful consultation process, and
(5) urging Secretary Norton, Assistant Secretary McCaleb, and Special Trustee Slonaker to attend the December 13, 2001 consultation and explain their actions; and

BE IT FURTHER RESOLVED, that the Department of Interior and BIA must, at a minimum, hold regional consultations before acting on the reorganization proposal; and

BE IT FURTHER RESOLVED, that the President of NCAI is hereby authorized to express NCAI's concerns and positions to the United States District Court for the District of Columbia in *Cobell v. Norton,* CIV #96-1285; and

BE IT FURTHER RESOLVED, that NCAI urges all Indian tribes to express their concerns regarding the proposed reorganization and the lack of consultation to their respective congressional delegations; 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 58th Annual Session of the National Congress of American Indians, held at the Spokane Convention Center, in Spokane, Washington on November 25-30, 2001 with a quorum present.

Tex Hall, President

ATTEST:

Colleen Cawston, Recording Secretary

Adopted by the General Assembly during the 58th Annual Session of the National Congress of American Indians, held at the Spokane Convention Center, in Spokane, Washington on November 25-30, 2001.

Mr. HAYWORTH. President Windy Boy, welcome, and we appreciate hearing your testimony.

STATEMENT OF JONATHAN WINDY BOY, PRESIDENT, COUNCIL OF LARGE LAND BASED TRIBES

Mr. WINDY BOY. Thank you very much, Chairman Hansen.

[Speaks in Indian language.]

Thank you very much, members of the Committee. Thank you for giving me this opportunity to come before you. I thank all of the members and the people that have traveled many distances and all of the people who have traveled throughout Indian country and the seven areas to follow this dog-and-pony show.

First of all, I would like to point out something, and keep this in mind. The first thing I want you to keep in mind is in the last week we have been watching the Enron hearings on TV. The Enron hearings have been mismanaged. Billions of dollars. We have the IIM account holders over here with the tribes. Billions of dollars over hundreds of years, monies in exchange for resources that we have that we have given up as Indian people. There are billions of dollars that are owed to our people because of this.

On the other hand, you take the Enron case. It is a big scandal. People are going to prison for it. More likely, they probably will not. On the other hand here, what is the difference? Billions of dollars on the left hand; billions of dollars on the right hand unaccounted for. The only difference here that I see between Enron and the IIM account is the Indians did not gamble their money. It is still owed to us. And as soon as that time comes when my people will receive their checks in the mail, then we can talk about fairness.

And one of the many things that we have been talking about, two things that I see come across the country in these hearings. No. 1, all of the tribes are opposing BITAM. BITAM is a proposal that has been devised that has been pushed on us. The specifics have not been brought out, have not been explained.

We are talking about different areas of the laws that are being impacted here. We are talking about the laws that are already in place. And those laws that we talk about are the Indian Self Determination Act. We talk about the Act of '94. We are talking about the Indian Self Determination Act. These are already acts and laws that you have already put in place to assure the tribes that we have this opportunity to come to the table to present our case to you.

There are many things that are in question here, as far as the tribes and our abilities on a local level. The tribal nations throughout this country, all 578 tribes across the United States are subject to the Single Audit Act. So you cannot tell me that each of these tribes does not have that ability to take care of our own back yard, because that is a farce, if that has ever been brought to our attention.

Another thing about the thing is we are talking about IIM receivership. And the gentleman behind me, Mr. McCaleb, I asked this question specifically to him when he met with us in December in Billings, Montana. On IIM, these individual accounts, what percent of the total trust accounts for that?

And you can correct me if I am wrong, Mr. McCaleb, but it amounted to 11 to 12 percent of the total trust. So if you take 11 to 12 percent of the total trust of the whole issue that we are talking about, what is going to happen to the other 88 percent?

There are a lot of things when I say these two issues, why I impress upon you the importance of keeping the IIM individuals and the IIM accounts and the trust accounts of the tribes separate.

And another thing, too, in the same sentence there, since December a lot of my people in my area have been being held—All of their checks have been held from them. Why do we have to make them suffer, when they are the receivers, they are the ones who have had this coming for 2 months? And there is no telling how much longer that the court case is going to be moving forward. Why can't they just get something that is due them?

And I know that my time is up here, but I am more than willing to be here. And I also have a lot of my other tribes who were not present for the comment on the record, and there are others.

Two things, also, I would like to make as recommendations. I recommend that all the proposals from the tribes be considered on this reform, be recommended from the consultations, to be submitted for congressional record as a matter of congressional record.

And furthermore, to field hearings on all tribal policy; not just this trust issue. Because our issues are broad. Our issues are broad because the administrations change every 4 years—every 8 years, sometimes. But the policies change. And we are always the ones that are always holding the bag here.

So with that, I, too, will be available for questions. Thank you.

[The prepared statement of Mr. Windy Boy follows:]

Statement of Jonathan Windy Boy, President, Council of Large Land Base Tribes

Good morning, Chairman Hansen and honorable members of the House Committee on Resources. My name is Jonathan Windy Boy, Business Committee Member, Chippewa Cree Tribal Council and I am testifying today in my capacity as President of the Council of Large Land Base Tribes. The Council of Large Land Base Tribes was formed in 2001 to advocate on behalf of a number of Indian tribes that have trust, allotted lands and other lands in the states of Montana, Wyoming, Arizona, New Mexico and Utah. The Council member tribes govern approximately 60% of the roughly 54 million acres in Indian Country. The members of the Council of Large Land Base Tribes express their appreciation to the honorable Chairman and members of the House Committee on Resources for this opportunity to address the Committee.

I am here today to address the following matters, trust management reform, the Cobell litigation, the plan of the Department of the Interior to establish a new Bureau of Indian Trust Assets Management (BITAM) and the associated hardships which Indian tribes are now experiencing because of the current shutdown of the systems within the Department of the Interior for payment of oil and gas allotment revenues and interest to the members of Indian tribes. These matters are causing extreme distress and hardship for members of all Indian tribes, including those Indian tribes that are members of the Council of Large Land Base Tribes. See Appendix A, Statistics on Trust Resources for the Rocky Mountain Region.

The Council of Large Land Base Tribes agrees wholeheartedly with Judge Royce Lamberth in the Cobell litigation that the Department of the Interior has failed dismally in its fiduciary responsibilities to Indian tribes and individual Indian allottees. Trust management by the Department of the Interior has largely been a sorry history of negligent, and in some cases, intentional trust mismanagement that has resulted in the loss of billions of dollars to Indian tribes and individual Indian allottees. However, the Council is extremely concerned with the current actions of the Department of the Interior to perform a radical reorganization of the Bureau of Indian Affairs through the establishment of the BITAM. See Appendix B, affected

full time equivalent positions (FTEs) in the Rocky Mountain Region. The Council is concerned that the proposed BITAM does not address the five breaches of trust already found by Judge Lamberth and is not designed in a manner which will lead to the effective reformation of the trust management system. Further, the Council is not convinced that the harm now confronted by individual Indian allottees are being effectively addressed by the Department of the Interior.

The Council of Large Land Base Tribes by its Resolution CLLBT–08–01, attached as Appendix C, has supported the concept of trust reform. However, the Council does not support the BITAM. Sometime in November 2001, the Department of the Interior developed BITAM entirely without consultation with the Indian tribes and individuals who are the beneficiaries of the trust obligations. The Department of the Interior has never provided a detailed description or plan for the BITAM, other than a single sheet organizational chart. The Indian tribes have traveled from Spokane, to Albuquerque, Minneapolis, Oklahoma City, Rapid City, San Diego, Anchorage, and finally, Washington D.C. in pursuit of information which has never been provided.

Without consultation with Indian tribes, on November 20, 2001, the Department of the Interior submitted a request for reprogramming of $300 million to Congress in order to establish BITAM. The Council, in Resolution CLLBT–08–01, rejected the BITAM and requested that Secretary Norton withdraw her request for the reprogramming of $300 million that was intended for the immediate establishment of BITAM.

The Senate Committee on Appropriations responded to Secretary Norton's request for reprogramming of $300 million by its letter of December 20, 2001 signed by Chairman Robert C. Byrd and the Honorable Conrad Burns. The Committee declined approval of the reprogramming, in spite of its recognition of the need for trust management reform. The Committee "wholeheartedly approved the Department of the Interior's announced plans for full consultation" with Indian tribes. In doing so, the Committee acknowledged that "an open and positive dialogue with those most directly affected by this reorganization is fundamental" to the success of the consultation process. The Committee recognized that "[q]uestions concerning the exact structure of the new Bureau, the ramifications of a reorganization on the remaining functions of the Bureau of Indian Affairs, and potential outyear costs of the reorganization are of special interest to many Senators." The Committee expected that the Department of the Interior would incorporate "additional information, conclusions and recommendations" of both the Department of the Interior and the Indian tribes in any further reprogramming request.

In Resolution CLLBT–08–01, the Council also requests that a number of principles be embraced by the Department of the Interior in proceeding with trust management reform. The Council requests that any trust reform effort preserve, enhance, and in no way diminish the trust responsibility that the United States owes to Indian tribes and individuals. Any trust reform effort shall affirm and support tribal sovereignty, self-governance, and self-determination as recognized in treaties, statutes, executive orders and regulations. Trust reform shall encompass all aspects and functions that the United States performs on behalf of the Indian tribes.

The Council requests that any reform implement the goals of decentralization, flexibility for each reservation or service area to tailor programs to the needs of individual Indian tribes, and the creation of well-defined duties of each federal official and employee relative to trust management. Centralized record-keeping systems should track information needed on a nationwide basis. But these records must be maintained in a manner consistent with trust responsibilities and managed in a manner which will avoid their destruction or loss, and ensure that they are available to the federal government, the tribal government, and the affected individual Indian allottees. The Council requests that Indian hiring preference be applied in all trust reform activities.

The Council requests that any cost savings generated by any proposed reorganization go directly to increase direct services at the local level, including those provided by direct federal services, self-determination contracts and grants, and self-governance compacts. Rather than being driven by perceptions of administrative convenience at the central level, increased funding for trust reform should be designed to address the need to improve services at the reservation level. No funds should be expended for trust reform or payment of damages in a manner that would detract from the quality or quantity of services currently provided to Indian tribes and individuals.

With regards to the need to compensate Indian individuals or tribes for trust mismanagement, the Council requests that assessment of damages determined in the Cobell or any other litigation for past mismanagement of trust resources be separately funded and proceed on a parallel track to funding for trust reform. The Coun-

cil supports the extension of any statute of limitation which might be argued to apply to any and all past mismanagement of trust assets, to allow all efforts to be exhausted to identify all past mismanagement of trust resources, including but not limited to physical trust assets and financial resources derived from such sources.

It is notable that in each of the scoping meetings held by the Department of the Interior in Spokane, to Albuquerque, Minneapolis, Oklahoma City, Rapid City, San Diego, Anchorage, and Washington D.C. the Indian tribes attending the meetings unanimously rejected the proposal for establishment of the new BITAM. The rejection by the Indian tribes of the Department's proposal for the establishment of the BITAM were based on unanswered questions by the Indian tribes relative to the proposed structure of the BITAM, the impacts of the creation of the BITAM on the remainder of the BIA, the affect of the proposed reorganization on the delivery of direct services to members of Indian tribes, including services provided by federal agencies, and by the Indian tribes through self-determination contracts and grants, as well as self-governance compacts. As well, the Indian tribes questioned the decision of the Department of the Interior to place its BITAM transition activities in the control of Ross Swimmer and Steven Griles, Deputy Secretary of the Interior, both long-time Department of the Interior officials whose lack of leadership and effectiveness in trust management have been instrumental in the continued mismanagement of individual and tribal Indian trust assets.

However, the Indian tribes remain dedicated to effective trust management reform. In this effort, member tribes of the Council of Large Land Base Tribes, including The Chippewa Cree Tribe of the Rocky Boy's Reservation, The Confederated Salish and Kootenai Tribes of the Flathead Nation, and The Navajo Nation participated last weekend, February 1—3, 2002, in a meeting of tribal leaders at the National Conservation Training Center in Sheperdstown, West Virginia. This meeting was scheduled and hosted by Secretary Norton, who visited briefly with the group of tribal leaders late on Friday and late on Sunday afternoon.

The group of tribal leaders who met at Sheperdstown last weekend was not an inclusive meeting. The National Conservation Training Center was managed as a secured federal facility, accessible only to certain named individuals through a security gate. Only two representatives, and one alternate, from each of the twelve BIA Regions were included in the group of tribal leaders. While the group was initially planned to have included technical representatives from ten organizations in which Indian tribes are members, including the Council of Large Land Base Tribes, these technical representatives were later excluded from the group. There were tribal leaders from over one hundred Indian tribes who were not provided the opportunity to participate in that retreat at Sheperdstown. They were left behind at the Hyatt Regency Crystal City to wonder what the Department of the Interior and the small group of tribal leaders might decide, on behalf of the entirety of all 575 Indian tribes, during that one weekend of closed meetings. The tribal leaders who were closed out of the meeting did not have that crucial opportunity to be included in an open and positive dialogue with the Department of the Interior. This failure must not be repeated in future meetings of the tribal leaders group.

The tribal leaders from the Council of Large Land Base Tribes who were admitted to the Sheperdstown retreat as representatives from the twelve BIA Regions reported back about the discussions held there. There were nine alternative proposals to BITAM that were received and subjected to preliminary review, including proposals from The Chippewa Cree Tribe of the Rocky Boy's Reservation, The Confederated Salish and Kootenai Tribes of the Flathead Nation, The Cheyenne River Sioux Tribe, The Oglala Sioux Tribe, and The Hoopa Tribe. There were also proposals submitted by the Intertribal Timber Council, the United Southern and Eastern Tribes, and the Van Ness Feldman Law Firm. All of these alternative proposals address matters that would be significant improvements over the BITAM proposal. Although the tribal leaders discussed the proposals and internal organizational issues, they were unable to reach a consensus by the end of the weekend. The tribal leaders have agreed to three committees who have set a meeting next week in Portland, Oregon to perform an in-depth analysis of these proposals, along with others that may be submitted by tribes and other organizations, and to discuss the internal organizational issues.

There are a number of general guiding principles that were common to the alternative proposals. There was strong support within the group to keep BIA as a viable agency, to provide a mechanism for establishment of trust standards that can be tailored by Indian tribes to their individual needs and values, for the establishment of a trust management system that is consistent with principles of self-determination and self-governance, and for the provision of resources and expertise at the local tribal, BIA Regional and Agency levels. While these general guiding principles must be incorporated into any trust reform plan, there obviously must be much

more work performed with open and full consultation with all Indian tribes prior to the determination of a plan for real, sustained, and effective trust asset management reform.

This is not a process that can or should be conducted in haste or in secret. The Congress passed the Indian Self–Determination and Educational Assistance Act, the Self–Governance Act of 1988, and the American Indian Trust Fund Management Reform Act of 1994 following extensive hearings and consideration of the concerns and interest of the Indian trust beneficiaries. The proposal of the Department of Interior to establish the BITAM, as understood by the Council, would administratively amend these laws without action by the United States Congress. The Council is concerned about such a process and believes that laws passed by the United States Congress should not be undermined by administrative actions. The gains made by Indian tribes in the areas of self-determination and self-governance compacts should not be reversed or jeopardized by an administrative reorganization which is contrary to the spirit, if not the letter, of the law.

I would like to emphasize that the crucial matter of trust asset management reform must not be driven by the current exposure of the Department of the Interior or the Secretary of the Interior to sanctions in the Cobell litigation. These matters must be separated, to the maximum extent, from the much larger matter of trust asset management reform in order for the interests of both the Individual Indian Money (IIM) account holders and Indian tribes to be effectively and adequately addressed. The IIM account holders who have had their primary or sole income halted by the Department of the Interior computer shutdown are being harmed, physically, emotionally, and spiritually, as well as financially. They are unable to buy food, shelter, clothing, and other household items. They are unable to make payments on vehicles, houses, and business equipment. All of these harms are a direct result of the failure of the Department of the Interior to make payments to these IIM account holders from funds earned from their own allotted lands. The Department of the Interior must be required to make estimated payments to these IIM account holders, based on historical payments, in order to decrease the unnecessary suffering and harm that they are sustaining.

In its 2002 Winter Session, the Navajo Nation Council had to appropriate over $527,000 to assist Navajo IIM account holders whose lives have been disastrously affected by the failure of the Department of the Interior to issue checks for income due to them. This is only the latest instance wherein the trust beneficiary Indian tribes have been forced to undertake significant financial detriments because of the failure of the Department of the Interior to adequately address its trust responsibilities. The Council of Large Land Base Tribes requests that this Committee assist its members, and all Indian tribes and peoples to correct this deplorable situation. Thank you, Mr. Chairman.

[Appendices A, B, & C attached to Mr. Windy Boy's statement follow:]

ROCKY MOUNTAIN REGIONAL OFFICE

GENERAL INFORMATION – TRUST RESOURCES

TRUST LANDS - OWNERSHIP

THERE ARE APPROXIMATELY 6.5 MILLION ACRES OF SURFACE TRUST ACRES.

THERE ARE APPROXIMATELY 5.1 MILLION ACRES OF MINERAL TRUST ACRES.

THERE ARE APPROXIMATELY 2.9 MILLION SURFACE ACRES OF TRUST LANDS OWNED BY INDIVIDUALS, WHILE THERE ARE APPROXIMATELY 3.5 MILLION SURFACE ACRES OF TRUST LANDS OWNED BY TRIBES.

THERE IS TOTAL OF APPROXIMATELY 9.3 MILLION ACRES OF LAND LOCATED WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATIONS WITHIN THE RMRO.

THERE IS A TOTAL OF 4.9 MILLION ACRES CLASSIFIED AS RANGELAND/PASTURE, 960,000 ACRES OF FARMLAND, 321,000 ACRES OF FOREST LANDS, AND 120,000 ACRES OF OTHER (TOWNSITES, RECREATIONAL, ROADS, COMMERCIAL, RESERVES, ETC.)

THERE ARE A TOTAL OF SEVEN RESERVATIONS UNDER THE JURISDICTION OF THE RMRO. IN ADDITION THERE ARE APPROXIMATELY 62,000 SURFACE TRUST ACRES AND 56,000 MINERAL TRUST ACRES OF TURTLE MOUNTAIN PUBLIC DOMAIN LANDS ADMINISTERD BY THREE AGENCIES IN THE RMRO.

THERE ARE APPROXIMATELY 45,000 UNIQUE TRUST LANDOWNERS WHO HAVE ACQUIRED THEIR TOTAL LAND INTERESTS 650,000 UNIQUE WAYS BY DIFFERENT ACQUISTIONS (PROBATES AND DEEDS).

THERE ARE 18,000 TO 20,000 LANDOWNERSHIP CHANGES THAT OCCUR ANNUALLY IN THE RMRO, THESE LANDOWNERSHIP CHANGES PRIMARILY DUE TO PROBATE ORDERS. HOWEVER, OTHER LANDOWNER CHANGES OCCUR DUE TO ACQUISITIONS, DISPOSALS, FEE PATENTS, CREATION OR EXTINGQUISHMENTS OF LIFE ESTATES, EXCHANGES, ETC.

TRUST ACCOUNTS (IIM)

THERE ARE APPROXIMATELY 45,000 IIM ACCOUNTS IN THE RMRO, WITH AN ADDITIONAL 800 TO 1,000 NEW ACCOUNTS CREATED EACH YEAR AND THE ELIMINATION OF 400 TO 600 EACH YEAR.

LAND TITLES AND RECORDS OFFICE

THE LAND TITLES AND RECORDS (LTRO) OFFICE IN THE RMRO ISSUES APPROXIMATELY 2,500 TO 3,000 CERTIFIED TITLE STATUS REPORTS ANNUALLY, ISSUES APPROXIMATELY 700 TO 800 CERTIFIED BIA-INVs (INVENTORIES FOR PROBATE PURPOSES) ANNUALLY, RECORDS 3,500 TO 4,000 TITLE DOCUMENTS ANNUALLY, AND MAINTAINS LAND RECORDS ON 39,000 TRACTS OF TRUST LANDS. IT IS ESTIMATED THAT WHEN ALL MINERAL SPLITS ARE ASSIGNED TRACT NUMBERS THE TOTAL TRACTS WILL BE 60,000.

THE LTRO RECORDS 500 TO 600 PROBATES ANNUALLY, WITH APPROXIMATELY 100 OF THOSE FOR INDIVIDUALS WHO ARE ENROLLED IN ANOTHER REGION, YET OWN TRUST LAND IN THE RMRO.

LEASES/PERMITS

THE AGENCIES IN THE RMRO ADMINISTER 10,000 TO 12,000 FARM/PASTURE LEASES. ADMINISTRATION OF THESE LEASES INCLUDE ISSUING 90 DAY NOTICES, LEASE ADVERTISEMENTS, ISSUING BILLS FOR COLLECTION, AND DISBURSING LEASE RENTALS. THERE ARE APPROXIMATELY 8,000 OTHER SURFACE LEASES/PERMITS ADMINISTERED INCLUDING BUSINESS LEASES, RECREATIONAL LEASES, HOMESITE LEASES, AND DEVELOPMENTAL LEASES.

THE AGENCIES IN THE RMRO ADMINISTER APPROXIMATELY 1,100 RANGE UNIT PERMITS, WITH APPROXIMATELY 350 PERMITTEES AND THESE RANGE UNITS CONTAIN APPROXIMATELY 6,600 TRACTS OF LAND (BOTH TRIBAL AND ALLOTTED). ADMINISTRATION INCLUDES ISSUING NOTICES, ISSUING BILLS FOR COLLECTION, AND DISBURSING RENTAL INCOME.

CONSERVATION PLANS ARE PREPARED FOR FARM/PASTURE LEASES AND RANGE UNIT PERMITS, WHICH GENERALLY INCLUDE STIPULATIONS REGARDING LAND USE, AUM CALCULATIONS, CONSERVATION PROVISIONS, STOCKING RATES, SEASONS OF USE, ETC.

THERE ARE APPROXIMATELY 350 TO 400 NON-PRODUCING OIL AND GAS LEASES, 56 INDIAN MINERAL DEVELOPMENT ACT (IMDA) MINERAL LEASES, AND 500 PRODUCING STANDARD OIL AND GAS LEASES. THESE OIL AND GAS LEASES AND AGREEMENTS HAVE GENERATED APPROXIMATELY $24,000,000 OF INCOME FOR INDIVIDUALS AND TRIBES IN THE PAST FISCAL YEAR.

TRUST INCOME

FARM/PASTURE LEASES AND RANGE UNITS GENERATE APPROXIMATELY 6.5 MILLION DOLLARS ANNUALLY, OTHER REALTY TRANSACTIONS SUCH AS EASEMENTS, GRAVEL PERMITS, SEISMIC PERMITS, LAND SALES, COAL MINES, GENERATE APPROXIMATELY 2.5 MILLION DOLLARS ANNUALLY AND FORESTRY GENERATES APPROXIMATELY 1.5 MILLION DOLLARS ANNUALLY. ALL OF THESE TRUST FUNDS ARE EITHER CREDITED TO EACH RESPECTIVE TRIBES TRUST ACCOUNT OR CREDITED TO EACH INDIVIDUAL'S IIM ACCOUNT.

Appendix B

The Department of Interior's current initiative to reform the Bureau of Indian affairs will affect a total of **696** positions within the entire Rocky Mountain Region. This initiative proposes to move all trust functions to a new organization called Bureau of Indian Trust Assets Management (BITAM). The positions listed below are by division and those being transferred to BITAM are considered trust by the DOI and those remaining in BIA are environmental services, roads & facilities, Indian services, and administration.

Administration

68 Positions, region-wide, will remain with BIA, **0** to BITAM.

Natural Resources (includes irrigation, land & minerals, range, forestry)

244 Positions, region-wide, will go to BITAM.

Engineering

152 Positions, region-wide, will remain with BIA, **0** to BITAM.

Realty

189 Positions, region-wide, will go to BITAM.

Environmental Services

6 Positions, region-wide, will remain with BIA.

Indian Services

37 Positions, region-wide, will remain with BIA.

Conclusion: In the Rocky Mountain Region, **263 positions** will remain with BIA and **433** will go to BITAM. BIA will **lose roughly 62%** of their current workforce to BITAM.

CLLBT-08-01

Appendix C

RESOLUTION OF THE
COUNCIL OF LARGE LAND-BASED TRIBES

Approving the Trust Reform Process and Supporting the Secretary of the Interior's Efforts to Reform the System for Delivering Trust Services

WHEREAS, the Council of Large Land Base Tribes supports reform of the system for delivering trust services to tribes and individual Indians; and

WHEREAS, Secretary Norton has provided only a general outline of how she proposes to reform the system; and

WHEREAS, any reforms to the system must result in real, practical, and measurable improvements to delivery of services on the reservations to tribes and individual Indians; and

WHEREAS, the members of the Council of Large Land Base Tribes have unique interests in trust reform because of the large land bases and vast natural resources within their reservations and the large populations of Native Americans which they represent; and

WHEREAS, the Council of Large Land Base Tribes has unique experience, information, and recommendations for trust reform because of their experience with past management of trust resources by the United States -- what has worked or not worked – and its members include tribes who contract, compact, or receive direct services:

NOW, THEREFORE, BE IT RESOLVED by the Council of Large Land Base Tribes that trust reform proceed as follows:

1. The Council of Large Land Base Tribes supports efforts by Secretary Norton to reform the system for delivering trust services to tribes and individual Indians. The Council of Large Land Base Tribes believes that such reform has the best chance of success if the recommendations contained in this resolution are followed.

2. Secretary Norton must pursue trust reform in a comprehensive, deliberate manner:

    a. Secretary Norton should withdraw, if not withdrawn already, the request to Congress to reprogram funds to implement the proposed reorganization until the items described below are addressed.

    b. Any trust reform effort shall preserve, enhance, and in no way diminish the trust responsibilities which the United States owes to tribes and individuals.

    c. Any trust reform effort shall affirm and support tribal sovereignty, self-government, and self-determination as recognized in the treaties and executive orders between the United States and Indian tribes.

    d. Trust reform shall encompass all aspects and functions which the United States

performs on behalf of Tribes.

e. Reform of the system going forward needs to proceed in priority over correction of the past.

3. To make consultation productive, Secretary Norton and tribes need to have a common base of information.

a. By January 15, 2002, Secretary Norton shall provide in writing to Indian tribes the details of her proposed trust reforms, including how any proposed changes will result in measurable improvements in actual services on the reservations.

b. By February 1, 2002, Secretary Norton shall respond in writing to Indian tribes and Congress why each of the reforms recommended by tribes in the 1994 Task Force on Reorganization of the Bureau of Indian Affairs report have not been implemented.

4. Based on the members of the Council of Large Land Base Tribes' extensive experience with previous efforts, the following should be considered in any trust reform:

a. Any reform of the BIA should implement the policies developed by the Tribal Task Force: decentralization, flexibility for each reservation or service area to tailor programs to their needs, and well defined descriptions of the responsibilities of each employee or official.

b. Cost savings from any reorganization of personnel shall go directly to increased services which have been historically unfunded and have failed to meet the basic needs of Native Americans.

c. Any reform needs to include increased funding based on the actual need for services on reservations.

d. Any centralized systems shall only track information necessary which needs to be available on a nationwide basis. Any system, or groups of systems, need to be flexible to meet local needs, but provide for necessary trust accountability.

e. No funds shall be expended for trust reform or assessment of damages that detract from the level of services and programs currently provided to tribes and individuals.

f. Indian hiring preference of qualified personnel shall be followed in any trust reform.

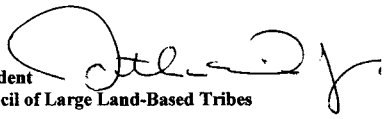
5. Assessment of the damages owed for any past mismanagement of trust resources shall be separately funded and proceed on a parallel track. No statute of limitations shall apply to any and all past damages until all efforts have been exhausted to identify all past

mismanagement of trust resources, including but not limited to management of physical trust assets and the financial resources received from such sources.

BE IT FURTHER RESOLVED that Secretary Norton meet with the Council of Large Land Base Tribes in Billings, MT on December 21, 2001 for a working session on trust reform.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Council of Large Land-Based Tribes at a duly called meeting in Albuquerque, New Mexico, at which a quorum was present and same was passed by a vote of 192.75 in favor, and 0 opposed and 0 abstained this 12th day of December, 2001.



President
Council of Large Land-Based Tribes

Mr. HAYWORTH. And we thank you very much, President Windy Boy.

Mr. Gray.

STATEMENT OF DONALD T. GRAY, ESQ., NIXON PEABODY LLP

Mr. GRAY. Thank you, Mr. Chairman and members of the Committee.

My name is Donald Gray. I am a forensic trust expert. And what that means in simple language is, I fix broken trusts. And I have done so for about 26 years with some of the nation's and world's largest financial institutions.

I think I am the token private-sector person on these panels.

[Laughter.]

Mr. GRAY. I also have followed this problem intensely for about 10 years, and have testified before Senate Committees, and have helped draft legislation—without a client. Which makes me the closest thing you will ever see to an altruistic lawyer.

I do care about this issue, and I do have some very definite ideas that I bring from the private sector, and I hope they are helpful.

The first is expertise. Secretary Norton talked a lot. Actually, I think it was Mr. Carson who asked a very direct question about, "Do you have the expertise to do it?" And there was an answer about, "There will be training programs that will go on." In all fairness, having followed this and read everything about it for 10 years, that is the blind leading the blind.

There is no expertise of the caliber that is required for trust processing, forensic fixes, land asset management, conceptual architecture, systems architecture, trust consolidation, modeling, and all of the things that have to go in—and I am now speaking about the IAM accounts—that will have to go into any kind of historic fix, much less a fix of the systems to go forward.

They do not have the expertise. And that is one of the reasons that prior administrations have never been able to grapple with this problem, even though they spent over $500 million in the process of doing it. And just a change of management inside the DOI does not do a thing. You have to have the expertise. And I will speak in a moment about how you get that expertise.

The second thing is conflict of interest. You have—and I think any lawyer will see this—you have an incredible conflict of interest, in having the BIA fix this problem. I want to give you an example from the private sector.

When we are asked to go into a bank and fix a 30-year-old trust problem that may involve 20 or 30 billion dollars, we take the trust staff that has administered that for the last five or 6 years, and we separate them. And we immunize them, unless they have done something criminal. And we say, "You are going to sit on the sidelines. We are going to fix this. And we are going to come to you and we are going to ask you a lot of questions. And you are going to help us. And at the end of the day, you are going to look like heroes, we are going to look like heroes, and the bank is not going to get sued."

But the first thing you do is to separate the people who have been working on these accounts from trying to fix the accounts, because they are going to run across mistakes they made, their father

made, their brother made, or someone else. And that is a terribly unfair thing to do to anybody in the BIA. And it is not done in the private sector.

The other thing that is admitted by Ms. Norton is that leaving accounting outcome to a defaulting agency does not make any sense at all. I mean, what the court has done is say, "Give us an accounting." They are the ones who are on the defensive. They are the ones that cannot come up with the accounting. How in the world are they going to come up with an accounting that is fair and reasonable and that takes into account the interests of the Indian beneficiaries?

The people who have worked on this—Ernst and Young; and Pricewaterhouse (which was an expert for the plaintiffs.) I have worked with both of those on numerous bank fixes. They know how to model. And what I mean by "model" is, when you have a 30-year gap in records, you go back in and you see what somebody else did; you stitch it together; and you come up with the best guess you can. And that was the basis of beginnings of settlement talks that the government wanted no part of.

The third thing is independence, which is related to conflicts of interest. If you do not have independence from a DOI who is heavily conflicted, then you will never get this problem fixed.

Whether it is a receivership or a GSE, this problem has got to come out of the DOI. Or you will put another few hundred million dollars into absolutely nothing. It has got to come out.

I would suggest to you that there is a sub rosa agenda here by Judge Lamberth. The judge is begging the Congress to offer a solution. He does not want to appoint a receiver. He has had enough trouble with trying to correct the problems of the past in accounting, much less a receiver with respect to how to go forward. And they are intimately linked, if you are a trust fixer. He is absolutely begging the Congress to come in there and do something; which is why I believe that some kind of GSE/receivership is the answer.

In fact, if you combine Ms. Cobell's testimony with President Makil's testimony, you will see that there is an answer here that Congress can implement to solve this problem.

But it will never be solved by the DOI. The judge is begging Congress to get into it. You need expertise. It does not have to last forever. It can be three to 5 years. But you have got to create an agency that has the money to hire the expertise and get the problem done.

And at the same time, train BIA people whom you have set aside as trust experts. At the end of the day, they will be able to be trust experts in Indian land banks or in commercial banks. So it is not leaving the BIA behind. And after that time, give it back to the BIA, because it is fixed.

I have gone over my time, and I apologize.

[The prepared statement of Mr. Gray follows:]

Statement of Donald T. Gray, Nixon Peabody LLP, San Francisco, California

My name is Donald Gray. I am a partner with the law firm of Nixon Peabody LLP in San Francisco. For 26 years, I have specialized in matters concerning commercial trust and institutional fiduciaries. I appreciate the opportunity to testify be-

fore you, and to bring what I hope is a helpful and fresh perspective to the Indian Trust Fund reform effort.

For many years, my practice—and the practice of Nixon Peabody's Trust and Financial Rehabilitation Group (the "Group")—has centered on working with institutional trustees and other professionals in establishing, administering, reconciling and rehabilitating long-term complex trusts. My work has given me extensive exposure to active asset management, trust administration and operations, investment, complex cash flow and risk control problems of trusts involving billions of dollars of managed assets of every variety. Our Group, which I lead, has represented some of the nation's largest financial institutions in these matters. One example of our work is our recent representation of a major money-center bank concerning trust funds of over one thousand governmental agencies, and hundreds of millions of dollars of claims relating to unclaimed trust monies, recordkeeping, investment and fees dating back many years. Simply put, our business is largely devoted to "fixing" broken trusts.

Although my experience is predominately in the commercial sphere, I have also been involved in trusts that touch both the public and private sectors. For example, in the mid–1980's, I authored the series of master and subsidiary trust agreements implementing the settlement between the United States Department of Commerce and the Native American corporations representing the Pribilof Islands of Alaska. Those trusts helped form the basis of the Islands' new economy, as it emerged from more than a century of U.S. Government oversight.

I was pleased to accept Chairman Hansen's invitation to testify on trust funds management by the Department of the Interior (DOI). I believe I bring a perspective which, except for the significant efforts of Mr. Homan during his tenure as Special Trustee, seems to be completely lacking in the current process. That is, the perspective of an independent person or group with significant private sector trust and financial institutions expertise. The key concepts here, and throughout my comments are "independence" and "expertise."

INTRODUCTION

The problems facing Indian Trust Fund reform are admittedly multi-faceted. Understandably, there are micro-economic, institutional, political, cultural and emotional concerns involving the DOI and the American Indian people, which have and will continue to manifest themselves throughout the process. I am not an expert on Indian affairs, nor on the intricate workings of the governmental agencies with responsibilities in these areas. I am a trust lawyer. But after significant research, I have reached the inescapable conclusion that the Indian Trust Fund reform effort cries out for the kind of detached, independent expertise that exists among professional trust administrators, accountants, lawyers and other professionals in the private sector. These are persons who have spent most of their careers dealing with trust problems comparable to those addressed in the GAO Report No. B–280950.

I reach this conclusion because the Indian Trust Fund problems are, first and foremost, financial trust problems based on issues frequently encountered by private sector trust institutions, such as inadequate policies and procedures and poorly planned systems conversions resulting in ineffective recordkeeping. It appears to me that, if the Indian Trust Fund problems are to be effectively dealt with, the resolution process needs to be removed from the vestiges of 150 years of U.S. Government/American Indian relations, with solutions fashioned primarily through the prism of historic structures and viewpoints. In my view, effective reforms will never be accomplished until the fiduciary and financial reporting aspects of Indian Trust Fund management is separated from the DOI's other role in overseeing the social and economic development and political concerns inherent in the U.S. Government/American Indian relationship. These latter concerns, which are an important aspect of DOI's mission, and the persons responsible for such matters, must, in my opinion, be separated completely from the management of the Indian Trust Funds with the latter function placed in the hands of persons with commercial and financial trust expertise who can identify and implement the systems and resources essential to real trust reform. I am convinced that without such independence and expertise, the affected American Indian people will be deprived of the same high level of money and asset-management services, as well as legal protections, that are available to every citizen of the United States, who puts his or her financial affairs in the hands of another.

THE GAO REPORT

The GAO extensively studied one aspect of the DOI's High Level Implementation Plan (HLP)—the planning and acquisition of a new trust asset and accounting management system (TAAMS). The GAO concluded that the DOI had not developed an

overall information systems architecture for the entire business cycle of the trust funds functions—including land ownership and appraisal, utilization and income management, trust fund accounting, investment, custody and records control, and disbursements. Without this architecture, there can be no assurances that isolated systems purportedly providing one function will interact and interconnect properly with systems developed for all other important trust functions. The GAO also found that the DOI, by purchasing the TAAMS off-the-shelf software, had not done enough to assure that all aspects of asset management data (involving complex oil and gas, timber, crop, fishing and other asset pricing, leasing and money flow information) would be accommodated.

The DOI acquired TAAMS, at a reported cost of $60 million, without regard to the GAO's warnings of the need for overall information systems architecture in correspondence with the DOI in 1997 concerning the Special Trustee's Strategic Plan issued in compliance with the American Indian Trust Fund Management Trust Reform Act of 1994 ("1994 Act"), and in its general guidelines on systems architecture development issued in 1992. The DOI also seemed to ignore the highly integrated approach for trust fund clean-up, rehabilitation and implementation recommended by the Special Trustee in his April 1997 Strategic Plan issued in compliance with the 1994 Act. Similarly, the DOI appears to have overlooked the specific directives of that statute (the governing document for all trust reform) to accomplish all aspects of reform in an integrated, coordinated and properly interactive process. The DOI also seems not to have heeded the advice of Macro International Inc., consultants to the Office of Special Trustee (OST), which found in 1997, after significant research into the personnel and training deficiencies of DOI's reform effort, that any implementation of a technologies infrastructure to solve the manifold trust problems first required the foundation of well thought-out practices and procedures relating to overall integrated reforms that would assure a comprehensive output consistent with commercial standards. In other words, without accurate data collection and input, no software system, even the most sophisticated, can achieve the required objective of providing accurate financial reporting.

As an outside trust expert, I must question why the DOI staff would apparently ignore the GAO, a highly qualified finance expert, former Special Trustee Homan, outside consultants, and finally, the governing statute, by purchasing an off-the-shelf system, at enormous expense, without any clear assurance that it will be integratable with other key aspects of trust reform, or even that it will be able to process all data variables inherent in the vast array of Indian Trust Fund assets. One theory is that such an extraordinary action is a symptom of a larger problem. The symptom, which I have seen in the commercial context, is the almost frantic attempt, when existing procedures fail, to grasp for a quick fix, even if the fix merely creates the appearance of a solution.

As explained below, any asset management system must be extremely agile and have the ability for constant modification to accommodate all the data variables inherent in the IIM assets. I believe it has been convincingly demonstrated that the TAAMS system is a failure in this regard and there are serious questions as to the compatibility of the system with other systems, or its consistency with an overall architecture, which does not yet exist.

The larger, and much more fundamental problem, is that the DOI and its internal Bureaus are encumbered by serious conflicts-of-interest, although not of their own making. It is highly probable that such extreme conflicts-of-interest will inevitably drive the DOI, its captive OST, and the Bureau of Indian Affairs (BIA) to actions that are not directed solely at rehabilitating and correcting accounting for all trust assets properly creditable to the Individual Indian Monies (IIM) accounts, the only true goal of the 1994 Act. The very essence of trustee status and integrity, and of fiduciary responsibility, is the absence of conflict-of-interest.

WHAT IS SYSTEMS ARCHITECTURE?

If I may be permitted a small digression, I suspect that some of the Committee members may be a bit confused with the overly technical jargon used by the DOI, the GAO and, admittedly, trust professionals like me. It may be helpful to decipher what "systems architecture" means, at least to me.

When professional trust experts approach the original set-up or historic reconciliation of a complex income asset/money flow/investment trust, they first start with a comprehensive listing of all possible data input, incorporated into a conceptual diagram of how that data must flow through each and every phase of the trust accounting system (appraisal, leasing, accounts receivable, accounts payable, any special cash flow allocations like reserves, posting to proper accounts, investment accounting, account ownership records and disbursements). In addition, assessments are made of the personnel expertise needed to keep track of, analyze and control

all such information. Finally, there is a narrative conceptualization of how information/technology (i.e., computer) systems can facilitate the above processes as well as an identification of so-called "inflection points," where one technical system's data is downloaded to people for analysis and re-uploaded to other systems, or where two technical systems can and should interface to transmit critical data. This process must be substantially complete before any one automated system is specified or purchased.

Put another way, seasoned trust professionals in the commercial context first apply simple common sense to the problem. This sounds obvious and easy, but it is far from it. In a trust rehabilitation context, this foundational process involves what we call in the industry "scrubbing." That is, the architects of a workable system must roll up their sleeves, review thousands of potential data input variations (past and future), conceptually design how trust data flows through a multi-phase system, perform calculations on trust data and explain what people should do, and what computer hardware and software should do, to implement the system.

This is some of the hardest work in professional trust management and requires expertise in all facets of commercial trust accounting and, typically, legal interpretation of trust instruments and governing laws. First and foremost, administrators must resist the sometimes inexorable urge to look at computer systems as panaceas for any complex problem. Computer systems do not think. Hopefully, they are designed by people who do think, and who are intimately familiar with processes and calculations which are being automated. They gain this knowledge by working intimately with such a multi-disciplinary trust team for countless hours. After flowcharting the desired processes or calculations, they write or procure a software program (or package of programs) embodying them. If the software is designed and programmed well, a computer system can then perform such processes and calculations in bulk and at great speed.

Also, computer systems do not self-correct and expand themselves to create new capabilities for handling information/data with which they were not designed to cope. I have seen highly sophisticated trust and asset management commercial systems that do a splendid job with 90% of complex data or analysis, but utterly fail to accommodate, or be modified to accommodate, 10% of the required data or analysis. Unfortunately, 90% correctness for millions or billions of dollars of managed assets does not sit well with investors and other beneficiaries.

Although seemingly reasonable to the lay person, the former DOI Secretary's comments concerning the selection of a "near enough" off-the-shelf asset management system, by selecting a system developed not for the IIM trust reform, but for an "analog" problem, is a bit frightening to a trust professional.

As the GAO report indicates, instead of the "intricate and complex coordination process" of all facets of the reform effort called for by the former Special Trustee in his Strategic Plan, the DOI's HLP leaves the IIM effort with a disjointed, potentially non-integratable mish mash of project initiatives, and the occasional "big splash" computer system for one element of the task that may work only for highly selective data. But the current trust reform effort, as evidenced by the DOI's HLP, contains features far more troublesome than a potential functionally deficient, or non-integratable TAAMS product.

INDEPENDENCE, EXPERTISE AND AN INTEGRATED APPROACH

Although both the HLP and the Special Trustee's Strategic Plan admittedly contain similar, and undeniably necessary, tasks essential to account clean-up, reform and new systems building (including data clean-up, records retention and proper custody, workable trust accounting and asset management procedures, investment, accounts and land title, appraisal and probate clean-up), these are no more than static descriptions of jobs to be performed on a coordinated basis. What is of ultimate importance is the philosophy, mission goal and the resulting and overriding "how" to attack all these deficient areas. Respectfully, while the former Secretary plucked out independent projects that are undeniably important to trust reform, he specifically and dramatically gutted the Special Trustee's Strategic Plan of its two essential cornerstones for such an overriding mission and goal—independence and expertise. Without these elements, which create both a reform environment and give it its essential tools, meaningful trust reform will not occur.

The Special Trustee's Strategic Plan, in its first two pages, could not have been clearer on this all-important "how." First, with some courage, Mr. Homan called for a completely independent and neutral body, a Government Sponsored Enterprise (GSE), to take over the trust rehabilitation process, under the supervision of government agencies expert in commercial finance and modern trust procedures. He continually cites the ongoing conflict within the DOI in failing to separate its special trust reform fiduciary goals from its general responsibilities in education, housing,

law enforcement and a multitude of other welfare programs and other American Indian services provided by the DOI and its Bureaus. In short, Mr. Homan concluded that, in the competition for the limited funds appropriated to DOI, when a choice must be made between a department's general responsibilities and trust fund reform, the latter program would inevitably suffer.

What is also obvious from the HLP's allocation of responsibility for its 13-category, piecemeal approach to reform, is that there is at least an unconscious attempt to employ the other internal Bureaus of the DOI, especially the BIA, in these processes, regardless of a proven lack of expertise, since only two of the projects are reserved to the OST. This foreshadows two very negative results. First, it displays a lack of appreciation for the expertise, and long-term training required for trust rehabilitation and administration, and suggests that involving these internal DOI Bureaus is of greater importance than solving the trust fund problems. The DOI's loyalty to one of its Bureaus, the BIA, is laudable, but completely inappropriate in the IIM trust reform process. Second, the misguided piecemeal methodology of the HLP permits agency employees, no matter how much they may wish to act in good faith, to attempt to solve the trust fund problems by purchasing an expensive new software system, creating the impression that by do doing they are attempting to obscure past mistakes with an easy, but ineffective fix. This is not intended to be an indictment of such personnel, it is simply a recognition that human beings, no matter how fair-minded and well-intentioned, should never be asked single-handedly, in isolation and without expert advice to rehabilitate a process which has gone seriously awry during their historic involvement in the process.

For a commercial trust practitioner, deeply involved in the activities of bank trust departments, and a veteran of dealing with the Office of the Comptroller of the Currency (OCC), and other federal agencies, state banking authorities, accountants and rating agencies in connection with audits of trust and fiscal agency procedures, the equally apparent inability of the DOI staff to appreciate the level of expertise required for the rehabilitation and modernization of a trust problem as vast as the IIM accounts issues is surprising to me. I cannot put this any more clearly than former Special Trustee Homan did in his Strategic Plan, and I fully concur with his conclusions. Regarding the lack of trust managerial resources within the DOI, and the BIA specifically, Mr. Homan states:

> Managers and staff of the BIA have virtually no effective knowledge or practical experience with the type of trust management policies, procedures, systems and best practices which are so effective, efficient and prevalent in private sector trust departments and companies. The BIA area and field office managers do not have the background, the training, the experience, the financial and trust qualifications and skills, necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. Thus, and through no fault of their own, and even assuming financial resources were made available, they are not capable of managing effectively the Federal Government's trust management activities on a par with that provided by private sector institutions to their customers. . .—[emphasis added]

If your or my bank or trust company were to handle our assets with completely unqualified personnel, in a manner that can be described metaphorically as a "shoe box" approach to accounting, we would be in court, or at the steps of the OCC or other appropriate regulator the next morning. That was one of the great lessons of the financial institution crises of the 1980's.

The independent contractors, Macro International Inc., Larson Slade Associates, LLC and Arrowhead Technologies, in cooperation with project resource firms (such as Riggs Bank, NationsBank and State Street Bank and Trust) echoed Mr. Homan's conclusions after hundreds of DOI personnel interviews. Their goal was, in part, to identify any gaps between the current Indian trust systems and trust departments in the commercial sector. These consultants concluded in 1997 that the accepted legal and procedural standards of fiduciary responsibility to manage trust assets and accurately report on their status to beneficiaries were not being met. Without properly trained personnel, and without a "single-point management responsibility" like a GSE, the current system falls far short of commercial trust standards. What is needed, these consultants found, is a single trust organization, with complete control over both resource and financial assets utilizing tried and true commercial applications. Finally, they concluded that all of these tasks will fail to improve the Indian Trust Fund reform process unless an effective and efficient staff is able to carry out the tasks.

A quick look at previous DOI budgets demonstrates with clarity the Agency's historic opinion of these expert findings. Although these numbers have since been in-

flated, the previous Administration's HLP, for combined fiscal years 1999 and 2000, called for a budget for computer software "systems" of $51.1 million. For the same years, this budget for "training" is a meager $7 million, and even that relates solely to on-the-job training for BIA officials (which the consultants found generally ineffective) rather than for the hiring of experienced commercial trust administrative staff. So much for expertise.

With the growing complexity of investment vehicles, asset-backed securitizations and their correspondingly complex cash flows (not unlike the IIM accounts), modern trust administration requires a level of financial and technical expertise that was unheard of twenty years ago. What once required a few accounting courses and on-the-job bond payment training, now frequently requires advanced degrees in money management, fiduciary standards and laws, complex cash flow analysis techniques (called "analytics" or "modeling"), dexterity on PC-based spreadsheet and database systems, a complete understanding of permitted investments, overnight "float" investments, special cash accounting systems and the use of complex computer programs. Even with this training, and with the constant support of expert supervisors, tax specialists, accountants and attorneys, it takes years to develop the intuitive expertise to perform proper trust accounting. To my knowledge, not one person from the commercial sector with such a background is presently on the staff of the DOI.

Again, I must ask why the DOI has completely ignored the critical need for such independence (i.e., lack of conflicts-of-interest) and expertise. One might guess that this answer would be the very "special" nature of U.S. Government/American Indian relations, and the ultra-sensitivity the BIA and the other DOI Bureaus bring to this special problem. But from the outside this rather looks more than suspiciously like institutional self-perpetuation, obfuscation of past mistakes, and at worst, the kind of paternalism that should have gone with the wind many years ago.

A PROFESSIONAL TRUST APPROACH

How would a team of commercial trust experts approach a problem like IIM reform, and how does the DOI's course of action compare to such a commercial approach?

Although admittedly a long time in the making, commercial trust entities have tackled efforts just as daunting as the IIM problem, especially when they have inherited active asset trusts which have been mismanaged.

An overview of a typical step-by-step approach to a major "fiduciary fix" of a private sector trust organization follows:

Step 1. Assemble a Team.

The first step is to assemble a team consisting of highly experienced trust professionals, accountants who specialize in detail analysis of trust accounts, cash flows, investments and control procedures, legal experts knowledgeable about the governing law, documents and the practical general industry practices, and computer systems analysts, specifically trained to translate conceptual architecture developed by the other team members into software systems requirements. We are not talking about hundreds or even dozens of people. Although they may all require expert staff assistance, at the core, we are talking about four to six trained professionals. I and my colleagues in the industry have worked successfully with many such teams.

Step 2. Assure the Project Team's Independence.

The next step is to establish the absolute independence of the project team. As I have mentioned to many interested people on the Hill during the past three years, establishing independence for the team responsible for either fixing a broken trust, or creating an entirely new trust system for a complex array of assets, money flows and beneficiary variables, is essential. That team would initially meet with personnel historically involved in the trust, or trust asset process. Those people will be separated and protected in the trust fix process. By this I mean that there will be the immediate recognition that those involved in a historic process where mistakes have been made, whether or not they personally have made them, are exactly the wrong people, at least at the initial phases, to be actively engaged in rehabilitation or designing replacement systems. The natural urge of all of us is to mitigate, gloss over and in extreme cases, hide past mistakes, and that urge can frequently take precedence over sound reform efforts. And yet these people, in this case DOI personnel, must be protected. Their institutional historic knowledge of problems, where data is to be found, what external pressures have been brought to bear at the expense of proper functioning, and a multitude of other essential information, resides in the memories of these people. If they are told that they will not be fired or otherwise punished for human errors and mistakes (short of criminal self-dealing, which I doubt is a serious concern here), they can be of tremendous help. But if they are left alone to fashion all reforms, they are being required to do the impossible—pro-

tect themselves and their families while being asked to single-mindedly protect the interest of IIM beneficiaries. Again, all efforts, at all levels, must be employed to eliminate such fatal conflicts-of-interest.

Step 3. Establish Document Custody and Control.

The next step of the team is to establish the strictest document custody and security measures possible. Every piece of historic data that is contaminated or disappears diminishes the integrity of any reconstruction effort, and eliminates data variables, and potential problems that may likely recur, and therefore should be collected, solved and input into a system that can accommodate all data variables and similar problems in the future. Past reports by the Department of Justice and the Special Master in the class action litigation regarding BIA document destruction and general substandard condition of trust record maintenance make this step an obvious priority.

Step 4. Identify Data Elements.

Next, the data elements relevant to all phases of the trust business cycle must be identified, whether relating to land records/ownership, asset management or trust accounting functions of proper crediting, investment and disbursement. Further, an analysis of how that data has, and may change over time is critical. Systems, especially automated systems, do not usually adapt well to data changes. Significant experience, knowledge and creativity in the ever-changing nature of land resource exploitation, investment parameters and ownership variables are required at this stage.

Step 5. Develop a Schematic Diagram.

Then comes the hardest part, the development of a narrative, logical but highly complex non-automated schematic diagram (which could cover the walls of this hearing room), demonstrating how all collected data must move, interface, inter-relate and be re-analyzed, recalculated and otherwise re-assessed to assure that all functions of a highly integrated lease-to-beneficiary disbursement system will, at least conceptually, work. For lack of a better term, this is the conceptual model, or overall architecture of any complex trust problem. In the end, if an experienced commercial trust administrator, with the aid of only an HP or a simple PC-based spreadsheet system, cannot track financial data from lease billing to beneficiary disbursement, throughout all the intervening trust business functions, then all the elaborate personnel task forces and isolated pieces of systems software, no matter how sophisticated, will be worthless. All the functional elements of the business cycle must be analyzed simultaneously and interactively at this conceptual architecture phase, or hundreds of millions of dollars in "magical fix" systems will be purchased, and ultimately wasted.

Step 6. Design Architecture.

Next, experienced trust systems analysts, capable of fully comprehending the conceptual architecture, and fully knowledgeable about the universe of commercial off-the-shelf (COTS) trust accounting systems and custom applications providers, can begin to design an interactive systems architecture to accommodate all functions. This does not mean such an expert independently develops separate, or fully integrated software components. What is does emphatically mean is that one person, or a group of extraordinary trained people, is fully cognizant of both the overall goals and the intricate conceptual plan based on actual data and the universe of automated solutions that might be brought to bear to facilitate the conceptual design. Then, and only then, are requirements developed, and systems pre-tested and finally purchased, and then only with extensive warranties, retrofitting and modification undertakings and extensive service, support and back-up packages.

Step 7. Recruit Permanent Trust Administration Staff.

Automated systems are only as good as data input performed by skilled trust administrators. Further, if multiple automated systems are used, such administrators must constantly monitor whether the systems are correctly interfacing and exchanging information, since this is an area of frequent difficulty given the ever-expanding universe of data variables and money calculations which flow through those systems. This requires knowledge of the basic functions these systems perform. Data variables, and sometimes simple automated systems breakdowns (or "crashes"), or failures due to viruses, require trust administrators to constantly test the validity of systems calculations, usually by "shadow" calculations mimicking the essential tasks of any automated systems, performed on single stand-alone spreadsheet PC systems. This is painstaking work, and requires significant experience.

I have read the Special Trustee's Strategic Plan, the HLP, the GAO report referred to above and countless preceding GAO reports, hundreds of pages of court transcripts and Congressional testimony, outside consultants reports, and press releases and studies of the DOI and its internal Bureaus. And yet, I am far from an expert on all IIM reforms to date. However, I respectfully ask the DOI, the former Special Trustee, the Advisory Board established by the 1994 Act, the members of this Committee—what kind of a report card would you give to the DOI during the past few years based upon the above model of a well thought-out, rehabilitation approach?

The following hypothetical, admittedly from a different but similar context, may help to put the current state of affairs in perspective. After growing up through the New York City public school system in the 1950's and 1960's, this hypothetical has meaning to me, and hopefully to others present.

Suppose a blue-ribbon group of local merchants, professionals and workers in an inner-city environment decided to establish a multi-faceted urban redevelopment project, aimed at dramatically improving the lives of the low income majority living in the area. The group engages the help of health professionals to set up clinics, educational professionals to establish remedial programs and vocational education to augment a perpetually underfunded public school system, artists and musicians to establish creative centers as counters to drugs and crime and off-duty police to assure an atmosphere of security rather than fear. Assume the group also sets out to develop an investment and asset management program to help the populace invest their hard-earned savings, budget their household funds to maximize the best life style, and to manage income-producing property that belongs to individuals or civic associations. Suppose this group over time, through successes, attracted local, state, federal and private non-profit funding to facilitate its programs.

Now, assume five solid years of demonstrable success. The streets are safer, drug use among the young is down, educational achievement and job retention is higher, and health benefits have reached homes never reached before. But also assume that the organizing group, simply due to lack of time and resources, neglected the asset management and investment functions with respect to potentially millions of dollars of poor people's money. Records were literally kept in shoe boxes, or lost, pending the engagement of financial professionals, or deposits in regulated financial institutions, that the group always intended to do, or to make, but simply failed to do given the enormity of the task it had undertaken. The result is millions of dollars of unrecoverable losses for citizens, and no adequate program in-place to manage the assets or invest the money, assuming the group even knows or can locate current balances.

As a citizen, or a state regulator, what would you do? Would you, out of anger and frustration, seek to punish the individuals who had formed the redevelopment project, or end the project itself? I doubt it. But would any sane person, in their wildest dreams, allow the control persons, who are now heavily conflicted and who lack any financial expertise, to continue to manage the assets and money out of the shoe boxes, and to spend fabulous amounts of other people's money to buy computer systems, with grand but empty promises to solve all problems? I do not believe so. Any responsible person would take what money they could find and deposit it in a bank, and transfer what assets they could find to a bank trust department. Then, under proper regulatory guidance, true experts would be employed to reconstruct proper balances, probably on a modeled test case basis given the paucity of records, and true reform would begin.

Why should the American Indian beneficiaries of the IIM accounts be treated with any less reasonableness and fairness?

CONCLUSIONS AND RECOMMENDATIONS

The leaders of the DOI and the BIA, and the rank and file of those entities in Washington and in the field, no matter how well-intentioned, are seriously conflicted in the process of Indian Trust Fund Reform. If fiduciary integrity means anything, it means the absence of such conflicts-of-interest posed by concerns of job security, political survival, institutional longevity and self-protection against blame for historic errors. People of good faith can argue about the meaning of the prudent investor rule, or other high fiduciary standards of care. But after a professional lifetime of attempting to reconcile textbook standards of care for trustees with real work capabilities of human beings like you and me, I (along with many courts, bank regulators and the Federal Securities Acts) have concluded that professional fiduciaries must, at the very minimum, be trained in state-of-the-art money management, completely free from conflicts-of-interest, and must treat the assets of others in their care as though they were the personal assets of the trustee, his or her spouse, and children. When the former Secretary of the Interior chose to backburner Mr.

Homan's concerns about trust standards of care, along with the Special Trustee's concerns about independence and expert staffing, in the HLP, it became clear that the only governing standard would simply be the best the DOI/BIA could do, hampered as they are by a void of necessary expertise and in the face of serious conflicts. This is not a fiduciary standard. This is capitulation to the status quo, with a correct accounting for the IIM accounts at best only a secondary or tertiary concern.

I strongly believe that the only viable answer to the present trust reform problems is the creation of a neutral body, independent of the DOI, with both public and private support and input. The GSE suggested by the former Special Trustee Homan in his Strategic Plan is one such vehicle. The Indian Trust Management Reform Authority recommended by the Chairman of the Intertribal Monitoring Association on Indian Trust Funds could also serve such a purpose.

Ideally, such an independent body would be sponsored by, or have some connection with a banking or other financially sophisticated federal regulatory or quasi-governmental body. Obvious candidates would include the OCC or, perhaps, one of the federally sponsored entities, such as Ginnie Mae or Freddie Mac (or its related entity, the Federal Housing Finance Board), which are intimately familiar with complex active asset/cash flow trusts. It is also essential, in my mind, that oversight be retained by this Committee as well as the Senate Committees on Indian Affairs and the Energy and National Resources Committee.

The structure of the neutral body need not be complex. In its simplest form, it would be administered by a financially sophisticated person with experience dealing with inter-governmental agency issues. In addition to government financial input, such an entity must have the ability to engage trust experts from the private sector, representing the disciplines referred to above in connection with a proper commercial approach to solving the IIM trust problems. It is my belief that such an entity would be able to obtain the services of highly qualified trust administrators, accountants, lawyers and systems experts who would be willing to work on this problem. Believe it or not, there are many people in the private sector who understand how important this problem is, and would be willing to devote extraordinary effort to help forge a real solution.

The budget for such an enterprise could be a fraction of the DOI's expected Indian Trust Fund reform requests. Its mission would be to develop the critical conceptual and systems architecture described above, and called for by the GAO, in order to assure that future spending is actually aimed at viable solutions. No input would be ignored. The cognizant Congressional Committees, the GAO and the DOI/BIA would be consulted on an ongoing basis. The entity should be task specific, and should have a sunset timeline coordinated with trust reform progress, although some viable means of continuing trust supervision, or progressive privatization, would be required. Such a small, well-controlled, highly dedicated and expert group, if given the cooperation of the DOI, could not only accelerate implementation of a properly integrated trust function for the entire IIM business cycle, but would also go a long way to relieve the unhealthy pressure that has built up around the historic approach to this problem.

A few years ago, the head of the BIA cited a concern about potential independence for the IIM trust function that is very telling. He voiced a serious concern that wresting this problem from the BIA might spell the end of that Bureau as a viable governmental body. Although his concern has nothing to do with the Trust Reform Act's primary purpose of assuring IIM trust reform for the Indian beneficiaries, one can certainly be sympathetic with a concern that hundreds of people, many of whom are American Indians, may not have viable work in the future. But I would respectfully suggest that the kind of neutral body I and others are recommending might present an opportunity of a lifetime for many American Indians, within and outside the BIA. With the tremendous growth of retirement assets and the use of complex trust structures as investment vehicles, this country needs more qualified trust administrators. Given the increasingly high qualifications required for such professionals in the private sector, many move on quickly to other financial positions, such as investment banking. The staff of any neutral body would constantly be interfacing with many of the BIA staff who are currently working on the problem, and who would continue to do so in cooperation with the neutral body. The opportunities for real, commercial level trust administration training is obvious. Whether an affected BIA staff person chose to use such training in government service, or in working with Indian-owned independent banks or any independent bank or trust company, his or her prospects for the future could be far brighter than continuing to work on any single-purpose project.

The most important observation I can make, as a dispassionate outside professional, is for all major players in this process—including the DOI, the American

Indian groups, the U.S. Congress and the Federal courts, to take advantage of the opportunities inherent in the present state of affairs.

This problem has been a long time in the making. The present staff of the DOI did not make the problem, and, in fact, have made some valiant efforts to solve it. But the DOI has already lost control of the process. This is because the historical accounting, reconstruction and rehabilitation of the IIM accounts is currently in the hands of the Federal courts, and will be played out in some kind of court-mandated accounting, a receivership or a consensual settlement process, in each case requiring outside trust professionals to determine how history is to be reasonably reconstructed. I can state with some assurance that in a trust problem of this magnitude, the validity of the systems designed to take care of future trust and asset accounting will depend in large part on what is learned in that historic accounting and reconstruction process, even if that process is accomplished largely on a sample modeling basis. Simply put, most if not all of the variables involved in complex asset leasing and accounting, in beneficiary succession and in custody problems have already presented themselves in the protracted history of the IIM accounts. Those data variables are the building blocks for any future systems or procedural architecture. The intricacies of leasing potato land in Idaho, as opposed to oil and gas deposits in Oklahoma, and what has gone wrong in the respective accounts payable/accounts receivable histories of such leasing, is vital information for any new asset management system.

What I am suggesting is that the two processes—historic accounting/reconstruction and future systems development are irrevocably linked. The experts of any independent body charged with future asset and trust accounting design, unless they are to duplicate effort, must talk with the experts involved in the reconstruction process. Ideally, at some point those processes should be combined. But the point is that one portion of the "fix" process, historical accounting, is already in the hands of a neutral body, the court. It makes little sense, then, since both aspects of the fix must be irrevocably linked, to leave the largely derivative portion, new systems, to a governmental agency, steeped in the knowledge of Indian welfare, but devoid of any trust expertise and heavily conflicted. This makes even less sense since the entity currently working on the future systems fix, the DOI, is in a legally adversarial posture in the current Federal court proceedings where the historical fix is being played out.

When the recommended independent body is formed, serious consideration should be given to combining any court-mandated accounting or receivership reconstruction effort with new systems development tasks of that neutral body.

Politics and institutional self-preservation aside, it is time for the DOI to let go, to the extent it has not already been forced to do so by the pending class action litigation.

I would also hope that all those involved, given the nature of the interests of the American Indian beneficiaries at stake, would take a strictly non-partisan approach to the trust reform process.

Finally, and briefly, I would like to remark on past published statements reportedly made by DOI officials in defense of their various reform efforts. Purported statements branding constructive critics of the DOI's efforts as "anti–Indian" are very regrettable. So are suggestions that anyone opposing the DOI/BIA reform effort, and the proposed additional funding for that process, are simply motivated by a desire to keep money from the Indians.

As a seasoned business lawyer, I am unfortunately inured to even to this kind of name calling. People say unfortunate things when they are on the defensive. If these labels are put on me because of my testimony, so be it.

EXHIBIT A

TESTIMONY OF DONALD T. GRAY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS REGARDING INDIAN TRUST FUND MANAGEMENT

FEBRUARY 26, 2002

My name is Donald Gray. I have testified as an expert previously before this Committee, and I appreciate the opportunity to do so again. I have also recently testified before the House Resources Committee on the same topic. I bring what I hope is a helpful and fresh independent perspective to the Indian Trust reform effort at a time when I believe real change is possible.

I am a partner in the law firm of Nixon Peabody LLP. For 26 years I have specialized in working with institutional trustees and other financial institutions in establishing, administering, reconciling and rehabilitating long-term complex trusts and

other money flow arrangements involving billions of dollars of managed assets. Simply put, my business is largely devoted to "fixing" broken trusts in the private sector. The clients of Nixon Peabody's Trust and Financial Rehabilitation Group, which I helped found, include some of the largest money-center banks in the world. I am also an international logistics and shipping expert, and in this area am well-known to the Alaska and Hawaii Congressional delegations as well as all government agencies with jurisdiction in the area.

When I testified previously in July of 1999, the atmosphere for potential change was very different, and not nearly as positive as I believe it is today. Yet, because there has been so little progress in the intervening time on trust reform, much of my prior testimony, especially concerning the precise methods and architecture for true trust rehabilitation in the IIM accounts, remains relevant. Therefore I re-submit that testimony, with minor updating revisions, as Exhibit A hereto.

In short, after following this process for many years and reading all relevant DOI, GAO, outside expert reports and court transcripts, and while I do not claim any panacea for one of this nation's most vexing problems, I believe for the first time there is a light in the forest. There is hope for a truly viable IIM trust fix.

I summarize the reasons for that belief, and the organizational methodology I believe to be essential to the trust fix below:

1. The Need for an Independent Body. What has been missing since the passage of the American Indian Trust Fund Management Reform Act of 1994 is the essential trust fix expertise within the DOI, with the exception of Mr. Homan, whose efforts were consistently thwarted by DOI officials. The other irreconcilable obstacles to trust reform have been the flagrant conflicts-of- interest within the BIA in attempting to fix a broken system it has helped to perpetuate. My conclusion, and the only conclusion I believe a private sector expert can come to, is that the fix must be under the auspicious of a body independent of the DOI and the BIA. The issues of lack of expertise, crippling conflicts-of- interest and the need for an independent body for the required trust fix are discussed in detail in Exhibit A. My suggestions for the form such an independent body should take—a time- limited, government-sponsored entity ("GSE")—and its Congressional mandate, are set forth below.

2. The Continuing Role of the DOI and the BIA. Before continuing to outline an alternative structure, I want to be clear about the positive role the DOI and the BIA can play in this process. With the exception of the highest-ranking DOI officials of the previous Administration, I do not believe any DOI or BIA employee has deliberately bogged down the process, obfuscated with respect to critical records, or intentionally wasted vast sums on computer systems that were ill-conceived and did not work. There is still a very important job for these BIA officials and employees to do.

The key here is to separate the trust "fix" problem from the day-to-day administration of trust funds. The BIA still needs to perform the basic collection and trust allocation and payment functions as best they can, while trust fixes are developed by the independent body and made a part of the existing trust function over time. However, the BIA employees can no longer be put in the impossible position of attempting to fix a system they and their parents have helped to create and perpetuate, especially since they lack the specific expertise to effect the fix.

In addition to day-to-day administration, such BIA employees would be available to the independent body suggested below, since they possess valuable information about past and present asset management and trust payment procedures. Their input is critical, especially in a case like this where some records have been lost or destroyed. As fixes are developed by the independent body, these employees would be essential in putting them into effect. The law changes required to establish the independent body must permit the full and open participation of these employees in the fix process, as mandated by the independent body, and must protect these employees from internal retribution and/or legal actions for good faith mistakes made in the past.

The interaction of the independent body and its professionals with the BIA trust employees in the fix process also offers a unique training opportunity for the BIA personnel involved. The BIA would learn the new system and proper trust functions from the best experts in the field. Such training can be used by the BIA employees in the years to come within the BIA, in connection with the IIM accounts or other similar trust functions in which the BIA is involved, or in the private sector, as they choose.

3. Inter–Branch Governmental Cooperation. The reason I believe there is hope for a true trust fix now has to do with what I perceive to be the posture of the major participants at this point. Most importantly, both houses of Congress appear willing to take dramatic action on a non-partisan basis. That did not appear to be the case three years ago. Also, despite the characterization of the current DOI officials in the

Cobell litigation and the press, it does not appear to me that they (unlike Mr. Babbitt and his top aides) are bent on obstruction, nor dead-set against external, independent assistance in reaching a trust fix. Respectfully, Secretary Norton's internal reorganization plan, although well- intentioned, will not work, and pouring another $200 million into that reorganization rather than a fix by real experts is a very great mistake. This is the only sound conclusion that I can reach after watching the waste of hundreds of millions of dollars over the past eight years on internal reorganization and inept systems, and assessing the lack of proper DOI expertise that Secretary Norton apparently admitted recently in her testimony in the Cobell litigation. Again, without the proper expertise, lack of conflicts-of-interest, and independence, an internal reorganization will do nothing. But the DOI's participation in an independent body structure, like the one outlined below, through Mr. McCaleb or another reform- minded DOI official, is essential.

Finally, there is the court. I cannot imagine that anyone would take the position that the heroic efforts of Ms. Cobell, and the tenacity of Judge Lamberth and his assistants, have not been an essential ingredient in shining light on, and narrowing the issues concerning the historic trust defalcations. But, as a purely practical matter, a court-appointed receiver does not appear to be the best answer as to future trust reform. For instance, how will that receiver be paid? How will proper trust fix experts be made available to the receiver? Will that receiver obtain the proper, timely and essential input and cooperation of the BIA officials and employees currently engaged in the trust administration function? As to these matters, I would hope the court and Congress would both seek to find a way to cooperate on the establishment of an independent body charged with that fix.

4. The Independent Body. I believe the best vehicle for effecting a viable trust fix is the creation of a GSE, with a mandate and structure as outlined below. However, except for the independence of this entity, which is essential, there is nothing magic about any part of the following structure. I would invite the Committee, and all interested parties, to suggest structural alternatives if they can be shown to better reach a trust fix in a timely fashion.

a. The GSE would have three levels of participants. This structure would be very lean, and would leverage on outside professionals on an "as- needed" basis.

At the top, all trust fix policies and procedures would be the ultimate responsibility of a "blue ribbon" board of Commissioners drawn from specific public and private sector sources. At least two Commissioners would ideally be acting officials in federal financial institution agencies or bodies, specifically a Governor of the Federal Reserve, a senior official of the Office of Comptroller of the Currency or the Federal Deposit Insurance Corporation. These agencies have a great deal of trust and related financial expertise, as well as regulatory oversight responsibility for the private banking sector. There should also be a representative of the IIM beneficiaries who is viewed in Indian County as financially sophisticated and completely trustworthy. In addition, given the extent of cooperation required between the GSE and the DOI (including the Special Trustee and the BIA), the board should include a high-ranking DOI official acceptable to the other Commissioners and Indian County. The Assistant Secretary for Indian Affairs would, in my judgment, be a likely candidate for this position. Finally, if the mandate of the GSE were broad enough to include Tribal trust issues, a representative approved by the various Tribal organizations should be a Commissioner.

The Commissioners would meet regularly, and should be paid for their time and expenses, but with recognition that they are serving as a very active board of directors, who have primary jobs and responsibility elsewhere. The Commissioners would have the direct and continuing oversight of the Senate Committee on Indian Affairs and the House Resources Committee.

The next level of the GSE would be an Executive Director ("ED"), with as lean a support staff as possible. This person should have "hands on" trust or other financial fix expertise, such as a former RTC official. The ED would manage professionals, be the liaison between such professionals and the Commissioners on all aspects of reform (e.g., document and records custody and control, identifying and maintaining critical data elements, developing a schematic diagram and design architecture for all aspects of the assets/trust systems, developing and implementing a systems design), be responsible for liaison with BIA trust administrators, and be a "plain language" interpreter for the oversight committees on what will be at times complex procedures employed by the professionals.

The last element would be trust professionals who work constantly in detailed trust accounting and reconciliation, cash flows, investments, control procedures, computer system analysts and implementators. This would include legal trust fix experts, trust administrators, forensic accountants and computer specialists, all of whom have worked on trust reformation and fixes in the past. It would be impos-

sible, and economically prohibitive, to have all such specialists on staff. They may, for periods, be used intensively, but only on an "as-needed" basis. Ideally, there would be a lead professional who would help the ED choose and coordinate the efforts of all other professionals to avoid overlap and promote efficiency.

b. The mandate of the GSE would be to design and implement a viable trust accounting and reporting system inclusive of the entire cycle, from resource leasing to IMM account-holder payments. The GSE would have authority to implement new systems and procedures, if possible on a progressive, partial basis. The GSE would have authority over BIA trust administrators for implementing the fixes and training BIA employees and officials as to proper implementation and maintenance.

c. The GSE would be time-limited. It is suggested that a initial life of five years would be adequate, with authority in Congress to extend this sunset provision, if necessary.

d. Ideally, the GSE would be able to coordinate its efforts with any trust professionals used by the Cobell court, or by the parties litigant therein, in accomplishing an accounting or reaching a settlement on past trust practices. As explained in Exhibit A, reconciliations, modeling and findings regarding past practice and mistakes are usually part and parcel of any future trust fix because the latter gleans so much information on proper (and improper) trust accounting from the former. Also, having worked with the plaintiffs' accounting professional on other significant large, historic trust and similar financial fixes, their input, if possible, into designing a suitable program for the future is almost indispensable.

In conclusion, it is ironic and telling that just such an GSE was recommended by Special Trustee Homan in his report (contested by then DOI officials) after several years of frustration in attempting to accomplish an IIM trust fix within the DOI.

Mr. HAYWORTH. Mr. Gray, we thank you for that testimony. And as is the case with all of the testimony, it leads to some questions. Amplify a bit what you were saying, Mr. Gray. You believe there should be created a governmental agency. This could not be, for example, farmed out to a private entity, in your mind? This needs to be a new type of agency, but it has to be outside of the Department of the Interior?

Mr. GRAY. No, I think total privatization has its own problems, in terms of oversight. I think that Congress has the responsibility, and the ability, to oversee some kind of limited commission or GSE. And I think Elouise was the one who actually told you who the members of that ought to be.

The members ought to be representative of the Indian community, definitely; forensic trust experts; land management experts; systems analysts; architectural analysts. I have watched this thing for 10 years, and I have watched them pour in over $500 million into mainly computer software. No one has ever come up with the conceptual—not computer—conceptual architecture of what are all of the tasks, from land leasing, to the check to the beneficiary. What are they? Just write them on the wall. No one has ever done it.

They do not even know what conceptual architecture is. And until they know that, it is not a panacea for this problem. This problem has at least 80 different parts to it. It could not work. And what I got back from a very sympathetic Appropriations Committee about 3 years ago was, we have no choice. If we do not appropriate the money, we will be called anti-Indian.

Mr. HAYWORTH. If it were up to you, Mr. Gray, in your mind, the numbers of people needed, the cost, any ballpark figures?

Mr. GRAY. Yes, I do. I do. I mean, Arthur Andersen, when they first tackled this problem in the late 1980's, they came up with, and this is fairly typical of Arthur Andersen. I am not just picking on them because they are down, but it is somewhat typical in my

experience. They were paid 20-something million dollars to say that we really need another $500 million to solve the problem, and I do not think that is true.

I do think that it would take—it would take the $150 million that will be, and I promise you it will be, appropriated this year simply to set up this, what do they call it, "bite em." That is a great acronym.

[Laughter.]

Mr. GRAY. To set that up, to defend the lawsuit that they have already lost 20 times and to do whatever else they are going to do, they will get, through direct and supplementals this year, at least $150 to $175 additional million. If you took that money and you had a commission that had six to seven people who were national experts on the issue, including tribal and IMM members who really, at the land level, really know what they are talking about, what would happen is that those people would not do all the work. At various stages in the process, they would go out and they would hire maybe 30 or 40 professionals to say, all right, here is the stuff. Now, here are the important things we need from it. Go through it and get it out, and they would do that.

So it is not a case that you have got ten people working 24 hours a day. You would have ten people who had the access and the knowledge, and there are two accounting firms already in this process who are absolute, dead-on experts at doing this thing. I have worked with both of them and gotten some very large banks out of some very bad situations.

Mr. HAYWORTH. One final question, just going back for the record, under a commercial trust, what is the normal input that beneficiaries have?

Mr. GRAY. Well, they have a lot of input, and it is usually in the sense of an accounting, an action for an accounting. I mean, it would take—everybody here has already admitted, including, I think, the Department of Interior, that a trustee has a higher standard of care than just a bank does with a depository account, which is true under U.S. law, commercial law. If you add to that the increased standard of care under U.S. Indian aspects of history, you have one of the highest standards of care in the world.

When there is a breach of trust or somebody thinks there is a breach of trust, they file a breach of trust action. I do not know of any State anywhere where that breach of trust action would not be heard on an expedited basis within six to 8 months because it is a trustee action, and it would be resolved one way or the other. This has been going on forever and nothing is resolved.

Mr. HAYWORTH. Just one final note here, to follow up on it. How would the Department, and again, taking into account what you are saying, but just take a look at the record, if the Department still had involvement, how would it even have to change its current trust relationship to make it operate more like a commercial trust, or is that even desirable?

Mr. GRAY. At this point, it is not desirable. What is very desirable is that the BIA stick to their knitting and what they really know, and what they really do know is social services and welfare and other things. What they do not know is anything about fixing a trust that is this bolloxed up, and not because they bolloxed it

up but because it has been messed up for years and years. First, they stick to the things that they really know well.

Second, they are delegated by whatever law you hopefully can put together on this thing, they are delegated the responsibility to cooperate with the Commission so that —A) they are immunized in a fair way; B) they can get information so people can really get at things, because if you go out to Billings, Montana, and get stonewalled, nothing is going to happen; and C) they are trained, they are trained in forensic trust.

This used to be a small industry. Twenty years ago, when the financial industry was nothing but stocks and bonds, a high school graduate could go out and be a trust officer. Now, what you have are the most complex securities that you have ever imagined, derivatives on top of derivatives, I mean, just things that would boggle most people's minds that flow through trust offices. They are MBAs; the first jobs that most MBAs have are trust officers for these large banks because these things are so complicated, and the training opportunity for people in the BIA who have a financial proclivity, I think is one of the missed opportunities of all time.

Now, all they are doing is running around trying to hide mistakes and worried that if they are a whistleblower, they are going to get punitive action. If they try to do the right thing or they are told what they are to do, they do not know whether they are doing something that is right or whether it is wrong. I mean, they are working in a total vacuum of knowledge. It is not their fault. It is not what they were trained to do.

Mr. HAYWORTH. Thank you, Mr. Gray.

Let me turn to the gentleman from Michigan.

Mr. KILDEE. Thank you, Mr. Chairman, and thank all the witnesses. Today, I was called upon to attend two different hearings. I serve on two Committees, Education and Labor, and we take care of pensions over there and they are having hearings on Enron, and then I had this responsibility over here on Indians and I figured there was a lot of attention being paid to Enron right now and not enough to Indians, so I spent the day over here.

I really appreciate your testimony. You would think that the public relations of the Department of the Interior would have thought through that new acronym, BITAM, before they changed that.

[Laughter.]

Mr. KILDEE. They did not run it by public relations, but maybe it was a Freudian slip over there.

Mr. Tillman, you mentioned that this trust responsibility is the oldest trust responsibility in the U.S. Government. As a matter of fact, it antedates even the Constitution. The Northwest Ordinance clearly specifies our responsibility, and it is not a trust as I think some people through the years have thought, a trust for minors. It is a trust for people, for tribes who have a civilization and a language and a land. Very often, they were treated as if these were minors they were taking care of, and they should take care of them, too, but very often, it has been a certain patronizing role, which is unfair. That is one of the reasons I established the Native American Caucus, because of some of the unfairness I hear.

It is rooted in, as I say, our responsibility to you. It is in the Constitution. Your sovereignty is not given to you in the Constitution, it is only recognized in the Constitution, right. It is a retained sovereignty, but Article I, Section 8, talks about it.

Mr. TILLMAN. Right.

Mr. KILDEE. It is a retained sovereignty, and it is rooted in the fact that the loss of so many of your assets taken by the Federal Government and promises made.

When I first got elected to the State legislature back in 1964, I read the Treaty of Detroit and read what was promised to the Ottawa and the Chippewa and the Potawatomi in Michigan and was not delivered. So it is well rooted. It is very well established and we have an obligation, and that trust responsibility, and I preach this all over, resides with the entire U.S. Government. It is not just with the Interior Department. It is with the Congress. It is with the courts, the entire U.S. Government, and we have a responsibility. That is why we are having these hearings today. We passed a bill in 1994 which is not working well enough.

I have 12 tribes in Michigan. We used to have about five. We got some of their sovereignty recognized. They have been dropped from the rolls, even their sovereignty. You could not even keep the trust responsibility of who is a sovereign tribe. They were dropped from the rolls and we have had legislation. So we have an injustice out there and we have to respond to that injustice.

Let me ask you this question, and I will ask it of all of you, the courts are involved now, and very often the courts and the Congress will act when the executive branch is not acting properly. If we amend or scrap and start over again the 1994 law and really try to address this well, will we in any way be interfering in a negative way with what the court progress may be now? Maybe I will ask Mr. Gray that question.

Mr. GRAY. I think you are at a real historic moment. Up to this point, I would have said yes, because what the court's mandate was was past foul-ups, and what always bothered me about a forensic fixer was how in heaven's name do you put together a future fix if you do not know what has gone wrong in the past, and that future fix was left with TAAMS and with the Interior.

Now, they have come together. Judge Lamberth is a very intelligent man and he looks at this down the road, not just one motion to the next. He had the historic problem and now he has ordered an accounting. Second, he had an opportunity to take jurisdiction, which can be challenged, but he took jurisdiction over the current fix because of the security problem. So now he has brought those two ends together, but I believe in my heart and with my legal reasoning that he believes he has done what he can do and he really needs the help of Congress.

Before this point, it would have been inter-meddling. I think it would have been seen as inter-meddling because there was not enough information out. Now he has seen all the information he can stand. But at this point in time, I really believe that the judiciary which is involved in this would really welcome Congress's participation and maybe cooperation. Maybe you have a receiver who is cooperating with a special purpose entity.

I do not have the magic bullet. I would love to write it for you, because it is coming together in my mind. But the fact of the matter is, I think it is a historic moment to do that, and I also believe—I went through 8 years with a Secretary of Interior, and I am an Independent, but I have to tell you, the former Secretary of Interior deserves the reputation for arrogance and stonewalling, period. I do not believe that Secretary Norton has been in the job long enough to deserve those epithets and I think she is trying to grapple with this problem the best way she can.

And frankly, I think if it were taken out with her advise and consent, I mean, she would be part of the process of saying, I want the BIA involved, I want my people trained, I want you to get the accurate information—you do not have many situations come together like this right now, but somebody has got to act and I think it is the Congress.

Mr. KILDEE. Maybe we can find some way we can mesh the two, because the executive branch of government for over 100 years has not done a good job. We are where we are because of the executive branch of government of both parties. So maybe we can mesh well our gears between the judicial branch and the legislative branch.

The 1994 law, which I voted for, probably passed virtually by a landslide, maybe unanimously—the 1994 law was written not on Mount Sinai but on Capitol Hill, right, so it is not perfect. We know it is not perfect. We see the imperfections. I am willing to work with particularly this group right here, because the three of you, along with your counsel here, represent groups of sovereign nations, so you can speak with great authority when you talk to this Committee. I would like to work with you to see what we can do to really resolve this, because justice delayed we know is justice denied, and this has been delayed and delayed and delayed and delayed. People have died who could have lived much better had this government kept its trust responsibility.

I am talking too much, but Chippewa Cree, are they related to the Chippewas in the Midwest?

Mr. WINDY BOY. Actually, they got lost.

[Laughter.]

Mr. WINDY BOY. That is where I come from. I would like to respond to that, if I may.

Mr. KILDEE. OK.

Mr. WINDY BOY. You know, you are talking about reforming or amending the 1994 law. There are a couple of things I would like to keep in mind here. No. 1, you are the trustee as the U.S. Government. No. 2, when we are having these government-to-government consultations as far as governments, my interpretation of a government is a tribal leader as chairman and tribal leaders sit up here as you sit up there and are considered as heads of state, and we are the ones that have been elected by our people to move forward and make decisions that are going to affect them positively to make their lives better. That is why we are here.

And if anything is going to come forward as far as any amendments toward that law, there should be a consultation. That is why I recommend this to you. Have these hearings, not just on trust, on all policy, because our policy that is going to be considered in

the White House right now is going to have great impact on the Indian country right now as we see it.

Mr. KILDEE. Thank you.

Mr. HAYWORTH. I see one more comment here, and then we need to let the other members go.

Mr. TILLMAN. I would like to say one thing about what Congressman Kildee had to say about the three groups that represent the total assets of Indian country, and we do. The InterTribal Monitoring Association has 53 tribes in it that are large stakeholders. The National Congress of American Indians has a certain amount of tribes that are stakeholders. And the Council of Large Land Based Tribes have also a great asset of millions and millions of acres.

So not only this diversification of assets, which include oil, gas, timber, millions and billions of board feet of timber, but fisheries and land-based tribes and leases and grazing, this goes on and on to when you line up all these assets, you are going to have a tremendous amount of assets to look after.

Now, how do you do that? The Osage Tribe at one time in 1992 hired Cooper Lybrand to come to the Osage Agency, which is a single-tribe agency, to assess that agency because they thought that they were the Cadillac of all of oil and gas operations. We hired Cooper Lybrand at a large amount of money to come to that agency to do that work for us, and they did.

And after their report was given to the tribal council that they were operating back in the 1950's and 1960's, in 1996, we spent $50,000 more and brought the same company back in to check it and to make sure that we knew what we were talking about. They came back and told us the same thing, that, yes, they have new equipment, yes, they have this, yes, they have that, but they are still operating back in the 1960's.

So here we are in 2002 and we are sitting here at this plateau today and we are sitting down here in the Bureau of Indian Affairs. Now, how do you bring that back up to standard? I am not talking about above standard, but just standard.

The Osage Tribe has 1,600 tank batteries that exist on its reservation. Those tank batteries consist of 5,000 tanks. Those tanks are being purchased every day as they fill up with oil. Do you know how many gaugers that the Osage Tribe has? Four. We have four to see over that asset.

Now, that is why I say that this is very critical to us today. It was an honor to be here today to tell you the horror stories that are going on out there. Yes, the trust responsibility that Congress has, is the ultimate trust holder, is true and that is why I came here. I came 1,400 miles to tell you that, that you can oversee the Bureau of Indian Affairs. You have the authority to oversee, to create a commission or a Committee made up of us people to overlook the BIA and become part of that, to make sure that our asset is being well taken care of. Thank you very much.

Mr. KILDEE. Thank you. Let me say to Chief Windy Boy, with my Michigan accent and Chippewa, I'll say, "Migwich" [ph.].

[Laughter.]

Mr. HAYWORTH. Thank you, Mr. Kildee.

The gentleman from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. I have to apologize. I missed most of this panel's testimony because I was at the Enron hearing and then I had to go to the floor on a bill that I had sponsored, but I wanted to say this.

My concern throughout today has been that the Secretary is just going to move forward with this proposal that she has, and even though she is saying, and there has been some consultation now at the late stage, that she wants to wrap this up fairly quickly and move on, I am not really asking this question, but at least there seems to be in her mind that she has the authority to set up a separate agency and not have to wait for Congressional action to do so. There might be some legal question there about whether she can do that and maybe you might want to comment on that. But she seems to think that she can do it on her own.

So I keep trying to push, and I guess my question is what you think maybe we need to do as Congressmen or as a Committee to try to make sure that that does not happen. In other words, we need to press for more time, we need to raise the issue of whether it can be legally done.

I understand that President Hall said in his testimony today that you were somewhat concerned about this meeting that was held over the weekend with the task force. She obviously told us that there was a split of opinion. Some were in favor of her proposal, others were not. That is, at least, the way I think she said it, and yet you seem to think that really nobody is in favor of it.

So I just wondered what you think we should be doing short of legislation, because that takes time, to press to make sure that this does not just pass by without proper input.

Mr. HALL. Thank you, Congressman. Just a couple of points. I appreciate your coming back.

In all of the plans, and I am sure Mr. Gray has the expertise as being a forensic trust expert, but no matter who it is, it has to be tribally driven. The tribes on our task force put together a matrix. Here are all the proposals, nine tribal proposals in lieu of BITAM, and here are the standards that we want to adhere to. We want to include BITAM and the individual plaintiff Cobell on this. But the task force had 6 days. Secretary Norton had 6 months with EDS and spent millions of dollars. And so that way, the computer system matches up with the records of the land, just like Mr. Gray was indicating, so we do not have another TAAMS fiasco.

So that is what we are saying, is that there is an executive order. If tribes are sophisticated, as we heard many of the speakers today, they have got great models that they are utilizing already, if given the time, the tribes will come up with—if the Secretary is not going to listen to the tribes, we will come up with our own plan and we welcome and we want to work toward legislation. Our task force does not want to be a rubber stamp.

It is really disheartening to spend a whole weekend, 30 hours from Friday to Sunday, trying to gain a trust with the Secretary and the 36 tribal leaders represent Indian country, and then we have to go back and sell that to Indian country, and we are committed to do that, but we have to have the trust of the Secretary that she is going to abide with consultation and with her word.

We told the Secretary before we went in, because a lot of tribes did not want to go in there because they did not trust the Secretary and her word, but we said, no, let us begin this relationship. Let us go in with an open mind and an open heart. Let us go in and work with our trustee and establish a relationship. She wants to be involved with the task force. She supports the task force. Let us sit down and see if she will consult with us throughout and let us come up with an alternative plan, because she knew we opposed BITAM.

It was in every seven consultation meetings. We opposed BITAM. She knew that. So we went in and we said, let us come up with an alternative tribal plan to BITAM. And then to hear that the Secretary may want to continue with BITAM and to say that some supported her plan, no tribe supported her plan in Shepherdstown, West Virginia, over the last week.

And so I am very disheartened by it, but I do see light at the end of the tunnel. I think there can be some merger here. If tribes will—if we are given the time to come up with our own preferred alternative, because we feel BITAM separates trust and is a potential breach of trust and we would not want to support a concept or a model that potentially breaches trust all over again.

We do not want to go back into litigation. We want to come back and find a solution. But in the report, again, it must be beneficiary-based approach plan, and to leave out the beneficiary, either tribal or individual, and just, no offense to Mr. Gray, but let a commercial expert do it, it could again breach a trust responsibility that Congress has to Indian tribes.

So I think I am confident that the tribes can get there because we want reform, and whoever says we do not want reform and want the same old BIA as it is is completely wrong. That is false, Congressman. We do want reform. We just, because it is our assets and money, we want to be at the table to help be a solution to it and to have the resources to come up with it, and I really like the examples that were made.

President Makil talked about the independent review commission. I think that is an excellent example. As a matter of fact, the task force is starting to consider that. We want external auditing. We want to consider that. And we want to look at, again, a tribal-driven plan that can put the focus at the local level, not in Washington but at the local level so that the tribal government and its IM account holders has the resources right in the field as they are looking to leasing for grazing, looking for appraisals, oil and gas, all of that. We need to have those accounting experts. We need to have those people and those resources right there, and I think it can happen, but we are going to need the assistance of Congress, clearly. I think there is no question about it.

Mr. PALLONE. Thank you. Thank you, Mr. Chairman.

Mr. WINDY BOY. Can I respond? My response to that is simple. The point that you brought up, all of the above should be adhered to, should be pursued. Make sure that it is legal. No. 2, in order to put a stop to this, make a reprogramming request. How can the Department make any moves without any money? How can you operate a Department without any money? It is simple.

Mr. GRAY. That is simple.

[Laughter.]

Mr. GRAY. Do that, and I have a slightly more moderate suggestion, and that is if this Committee, in connection with and in tandem with the Senate Energy and Senate Indian Affairs Committee, were to send a letter to the Secretary and say that these hearings have brought to light issues that call into question her plan and that before she implement that plan, it is important for you to hear more from her as to the—or to answer the questions that have been here today about the viability of that plan as a trust fixer and also the legality of creating a new bureau within an agency.

I do not know the answer to that, but it would give the Committees time to look to their counsel to get a handle on that. It would put some pressure on them to come up with their legal reason for it. And it would also have a substantive basis, which is we have heard enough to really question whether or not that makes a whole lot of sense.

I was here for 8 years, but I never considered myself a Washington lawyer, so you know how things work and I do not, but I have worked with those Committees and one of the things that is, having come 3,000 miles for this little adventure, I can tell you that I am amazed at the bipartisan approach of these Committees toward this issue. I mean, I really am and it is a credit to everybody in this room and it is a credit to the Senate side, because I know those Committees very well.

I think it is time to take some action. Ms. Cobell may do it anyway, but having done that under the umbrella of a perfectly reasonable request from Congress, that would be a bold act, indeed.

Mr. PALLONE. Mr. Chairman, maybe the Chairman and the ranking member and we could look into that more and see if maybe they would be willing to do something like that.

Mr. HAYWORTH. I think there are a variety of things, and the chair would just point out something here today. There have been some differences of opinion, honestly expressed, but I think I would be remiss if I did not point out that the Assistant Secretary and the Associate Deputy Secretary have stayed here the entire time. This was not a cameo appearance. This was not, oh, gee, we have got to run off somewhere else.

I can speak from personal experience with the bipartisanship or the nonpartisanship. When I first came to the Congress, there was inherent distrust of one of the new guys coming in, and when we finally get past this, and yes, the philosophers who say, is it not a shame that youth is wasted on the young, and to a certain degree we can say, is it not a shame that policy is not always related to politics.

But in fairness, I think we ought to be compelled to say that stepping into a difficult situation, the Secretary of the Interior deserves the benefit of the doubt and honest and open and unbridled and unvarnished criticism, and that is going on today, but let us try to deal with this in a positive manner, and whether it is written communication or whether it is transmitted face-to-face or taken back by her representatives, I think there is a chance to build trust based on this type of hearing and the constructive things we can do.

So we can take a look at letters, but I just want to point out for the record, I appreciate very much the fact that Mr. McCaleb and others have stayed here for the entire hearing to take into account what is being said. I think we can move forward in a positive, constructive way. It will not mean there will not be differences of opinion down the road. Consensus differs from unanimity. But I think we can hammer this out, and so I appreciate the suggestion you offered, Mr. Pallone, and we will see where we can go.

Of course, the gentleman from Michigan and I, as co-chairs of the Native American Caucus, have done a number of things, and I want to work proactively with everyone in here. So I appreciate the spirit of that remark.

I see my good friend from American Samoa who has been here who has worked with us on so many of these issues and I know he may have some questions or thoughts.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I think some of the people have raised the question, why am I interested in the issues dealing with Native Americans? I consider myself as a member of the Samoan tribe. I do not know if some of our Native American friends here have ever heard of Samoans. We are very small numbers, although we do have 16 that play in the NFL right now.

[Laughter.]

Mr. FALEOMAVAEGA. I keep asking my good friend, Windy Boy, when are we going to get one of Sonny Six Killers and the famous Jim Thorpes. I do have a very strong feeling for Native American people because I think there is a cultural relationship with those of us who come from the islands.

I do want to offer my personal welcome to my good friend, Jonathan Windy Boy, President of the Council of Large Land Based Tribes, and certainly Mr. Hall, this is the first opportunity I have had in meeting you, President of the NCAI, and Mr. Tillman and Mr. Gray.

I think there has been no question, Mr. Chairman, and I do thank you in all sincerity, in our efforts in trying to work this on a bipartisan basis. Over the years, you and I have known that it has been very difficult even to have a Subcommittee on Indian Affairs established. I wish we could have taken the tack and the initiative that the Senate has taken and now the Senate Committee on Indian Affairs is a full standing Committee. It is a very difficult situation, and not taking anything away, the sincerity of all the members that want to do for their constituents, but this has always been the problem.

And whether we like it or not, what Ms. Cobell has done really has now forced the issue before the Congress and before the administration to resolve the issue. As you said, Mr. Chairman, and I could not agree with you more, Secretary Norton and members of her staff have taken on the responsibility. It has only been a year. I would be the last person to pass judgment in terms of what she has tried in her attempts to resolve this very difficult problem.

It is always easy for us to look at hindsight and to say what we have done to the S&L and the $87 billion that we were able to focus and how sad it is that here we have the issue with Enron and just about every major media company, television and all the networks are focusing on this issue, which is before three or four Com-

mittees. I do not even see C-SPAN taking an interest in this $10 billion debacle on issues involving the needs of some four million Native Americans. I think there is no question where our hearts are and how we feel about the needs of our Native American brothers and sisters.

Mr. Gray, you made a very provocative statement about the situation. You say BITAM. I would say "chew it and spit it out."

[Laughter.]

Mr. FALEOMAVAEGA. But with all respect to what Secretary Norton is trying to do, I certainly do not want to second-guess her efforts in wanting to do this, but I sincerely hope that before implementation, and I doubt very much that she can implement it anyway because she cannot get the authorization or even any funding allocated for doing this. I think she was wanting $300 million and I think the Appropriations Committee from the Senate side did not approve this request.

So there is a question of structure and how we are going to fund this $300 million effort to address the issue. Mr. Gray, I want to ask you, you made it very clear that this issue should not even be involved—BIA should not even be in it. You suggested a third party or whatever organization that we put up, a trusteeship, a receivership, whatever it is. In your honest opinion, this is probably the best procedure that we can go about in resolving this 100-year-old issue once and for all?

Mr. GRAY. Yes, I think it is, but with a qualification on that. I think that when people think about GSEs, they think about a bunch of government officials, some of them very good. I mean, if you look at the D.C. Commission and the enormous job that they did, I mean, that was really a wonderful job, but that is not really what I am talking about.

I am talking about a commission, whatever you call the name, I am talking about a group that is made up of Native American experts on this, because one of the things that you never hear when the Department of Interior talks about this thing is where it all starts, and that is what is happening with the land and whatever the natural resource is that is being leased. Historically, I know it has been mismanaged horribly, but I just wonder, now, other than when it is in the hands of the actual beneficiaries themselves and they know what they are doing, I just wonder about that.

I think that Indian participation on that commission, direct participation, is absolutely essential. I think that well-respected government officials who have—I am sorry, I have forgotten her name now, but the person from the Fed who ran the D.C. program for a long time, but there are people in government who are highly respected who could be on this, with financial backgrounds, people from finance-type agencies who understand, I think, not only the business aspect of it but who are sympathetic to the fact that you have got a major cultural sovereignty issue here. So it would be an unusual body, but if you do not get agreement among those people about what you want to do, then it is not going to go anywhere.

The second thing I would say is I do not think the BIA should be left totally out of this. I think the BIA is an enormous resource for this, but to ask them to fix a problem where they are inherently conflicted and have no expertise is absolutely insane. I mean, if you

did that in the commercial sector, they would blow you right out of court. You would be in jail. I mean, you cannot do that. It does not make any common sense, much less legal sense.

But if they are there and they are protected, they are a wealth of information. You cannot do it without them. You could even consider having them on the commission. I mean, I have not come up with a perfect fix on this thing, but have somebody—I think the Special Trustee has done a remarkable—the new Special Trustee has done a remarkable job at keeping his independence within an agency that can slap him down at any time. I think Mr. Holman showed disarming restraint in not walking out of the door the second year he had the job. He held onto it for a long time in the face of much more demonic opposition than Secretary Norton is capable of.

So I would not take them out of the process. I am just saying you need an independent group that is ultimately responsible to the Congress of the United States and the courts that brings these people together. I am not for division here. The idea is to bring them together and say, you have got to fix this, and we are going to give you the resources to hire the professionals who can. It is not that hard.

Eloise Cobell told you the truth. She is a banker and a good one. It is not that hard to fix. I am not sure I would agree with her that it is not brain surgery, because I like to kind of think of it that way, but she is right. If you get the right professionals, you can fix it.

Mr. FALEOMAVAEGA. Mr. Windy Boy—I am sorry, I think the time is—

Mr. WINDY BOY. I would like to have a slight difference of opinion of that as far as receiverships. I think when you are talking receiverships, you have got to keep in mind, though, that there has got to be the difference of the individual and tribal, because the individual accounts are separate, and that is what this whole litigation is based upon. And then we are talking about the trust assets on the tribal side, that is where the tribal leaders have control, with the tribes within themselves of the land within the boundaries of their nations. That is why I say this issue has got to be separate.

Mr. GRAY. By the way, I agree with that. Most of my comments—all of my comments are directed to the IIM accounts. It is not the tribal accounts. I am not an expert on that.

Mr. HALL. Congressman, can I just add one point on what has been made here? There is a unique situation, though, oil and gas, for example. Chief Tillman comes from oil and gas. Many times, a tribe will own the mineral but an individual will own the surface. So there is an interweaving here. There is an interweaving because the tribes and individuals still have to go back to the same agency, the same department, when it comes to leasing, appraisal, grazing, and oil and gas extraction. So to totally separate, now, that is going to take some work here to do that. And there are some tribes, also, that have some IMM accounts.

So just to say there is total separation is not quite true. So there is going to have to be some strategy and to get with some experts to look at those unique situations where a tribe owns the oil and gas, an individual owns the surface, and the tribes own some—

some, not a whole lot, but some IMM accounts. I just wanted to clarify that.

Mr. GRAY. I think you need representatives of both on a commission like this.

Mr. WINDY BOY. Then you get into more issues there, when some tribes have a lot of water rights issues. So there are a lot of things here, I think, whole complexities.

Mr. HAYWORTH. President Windy Boy, I think we are finding just how, again, just how interrelated and how challenging this may be.

My good friend from Michigan had a final note.

Mr. FALEOMAVAEGA. Mr. Chairman, I just want to say again to thank Mr. McCaleb for his patience in being here with us all day and thank you for your patience and the gentleman from Michigan. I sincerely hope that this is not the end of this whole process and I sincerely hope that our Indian Caucus could perhaps collaborate with our friends from the Department of the Interior and with as many of our Indian tribal organizations. Let us see if we can consult and see if we can do anything by way of legislation or help Secretary Norton beef up or improve whatever she started in her proposal at this point in time.

But I sincerely want to thank you and thank the gentleman from Michigan for your diligence in pursuing this on behalf of our caucus. Thank you.

Mr. HAYWORTH. The gentleman from Michigan?

Mr. KILDEE. Just one comment. President Hall, your point was very good that we have to recognize that in solving these things, we have to deal with sovereign-to-sovereign, and that is very, very important. That is fundamental to this. Whether it be Congress, whether it be the Secretary, they have to recognize that you are chief executives of sovereign nations and that status is very important.

Let me tell you just one quick story on that. Several years ago, I helped three tribes in Michigan get their sovereignty recognized and reaffirmed, not given, it is retained sovereignty. So I asked President Clinton to have a bill signing ceremony in the Oval Office for that. So we went over there to the Oval Office and we had the three chairmen of the tribes whose sovereignty has just been reaffirmed. And President Clinton after the signing likes to wander around the Oval Office, talking. The office was filled.

And I turned to the three chairmen of the sovereign tribes that had just had their sovereignty reaffirmed. I said, "Sit down in the President's chair." And there was a U.S. Senator there and he said, "Dale, I do not think we can do that." I said, "That is right, we cannot do that, because we are not chief executives of sovereign nations, but these guys are."

[Laughter.]

Mr. KILDEE. So they all three sat down in the President's chair, because they were co-equal with the sovereign.

Mr. HAYWORTH. That is a good story.

Mr. KILDEE. As a matter of fact, on the way out, I turned to Frank Ettawageshik, who was the Chairman of the Little Traverse Bay Band of Odawa, and I said, "Frank, you know, all I have ever had in that chair was my eye."

[Laughter.]

Mr. HAYWORTH. Thank you, Mr. Kildee.

Ladies and gentlemen, we thank all of you, those who came to testify today, those who have joined us to pay close attention to what is transpiring here, the aforementioned friends from the Department of Interior. Many things have been said and I just thank everyone for making what I hope will be, I do not know if this is so Churchillian, the beginning of the end so we can bring this to a conclusion and working closely with everyone concerned.

Mr. KILDEE. One more unanimous consent, to put something from the Tribal Council of the Northern Cheyenne Tribe in the record.

Mr. HAYWORTH. Without objection, it is so ordered.

[The resolution of the Tribal Council of the Northern Cheyenne Tribe follows:]

TRIBAL COUNCIL OF THE NORTHERN CHEYENNE TRIBE
NORTHERN CHEYENNE RESERVATION
LAME DEER, MONTANA

RESOLUTION NO. DOI-062(2002)

A RESOLUTION OF THE NORTHERN CHEYENNE TRIBAL COUNCIL OPPOSING THE SECRETARY OF THE INTERIOR'S PROPOSED PLAN TO DIVEST THE BUREAU OF INDIAN AFFAIRS OF ITS TRUST ASSET MANAGEMENT DUTIES AND RESPONSIBILITIES.

WHEREAS; *the Northern Cheyenne Tribal Council is the governing body of the Northern Cheyenne Reservation by authority of the Amended Constitution and Bylaws as approved by the Secretary of Interior on May 31, 1996; and*

WHEREAS; *the Tribal Council is authorized to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the Northern Cheyenne Reservation pursuant to Article IV, Section 1(a) of the Tribe's Amended Constitution and Bylaws; and*

WHEREAS; *the Secretary of the Interior is proposing to strip the Bureau of Indian Affairs (BIA) of all of its trust asset management responsibilities by transferring these responsibilities to the Bureau of Indian Trust Asset Management; and*

WHEREAS; *the Secretary failed to consult with Indian Tribes prior to making this proposal in accordance with the government to government relationship between the federal government and tribal governments; and*

WHEREAS; *the Tribal Council opposes any proposal that would diminish the BIA's duties and responsibilities to Tribal government as the BIA serves an important role to Tribes and the federal government and the Tribal Council does not desire to jeopardize this role; and*

WHEREAS; *the Tribal Council believes the BIA's trust asset management problems can be resolved without divesting the BIA of its trust asset management responsibilities; and*

WHEREAS; *the Tribal Council desires that the Secretary of the Interior rescind her proposal to divest the BIA of its trust asset management responsibilities and formulate another plan that will leave the BIA's duties and responsibilities to Indian tribes and tribal members in place.*

NOW, THEREFORE BE IT RESOLVED *that the Tribal Council hereby officially opposes the Secretary of Interior's proposal to divest the Bureau of Indian Affairs of its trust asset management responsibilities.*

Resolution No. DOI-062(2002)
Opposing DOI Proposed Plan
Page 2 of 2

BE IT FINALLY RESOLVED *that the Tribal Council hereby demands that the Secretary of Interior formulate another plan with Tribal Consultation that will leave the duties and the responsibilities of the BIA to Indian tribes and tribal members in tact.*

PASSED, ADOPTED AND APPROVED *by the Northern Cheyenne Tribal Council by eleven (11) votes for passage and adoption and zero (0) votes against passage and adoption this 27th day of December, 2001.*

Geri Small

Geri Small, President
Northern Cheyenne Tribe

ATTEST:

Serena K. Brady

Serena K. Brady, Secretary
Northern Cheyenne Tribe

NOTED: John E Lavato

SUPERINTENDENT JAN 22 2002

Mr. HAYWORTH. This hearing is adjourned.

[Whereupon, at 4:05 p.m., the Committee was adjourned.]

[The opening statements of Members submitted for the record follow:]

[The prepared statement of Mrs. Christensen follows:]

Statement of The Honorable Donna M. Christensen, a Delegate in Congress from the Virgin Islands

Thank you, Mr Chairman.

I appreciate your holding this hearing, but we have all been at hearings on this issue before and are not any closer to a resolution of the problem of the trust. As a matter of fact, at one of the last hearings which was a joint one for the Senate and the House, for the better part of the hearing, I was the only member present.

So I am here today and I may or may not have a lot of questions because this is an over 120 year problem. Looking at how long it has gone unaddressed, despite investigations, reports and acknowledgments of the travesty that it has been, I have already concluded that we, as a country, do not have the requisite will to fix it.

Is it that we do not in our hearts do not believe that Native Americans should get this kind of money (and trust me as a member from a territory we have been there, so we know it happens and we know how it feels)?

The other possible conclusion is that no matter what the law says, many states, and even our federal government still does not fully respect the sovereignty of the recognized tribes.

This country owes the first Americans a debt we can never repay. Even in health care, which is my field, we see glaring disparities in the health of all of the indigenous peoples of this country. Just as in African Americans they are an outcome of long term neglect, so the issues that have yet to be rectified are many—not just this trust fund.

My maternal grandmother was part Chocktaw, and even though I don't know my Native American family or if her tribe or my ancestors have lands or money in this trust, I come to this hearing on her and their behalf.

Today we need to go beyond the hearing stage to action. It is long overdue and only right that we pay up.

[The prepared statement of Mrs. Cubin follows:]

Statement of The Honorable Barbara Cubin, Chairman, Subcommittee on Energy and Mineral Resources

For more than a century the federal government has been the trustee of funds for Indian tribes as well as individual Indians. These trust funds, generated from rights and leases, have become a significant source of funding for many Indian tribes all across the nation.

This is especially the case on the Wind River Reservation, which lies within the borders of my state of Wyoming. Wyoming has two resident tribes, the Eastern Shoshone and the Northern Arapaho. As is the case in most of Wyoming, these large land based tribes have been blessed with a substantial amount of natural resource interests, particularly oil and gas production. Because of their substantial financial interests in how the federal government resolves this issue, and because of concerns regarding Internet accessability, I too have a great interest.

I would like to emphasize in my previous statement the phrase, "how the federal government resolves this issue," because the responsibility to find a workable solution is borne not only by the Department of Interior, but by the Administration, Judiciary and Congress. It is essential that each branch work together to find the fair and equitable solution that has eluded Indians for well over 100 years. I pledge my energy to this effort and highly encourage my colleagues to do the same.

[The prepared statement of Mr. Kildee follows:]

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

Good morning. Mr. Chairman, as a senior member of the Resources Committee and as Co–Chair of the Congressional Native American Caucus, I am pleased to have the opportunity to speak to the issue of Indian trust funds. I remain deeply

concerned that the government is not living up to the high standards the law demands of the Federal trusteeship over Indian and tribal trust funds. The Interior Department is legally bound to manage and prudently invest individual Indian and tribal income from judgments, grazing and farming leases, timber sales, oil and gas royalties, mineral leases and investments from Indian lands.

For more than a century, Interior has done a poor job maintaining trust fund records. This issue dates back to more than 180 years when the Federal Government first began its policy of holding tribal funds. It 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 40, 80, and 160 acre tracts 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 still remain as the problems of today.

Because of the allotment policy, Indian allotees face the complex problem of owning fractionated interests in allotted land. Today, it is common for hundreds of owners to hold an interest in one tract of land. These owners are heirs of the original allotment holder whose land can become more fractionated as the number of beneficiaries increases. This means that hundreds of beneficiaries could own shares in income derived from 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, Elouise Cobell, a beneficiary of an Individual Indian Money (IIM) account and a witness at today's hearing, filed a class-action lawsuit against the Secretary of Interior on behalf of approximately 300,000 IIM account holders seeking an accounting of the money owed to the account holders and to bring permanent reform to the trust fund system.

During the previous administration, a U.S. District Court judge found Interior and Treasury officials in contempt of court for their failure to produce trust documents for IIM account holders. In the current administration, Interior and other officials face contempt charges in the Cobell v. Norton case. With respect to tribal trust funds, Interior cannot reconcile $1.9 billion in tribal trust funds because of missing documents.

On November 14, 2002, in response to the Cobell v. Norton case, the Department of Interior developed a reorganization plan. Interior's plan would strip the BIA of all its trust functions and consolidate those functions into a new Bureau of Indian Trust Assets Management (BITAM). Overseeing this new agency would be a new Assistant Secretary who would report directly to the Secretary of Interior.

Interior began its tribal consultation sessions subsequent to the reorganization proposal rather than create a plan concurrently with the tribes. In addition, 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.

Another issue stemming from the litigation includes a computer shutdown at the Department of Interior that has prevented tribal and thousands of individual trust beneficiaries from receiving payments. This situation is simply unacceptable. The notion that the Federal Government cannot do its job sends the clear message that Native Americans are considered to be second-class citizens.

Decade after decade, this problem has plagued both Democratic and Republican administrations, but none more than the Indian people and tribes. Indian people and tribes have the right to know about all transactions and ownership interests in their land. These trust beneficiaries also have the right to create a plan concurrent with the administration to address the issues raised in the Cobell litigation and to develop an alternative plan to the Department's reorganization plan. I strongly urge the Department of Interior to continue its dialogue with the tribal task force on trust reform.

In the end, we would all do well to remember that those in Indian country who are caught in this web of mismanagement are not asking for any privileges or handouts. This money belongs to them. The Federal Government's involvement was meant to give legal and technical support only. There is no doubt that, up to this point, the government has failed. The only question is whether or not we will now

rectify these accounts for the future and in the process restore some dignity to the past.

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

[The prepared statement of Mr. Pallone follows:]

Statement of The Honorable Frank Pallone, Jr., a Representative in Congress from the State of New Jersey

The United States Government committed to a trustee relationship with the Indian Nations. Defined by treaties, statutes and interpreted by the courts, the trust relationship requires the federal government to exercise the highest degree of care with tribal and Indian lands and resources. At first, the federal trust responsibility served to protect tribal lands and tribal communities from intrusion.

However, in a push to acquire tribal land and turn Indians into farmers, the federal government imposed reservation allotment programs pursuant to the General Allotment Act of 1887. Under these policies, the selling and leasing of allotted lands and inherited interests became primary functions of the Bureau of Indian Affairs. Tribes lost 90 million acres and much of the remaining 54 million acres was opened to non–Indian use by lease. In sum, the federal government took the trust responsibility for Indian land upon itself in order to gain the benefit of vast tribal lands and resources that were guaranteed by treaty, Executive Order, and agreements for exclusive use by the tribes.

It is widely known that the BIA has grossly mismanaged the remaining tribal lands and has squandered billions of dollars worth of resources that should have gone to the benefit of often impoverished American Indians. Today, the Secretary of the Interior is faced by a mandate from Congress to clean up the accounting and management of Indian trust funds, and by a lawsuit alleging a great failure of the Secretary's trust responsibility for Indian lands. In response, the Secretary has proposed a plan to create a new Bureau of Indian Trust Asset Management and remove the trust functions from the Bureau of Indian Affairs.

This proposal will profoundly effect the BIA's management of 54 million acres of Indian lands, the administration of trust funds derived from those lands, and nearly every aspect of economic development, agriculture, and land management within Indian Country.

I am greatly concerned that this plan is repeating the failures of the many past trust reform efforts. Recently, 193 Indian tribes unanimously adopted a resolution opposing this reorganization and transfer of the responsibilities of the Bureau of Indian Affairs. I strongly believe that this reorganization effort cannot go forward until the Department consults with Indian tribes in the development of a business processes plan for trust reform—a clear plan for performing the basic trust functions of accounting, collections, record keeping, inspections, enforcement and resource management. The plan must include policies, procedures and controls. The fundamental and consistent criticism of the Department's trust reform efforts over the last decade has been the failure to develop a plan for these business operations of trust management. Instead, the DOI has a well-documented record of making short-term cosmetic changes in response to court imposed deadlines or Congressional inquiries.

It is notable that this criticism, a lack of structural foundation, is exactly the same as has been leveled against the Department's development of the Trust Asset and Accounting Management System. All tribal leaders strongly support trust reform and want to work constructively with the Department and with Congress to ensure sound management of tribal assets. In fact, it is the tribes that have the greatest interest in ensuring that tribal assets and resources are properly managed.

To complete my statement, I just want to raise concerns regarding today's hearing. Similar to Mr. Rahall, I do not concur in the request made by Chairman Hansen to Secretary Norton of the Department of the Interior, by letter dated January 15, 2002, to submit to the Committee a report compiled by the auditing firm Ernst & Young that is under seal by the Court as part of the Cobell v. Norton lawsuit.

Striving to maintain the integrity of the federal government's trust responsibility of Indian tribes, and thereby tribal assets, is a commitment that the United States first made as part of the Cherokee Nation v. Georgia lawsuit in 1831. Making the individual trust accounts a matter of public record is not adhering to the spirit of the federal trust responsibility. Ironically, if such account records were opened, the public would have more information about the monetary balances of Indian accounts than the actual Indian account holders themselves. Trust responsibility to the indi-

viduals in question requires that this report not be placed into the public domain unless they concur.

The Tribal Leaders Task Force on Trust Reform, comprised of 24 appointed tribal leaders from throughout the United States and Alaska, convened here in Washington this past weekend to discuss the trust reform issues. Indian tribes and their representatives are continuing to interface between their separate governments in order to put forth their recommendations for Indian trust reform. Proper consultation between Indian tribes and the federal government must occur to ensure that decades of Indian trust mismanagement ends.

In conclusion, I do not believe—and I think much of Indian country would agree with me—that creating a new agency to manage existing Indian trust accounts is the solution for government reform. Especially given that proper consultation between the federal government and Indian tribes did not occur. I am disappointed with the Department of Interior concerning this government reform issue and believe that DOI needs to do a better job in exercising the trust responsibility to Indian tribes and Alaska Natives.

[The prepared statement of Mr. Rehberg follows:]

Statement of The Honorable Dennis R. Rehberg, a Representative in Congress from the State of Montana

Thank you Mr. Chairman. I would like to join my colleagues in thanking the Committee for holding this very important hearing. Indian Trust Reform has been on the back burner long enough.

The more I learn about this issue, the greater appreciation I have for the complexity of the situation. Montana is proudly the home to seven tribes. I know that in my experience the needs of different tribes can be very specific and diverse in nature. Several representatives from Montana's tribes have traveled far to be in attendance. I am privileged to have three Montanans here to testify—each in different capacities. Their respective roles here today are representative of the various needs of tribes across our nation. I would like to take this opportunity to let the tribes in my state know that I admire their commitment to work together on proposals for trust reform, and I look forward to assisting them in their efforts.

I appreciate the efforts of the Secretary on this issue. Many have come before her and despite their efforts they failed to produce meaningful reform. I know there are a lot of concerns relating to the BITAM. Regardless of what you think of the plan, Secretary Norton should be applauded for her commitment and willingness to tackle this issue. I know she is committed to working with stakeholders to come up with the best final product possible.

I know this will not be easy. Trust management reform is severely overdue. The circumstances that brought us to this crisis situation are nothing we can be proud of, but I hope that the final product—of what promises to be the result of a lot of hard work—is something we will be proud of.

Thank you all for being here and I look forward to a productive hearing.

[The prepared statement of Mr. Young follows:]

Statement of The Honorable Don Young, a Representative in Congress from the State of Alaska

I would like to thank Chairman Jim Hansen for scheduling this oversight hearing on the Trust Fund accounts of American Indians and Alaska Natives. Since the l980's, I have been an active member on this Committee with Trust Fund reform and am pleased to see that Chairman Hansen has set a high priority to try and resolve this issue in this Congress.

For more than ten years, Congress has given the Department of the Interior (DOI) the funding and the flexibility to try to resolve the problem with the DOI's accounting of IIM and tribal accounts. Obviously this has not worked. While I believe that this current Administration should be given the opportunity to try to resolve the problem, it has always been my belief that tribes need to be consulted to help find a resolution to the problem with the accounting of their IIM and Tribal account funds. I am hopeful that the consulting process will continue with Tribes and that the DOI will take their recommendations seriously and implement some of these recommendations in the effort to finally resolve the Trust Fund issue.

In the past, I have worked with the InterTribal Monitoring Association (ITMA) and have made a verbal commitment to continue a dialogue to develop, if necessary,

further reform legislation to finalize the accounting problems with the IIM and Tribal accounts. I would like to take this opportunity to welcome my Alaskan on the board of ITMA, Bill Martin, and to offer my continued commitment to work to resolving the Trust Fund issue.

The following information was submitted for the record:

- Addison, Anthony A., Chairman, Northern Arapaho Business Council, Statement submitted for the record
- Addison, Anthony A., Chairman, Northern Arapaho Business Council, Letter to the Department of the Interior submitted for the record
- Anoatubby, The Honorable Bill, Governor, The Chickasaw Nation, Statement submitted for the record
- Assiniboine & Sioux Tribes, Counterproposal to Bureau of Indian Trust Assets Management submitted for the record
- Bradley, Carman, Chairman, Council of Energy Resource Tribes, Statement submitted for the record
- Bourland, Gregg J., Tribal Chairman, Cheyenne River Sioux Tribe, Statement of the Great Plains Tribal Chairmen's Association submitted for the record
- Hoopa Valley Tribe, Tribal Self-Governance Trust Reform Proposal submitted for the record
- Mille Lacs Band of Ojibwe, Letter submitted for the record
- Montana Wyoming Tribal Leaders Council, Resolution submitted for the record
- Nez Perce Tribe, Statement submitted for the record
- Tribal Chairmen's Position Statement submitted for the record
- Windy Boy, Alvin, Sr., Chairman, The Chippewa Cree Tribe of the Rocky Boy's Reservation, Statement submitted for the record

[A statement submitted for the record by Mr. Addison follows:]

Statement of Anthony A. Addison, Chairman, Northern Arapaho Business Council

The Northern Arapaho Tribe wishes to express its concerns with respect to the proposed reorganization of the Department of the Interior, removing trust-related responsibilities from the Bureau of Indian Affairs and placing them in a proposed Bureau of Indian Trust Assets Management. Let there be no doubt: the Northern Arapaho Tribe fully supports trust reform. As a land-based Tribe with substantial natural resource interests "" most notably oil and gas production "" the Northern Arapaho Tribe would undoubtedly benefit from a reformed and fully functioning trust system.

However, the Northern Arapaho Tribe is deeply concerned about the manner in which the current attempt at reform has been put forth. Foremost among the Northern Arapaho Tribe's concerns is the lack of meaningful consultation between the United States and any sovereign Tribe "" particularly the Northern Arapaho Tribe. Although both you and the Secretary were present for the consultation meeting in Albuquerque on December 13, 2001, this meeting can hardly be considered meaningful consultation. First, the failure of the Department of the Interior to be more forthcoming with information about the proposed Bureau made it impossible for any Tribal leader to make meaningful and insightful suggestions or comments. Second, the after-the-fact nature of the event itself created considerable resentment among many of the attendees, effectively eliminating the possibility of meaningful dialogue. At a breakfast meeting with the Council of Large Land Based Tribes, Deputy Assistant Secretary Wayne Smith represented that the Albuquerque meeting would be nothing more than a "listening session." The Northern Arapaho Tribe respectfully suggests that meaningful government-to-government consultation requires actual dialogue between governments, not one government listening in silence to the grievances of another.

That stated, the Northern Arapaho Tribe believes Secretary Norton can and should undertake reform of the current trust system. However, such reform can only work if undertaken in a deliberate and comprehensive manner. Second, Secretary Norton must agree that not only will any trust reform in no way diminish the current trust obligations owed by the United States to Tribes and individuals, but will also preserve and enhance that trust relationship. Third, trust reform should affirm and support Tribal sovereignty, self-government and self-determination, and should not undermine any treaties or executive orders between Tribes and the United States. Fourth, in any trust reform, the concerns of the present and the future need to take precedence over the failures of the past. The Northern Arapaho Tribe is confident that Secretary Norton is mindful of these basic principles, and will diligently observe them in any trust reform she undertakes.

As stated above, trust reform is impossible without consultation. So far, the Secretary's attempts at consultation have been unsatisfactory. However, this is not to say that meaningful consultation cannot be accomplished. The first step in a meaningful consultation process is to give all concerned parties a common base of information. This means that the Secretary needs to tell Tribes "" specifically the Northern Arapaho Tribe "" exactly what she intends to do with respect to trust reform, including how this proposed reform will result in measurable improvements over the services currently in place on the Wind River Reservation Without specific information, the meaningful dialogue between sovereigns embodied in government-to-government consultation simply cannot be accomplished.

Additionally, as the Committee and Secretary Norton are both undoubtedly aware, Congress tasked the Department of the Interior with trust reform in 1994. Although the Northern Arapaho Tribe understands that many of the problems facing the Secretary now with respect to trust reform were inherited from past administrations, we would like to know why the requirements and recommendations made pursuant to the 1994 Act have not been implemented, or if implemented, have not been successful. The Northern Arapaho Tribe requests that the Secretary publish an account of why each of the reforms proposed in 1994 has failed, either in implementation or effect. We are confident that the Secretary agrees that without a frank and thorough examination of the failures of the recent past, no progress can be made in trust reform.

With respect to the actual effect of trust reform, the Northern Arapaho Tribe strongly recommends the Secretary consider the following: any reform of the Bureau of Indian Affairs should increase the ability of each reservation or service area to tailor programs and services to the specific needs of that reservation or service area; any cost savings realized from trust reform in any way should go directly to increased services to the trust beneficiaries themselves; any system implemented to track trust activity needs to be flexible enough to both provide necessary trust accountability and meet the unique needs of specific geographical areas; trust reform should not come at the expense of any services or programs currently provided to Tribes or individuals; and Indian hiring preference of qualified personnel must be continued in any trust reform. Finally, while the mistakes of the past should not prevent trust reform, neither can they be ignored. Trust reform should not preclude any recovery of damages by Tribes or individuals for past trust mismanagement, nor should it create a statute of limitations or other bar to recovery for such mismanagement.

In closing, the Northern Arapaho Tribe is committed to meaningful trust reform, and as a large, land-based Tribe with extensive natural resources would benefit from such reform. Secretary Norton is certainly correct in recognizing the problem with the current trust system; however, without further details of her current plan for reforming this system, she cannot engage in meaningful, government-to-government consultation and dialogue with Tribes. Any group or committee called upon by the Department of Interior for consultation must be comprised of elected Tribal leaders.

Additionally, it is extremely important that any reorganization— whether it be within the BIA, or through the development of a new agency—it is important that it be clearly established that all aspects of the Federal Government's responsibilities to Indian Tribes are trust responsibilities. It is just as important that members of the Northern Arapaho Tribe receive adequate health care, for example, as it is that their land and minerals be properly administered. However the reorganization occurs, it cannot be emphasized to greatly that all aspects of the Federal Government's duties be properly classified as trust responsibilities.

It is also important that the Indian preference be continued within any agency that has trust responsibilities to Indian Tribes. Just as it is critical that there be government-to-government communications between Tribes and the Federal Government, it is also critical that qualified Indian people fill the jobs that have the most

interaction with Indian Tribes. Additionally, no monies can be taken from existing programs to fund any new or reorganized agencies. Almost all programs on the Wind River Reservation are presently under funded, and any further reductions would be devastating.

The Northern Arapaho Tribe would like to engage in discussion with the Secretary and provide whatever assistance possible in furthering meaningful trust reform, but first the Secretary must let us know what we would discuss.

[A letter submitted for the record by Mr. Addison follows:]

December 18, 2001

The Honorable Neal McCaleb
Assistant Secretary for Indian Affairs
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Assistant Secretary McCaleb,

This letter is to express the strong concerns of the Northern Arapaho Tribe with respect to the proposed reorganization of the Department of the Interior, removing trust-related responsibilities from the Bureau of Indian Affairs and placing them in a proposed Bureau of Indian Trust Assets Management. Let there be no doubt: the Northern Arapaho Tribe fully supports trust reform. As a land-based Tribe with substantial natural resource interests—most notably oil and gas production—the Northern Arapaho Tribe would undoubtedly benefit from a reformed and fully functioning trust system.

However, the Northern Arapaho Tribe is deeply concerned about the manner in which the current attempt at reform has been put forth. Foremost among the Northern Arapaho Tribe's concerns is the lack of meaningful consultation between the United States and any sovereign Tribe—particularly the Northern Arapaho Tribe. Although both you and the Secretary were present for a purported consultation meeting in Albuquerque on December 13, 2001, this meeting can hardly be considered meaningful consultation. In the first place, the failure of the Department of the Interior to be more forthcoming with information about the proposed Bureau made it impossible for any Tribal leader to make meaningful and insightful suggestions or comments. In the second place, the after-the-fact nature of the event itself created considerable resentment among many of the attendees, effectively eliminating the possibility of meaningful dialogue. At a breakfast meeting with the Council of Large Land Based Tribes, Deputy Assistant Secretary Wayne Smith represented that the Albuquerque meeting would be nothing more than a "listening session." The Northern Arapaho Tribe respectfully suggests that meaningful government-to-government consultation requires actual dialogue between governments, not one government listening in silence to the grievances of another.

That stated, the Northern Arapaho Tribe believes Secretary Norton can and should undertake reform of the trust current trust system. However, such reform can only work if undertaken in a deliberate and comprehensive manner. This means first and foremost that Secretary Norton must withdraw—if not already withdrawn—the request before Congress to reprogram funds for the proposed Bureau. Second, Secretary Norton must agree that not only will any trust reform in no way diminish the current trust obligations owed by the United States to Tribes and individuals, but will also preserve and enhance that trust relationship. Third, trust reform should affirm and support Tribal sovereignty, self-government and self-determination, and should not undermine any treaties or executive orders between Tribes and the United States. Fourth, in any trust reform, the concerns of the present and the future need to take precedence over the failures of the past. The Northern Arapaho Tribe is confident that Secretary Norton is mindful of these basic principles, and will diligently observe them in any trust reform she undertakes.

As stated above, trust reform is impossible without consultation. So far, the Secretary's attempts at consultation have been unsatisfactory. However, this is not to say that meaningful consultation cannot be accomplished. The first step in a meaningful consultation process is to give all concerned parties a common base of information. This means that the Secretary needs to tell Tribes—specifically the Northern Arapaho Tribe—exactly what she intends to do with respect to trust reform, including how this proposed reform will result in measurable improvements over the services currently in place on the Wind River Reservation. The Northern Arapaho respectfully request this information, in writing, no later than January 15, 2002.

Without specific information, the meaningful dialogue between sovereigns embodied in government-to-government consultation simply cannot be accomplished.

Additionally, as you and Secretary Norton are both undoubtedly aware, Congress tasked the Department of the Interior with trust reform in 1994. Although the Northern Arapaho Tribe understands that many of the problems facing the Secretary now with respect to trust reform were inherited from past administrations, we would like to know why the requirements and recommendations made pursuant to the 1994 Act have not been implemented, or if implemented, have not been successful. The Northern Arapaho Tribe requests that the Secretary publish, by February 1, 2002, an account of why each of the reforms proposed in 1994 has failed, either in implementation or effect. We are confident that the Secretary agrees that without a frank and thorough examination of the failures of the recent past, no progress can be made in trust reform.

With respect to the actual effect of trust reform, the Northern Arapaho Tribe strongly recommends the Secretary consider the following: any reform of the Bureau of Indian Affairs should increase the ability of each reservation or service area to tailor programs and services to the specific needs of that reservation or service area; any cost savings realized from trust reform in any way should go directly to increased services to the trust beneficiaries themselves; any system implemented to track trust activity needs to be flexible enough to both provide necessary trust accountability and meet the unique needs of specific geographical areas; trust reform should not come at the expense of any services or programs currently provided to Tribes or individuals; and Indian hiring preference of qualified personnel must be continued in any trust reform. Finally, while the mistakes of the past should not prevent trust reform, neither can they be ignored. Trust reform should not preclude any recovery of damages by Tribes or individuals for past trust mismanagement, nor should it create a statute of limitations or other bar to recovery for such mismanagement.

In closing, the Northern Arapaho Tribe is committed to meaningful trust reform, and as a large, land-based Tribe with extensive natural resources would benefit from such reform. Secretary Norton is certainly correct in recognizing the problem with the current trust system; however, without further details of her current plan for reforming this system, she cannot engage in meaningful, government-to-government consultation and dialogue with Tribes. The Northern Arapaho Tribe would like to engage in discussion with the Secretary and provide whatever assistance possible in furthering meaningful trust reform, but first the Secretary must let us know what we would discuss.

Sincerely,

Anthony A. Addison,
Chairman,
Northern Arapaho Business Council

[A statement submitted for the record by Governor Anoatubby follows:]

Statement of Chickasaw Nation Governor Bill Anoatubby submitted for the record

It is a pleasure, on behalf of the Chickasaw Nation, to provide this written testimony to the U.S. House of Representatives Resources Committee on the topic of trust funds management reform. This is a topic of much concern throughout Indian Country, and it is one which has the potential to affect every single Native American in this country.

The Chickasaw Nation is strongly in support of trust funds management reform. For far too long, assets of tribes and private citizens have been relegated to a "back room" of accounting. The tribes have entrusted the federal government with those funds for safekeeping. That trust has been violated over and over again, compounded by the federal government's inability to account for those dollars—dollars which rightfully belong to the tribes and to their citizens. Reforming the system of management of those funds is not only a necessity, it is a moral obligation which should be addressed thoroughly and as efficiently as possible.

We ask the Committee's understanding in stating that we oppose any court-appointed receiver in the matter of accounting for and/or managing individual trust funds accounts. It has always been the obligation of the U.S. Department of the Interior, through the Bureau of Indian Affairs, to manage and account for these funds.

It should remain that way, in order that a clear and extant line of responsibility remain in place for the monumental task which lies ahead.

The process for correcting the current situation while satisfying the concerns of the federal court, should be independent of the Department of the Interior, conducted by independent advisors with private-sector expertise in financial trust rehabilitation. We most impressed with the testimony before the Committee of Donald Gray, Esq., who has over 25 years experience in reconciling and rehabilitating long-term complex trusts and other money flow arrangements involving billions of dollars of managed assets with some of the most prestigious financial institutions in this country. The Department of the Interior simply lacks this kind of expertise. We recommend and advocate a legislative solution.

Further, we wish to affirm our support for tribal consultation in this process. As one of two representatives to the task force for Oklahoma, I am keenly aware of how vital tribal consultation is to the success of this process. Tribes must have a role in the administration of the new sovereignty and the study of restructuring trust asset management.

We urge the Congress to take expeditious and decisive initiative to propose a plan for revamping federal accountability for individual Indian trust monies. The process for management of tribal trust funds should not be disturbed.

We appreciate being given the opportunity to provide these comments, and wish the committee every success in its deliberations.

[A counterproposal submitted for the record by the Assiniboine & Sioux Tribes follows:]

Assiniboine & Sioux Tribes Counterproposal to Bureau of Indian Trust Assets Management (BITAM); BIA Reorganization Advisory Group, Draft 12/12/01

In response to the reform proposals submitted by the Department of the Interior and Bureau of Indian Affairs Advisory Group, the Assiniboine and Sioux Tribes submits the following counterproposal which is designed to achieve a lasting and comprehensive trust reform in the management of Indian trust assets.

The counterproposal includes infusion of additional resources where they are needed to provide true lasting trust reform—at the reservation level. It is the level and location where protection and management of trust assets occur. It is also where the Bureau of Indian Affair's legal responsibilities on behalf of the Federal government for accountability and responsibility originates.

This counterproposal does not create additional levels of bureaucracy that do nothing to enhance or improve the quality of fiduciary performance but rather provides the professional staff, facilities, and equipment where all documents and transactions originate which enhances the quality of fiduciary performance. It also returns those functions which have been fractured from the Bureau of Indian Affairs—OST, OTFM, MMS—to one entity control.

It maintains the basic structure of the Bureau of Indian Affairs by retaining a Central Office operation in oversight, legislative, and management assurance facets but requires meaningful consultation with the local levels prior to any legislative proposals. In this reorganization image, regional offices are virtually expendable with professional staffing and funding resource reassigned to the field offices at the agency level. Central Office operations remain with policy and regulation functions, however direct contact with the field offices are envisioned for clear working principles and impacts prior to any formal proposals being adopted.

In support example, currently 62 positions at the Fort Peck Agency consists of 50 full time and 12 career seasonal positions. The funding support for these positions totals $2,202,958 with $122,019 agency operational costs for over 15 baseline program functions handling approximately 2,112,000 trust acres with an estimated $11,100,000 annual trust fund disbursement. Of the 50 full time positions at Fort Peck, only 12 are professional level with a surprising gap in professional accounting, information and records management and technology, let alone not considering the various specialized fields required at the agency level management of trust assets. Professional services were to be provided by regional/central office staff for any problem areas in field operations, a cumbersome unworkable procedure that has resulted in enormous delays in all services, including long term management dysfunctions.

The following proposal envisions the Assiniboine and Sioux Tribes' full service Agency operations only. As such, it is intended to be a blueprint for further develop-

ment in other levels of operations as well as use by other Tribes to develop as their unique operations require.

FORT PECK AGENCY REFORM PROPOSAL

FUNCTIONAL REORGANIZATION STATEMENT

The Fort Peck Agency is located at Poplar, Montana. The Agency jurisdiction lies in the northeast corner of the State of Montana. It is responsible for the delivery of all Bureau of Indian Affairs programs, administration and management services (1) to the tribal government, individual tribal members, and trust resources of the Assiniboine and Sioux Tribes of the Fort Peck Reservation; (2) to the trust resources owned by individual tribal members of the Turtle Mountain Tribe of Chippewa Indians in North Dakota which are located in northeastern Montana outside of the external boundaries of the Fort Peck Reservation; and (3) individual Indians who are members of other tribes but reside in the Fort Peck Agency jurisdiction.

Two separate tribal groups, the Assiniboine and the Sioux, have maintained a single tribal government entity on the Fort Peck Reservation since its establishment in 1888. The two tribes rejected the Indian Reorganization Act of 1934 but operate under a constitution approved by the Commissioner of Indian Affairs in 1960. Tribal business is conducted through an Executive Board comprised of a Chairman, Vice–Chairman, Sergeant-at Arms, and twelve Members. All are elected at large in elections held in odd numbered years. Although a single joint tribal membership roll is maintained, each tribe exercises control and supervision over its own enrollment.

Members of the Turtle Mountain Tribe of Chippewa Indians in North Dakota own trust land allotments situated outside of the boundaries of the Fort Peck Reservation in northeastern Montana which are administered and managed by the Fort Peck Agency. These Indian landowners are not affiliated with or represented by the Assiniboine and Sioux Tribes. Their business is transacted individually directly with the Fort Peck Agency staff.

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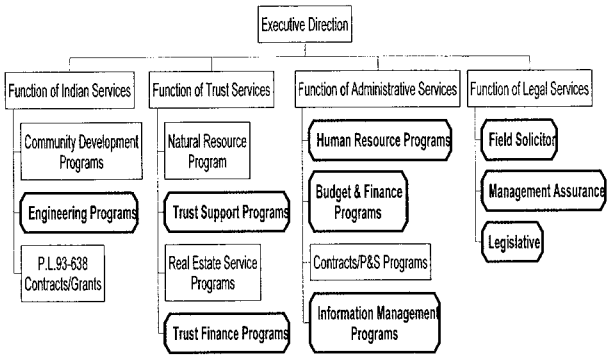
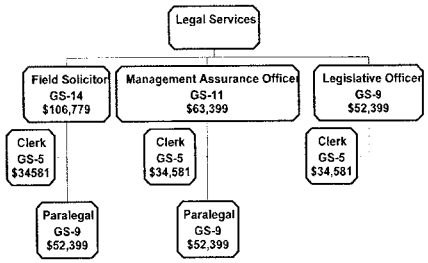
OFFICE OF EXECUTIVE DIRECTION



The proposal envisions strengthening this office through the inclusion of trust support, trust finance, and legal support functions as well as increasing professional and paraprofessional resources in current operations.

This envisions four (4) major functions with fourteen (14) programs - 9 returned or moved to field level operations as below:

OFFICE OF LEGAL SERVICES



A full service legal office, independent of the Indian Affairs that will provide immediate legal services to all functions.

Field Solicitor
Includes access on a need to basis for Agency programs in the performance of their daily business.

Management Services
Includes the prevention and elimination of waste, fraud and abuse (OMB Circular A-123); program review and audit (OMB Circular A-50); information management services including

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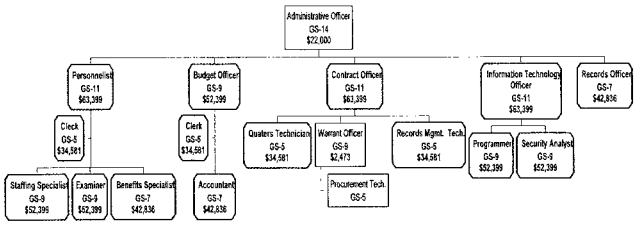
ADP systems operations and development, ADP records and equipment security and accountability, Freedom of Information/Privacy Act compliance and Management Information Systems, reports and audit tracking controls; and regulatory and policy compliance.

Legislative
Responsible for legislative management, review analysis, coordinating with upper level development to real local level conditions for inter and intra policy, congressional/public developments; and coordinating with Federal Register publications.

OFFICE ADMINISTRATIVE SERVICES



An Administrative Officer is responsible for planning and directing the execution of all Agency administrative and management functions, consistent with Bureau, Departmental and other applicable Federal law, regulations and policy; supporting the attainment of reservation and community development objectives; advocating the Indian Self-Determination policies; and strengthening the government-to-government relationship.

Contracts/Property & Supply
Includes administration of the contract warrant system; coordination of COR/GOR functions within the Agency and between the Agency and Contracting Officer; administration of the acquisition, communications, transportation and stores functions; excess property utilization; Board of Survey process; personal and capital property inventory and accounts; and government owned real property inventory and accounts.

Information Management
Includes (1) oversight and maintenance of the day-to-day operation of the entire Agency system; (2) planning and programming required service and new and replacement acquisition; (3) identification and development of user requirements, working and Agency tribal managers, Agency and Bureau ADP management, and subject matter specialists; and (4) maintaining systems security requirements consistent with regulations and standards.

Budget/Finance
Involves all budget development, analysis and assurance, policy development. Involves all finance analysis and assurance utilizing automated systems in place as well as development of any revisions in systems.

Human Resources

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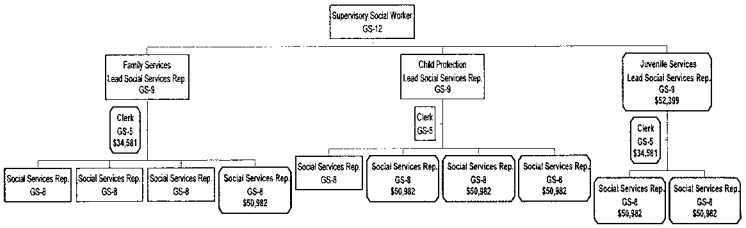
Involves all aspects of human resource management addressing attrition/retention problems.

OFFICE OF INDIAN SERVICES



Headed by an Indian Services Officer, this division includes liaison activities with tribal officers, officials, and program managers on all matters affecting or affected by tribal government operations and processing of official tribal actions consistent with requirements of the tribal Constitution and ordinances and Federal policy and regulation. It will contain all of the community development programs.

The three (3) program areas consist of Community Development Programs, Engineering Programs and Public Law 93-638 Programs. These three programs will require massive tribal input in community and trust asset development support. Breakdowns are envisioned as follows:

Social Services Program
Includes the supervision and program management of the following sections within the branch:

Child Protection Services
Includes provision of welfare and protective services to abused, neglected, dependent and pre-delinquent children; assistance to the tribal foster home licensing agency in the development of foster home resources; development of institutional treatment resources; planning and developing children's protective services advocacy and intervention resources; providing in-depth, comprehensive professional social casework support to the tribal court and prosecutor on child protection matters; coordinating and administering the execution of protective court orders; assuring effective coordination of all child protective services between the state and tribal agencies and the Bureau of Indian Affairs; participation and leadership in the development and operation of the reservation child protection team consistent with prescribed policy and procedure; and providing technical and staff assistance to the tribal court, Executive Board and tribal HEW Committee as requested or required.

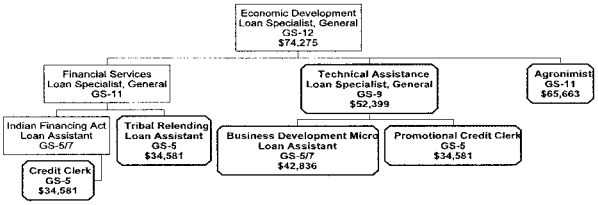
Family Services
Includes provision of social, protective and financial assistance services to needy, handicapped and dependent adults; developing and maintaining care resources addressing special needs such as battered spouses, the elderly and the addicted;

administration of the Agency General Assistance program; providing referral assistance to clients to state, local and other Federal resources; providing individual and family counseling; providing in-depth, comprehensive, professional social casework support to the tribal court and prosecutor; providing technical and staff assistance to the tribal court, Executive Board and tribal HEW Committee as requested or required; and casework services to individuals determined to be in need of assistance under the provisions of 25 CFR 115.9 or through court order.

Juvenile Services

Includes development of resources directed to the special needs of children and youth; prevention, control and prosecution of child abuse violations through community education and the judicial process; supervision of juvenile probation and other restrictions directed by the courts; development of resources and assisting the courts in arranging appropriate programs, including foster homes, for the treatment and rehabilitation of adjudicated juvenile offenders; conducting preliminary investigation of child abuse allegations; and assistance to the tribal court, Executive Board, and tribal Safety Committee with the development and administration of the Tribal judicial code.

Economic Development Program



The Economic Development Program includes administration of the Indian Financing Act loan programs and the tribal short and long term loan programs, and other federal agency support activities in lending. The Program develops financing resources with other Federal and commercial lenders meeting the business and personal needs of the service population, administers all mortgages and other security instruments involving encumbrances of trust resources by Bureau, other Federal and tribal and commercial lenders resulting from credit and financing activities. It provides technical assistance and staff support to the credit committees, Executive Board, Superintendent, and clients on matters pertaining to economic feasibility, credit practices and standards, and management procedures necessary to protect any loan or investment.

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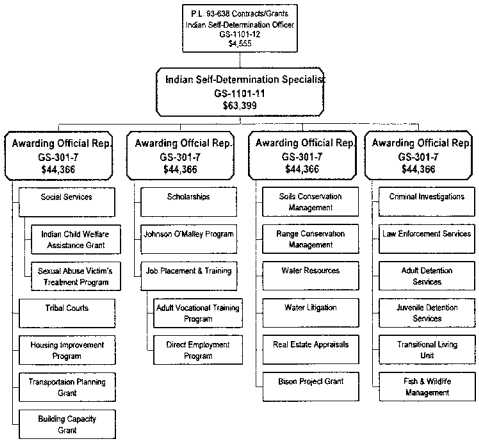
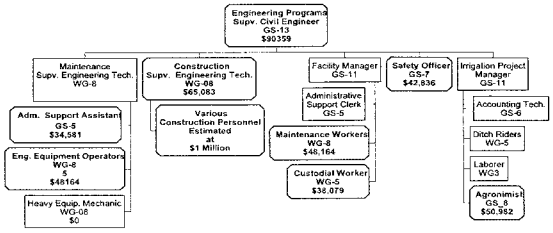
P.L. 93-638 Contracts/Grants



This Program includes liaison with tribal officers and program managers on all matters affecting or affected by tribal government operations; processing of official tribal actions consistent with requirements of the tribal Constitution and ordinances and Federal policy and regulation. This includes all matters pertaining to the status of the tribal U.S. Treasury accounts; the investment of funds held in them and the development of the annual tribal budget, preparation of the annual tribal trust funds income statement, processing for all required approvals, and monitoring budget status on a continuing basis; the administration of all Agency P.L. 93-638 contracts and grants, verification of Agency compliance with legislative, regulatory, policy and procedural requirements on a continuing basis; providing guidance and technical assistance to tribal and Agency officials on self-determination legislation, regulation, policy and procedures; and providing or arranging required or requested training and technical assistance.

Engineering Programs



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The function of the Engineering Programs include responsibility for planning and directing the execution of those programs which develop and maintain the reservation transportation system and operate and maintain the facilities utilized by the Fort Peck Agency in the performance of its mission. It also provides those programs that perform community development support functions.

Roads Maintenance includes snow removal, gravel road grading and repair, asphalt sealing and patching, weed control, bridge and guard rail maintenance and repair, culvert maintenance and repair, equipment maintenance and repair, and sign installation and maintenance. The program operates and maintains a safe all weather road system consisting of some 183 miles of primary and secondary roads and streets for reservation residents to date.

Roads Construction including planning, organizing, staffing, equipping, managing, supervising and directing all phases of work associated with the construction of roads and bridges on the reservation road system from inception to completion of the finished project. Included are right-of-way acquisition, surveying for new construction and maintenance work, preparation of application for and processing of all required permits for water, gravel, fill material, stockpiling access trails, etc., performing quality control procedures and maintaining diaries incident to new construction and maintenance work in progress to assure strict compliance with all applicable Federal highway standards. Coordination of the reservation transportation system planning and priority setting with the Tribes, coordinating transfer agreements, and other Bureau/County interests with the Commissioners of four counties, and providing technical assistance to the tribes and communities and business leadership in planning the development of the reservation transportation systems.

Facilities Management includes maintenance, repair, operation and improvement functions for all Agency buildings, grounds, streets, communication systems, and utilities, administering and executing facilities construction functions as assigned; operation and maintenance of the Agency structural fire prevention and control program; providing technical assistance to the tribes and tribal members in facilities and housing activities.

Irrigation includes operation and maintenance of the Fort Peck Irrigation Project, development and coordination of the work and budget program with the water users association; development of the annual O&M water assessment rate and recommendation for required publication and approval; consideration of undeveloped tracts; classification and reclassification of the irrigable status of Project lands; execution of the annual billing and collection process; identification and programming of ongoing rehabilitation and betterment activities to maintain and improve the efficiency and effectiveness of the system; and planning system development to strengthen irrigated agriculture economic potential.

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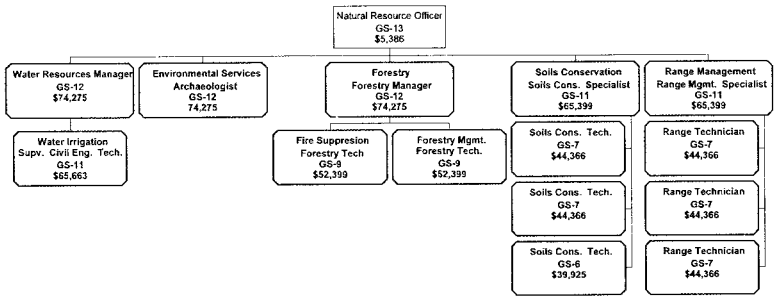
OFFICE OF TRUST SERVICES

Natural Resources Program



A Natural Resource Officer is responsible for planning and directing the execution of Agency programs for the protection, management, conservation and development of tribal and individual owned resources and funds held in trust by the United States, consistent with tribal, Bureau, Departmental and other applicable Federal law, regulation and policy; ensuring attainment of tribal/Bureau reservation and community development objectives; advocating the Indian self-determination policies; and strengthening the government-to-government relationship. The branch is organized and functions as follows:

Soil Conservation

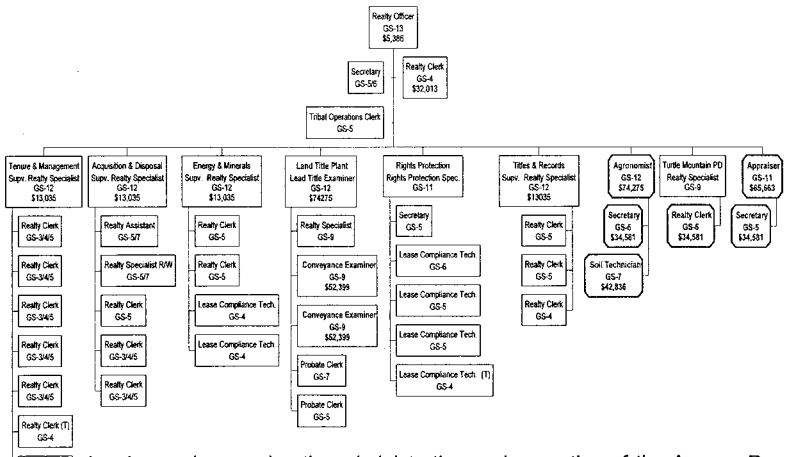
Includes farm and ranch planning and technical assistance to landowners and lessees incident to securing development and operating loan financing and to promote effective management practices; developing soil and water conservation protective use provisions to support trust farm and pasture leases and as a service to landowners and operators; administration of services to promote interest and participation in agricultural and conservation vocations and economic development; and promoting effective coordination with and between the agricultural community, Tribal government and program officials, the Tribal Community College, Colleges and Universities, public schools and the Department of Agriculture; and the administration of Agency water resources responsibilities.

Range Conservation

Includes grassland resources planning and technical assistance to landowners and lessees incident to securing development and operating loan financing and to promote effective management practices; developing range and water conservation protective use provisions to support pasture leases and range unit permits and as a service to landowners and operators; management and administration of the reservation grazing unit system occupying approximately 401,000 acres on the reservation; management and development of the reservation timber resource through conservation, reforestation, insect and disease control, fire management and woodlot management practices; coordinate and administer the Agency Fish and Wildlife responsibility; forest and range fire control services including the administration of the Agency's participation in the Indian fire fighters Program; promoting interest and participation in agricultural and conservation vocations and

economic development; and promoting effective coordination with and between the agricultural community, tribal government and program officials, the Tribal Community College, Colleges and Universities, public schools and the Department of Agriculture.

Branch of Real Estate Services



Includes planning and managing the administration and execution of the Agency Real Property Management Program. Provides direction on matters Involving tribal natural resource programs and real estate in the jurisdiction of the Agency and provides oversight to the Agency and tribal management officials on all matters relative to current property and building values and rental rates, legislation, regulations and policies affecting the management of Indian lands and natural resources.

Acquisition and Disposal Section

Includes administration and processing of all negotiated and competitively advertised trust land sales to and by the tribes and individual landowners, land exchanges, gift conveyances, fee patent issuances, and grants of right-of-way; providing technical and staff assistance to the Executive Board, tribal Land Committee, individual Indian landowners and the general public on acquisition and disposal matters; and billing, collecting and distributing proceeds due to owners for all acquisition and disposal transactions.

Tenure and Management Section

Includes administration and processing of farm and pasture leases, miscellaneous haying permits, homesite leases, business leases, lease cancellations and assignments and all other modifications; recording lease information on lease cards and plat books and into the automated Integrated Records Management system; technical and staff assistance to the Executive Board, tribal Land Committee, individual Indian landowners and the general public on tenure and management matters; and billing, collecting and distributing rental proceeds due to owners for all tenure and management transactions.

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Oil & Gas Leasing Section

Includes administration and processing of all oil, gas, sand and gravel and other mineral leases, miscellaneous mineral use and seismic permits, salt water disposal agreements, communitization agreements, lease cancellations and assignments and all other modifications, and preparation of advertisements and abstracts and conducting sales, for all mineral resources within the Fort Peck Reservation and on all Turtle Mountain Public Domain Allotments; recording lease information on lease cards and plat books and into the automated IRMS system; technical and staff assistance to the Executive Board, tribal Land Committee, individual Indian mineral owners and the general public on mineral leasing matters; billing, collecting and distributing proceeds due to owners for all mineral lease transactions; and assuring accuracy in the distribution of royalty income by the Minerals Management Services.

Titles and Records Section

Includes administration and processing of estate probates; research of realty records to prepare real property inventories and family history for submittal to the Administrative Law Judge; technical and staff assistance to the Administrative Law Judge during and after probate hearings; preparation of probate modifications, processing payment of approved claims against estates, distributing trust funds to heirs, and processing all title changes to the ownership subsystem of the IRMS as probate closing is executed; technical and staff assistance to individual Indians in the preparation and execution of wills, codicils and revocations; and technical and staff assistance to the Executive Board, tribal committees, individual Indian people and the general public on all titles and records matters.

Turtle Mountain Allotments Section

Includes administration and processing of all acquisition and disposal, tenure and management and titles and records functions for all lands owned by members of the Turtle Mountain Chippewa Tribe of North Dakota which are assigned to the Fort Peck Agency's jurisdiction, except that mineral leasing on these lands is administered by the Mineral Leasing Section; technical and staff assistance to individual landowners on all matters affecting the management and administration of their trust resources; and billing, collecting and distributing proceeds due to owners for all leasing or sale of trust, non-mineral, resources transactions.

Trust Services - General

Includes providing technical assistance, coordination, monitoring, and guidance and assistance as requested or required for Minerals and Mining, Fish and Wildlife and the Water Resources programs, which are operated by the tribes under P.L. 93-638 contracts/grants.

Real Estate Appraisals Section

Includes providing real estate land and mineral appraisals for trust lands as requested.

Enrollment Section

Includes the tribal enrollment process; and (4) administering tribal attorney/consultant contracts in accordance with 25 CFR 89 and 25 U.S.C. 81. Includes all matters pertaining to the withdrawal of tribal treasury funds in accordance with approved budgets and cash flow schedules and the administration of claims settlements, judgement awards and per-capita payments.

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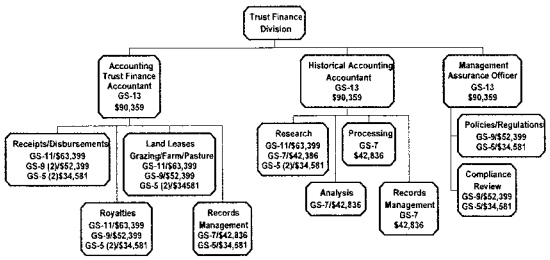
Other Rights Protection

Includes enforcement of the management, utilization, development and conservation requirements of leases and permits affecting trust surface and subsurface natural resources; enforcement of trespass law and regulation in all cases involving unauthorized use of trust surface and subsurface natural resources; compliance with the requirements of NEPA, Air and Water Quality Acts, Natural Historical Preservation Act and Federal and tribal law protecting cultural practices, places and objects; protection of water rights; prosecution of rights protection litigation; and planning and technical assistance for the development and management of trust mineral resources, land use planning and resource inventories.

Trust Finance Services



Trust Finance Services will contain all services pertaining to the administration of cash assets including collections and disbursements as well as management and compliance assurance. Proposal would expect all resources available to current OST/OTFM operations to be returned and funding this section.

Program	Current	Additional	Totals
Executive Direction	$110,105	$2,200	$112,305
Legal Services	$0	$431,118	$431,118
Administrative Services	$174,721	$22,000	$196,721
Self-Determination	$62,483	$247,682	$310,165
Budget	$0	$129,816	$129,816
Personnel	$0	$245,614	$245,614
Records Management	$0	$42,836	$42,836
Information Technology	$0	$168,197	$168,197
Contracts/P&S	$81,158	$135,034	$216,192
Facilities Management	$250,724	$86,243	$336,967
Real Estate Services	$873,145	$517,730	$1,390,875
Trust Financial		$1,329,292	$1,329,292
Social Services	$464,071	$427,453	$891,524
Natural Resources	$88,618	$791,225	$879,843
Fire Management	$130,000	$179,073	$309,073
Irrigation	$235,000	$50,982	$285,982
Economic Development	$147,843	$338,916	$486,759
Roads Maintenance	$290,000	$1,190,664	$1,480,664
Rights Protection	$157,250	$0	$157,250
Facilities/Other One Time	$0	$3,500,000	$3,500,000
TOTALS	$3,065,118	$9,836,075	$12,901,193

[A statement submitted for the record by Mr. Bradley follows:]

Statement of Carman Bradley, Chairman, Council of Energy Resource Tribes

On behalf the Council of Energy Resource Tribes ("CERT") I extend my appreciation to the Resources Committee and Chairman Hansen and Ranking Member Rahall for providing CERT the opportunity to submit testimony on Indian trust management reform. My name is Carman Bradley and I am Chairman of CERT and also Chairperson for the Kaibab Paiute Tribe.

CERT was formed in 1975 by twenty-five energy resource-owning Tribes who shared the philosophy that collectively Tribes could manage and responsibly develop their natural resources in a manner that reflects Tribal priorities and values. Tribes owning energy resources collaborated to rewrite the federal law and policy with respect to Indian minerals and royalty accounting with the Indian Mineral Development Act of 1982 and the Federal Oil and Gas Royalty Management Act. Tribes themselves have developed sophisticated capabilities in resource management and development as well as in revenue accounting and auditing that in many cases exceed those of private industry and government agencies charged with similar responsibilities for public resources. Each CERT member Tribe's chief elected official sits on the CERT Board of Directors. Because of vast resource ownership and sizable income generated from energy minerals, each Tribe individually, and Tribes collectively in CERT, has a great stake in trust management reform.

The Bureau of Indian Affairs, Office of Trust Fund Management, states that 77 percent of the Fund assets are held by 8 percent of the Tribes[1]. CERT member Tribes own vast quantities of oil, coal, natural gas mineral resources and vast quantities of land and other natural resources that contribute the greatest part of the income flow through the tribal trust fund accounts. Energy mineral production from Indian lands in 2000 was 9.3 million barrels of oil, 299 billion cubic feet of gas and 21.4 million short tons of coal. Energy minerals from Indian lands remain significant at greater than 10% of total federal on shore production[2]. Any trust reform measures taken by the Department of the Interior (DOI) will significantly impact CERT member Tribes. The trust income goes to support the discharge of Tribal governmental responsibilities from education to law enforcement and from resource management to economic development. For many of the energy resource Tribes, this income represents the majority of their non-federal income for investing in their own social and economic development.

CERT applauds Secretary Norton's desire to address trust management reform within the DOI. However, CERT has grave concerns about the procedure that Secretary Norton has followed in development of a reform plan and the Department's proposal to transfer fiduciary trust services to a new Bureau in an attempt to separate fiduciary trust responsibilities from other trust services provided by the Bureau of Indian Affairs ("BIA"). CERT strongly opposes the DOI's Bureau of Indian Trust Assets Management ("BITAM") reorganization proposal and the reprogramming of BIA Fiscal Year 2003 appropriations to support the development of the Department's proposal.

The DOI's proposal is incomplete and does not address critical elements that prevent the Department from enacting effective trust management reform. CERT contends that the Department must work with all stakeholders including Tribes, Tribal organizations, Indian individuals, and Congress, to develop a comprehensive, transparent trust management reform plan. Participatory methodologies in roundtable style, open dialogue, collaboration and problem solving on a regional level will ensure full Tribal participation. CERT suggests that the Bureau define the regional areas according to Tribal regions and not confined to BIA administrative regions. The role of Tribal organization should be recognized by the Bureau as a valuable information source providing important subject matter expertise to supplement, but not replace the important Tribal work at the regional level.

The atmosphere between the DOI and Tribes is poisoned with distrust and suspicion. The Secretary of the Interior will fail in her attempts to bring positive change until she and the Department as a federal institution addresses the lack of faith and confidence with their Tribal constituencies. "No government policy toward Indians can be fully effective unless there is a relationship of trust between the

[1] Misplaced Trust: The Bureau of Indian Affairs Mismanagement of the Indian Trust Fund, Committee Reports 102d Congress, House Report. 102–499.

[2] Minerals Management Service 2000 Year End Report.

Federal government and the Indian people."[3] Recent actions taken by Secretary Norton and her senior officials at the DOI reduce the little confidence Tribes hold in the DOI. Secretary Norton must answer how she intends to establish the conditions necessary for the Department and the Tribes to work together to solve the crisis that their mismanagement of their responsibilities to the Indian Trust created.

CERT challenges the Secretary's testimony presented to the Resources Committee on February 6, 2002 in which she states that Tribes are opposed to change and would like to see the BIA continue with the current trust management practices. Tribes support trust management reform to ensure Tribes are getting paid on time, at fair market value, royalty payments; and the Department develop an accurate accounting system that will interface with Tribal computer systems. Tribes have unified in a single voice to oppose the Secretary's BITAM proposal for reform. Tribal opposition to the Department's reorganization plan should not be, and cannot be, misconstrued for opposition to trust management reform.

Inadequacies of BITAM Proposal

The BITAM proposal is fatally flawed as it fails to address several barriers that have prevented the Department from successful trust management reform. CERT does not support any proposal that does not address the issues outlined below.

- DOI Secretary's Conflict of Interest as Trustee

  The Federal Government's trust responsibility includes the protection of Indian lands and natural resources, provision of social, medical, and education and other essential services necessary for survival of Tribal members, and protection of Tribal political and territorial integrity. The DOI is to act on behalf of Tribal interests in conflicts and disputes that arise from the protection and the development of Tribal lands and natural resources. Former President Nixon recognized this conflict of interest on behalf of the United States. He said, "[T] he Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee." [4]

  The conflict of interest described by President Nixon cannot be more evident than in the Department's handling of the Cobell litigation and its response to the demand that it reform its management of the Indian trust. The Department of Justice represents the Department of the Interior and the Department of Treasury on behalf of the federal government against the Indians with whom it has a trust obligation. Litigation in the trust mismanagement debacle seems to be driven by DOJ's desire to minimize the government's liability to its trust beneficiary. Management reform has been frustrated even after an act of Congress mandated its reform.

  Another example of DOI and DOJ's conflict of interest is evident in their use of the Arthur Andersen report. The BIA contracted Arthur Andersen to reconcile both the Tribal accounts and a random sampling of some 17,000 IIM accounts. Arthur Andersen was only able to reconcile the 2,000 Tribal accounts for a short time period from 1973 to 1992. For this 20-year period alone, the auditor noted that at least $2.4 billion in Tribal trust accounts was unaccounted for and billions of dollars more were virtually untraceable because of the questionable nature of the government records. Arthur Andersen was unable to reconcile any of the IIM accounts and further estimated that to begin such a process would cost upwards of $281 million. "The accounting firm claimed that the government had destroyed, never created or otherwise did not maintain, the records necessary to conduct a reconciliation. Even if the full IIM audit were performed, the firm said the costly information would be of little or no value when it came to providing IIM account holders with any real assurance that their balances are correct."[5] Although the Arthur Andersen report plainly illustrates difficulties to full trust fund reconciliation, the Department of Justice has indicated their intention to enter a motion for the Arthur Andersen report marking the starting point for statute of limitations for Tribes and individuals to file claims for damages against the Department of the Interior. And yet, it is the Department of Justice that should litigate against the Department of

[3] Nixon, Special Message to Congress on Indian Affairs, July 8, 1970.
[4] Nixon, Special Message to Congress on Indian Affairs, July 8, 1970.
[5] Joel Dyer, "Billions Missing From U.S. Indian Trust Fund."

the Interior on behalf of the Tribes and Indian individuals for damages against the DOI.

The inherent conflict of interest creates an ethical impediment for the Secretary of the Interior to unilaterally develop and implement a plan for reforming the management of Indian trust resources in "good faith". The Secretary must demonstrate that her plan resolves this inherent conflict of interest.

- Basic Standards for Trust Management Reform

First Principles of the Federal Indian Trust

- Trustee deals in good faith.
- Trustee cannot engage in self-dealing. The Trustee cannot have a conflict of interest with the beneficiary of the trust nor can it place its administrative convenience before the trust.
- The Trustee makes FULL DISCLOSURE of all known losses, thefts, and errors past and present.
- Tribal resource information is proprietary, not public information, and is not subject to freedom of information disclosure.
- To assure that the Trustee is adhering to the reform systems principles and that the systems continue to have integrity over time and that there is oversight by an Independent Regulatory Body.
- That the Trust management and accounting system is based on the terms of the organic documents that give rise to the fiduciary trust responsibility.

Requirements that a new management system must exhibit:

- Legal documents from which the trust arises—treaties, statutes, executive orders, purchases and documents that created the trust lands—from the foundation for the information systems;
- Agreed upon land/resource management responsibilities are accounted for;
- Tribal and individual land description records are integrated;
- Surface and subsurface resources are integrated in the data base;
- Contracts, leases, rights-of-way agreement terms and conditions are used in the system;
- Monitoring of activities such as mineral production to assure compliance to terms of the agreements, applicable regulations and environmental standards are integrated;
- Accounting based on legal requirements created by court decisions, statutes, regulations and contract terms are adopted;
- All Tribal resources management ordinances, zoning, and land use that affect Tribal resources management, protection and development are integrated into the system; and,
- Management and information systems design are compatible with local Tribal administration.

Violation of Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

Secretary Norton did not follow guidance for consultation with Indian Tribal Governments on Departmental actions that affect Indian Tribes. By not consulting with Tribes, the DOI was unable to completely develop their plan and therefore announced BITAM with only a skeleton sketch of the new Bureau and its functions. The DOI cannot completely answer or fill in the blank spaces of the plan without seeking advice from Tribes. Again, this dilemma was anticipated by President Nixon when he said, "The Federal government needs Indian leadership if its assistance is to be effective in improving the conditions of Indian life." Secretary Norton forgot this important advice from past leadership of her Party who knew in 1970 that only with Tribal support and advice could effective policy be developed. It seems that she also forgot that the basis of democracy is that government can only govern with the consent of the governed. CERT advocates that DOI consult with all Tribes on a government-to-government basis. CERT does not recognize the series of meetings DOI is currently convening around the country as "government-to-government" consultation.

Implementation of Cost Analysis for BITAM

The BITAM proposal cannot be seriously analyzed. One undisputable factor that can be substantiated is that implementation of BITAM will be very expensive, confusing and will cripple BIA and Tribal operations beyond current inconveniences. The major objective of the Norton plan is to establish, through consolidation of management responsibilities of Indian trust assets, a single Office responsible for trust management. The BITAM plan does not explain how adequate funding and staff re-

sources will be made available to the Special Trustee and the new management; how another, separate and distinct Bureau will be adequately funded to complete all of its assigned duties; how duties between the field BIA employees will be separated and reassigned with minimum confusion and loss of services to Tribal members. The very real risks to not only the Trust beneficiaries but to entire Tribal communities associated with the new Bureau far outweigh any potential benefit BITAM might provide.

Full Review of DOI's Implementation of The American Indian Trust Fund Management Reform Act of 1994

CERT calls on Congress to conduct a thorough review of DOI's implementation of The American Indian Trust Fund Management Reform Act of 1994 (PL 103–412) and the failure of the Office of Special Trustee to bring about the necessary measures within the Department for trust management reform. CERT asserts that Secretary Norton has not closely analyzed the problems of implementing the Reform Act of 1994. In some respects, the idea behind the OST and BITAM are similar in theory, however the OST has been largely unsuccessful in any reform measures for the accounting systems or implementing policy change within the involved Bureaus for accurate accounting or reconciliation of the IIM or Tribal accounts. The Secretary has not been responsive to the Special Trustee and OST has never been adequately funded or staffed to perform the required duties under law. Neither the Secretary nor her predecessor ever vested any authority to the Special Trustee preventing the Special Trustee from implementing policy change in a timely manner. This failure must be explained.

Perceived Threat of Termination of the Bureau of Indian Affairs

Tribes across the Nation have expressed concern about a hidden agenda of the Secretary to terminate the BIA after BITAM has been completely established. The DOI perceives BIA programs and funding that are not directly related to the fiduciary trust obligations as "services" to Indian people based upon the concept that Tribes cannot function without federal government help, or in short, welfare for the Indians. All functions of the BIA are trust obligations and are integral to the Federal Indian Trust as services to Indians because of Indian status. Since the 1970s with the advent of Indian Policy based on Tribal Self-determination, the Executive and Legislative Branches of government have acknowledged that the trust obligations are based upon agreements and solemn obligations between the United States and Tribes. Tribes surrendered claims to vast tracts of land and submitted to forced lifestyle changes in exchange for essential services such as health, education and public safety to ensure a quality of life enjoyed by other Americans. BIA services such as education, construction, environmental permitting, and recent congressional laws such as Indian gaming, Indian Child Welfare Act, and environmental regulatory authority and others are based upon the U.S. constitution, treaties and court decisions affirming that the federal trust obligation includes a social contract, protection of political autonomy as well as a fiduciary responsibility.

While the responsibility for land, resources and revenues derived from them make the fiduciary the more tangible of the three trust obligations and, in theory the easier to fulfill and to fix, the fiduciary trust obligation is inseparably linked to the social contract and political protection aspects of the trust obligation. Any proposal for trust reform that does not recognize the full federal obligation to Tribes will fail and perpetrate the specter of termination of federal trust obligation to Indian people.

Separating the fiduciary trust obligation from the other trust responsibilities will not bring about trust management reform. The Secretary has not addressed how the Minerals Management Services and the Bureau of Land Management fiduciary trust management services will be integrated into the BITAM proposal. Tribes are validated in their concerns of DOI dispelling their all trust responsibilities not related to the fiduciary trust obligation. CERT asks Congressional support to ensure that all trust obligations are preserved and honored.

Alliance with the Intertribal Monitoring Association on Indian Trust Funds

CERT has a long history and close working relationship with the Intertribal Monitoring Association on Indian Trust Funds ("ITMA"). Many of CERT member tribes are also members of ITMA. CERT has worked with ITMA on trust management reform efforts and will continue to support their recommendations and position on trust management reform.

Conclusion

The Council of Energy Resource views Secretary Norton's decisive action to fix the trust management problems as an opportunity to reform the Trust to fulfill the federal government's fiduciary obligation and bring the concept of Trust Protection

Responsibility into the twenty-first century based upon modern American ideals of a government-government relationship with Tribal control over Tribal trust resources and funds and away from the eighteenth century concepts of Federal control over Indian. CERT looks forward to working with the Resources Committee to develop legislation that will meet this goal.

[A statement submitted for the record by the Great Plains Tribal Chairmen's Association follows:]

Statement of the Great Plains Tribal Chairmen's Association to the Senate Committee on Indian Affairs on Management of Indian Trust Funds, February 26, 2002

Mr. Chairman, Honorable Committee Members, and others present. Thank you very much for allowing us this opportunity to testify today on the very important matter of Trust Fund Management Reform. The Great Plains Tribal Chairman's Association consists of sixteen tribes in three states that include: The Cheyenne River Sioux Tribe, The Crow Creek Sioux Tribe, Three Affiliated Tribes, Spirit Lake Tribe, Lower Brule Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Sisseton–Wahpeton Sioux Tribe, Standing Rock Sioux Tribe, Turtle Mountain Band of Chippewa, Omaha Tribe, Santee Sioux Tribe, Winnebago Tribe, Yankton Sioux Tribe, Ponca Tribe of Nebraska, and the Flandreau Santee Sioux Tribe.

According to federal statistics, the Great Plains Region accounts for almost half of the total Native American land-base and over half of the total trust accounts. Additionally, the Great Plains Region accounts for the majority of the tribal trust funds, with the largest being the Sioux Nation Trust Fund of over six hundred million dollars, and several tribal settlement funds or JTAC funds, with hundreds of millions of dollars.

As the majority of these trust funds are managed by the Bureau of Indian Affairs (BIA) and the Office of the Special Trustee (OST), we in the Great Plains Region have a very large interest in the outcome of federal trust management reform.

HISTORY

The majority of the tribes in the Great Plains Region are treaty tribes. These tribes have been promised by the United States Government that their interests and assets would be protected. We were promised that our money and assets would be safeguarded and that the federal government would provide us with full fiduciary and trust services.But history has shown that the exact opposite has been true. Native American money has been squandered, misspent, stolen, and mismanaged while Native American assets have been lost, swindled, and mismanaged by the federal government. Trust is the predominant job of the Bureau of Indian affairs since it was conceived over 150 years ago. But, unfortunately, they have a long and sordid history of mismanaging that trust for Native Americans and their resources and assets.

For many years tribes, tribal members, and organizations have been reporting these facts to the Department of Interior, the Bureau of Indian Affairs, and Congress. We have heard many promises. As a result, organizations like the Inter-tribal Monitoring Association on Tribal Trust Funds (ITMA) have made it their mission to bring to the attention of Congress, the Administration, and the world, this federal mismanagement of tribal assets and funds.Congress took charge and began to investigate the allegations against the federal government of this mismanaged trust. In 1992, Congress mandated that a reconciliation and audit of select trust fund accounts be done. A CPA firm, Arthur Anderson & Company, was hired for this very daunting task. The outcome was as ITMA had expected. The BIA could not account for over two billion dollars of Native American tribal trust money.

This was not even counting all of the trust fund accounts in the BIA, nor the IIM (Individual Indian Money) accounts. And the reconciliation only went back a few years. Estimates are that the total unaccounted for in Indian Trust Money's could be in the billions of dollars. And that is not even including the trust lands and assets that have been taken from us.In late 1993 ITMA put together the Indian Trust Fund Reform Act in hopes of the Federal government truly reforming the federal trust program. Instead, after much opposition by the Department of Interior, Native America was given half- hearted legislation in the Indian Trust Fund Reform Act of 1994. And since then, Native America has faced opposition from the Department of Interior at any meaningful attempt at true trust management reform.

Congress thankfully did attempt to make the Department of Interior improve Indian trust asset management and provide basic fiduciary services to trust beneficiaries in the 1994 Indian Trust Fund Reform Act.

A new department within Interior was created, as a result of this act; the Office of Special Trustee. A Special Trustee for American Indians was hired. An investment banker by the name of Paul Homan took this job. Under Mr. Homan, the Office of Trust Fund Management was transferred over to OST. The BIA kept all other trust functions.

Mr. Homan also instituted a new plan for trust, called the High Level Implementation Plan (HLIP). This HLIP included several major components, two of which are the most controversial; TAAMS (Trust Asset Accounting Management System) and TFAS (Trust Fund Accounting System). TAAMS is under the BIA and TFAS under the OST.

But, then Secretary of Interior Babbitt continually interfered and undermined his efforts. Mr. Homan resigned as a result of the negative politics and constant interference from the Department of Interior.

Additionally, as a result of the consistent failure on the part of the Department of Interior, Eloise Cobell of the Blackfeet Nation filed a class action lawsuit on behalf tribal allottees in United States Federal Court. This has resulted in a huge amount of media attention to the issue. And the previous Secretary of Interior, Secretary of Treasury, and Assistant Secretary of Indian Affairs were all held in contempt of court for failing to protect native trust and records.The current Special Trustee for American Indians, Mr. Tom Slonaker, has tried unsuccessfully to get the HLIP in working order. There have been many problems in TAAMS. This led Secretary Norton, to do an independent study of the HLIP and trust reform efforts in June 2001. The Department of Interior contracted with EDS (Electronic Data Systems Corporation) to conduct this study. EDS was to do an assessment of TAAMS and the BIA Data Cleanup Project. (A project that would ensure that only good clean data was inputted into the system).

EDS published a "confidential" report titled: DOI Trust Reform, TAAMS/BIA Data Cleanup Recommendations: "For Comments" Report dated October 31, 2001. [1] Concurrently in Federal Court DOI Secretary Gayle Norton was on the verge of being declared in contempt of court.

As a result, the Department of Interior put pressure on EDS to publish their interim report on TAAMS and BIA Data Cleanup. As stated on page seven of that report: "Subsequent to the release of the "Recommendations: For Comments Report", the DOI asked EDS to accelerate the development and publication of a roadmap." What this means is DOI was worried about the Court and hurried EDS to get their report out so they could use it as a means for filing in court.

In collaboration with the DOI, EDS shortened the comment period that was to be provided to tribes on the October 31st report and prematurely published the report entitled "Interim Report and Roadmap for TAAMS and BIA Data Cleanup," dated November 12, 2001. [2] This report said, and I quote:

"The EDS Report contains the following key Recommendations for improving Indian trust asset management:

- Immediately appoint a single, accountable Trust Reform Executive Sponsor
- Develop an overarching trust operations business model
- Adopt an overall business and computer systems architecture
- Adopt a consistent information systems acquisition strategy
- Implement consistent technology frameworks, methods, and tools
- Establish a trust program management center
- Execute comprehensive staffing plans for all participating organizations."

This report led the Special Trustee, Tom Slonaker, and the Assistant Secretary of Indian Affairs, Neal McCaleb, to immediately issue a joint memo to Secretary Norton recommending, "a dramatic change in organization and management structure for Indian trust reform and trust operations." [3] (See Tab A) Secretary Norton concurred with their recommendations and directed Interior staff to begin the process of reorganizing DOI's Indian trust asset management systems. [4] (See Tab A)

This prompted Steven Griles, Deputy Secretary of DOI, to immediately file in Federal Court a document outlining the reorganization on November 14, 2001. [5] This reorganization would, in Griles own language:

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[1] This information is available on the Internet on the DOI website.
[2] This information is also available on the Internet at the DOI website.
[3] Tab A..Nov. 14, 2001 Memo from McCaleb and Slonaker to Norton, included Tab B
[4] Tab A..Nov. 14, 2001 Memo from Norton to McCaleb and Slonaker
[5] Federal Court filing: Declaration of Steven Griles

"consolidate/s Indian trust asset management functions in a single agency separate from the OST and BIA: the Bureau of Indian Trust Assets Management. Segregating these trust functions is intended, as in the private sector, to facilitate the development of performance measures, processes, controls, and systems that are designed to meet Interior's fiduciary obligations.

The Bureau of Indian Trust Assets Management will report to an Assistant Secretary for Indian Trust Assets Management. This new Assistant Secretary will have authority and responsibility for Indian trust asset management, The Special Trustee will continue to perform oversight for Interior's trust reform efforts. BIA, under the supervision of the Assistant Secretary - Indian Affairs, will continue to provide those services to Indian tribes and individuals that are not related to trust assets." (Griles court filing–DOI–11/14/01)

The Department of Interior goes on to say:

"The proposed reorganization impacts many interested parties. Interior has begun consultation with Indian tribes and with Congress. Appropriate notification to departmental employees and union representatives will occur on November 15, 2001. Also, candidates for the Assistant Secretary and the Bureau Director must be found. The Assistant Secretary must be nominated and confirmed.

Trust reform activities will continue during this transition process. The final organization structure will depend upon the results of the consultation process. Implementation will progress as soon as it becomes final. In the meantime, three key subprojects (TAAMS, BIA Data Cleanup, and Probate) will be supervised by Ms. Donna Erwin, previously Deputy Special Trustee for Trust Systems and Projects, under a newly created Office of Trust Transition in the Office of the Secretary. Planning for the transfer of the remaining subprojects is underway. Project resources needed in the short term are being identified and work with EDS to develop a business model is underway.

Meanwhile, OHTA (Office of Historical Trust), created by Secretarial Directive on July 10, 2001, has proceeded on its announced schedule with its task of planning, organizing, directing and executing the historical accounting of EM accounts. On September 10, 2001, OHTA issued a 'Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts,' which sets forth a description and timetable for completion of all steps necessary to staff and develop the plan for the historical accounting.

On November 7, 2001, OHTA issued its 'Report Identifying Preliminary Work for the Historical Accounting.' It identifies work that is underway and work that can begin immediately to constitute an historical accounting and pilot test possible methods and assumptions about how to conduct the historical accounting, among other tasks. In the, proposed reorganization, OHTA will be a line organization under the new Assistant Secretary."

On November 15th, 2001 the Department of Interior released a document entitled "Reorganization to Improve Indian Trust Asset Management".[6] This was the closest thing to a plan that they had at that point. In December 2001, the National Congress of American Indians passed a resolution in Spokane, Washington asking for consultation with Native America and also asking for the creation of a task force to study the proposed reorganization by an overwhelming unanimous vote.

On January 8th, 2002, Keith Beartusk, BIA Rocky Mountain Regional Director, sent an email that had a draft alternative proposal from the BIA Regional Director Reorganization Advisory Group. This document makes clear that the BIA will not be able to survive if all trust functions are taken away from it.[7]

Since mid–December, Secretary Norton and Assistant Secretary McCaleb have convened "consultation" meetings around the country and have heard overwhelming opposition from Tribal Nations and Tribal people to the creation of BITAM.

21OPPOSITION TO BITAM

First it is important to understand that we support trust management reform. But, not under these circumstances! Trust reform should be for the sake of Native America, not for the sake of Department of Interior Secretary Gayle Norton! On November 14th, 2001, Secretary Norton introduced to the Federal Court the concept

[6] Reorganization to Improve Indian Trust Asset Management

[7] 1–8–02 Keith Beartusk..includes: Draft memo 12–12–01 Version 6.1

of creating the Bureau of Indian Trust Asset Management. This was in response to a threat from the court to be held in contempt. The Department of Interior used as its excuse the Electronic Data Systems Corporation report of November 12th, 2001.

It is very clear as to the intent of Secretary Norton. Take all trust functions away from OST and BIA and create BITAM. Do it with little consultation from the tribes, BIA, OST, Congress or anyone else. And keep in mind that this is not for the sake of Indian Country. No, it is purely being done for her sake. And why is this being done? Has the Interior Department suddenly decided it was time to "fix" 150 years of mishandled Native American trust? No, it is in response to the Cobell court case. If Secretary Norton did not respond as she had, the Court may have taken this trust authority and placed it under a receivership. And of course there was still the contempt of court charge hanging over her head.

And by doing this, Secretary Norton is able to shift attention from the fact that TAAMS has been a scandalous nightmare for the BIA, having spent tens of millions of federal dollars on a system that does not work. They have misled the Court, Tribes, and Congress about the "success" of TAAMS knowing full well it does not do the job it was intended to do.[8]

And finally, by creating a new agency, there is also the possibility that the BIA could be completely gutted and have to compete with the new agency for valuable resources. It has also been proposed that all contracting and compacting functions be placed under BITAM. This may make the "638" contracting of Roads, Social Services, Education, Police, Courts, etc. very difficult as they would stay under the BIA.

Additionally Assistant Secretary Neal McCaleb said at the Spokane NCAI meeting that the DOI was going to transfer all trust functions from the BIA over to BITAM. He said that all "empowerment" programs like roads, welfare, law enforcement, etc. would stay with the BIA. This potentially could have a critical impact in years to come as these programs may be declassified as "trust" programs by the Federal government.But, in fact, all trust functions do not transfer over to BITAM. The Minerals Management Service, BLM, and other federal agencies within the Department of Interior remain intact and free to continue their mismanagement of Native American Trust while not being placed under BITAM.

And Secretary Norton has yet to provide Native America with a sufficient plan or "Trust operations business model". In contrast she has declared that the HLIP was obsolete, when in fact it has never been implemented to any sufficient degree.DOI has yet to prove that their computer nightmare, TAAMS and TFAS, can ever interface with a myriad of other DOI "Trust computer systems". The DOI has failed to adopt a "consistent information systems acquisition strategy", implement consistent technology frameworks, methods and tools, and "establish a trust program management center".

As a blunt matter of fact, all the DOI has done is to shuffle existing federal employees around, while bringing in ex-federal officials who were part of the problem to begin with. A far cry from executing a "comprehensive staffing pattern" as suggested by EDS.

SOLUTION

The Solution is simple and to the point. Keep in mind that the DOI is basing this reorganization and creation of BITAM on the EDS report, and the EDS report says:

- Immediately appoint a single, accountable Trust Reform Executive Sponsor;
- Develop an overarching trust operations business model;
- Adopt an overall business and computer systems architecture;
- Adopt a consistent information systems acquisition strategy;
- Implement consistent technology frameworks, methods, and tools;
- Establish a trust program management center; and
- Execute comprehensive staffing plans for all participating organizations.

BITAM cannot do this because it does not consolidate all trust activities under a "single trust reform executive sponsor". The intent of DOI Secretary Norton is to take all trust functions away from OST and BIA and create BITAM, thereby giving this new agency those functions, but the Secretary's plan does not transfer any authority from MMS, BLM nor any other agency of the DOI. This in itself falls far short of the EDS report.

The Great Plains Tribal Chairman's Association respectfully requests the United States Senate, through the Senate Committee on Indian Affairs, to consider the following recommendations for trust management reform:

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[8] See Nov. 14, 2001 EDS Interim Report and Roadmap for TAAMS and BIA Data Cleanup Page 31–33

- Consolidate all trust activities from within DOI such as OTFM, MMS, and others under the Bureau of Indian Affairs;
- Place all above activities under the existing Director of Trust or a like agency within the BIA;
- Allow tribes input into the architecture of the High Level Implementation Plan. (Trust Operations Business Model);
- Implement the High Level Implementation Plan under the newly consolidated trust management program under the Director of Trust in the BIA;
- Implement all other EDS recommendations as per the report;
- Amend the Indian Trust Reform Act to authorize the Office of the Special Trustee to act as a separate agency apart from the Department of Interior, with the responsibility of oversight over all trust activities within the BIA.
- Authorize the Office of Special Trustee the power to impose sanctions on any government agency or department that fails in it's responsibility for proper administration of Native American trust programs; and
- The Office of Special Trustee should report to Congress and Native America of all trust activities.

While the solution is simple and to the point, it allows the full EDS recommendations to be carried out. We see this as the simple, cost effective solution to trust fund reform. It keeps the BIA totally intact while strengthening the BIA's trust management capability. It allows for the creation of one centralized system under the BIA for Trust Fund Management. And it ensures that the BIA will be held accountable.

CONCLUSION

We also feel that the ultimate solution would be to create a Department of Indian Affairs. The above structure could be placed under this department. It is long overdue for Native American to have it's own cabinet level position. It is our hopes and prayers that your honorable Committee and honorable Senators will find the power and the will to convince the President to implement a plan to establish a Department of Indian Affairs.Until then, prompt passage of our recommendations would be appreciated.

We thank you for your time and consideration of this testimony.

Written by:
Gregg J. Bourland
Tribal Chairman, Cheyenne River Sioux Tribe

[A statement submitted for the record by the Hoopa Valley Tribe follows:]

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PLEASE REPLY TO THE
WASHINGTON, D.C. OFFICE

January 28, 2002

Mike Olsen, Director
Office of Native American and Insular Affairs
House Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515
Via facsimile - 202-225-7094

Re: February 6th House Resources Committee Hearing on Native American Trust Management

Dear Mr. Olsen:

It was my pleasure speaking with you last week on behalf of the Hoopa Valley Tribe about the witness list for the Committee's February 6, 2002, hearing on the Department of Interior's management of the Indian trust funds. As discussed, Chairman Lyle Marshall of the Hoopa Valley Tribe is interested in participating as a witness in this hearing.

We understand the time and resource limitations you have for this hearing and that it makes it difficult to accommodate all the Tribal Leaders that wish to testify. As discussed in our call, the Hoopa Tribe is a prime candidate to testify at this hearing because of its leadership role and work on a viable alternative for addressing trust management issues -- an alternative the Hoopas are working on with other California tribes and the Bureau of Indian Affairs (see attached). The plan the Hoopa Tribe supports is the quickest and most economical method for addressing the problem because it builds on existing systems within the Bureau of Indian Affairs instead of shifting the problems to a new agency which will require substantial time and money for start-up and operations.

We understand that Chairman Marshall will be at the top of the list to be a witness if a witness cancels or the Committee can open up the panels more. Thank you for your consideration. We hope to hear from you.

Very truly yours,

MORISSET, SCHLOSSER, AYER & JOZWIAK

Jennifer P. Hughes

Enclosure

cc: Chairman Lyle Marshall, Hoopa Valley Tribe
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Statement of the Hoopa Valley Tribe submitted for the record

SGPROP–03

TRIBAL SELF–GOVERNANCE TRUST REFORM PROPOSAL

BACKGROUND.

The origin of federal trust responsibilities to Indian tribes began when the United States began negotiating and entering into treaties and agreements with sovereign Indian nations. Those treaties and agreements accomplished a number of key goals, including: 1) allowing for the transfer of billions of dollars worth of assets, rights and territories to the United States, 2) providing provided for a number of guaranteed programs and services available to tribes in exchange for lands and rights ceded, and 3) providing for the preservation of inherent tribal self-governing powers. The Federal trust responsibilities to individual Indians began with the enactment of the General Allotment Act in 1887. Since then, many laws and court cases have further defined those responsibilities, including clarifying management standards and agreeing to pay liabilities when those standards are breached. It is this legal and political framework that mandates that tribes and the Federal Government will conduct their affairs in a government-to-government like fashion. Many federal officials do not seem to understand or possibly appreciate the fact that treaties and agreements are two party contracts, between tribes and the Federal Government. And today, now more than 2 centuries later, the Federal Government still struggles to define what these responsibilities really consist of.

When the U.S. Congress passed laws that authorized the sale, use or disposition of resources being held by the U.S. for the benefit of a tribe or individual Indians, they also imposed management responsibilities on the agency that carries out that function. For example, when the BIA forestry branch sells tribal or allotment timber, they must incorporate land management practices that will ensure that the tribe's or Indian's lands will remain productive. This requirement is what creates the federal forest management standards that apply to tribal and Indian lands. Similar standards have been developed for land leasing, grazing permits, water uses, roads, etc. Likewise, when a Federal agency is charged by law with the responsibility to "manage" tribal and Indian money accounts that were generated from the sale or use of resources, or from breach of trust lawsuits and the like, then the Federal Government is responsible for carrying out the prudent management requirements of those accounts. When applying standards to "trust responsibility", the courts have defined the United States' responsibilities as being similar to "how a prudent person would manage their own resources". Basically, this means that if the BIA or another agency, or their employees would not in their course of doing business destroy, diminish the value of or otherwise improperly use their own assets, then neither should they do so with tribal or individual Indian resources and funds that they are charged with overseeing.

Interior Secretary Norton recently announced a proposal to reform the manner in which the Department of the Interior manages trust assets that are being held for the benefit of individual Indians and Indian tribes. The Secretary's proposal includes the establishment of a new Assistant Secretary for Trust Assets Management and the transfer of all activities presently being managed by the BIA to this new bureau. Obviously, undertaking the process of developing a new bureau within any Federal agency will be expensive, time consuming, difficult to staff and "carving out'trust related functions from the existing BIA offices may prove to be a quite complex undertaking. Furthermore, the Self–Governance tribes believe that other options should also be considered that will accomplish the same level, if not more, of the intended objectives outlined for the trust reorganization proposal. Therefore, the Self–Governance Tribes offer the following approaches to addressing the Department's trust reform concerns:

BITAM—WHAT IS IT?—SCENARIOS A & B—APPENDIX 1.

In November, 2001, Secretary Norton proposed a plan to create a new Bureau of Indian Trust Asset Management (BITAM). The proposal is reported to be an effort to transfer all trust related functions presently being carried out by the BIA to the new BITAM agency. Since the announcement of the BITAM proposal, Tribal leaders have also been asked to comment of the plan, which is yet to be defined or explained with any level of detail. Without anything to analyze, input on the BITAM proposal seems fruitless. Therefore, in an effort to provide constructive analysis of the concept, Appendix 1 attached hereto contains Scenarios A and B of what BITAM could be. Each scenario also contains an impact analysis of the concepts outlined therein.

These scenarios also provide a baseline proposal from which alternatives can be analyzed.

INDIAN TRUST VS. COMMON TRUST.

Since development of the Trust Management Improvement Project, an issue at the heart of the trust reform effort has been how to establish a process that integrates both the common law principles of financial management with the unique and fundamental principles of Indian trust law. Within the arena of management of Indian affairs today, both common law and Indian trust law principles are critical and necessary parts of successful implementation of any trust reform plan. Under common law standards, courts have ruled that the U.S. must manage trust assets and financial accounts in a prudent manner as if an official were to be managing their own assets and accounts. This is an essential and fundamental part of the U.S." management of tribal and individual financial accounts. Obviously, the courts would hold the U.S. liable if they were to manage tribal and individual Indian accounts in a manner that is not consistent with banking industry standards. However, when dealing with the management of tribal and individual Indian trust asset management, the emphasis naturally must shift to employing the fundamental principles of Indian trust law.

Under Indian trust law principles, tribal and individual Indians must be an integral part of both setting standards and carrying out the management activities related to their trust assets. In fact, without such direct involvement, the legal and political framework of tribal self-government and the U.S/Tribal government-to-government relationship is rendered meaningless. It has been consistently upheld in case law and Congressional and Administration policy that one of the most fundamentally important inherent principles of tribal self-government is for tribes to be able to exercise authority to plan and administer activities related to their territorial jurisdiction, including being directly involved with the management of their trust assets. A similar inherent authority is retained by individual Indians that are the owners of trust assets that were acquired under the authority of the General Allotment Act.

Therefore, any trust reform effort of the U.S. must necessarily integrate the principles of both common law and Indian trust law if it is to be successful. Anything less will result in reversing more than 200 years of laws, policies and principles upon which the U.S./Tribal government-to-government relationship is based.

PART I

TRIBAL SELF–GOVERNANCE TRUST REFORM PROPOSAL

IMPROVEMENTS IN TRIBAL/FEDERAL RELATIONS AND TRUST ASSET MANAGEMENT UNDER SELF–GOVERNANCE AND SELF–DETERMINATION.

The Indian Self–Determination Act was inspired from tribal dissatisfaction of the Federal Government's management of Indian affairs. Following decades of Federal agencies disregarding tribal concerns and priorities regarding the management of their treaty-protected properties, resources, and other Indian programs, in 1974, Congress enacted the first Indian Self–Determination and Education Assistance Act. The Act was designed to establish legal contracting obligations on Federal agencies charged with carrying out Indian functions to contract with interested tribal governments and transfer those functions to tribes to carry out. The Act also allowed the Tribal Governments to plan, prioritize and administer many of the programs to which their members were the intended beneficiaries. Throughout the years, the provisions contained in the Act has been expanded and to where today, most Indian programs of the BIA and IHS are being carried out by tribes under Self–Governance compacts and 638 contracts. In effect, the Indian Self–Determination Act have been always been in the forefront of federal trust reform efforts and have been demonstrated to be possibly the most cost effective and efficient means for the Federal Government to carry out functions that benefit Indians.

Self–Governance and Self–Determination Acts has resulted in broad Tribal assumption of trust-related programs from the BIA under the Tribal for more than the last decade. One of the most fundamental basis for these efforts is to design an evolving process whereby the Tribes could continue to assume and carry out trust related activities with the greatest degree of flexibility at the reservation level while, at the same time, the Federal Government could effectively carry out its fiduciary trust obligations to tribes and individual Indians that are required under treaties, agreements, statutes and regulations.

Under Self–Governance and Self–Determination agreements, tribes have become integral parts of the federal system to fulfil the U.S." fiduciary and legal obligations to Indian Tribes. It is most unlikely that any federal trust reform efforts will ever be successful unless they fully incorporate the philosophies and ideals of the Tribes and individual Indians, the true intended beneficiaries of the Federal/Indian relationship. Anything less that full integration of Self–Governance and Self–Determination objectives in trust reform will simply not be consistent with the government-to-government relationship between Indian tribes and the U.S., upon which the trust responsibilities are based.

SELF–GOVERNANCE/FEDERAL AGENCY STRUCTURE.

An important part of the Self–Governance Act is the ability of tribes to negotiate with Federal agencies for the transfer of all non–Inherent Federal Functions to tribal agreements. This provision has served as a very useful means for tribes and Federal agencies to establish positive working relationships at both the reservation and agency levels. Under Self–Governance, many tribes have assumed broad trust and not-trust functions, which in turn has transferred most of the program administrative functions to tribal governments. In other cases, tribes have agreed to leave functions to be carried out by the agency. In all cases, Self–Governance has created a method for tribes and federal agencies to establish meaningful working relationships, including for activities involving trust resources and other programs, including the ability for tribes to negotiate to determine the administrative level that the agency will use to carry out various federally-retained functions.

A part of the Federal/Tribal working relationships include developing agreements on how trust transactions are processed, the types of supporting records that will be required to complete a trust transaction, how a trust activity will be monitored, and how annual trust evaluations will be carried out. Since Self–Governance was implemented in 1990, not a single unresolved trust problems within any trust programs assumed by a Self–Governance tribe has been identified. Further, the number of breach of trust complaints against the U.S. by Self–Governance tribes and those of individual Indians that associated with Self–Governance tribes has been significantly reduced since Self–Governance was initiated in 1990.

Therefore, the ability of Federal agencies and tribes to resolve longstanding trust management concerns has been significantly strengthened under the Tribal Self–Governance Act. In addition, even though tribes have assumed responsibilities for trust programs as a lower funding level that was even utilized by the BIA when they administered the trust program, Self–Governance has demonstrated the dedicated commitment of tribes to address difficult and complex trust issues by the Act's authority to consolidate, redesign and prioritize programs activities to address the needs and concerns of the true beneficiaries of the trust functions at the reservation level.

TRUST MANAGEMENT STANDARDS.

There can be no "one size fits all" approach to management of trust assets around the Country because each tribe may have a number of individual issues, concerns or trust obligations that must be address in carrying out trust transactions. For example, Douglas Fir timber may have one monetary value on one reservation because a tribe has a sawmill and will recover a higher return on sales after processing, while another tribe may not and seeks only the highest monetary return on the logs being sold. Another example may be that a tribe may allow the use of tribal lands for land leases to members for virtually no monetary return while still requiring nonmembers to pay fair market commercial value for a lease. Each of these trust transactions can create a federally-managed trust account which has a specific monetary return based on a tribally-defined "beneficial use" for each trust asset.

Under Self–Governance, the Tribe and BIA can develop agreements whereby the management standards for trust assets can accommodate both the requirements of 25 C.F.R. or other appropriate Federal statutes and regulations. As a result, each tribe, as beneficiary of the trust relationship can work with the BIA to develop trust management standards on a resource-by-resource basis that will also be used in approving trust transactions. In cases where tribal management standards have not been developed, a tribe and BIA utilize applicable federal standards for trust transactions. In the event of a potential conflict between tribal and federal trust management standards, the tribe and BIA meet to develop mutually-acceptable methods for resolving the conflict. In areas where ongoing statutory and regulatory concerns may be required, such as compliance with the Endangered Species Act and Clean Water Act, both Self–Governance tribes and the BIA work with other tribes to develop mutually-acceptable management standards that are applicable to each effected trust transaction.

TRUST RECORD KEEPING.

Under Self–Governance, tribes carry out many governmental functions in addition to those that are required for BIA trust transactions. Therefore, all records developed by a tribe that are not needed for BIA approval of a trust transaction are the property of the Tribe. However, all documents developed and submitted by the Tribe for BIA approval of a trust transaction become the property of the BIA and recorded on the title, as appropriate. Under Self–Governance, it is the responsibility of the BIA to ensure that all records necessary to approve and monitor a trust transaction are secured and maintained by the BIA. Under this arrangement, the Tribe is free to developed internal centralized files for BIA and non–BIA activities, while also providing the BIA with the necessary records to ensure its trust obligations to the tribe and individual Indians are carried out. Under Self–Governance, the responsibility to approve all trust transactions is maintained with the BIA, as required by the Self–Governance Act.

TRUST FINANCIAL ACCOUNTING.

Self–Governance tribes and the BIA continue to work cooperatively with the Office of Trust Funds Management (OTFM) in the financial accounting of all trust transactions, however, it is necessary for OTFM expand its activities to include program experts who will provide oversight in the programmatic accounting of all trust accounts. It will be the responsibility of OTFM to work with the BIA and appropriate Self–Governance tribes to ensure that all necessary documents are provided to assure the proper accountability of trust transactions.

There is a need for OTFM, the BIA and tribes to work out procedures to ensure that proper and efficient management or trust transactions and their resultant trust financial accounts are reconcilable. Self–Governance tribes believe this is best worked out during the typical negotiations between the Tribe and BIA. For example, if a tribe compacts an OTFM activity, then that tribe would be required to develop and maintain the required internal procedures and checks and balances that are required in its Self–Governance agreement. Monitoring of this requirement can be incorporated into the annual trust evaluation process that is required by the Self–Governance Act.

SUMMARY.

There are many reasons that led to the situation that the Federal Government finds itself in today in the Cobell litigation, many of which stem from the inherent problems that exist solely within the confines of its own infrastructure. Attempts to simply move the same or similar functions from one office to another, or from one agency to another, quite often do not achieve the intended results. Furthermore, no agency shuffling efforts result in creating one of the greatest tools necessary to guarantee success, which is establishing a vested interests in the activity to be performed. However, it is "tribal vested interest" that has been the fuel that has made Self–Governance both successful and effective in addressing longstanding problems that the Federal Government has experienced in managing Indian programs for over 200 years. Likewise, Tribal Self–Governance is the fuel that is necessary to make trust reform both successful and effective in the future.

PART II

SELF–GOVERNANCE TRUST REFORM IMPLEMENTATION AND ORGANIZATION PLAN

The following contains detailed proposals and organizational structures, as well as their supporting justifications, for implementing trust reform activities within the Department of the Interior.

FOUR COBELL BREACHES.

The Cobell Court has identified the following four breaches of the Courts Orders, as described by the BIA Regional Director: Reorganization Advisory Group (Memorandum of 12–12–01)

A. The Secretary has no written plan to gather missing data;
B. The Secretary has no written plan for the retention of IIM trust documents;
C. The secretary has no written architecture plan; and
D. The Secretary has no written plan addressing the staffing of trust functions.

INTERIOR AGENCIES INVOLVED IN TRUST REFORM AND THEIR PURPOSE.

The following are brief descriptions of Interior agencies that are involved in trust reform and their purposes:

1. Office of Special Trustee. The Office of Special Trustee (OST) was established under Title III of P.L. 103–412, the American Indian Trust Fund Management Reform Act of 1984. Under Section 302 (c) of the Act, OST is designed as a temporary agency that is to be phased out after the components of trust reform are developed and implemented. Under the Act, OST is to provide oversight and coordination of trust reform activities which are being carried out by the Bureau of Indian Affairs, Bureau of Land Management and Mineral Management Services.

2. Bureau of Indian Affairs. The BIA is one of the primary agencies of the Federal Government that is empowered to specifically carry out the U.S." trust obligations to Indian tribes and individual Indians, which includes those associated with both trust resources and other legal obligations. The BIA, through Regional, Agency and Sub–Agency offices work with Indian tribes and individual Indians to implement the U.S. obligations that are protected by treaties, Executive orders and federal statutes.

3. Office of Self–Governance. The Office of Self–Governance is charged with implementation of the Tribal Self–Governance Act, P.L.103–413, the Tribal Self–Governance Act, as amended. The OSG typically functions in an oversight role ov er Tribal/Federal Self–Governance negotiations and is responsible for implemented Self–Governance agreements once the are completed.

AUTHORITY OF P.L. 103–412 TO RESTRUCTURE THE BIA.

Questions have arisen about whether implementation of federal trust reform measures require the creation of a new trust agency within the Federal Government. This Implementation and Organization Plan is based in part on provisions contained in P.L. 103–412 that specifically provides that improvements are to be made in the systems of the Bureau of Indian Affairs and other Interior agencies. Relevant parts of the Act relating to improvements in the BIA trust-related systems are as follows:

Sec. 202(a)—...held in trust by the United States and managed by the Secretary through the Bureau [of Indian Affairs].

Sec. 202(b)—...the Director of Office of Trust Funds Management within the Bureau [of Indian Affairs].

Sec.301(2)—...and that reforms of policies, practices, procedures and systems of the Bureau [of Indian Affairs]...

Sec.303(a)(2)(A)—Identification of all reform to the policies, procedures, practices, and systems of the Department, the Bureau [of Indian Affairs]...

Sec. 303(b)(1)—The Special Trustee shall oversee all reform efforts within the Bureau [of Indian Affairs]...

Sec. 303(b)(2)(A)—...trust accounts to ensure that the Bureau [of Indian Affairs]...

Sec. 303(b)(2)(B)—The Special Trustee shall ensure that the Bureau [of Indian Affairs]...

Sec. 303(b)(2)(C)—The Special Trustee shall ensure that the Bureau [of Indian Affairs]...

Sec. 303 (c)(1)(A)—...the policies, procedures, practices, and systems of the Bureau [of Indian Affairs]...

Sec. 303 (c)(2)—The Special Trustee shall ensure that the Bureau [of Indian Affairs]...

Sec. 303 (c)(3)—...and that they are adequate to support the trust funds investment needs of the Bureau [of Indian Affairs].

Sec. 303 (c)(4)(A)—...the land records system of the Bureau [of Indian Affairs]...

Sec. 303 (c)(4)(B)—...interface with the appropriate asset management and accounting systems of the Bureau [of Indian Affairs]...

Sec. 303 (c)(4)(B)(i)—...and disburse to the Bureau [of Indian Affairs]...

Sec. 303 (c)(4)(B)(ii)—...the Bureau of Land Management and the Bureau [of Indian Affairs]...

Sec. 303 (c)(5)(A)—...with the advice of program managers of each office within the Bureau of Indian Affairs...

Sec. 303 (d)—...and in implementing reforms to Department, Bureau [of Indian Affairs]...

Sec. 303 (f)—...each year on the progress of the Department, Bureau [of Indian Affairs]...

ORGANIZATIONAL STRUCTURE.

Attached is a proposed organizational structure to implement trust reform within the BIA and other Interior Agencies that is based on the legal framework outlined in P.L. 103–412. The trust reform functional components of the organization are briefly outlined as follows:

Chart—Bureau of Indian Affairs—Office Organization.

Office of Special Trustee. The Office of Special Trustee is provided oversight capability, which is to be phased out once trust reform is successfully completed. In addition, responsibility for oversight of implementation of the the Cobell Court's four breaches has been assigned to OST.

Assistant Secretary–Indian Affairs/Central Office. The Assistant Secretary–Indian Affairs is also assigned responsibility of implementing the Cobell Court's four breaches. A Division of Trust Accounting (see separate chart) is incorporated as a subordinate office of the Assistant Secretary–Indian Affairs so that direct oversight and control can be assured over this new Division.

Regional/Agency Offices. Within each Regional Office, a new Deputy Director of Trust management is established whose responsibilities include implementation of trust reform at the Regional, Agency and Sub–Agency levels, as well as responsibility to implement the four Cobell Court breaches. As has been carried out by the Pacific Regional Office for decades, the Regional Office Appraisal functions are under the direct control and oversight of the Deputy Director of Trust Management. This structure will ensure that the integrity of the Appraisal Office is maintained by segregating their functions from those of Real Estate Services. Also as contemplated in P.L. 103–412, the Division of Trust Accounting (possibly a Regional Office counterpart to OTFM) is made part of the responsibilities of the Deputy Director of Trust Management. This structure will ensure that proper and timely accounting and reconciliation of trust functions and trust accounts takes is maintained.

Another important part of the proposed organizational structure if the ability to coordinate, through the Regional Director, the functions of both the Deputy Director of Indian Programs with those of the Deputy Director of Trust Management. The objective of this structure is to streamline the administrative functions of both offices so that important BIA services, such as economic development and road maintenance and construction, each of which must necessarily be coordinated to be successful, has the greatest opportunity of providing the intended benefits to Indian Country.

SINGLE ADMINISTRATIVE OFFICIAL RESPONSIBLE FOR TRUST REFORM.

In their critique of trust reform, EDS stated that significant problems have been encountered in both developing the trust reform measures and implementing them because there has not been a single authority charged with trust reform improvements. While this has been a problem within the BIA for years, it has been compounded with the creation of the Office of Special Trustee under P.L. 103–412 in 1994. Since then, trust management has in effect been divided between two separate agencies. This Self–Governance proposal addresses this problems, consistent with the provisions of P.L. 103–412 by establishing a clear line of authority from the Secretary of the Interior, through the Assistant Secretary of Indian Affairs, the BIA Regional Directors and to the Deputy Regional Director for Trust Management. The Deputy Regional Director for Trust management is directly responsible for the actions of all Regional, Agency and Subagency personnel. Under this streamlined structure, an understandable process is established whereby each progressive line of authority can monitor and evaluate the actions of their subordinate official (See attached organizational charts).

MECHANISM TO ESTABLISH TRUST VALUATION STANDARDS.

Important events always lead up to the filing of breach of trust cases against the U.S. by Indian tribes and individual Indians. Also, systems such as TAAMS and federal trust record keeping systems are less useful if they do not also contain information that helps all parties concerned to understand the reasons why various components were included, or not included in a specific trust transaction. Again, many of these "unknowns" can result in a breach of trust claim against the U.S.

To address this situation, the Department of the Interior, through the BIA Regional Office structure, should develop a plan to work with tribes and individuals to establish formal management standards for each trust asset and money account. This process would entail conducting an inventory of all trust assets and accounts that would need to be managed under these standards. Each BIA Regional office would be charged with the responsibility to work with each tribe and individual Indian owner to establish formal management standards for those resources and assets.

For areas where the BIA and Tribe/individual Indian do not develop formal management standards, the BIA shall only process a trust transaction under the control of an "Informed Decision Process" (IDP. The IDP would consist of a checklist of required questions that must be affirmatively answered before the BIA can proceed with completing a trust transaction. The questions would include such things as,

was the owner informed of the resource value, does the owner agree with the values included in the trust transaction and were any difference explained, were they provided copies of support documentation (appraisals, timber cruises, gas and oil estimates, market values, etc). The IDP documentation will be made part of the BIA decision making process for the trust transaction.

Timefames and funding will be provided to the BIA and tribes/individual Indians to complete this process.

RECONCILIATION OF TRUST ACCOUNTS.

Questions continue to be raised regarding how the U.S. will reconcile the trust accounts held by the Federal Government with the trust transaction that crated the account, then ultimately reach agreement with the tribe or individual owner(s) of the account.

To address this, the Department of the Interior should sponsor legislation that would allow an individual tribe or Indian account holder to select an option for conducting an accounting. These options could include:

a. A transaction-by-transaction accounting;
b. A random accounting of selected accounts; or
c. A process for selecting existing accounting information.

Each option have specific timeframes and costs assigned. Under the accounting process, the BIA and tribe/individual Indian could negotiate how the accounting process would be completed, including the option for tribes to contract/compact that function.

Once the accounting is completed, either the Federal Government or tribe/individual Indian could contest the accounting results in a forum established for that purpose.

PROS AND CONS OF PROPOSAL.

Pros:

- More timely and less expensive to implement
- Has broad support among Tribal and the BIA
- Doesn't require federal employee union or GSA involvement to implement
- Is consistent with both the Trust Reform Act and Tribal Self–Governance/Self–Determination
- Facilitates resolution of potential conflicts between Tribal and Federal trust asset management standards which led to Cobell and other breach of trust cases
- Responds to the Cobell Court issues in a timely manner
- Does not require a second restructuring plan for BIA retained function that would follow BITAM implementation
- Integrates Tribal and BIA directly into Federal trust reform efforts

Cons:

- Does not address perceptions that BIA cannot do the job
- Requires legislation to implement Cobell related reconciliation issues
- Will require re-integration of OST functions back into BIA structure
- Reconciliation process would require added work to resolve Federal/Tribal/individual Indian reconciliation related issues

APPENDIX NO. 1

BITAM—WHAT IS IT?—SCENARIOS A & B..

In November, 2001, Secretary Norton proposed a plan to create a new Bureau of Indian Trust Asset Management (BITAM). The proposal is reported to be an effort to transfer all trust related functions presently being carried out by the BIA to the new BITAM agency. Since the announcement of the BITAM proposal, Tribal leaders have also been asked to comment of the plan, which is yet to be defined or explained with any level of detail. Without anything to analyze, input on the BITAM proposal seems fruitless. Therefore, in an effort to provide constructive analysis of the concept, Appendix 1 attached hereto contains Scenarios A and B of what BITAM could be. Each scenario also contains an impact analysis of the concepts outlined therein. These scenarios also provide a baseline proposal from which alternatives can be analyzed

BITAM ORGANIZATION—SCENARIO A

Assumption.

A. That the BIA consists of approximately 50% trust asset related activities and 50% other programs.

B. That all trust-related staff of the BIA personnel of the Central, Regional, Agency, and Field Offices will be physically relocated and reassigned to BITAM.
C. That there will be established a comparable (mirror) structure under BITAM as existed under the BIA.

Implementation Impacts.

1. Employee related impacts- Existing BIA trust related employees would need to be offered a job at the BITAM office at a different location. For employees who choose not be relocate, there would have to be severance pay provided. For each BIA employee who did not relocate, a new employee would have to be hired and trained. This scenario would entail working with the federal employee union and effected employees to implement. All administrative manuals of the BIA would need to be revised.
2. Facilities and equipment impacts: Before the BITAM could be implemented, the General Services Administration would need to negotiate and enter into a facilities agreement for the Agency. At least 2 options could be involved, including:
   a. Establishing BITAM offices in each pervious BIA location. This concept would entail "duplicating" the BIA offices and staff in each of the separate Central, Regional, Agency and Subagency locations. In addition to office space negotiations and agreement, this concept would require that office equipment and other support functions also be relocated and/or purchased.. Also, there would be a need to remove all trust related files, records and manuals from the BIA to be relocated to the new BITAM offices; or
   b. Consolidate BITAM offices in locations different from the BIA offices. This concept would probably require all of the activities identified in "a" above, but would also require significant additional consultation with tribes and BIA employees regarding where and how to select the locations for the new BITAM consolidated offices.

Implementation Timeframes Impacts.

Scenario A will likely take the longest amount of time and will be the most costly to implement. This scenario will likely take more that a year, even under the best of circumstances, to implement (assuming that tribes and the Congress give up their objections to BITAM). Given the pressures of the Cobell Court for Secretary Norton and Assistant Secretary McCaleb to get something done, this scenario will not meet the needs of DOI.

BITAM ORGANIZATION—SCENARIO B

Assumption.

1. That the BIA consists of approximately 50% trust asset related activities and 50% other Indian programs.
2. That all trust-related staff of the BIA personnel of the Central, Regional, Agency, and Field Offices will be retained in the existing BIA offices but reassigned to BITAM.
3. That there will be established a comparable (mirror) structure under BITAM as existed under the BIA.

Implementation Impacts.

A. Employee related impacts- Existing BIA trust related employees would need to be offered a job in the BITAM offices. For employees who choose not be reassigned, there would have to be severance pay provided. For each BIA employee who did not agree to be reassigned, a new employee would have to be hired and trained. This scenario would entail working with the federal employee union and effected employees to implement. Additionally, it is conceivable that each of the Central, Regional, Agency and Subagency offices will need to hire separate BITAM department heads, regional directors, agency superintendents and subagency directors in order to effect a "separation" of BIA functions from those of BITAM. One must assume that this action must be undertaken in each of the 12 Regional, 58 Agency, 1 Subagency, 28 Field Station and 3 Irrigation Project Offices, which would probably require around 125 new federal positions.
b. Facilities and equipment impacts: Under Scenario B, it is assumed that the same BIA offices will be utilized for BITAM, however, it is probable that some equipment that is presently being shared within BIA offices will have to be replaced in order to physically separate the different agency functions. All existing administrative manuals of the BIA would need to be revised to separate

the trust-related functions from the BIA. Supervision of BIA vs. BITAM personnel would be interesting because "co-mingled staff" would be working for completely different agencies. At least conceptually, there may have to be "green" doors and lines on the floor for BITAM personnel and "red" door and lines on the floor for other Indian program staff. Also, there would be a need to move all trust related files, records and manuals from the BIA to the new BITAM offices.

Implementation Timeframes Impacts.

Scenario B will be easier to implement that Scenario A, but is still required hiring a significant number of new BITAM and other support needs. Because of the increased implementation costs, it is unlikely that this concept can be implemented in less than a year. In both Scenarios A and B, the most limiting factor that will negatively impact the implementation schedule will be finding personnel who are familiar with Indian trust and related requirements. The difficulties in implementing Scenario B is also likely to strain the patience of the Cobell Court.

[A letter submitted for the record by the Mille Lacs Band of Ojibwe follows:]

Melanie Benjamin

Office of the Chief Executive

February 4, 2002

The Honorable Betty McCollum
United States House of Representatives
1028 Longworth House Office Building
Washington, DC 20515

Dear Representative McCollum:

Thank you for your recent letter. I commend the Committee on Resources for planning a hearing February 6 on the important topic of Bureau of Indian Affairs (BIA) trust reform and the reorganization of the Department of the Interior (DOI). As you know, tribes were not consulted about the DOI's plan to create a new agency to manage trust assets, and many tribes are concerned that the plan was not well thought out.

It was my honor to have been recently appointed to the Tribal Task Force on BIA Trust Management Reform. As one of two representatives of the Midwest Region, I take this responsibility very seriously. This is a critical time in the history of federal Indian policy, and reorganization of the DOI is of paramount importance to all Indian tribes in the country.

I appreciate you inquiring if I have any questions for the February 6 hearing. Here are several questions you may wish to ask the DOI representatives. Written answers to these questions would also be welcome.

1. The mismanagement of tribal assets is without parallel in American history. Is there any way you can think of to make Indian tribes and individual Indian people whole with regard to their losses?
2. Prior to any settlement that may or may not be negotiated, are you committed to a full disclosure of the extent of BIA mismanagement of the trust assets?
3. Without such a full disclosure and acknowledgement of the scope of the problem, how can you expect any proposed solution to work? And without a full disclosure, how can you expect Indian tribes to trust the federal government?
4. Are you committed to cleaning up the backlog of incorrect and missing data about trust assets, and doing so in cooperation with tribes?
5. Are you willing to appropriate money to tribes, rather than the BIA, so tribes can go through the backlog, as this seems like the most cost-effective solution?

Mille Lacs Band of Ojibwe

45408 Oodena Dr.

Onamia, MN

56359

6. What immediate improvements do you think are needed in the DOI to properly manage tribal trust assets?

7. Under the Self-Determination Act and the Self-Governance Act, many trust assets are managed by the tribes themselves. In your view, will this continue? What will the role of tribes be in managing trust assets in the future?

8. In the past, there have been tribal task forces on reorganization of the BIA. Their work collects dust on the shelves of the Department of the Interior. Will the new Tribal Task Force on BIA Trust Management Reform be a true partner to the DOI, or will it merely be expected to rubber stamp a federal plan?

9. If the Tribal Task Force develops its own proposal for BIA reorganization and/or trust asset management, will the DOI give it serious consideration?

Representative McCollum, thank you again for seeking the Mille Lacs Band's input on this vital matter, and for your service to all of Minnesota's citizens.

Best wishes on the upcoming election,

Melanie Benjamin

Melanie Benjamin
Chief Executive
Mille Lacs Band of Ojibwe

cc: Midwest Region members of the Tribal Task Force on BIA Trust Management Reform

[A resolution submitted for the record by the Montana Wyoming Tribal Council Leaders follows:]

Montana Wyoming Tribal Leaders Council
207 No. Broadway, Suite BR-2, Billings, MT 59101-1951 Ph: (406) 252-2550 Fax (406) 254-6355
WWW http://tlc.wtp.net Email: bplegart@wtp.net

No. MT/WY-TLC2002-01

RESOLUTION OF MONTANA WYOMING TRIBAL LEADERS COUNCIL TO THE SECRETARY OF INTERIOR GALE NORTON AND DEPUTY SECRETARY NEAL McCALEB.

WHEREAS, the United States has substantial trust responsibilities to each of the Tribes in Montana and Wyoming; and

WHEREAS, the United States Department of Interior is conducting a series of meetings across the country regarding trust reform issues; and

WHEREAS, Tribal governments have been receiving information from regional offices and others involved in the trust reform process that has been conflicting and unclear;

NOW, THEREFORE BE IT RESOLVED that the Montana - Wyoming Tribal Leaders' Council urges the U.S. Secretary of Interior to proceed with respect to trust reform issues on the following principles:

1. All services provided by the United States are provided pursuant to the United States' trust responsibility to Tribes. The Tribes oppose the separation of BIA services from trust asset management if it will result in a diminution of the trust responsibility and seek clarification on this issue.

2. Communications regarding trust reform should be made directly with elected leaders of Tribes and should originate from the Secretary of Interior or her office and not from regional BIA offices or other staff.

3. The Secretary of Interior should consider the BI-TAM proposal made by the Interior to be only one potential alternative in the development of a final trust reform plan.

4. The Secretary of Interior should as soon as possible clarify for Tribes the proposed roles and responsibilities of the proposed "task force" or "advisory committee."

5. Trust reform being proposed by the Secretary of Interior should proceed separately with respect to Individual Indian Monies accounts, which represent only a small percentage of trust property, and Tribally-owned trust assets, which represent the overwhelming majority of trust property.

6. The Secretary of the Interior should make available for review and consideration by the "task force" all studies, reports, and other information regarding prior re-organization or reformation of the Department of Interior affecting Tribes including, without limitation, the 1994 re-organization report, 1977 American Indian Policy Review Commission Final Report, and the HLIP [Higher Level Implementation Plan.

7. The Montana - Wyoming Tribal Leaders' Council nominates the following individuals to serve on the "advisory committee" on a conditional basis:

   A. Member – Alvin Windy Boy, Sr., Chippewa Cree
   B. Member – Ivan Posey, Eastern Shoshone
   C. Alternate member – Geri Small, Northern Cheyenne

8. Nothing in this resolution shall be used by the Secretary of the Interior to limit or diminish the United States' trust responsibility to the Tribes and Tribal members.

CERTIFICATION

The undersigned hereby certifies that the Montana - Wyoming Tribal Leader's Council is composed of ten Tribes, that eight (8) Tribes were present, said number constituting a quorum, at a duly called meeting held the 10th day of January, 2002, in Rapid City South Dakota, and that the foregoing resolution was duly approved at such meeting in person and by teleconference, by a vote of eight (8) in Favor and zero (0) Opposed and two (2) not present. Done this Tenth (10th) day of January 2002.

Jonathan Windy Boy, Chairman
Montana-Wyoming Tribal Leaders' Council

[A statement submitted for the record by the Nez Perce Tribe follows:]

Position of the Nez Perce Tribe Opposing Transfer of Trust Asset Management Responsibilities to the "Bureau of Indian Trust Asset Management" in the Absence of Tribal Consultation and a Comprehensive Reorganization Plan

The Nez Perce Tribe has serious concerns with the decision of the Department of the Interior to create a new federal agency, the Bureau of Indian Trust Assets Management (BITAM), and remove certain trust responsibilities from the Bureau of Indian Affairs (BIA). To strip the BIA of its core trust responsibilities and transfer them to an entirely new agency casts into doubt over 100 years of well-established Tribal-federal policy.

Beginning with the passage of the Indian Self–Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and subsequent legislation, the United States government has repeatedly recognized the need to work closely with Tribes on a government-to-government basis and to support tribal self-determination and self-governance. In 1968, President Lyndon B. Johnson stated that "Indian must have a voice in making the plans and decisions in programs important to their daily lives," so that the relationship between Tribes and the federal government would be one of the "full partnership—not dependency." Two years later, President Richard Nixon reaffirmed this policy stating that "the time has come . . . for a new era in which the Indian future is determined by Indian acts and Indian decisions. After similar statements from Presidents Regan and Bush, this process culminated with Executive Order 13175 which required all federal agencies to consult with Tribes prior to formulating and implementing policies or other actions which may have a substantial affect on a Tribe or tribal resources. In a letter sent to the Nez Perce Tribe in August 2000, then–Governor George W. Bush recognized and reaffirmed the unique government-to-government relationship that exists between our two sovereign nations and promised to work with Tribes to strengthen the federal trust relationship.

Despite these mandates and promises, and in violation of the consultation Executive Order, Secretary Norton released a decision to reorganize the BIA without prior consultation between the Department of the Interior and Indian Tribes. The failure of the Department to consult with Tribes prior to announcing this decision represents a complete abdication of the federal trust responsibility and a refusal to abide by the unique government-to-government relationship that exists between Tribes and the federal government. As the primary agency dealing with Tribes on a daily basis, any BIA reorganization plan will immediately impact Tribes. Considering that the proposed reorganization will remove a core group of BIA's trust responsibilities, the need for early, meaningful consultation could not be greater. For Tribes to find out about this reorganization through the Washington Post is simply unacceptable. Moreover, the decision to reorganize was made without input from BIA regional management, further undermining the reorganization proposal. Consultation is not a process you endure before moving forward with predetermined plans.

The proposed reorganization will not, in itself, solve the numerous problems of trust reform. The proposal, as outlined to date, is vague and incomplete, and raises more questions than answers as to the future of trust reform and the tribal-federal relationship. These are complex problems which require well-reasoned thoughtful plans. Absent consultation with affected parties, the proposed action by the Department will fail to resolve the problems with Individual Indian Money (IIM) accounts.

The Nez Perce Tribe, nearly two months after the decision to reorganize the BIA was announced without regard to the dramatic impact the reorganization would have on trust asset management and the entire trust relationship itself, has neither received any detailed substantive information about the proposed reorganization, nor any guarantees that, like the BIA, the BITAM will honor the government-to-government relationship, Indian preference, or other fundamental principles of Indian self-determination. In order to obtain additional information, the Nez Perce Tribe recently filed a Freedom of Information Act request with the Office of the Secretary and the BIA to obtain any documents describing the process and procedure for trust reform and BIA reorganization. The Nez Perce Tribe strongly believes that the reorganization effort cannot go forward until all Tribes have participated in meaningful consultation to develop a comprehensive plan for trust reform, including clear policies, procedures, and controls.

It is widely known that the BIA has grossly mismanaged tribal trust assets since the inception of the Bureau. It is clear that the Secretary of the Interior is faced

with a mandate from Congress, dating back to the 1994 Indian Trust Reform Act, to clean up the accounting and management systems of Indian trust accounts. It is also clear from the Cobell v. Norton litigation that the Secretary has failed to meet the mandates that Congress established for her. In fact, the report contracted for by DOI from EDS which serves as the basis for the trust reform proposal freely admits these failures. Without a doubt, a comprehensive, sweeping response is needed; however, the proposed reorganization of the BIA is not the answer.

The proposed reorganization of the BIA will profoundly effect the BIA's management of 54 million acres of Indian lands, the administration of trust funds derived from those lands, and nearly every aspect of economic development and land management within Indian Country. The Nez Perce Tribe is greatly concerned this proposal is simply repeating the failures of many past trust reform efforts by providing a short-term cosmetic fix to a much more serious problem. Trust reform must not come as a response to court imposed deadlines or Congressional inquiries. Trust reform must be based on a long-term, well-reasoned plan, complete with comprehensive policies, procedures, and guidelines which will truly reform the trust management system. Without this type of proposal, the scheduled consultation meetings are no more than initial scoping meeting which does not and cannot qualify as meaningful consultation. A good faith effort must be made to include Tribes and IIM account holders in the reform effort.

Creating a new agency does not create trust reform. The proposal to create the BITAM would strip a majority of the BIA's trust responsibilities, leaving the Bureau to function as a social service agency. The responsibility for billions of dollars of trust assets would be handed over to a new office, with no congressional authorization, no appropriations, and at present, no support from Tribes. The same understaffed and undertrained employees will not be able do for BITAM what they could not do for the BIA. Moreover, a proposal to artificially divide "trust" from "services" is simply unworkable. While it is often criticized, the BIA is only voice for Indian issues in the Executive Branch, and is critical to the functioning of our government-to-government relationship. Stripping the BIA of trust responsibilities would de-emphasize the importance of these relationships.

The proposal is also too broad and unmanageable. The reorganization plan goes far beyond the situation in Cobell where solely Individual Indian Money accounts are involved. The proposed formation of BITAM goes decidedly beyond the management of funds at issue in the trust fund litigation to reach all trust assets, including those belonging solely to tribal governments. If the BIA cannot properly manage the accounts that were under their control, what makes the Secretary believe that the BITAM can take on an even greater responsibility—one that should rest with the Tribes that control those resources. Trust reform must focus solely on the four trust breaches identified by the Cobell court.

Over the past twelve years, the Department of the Interior has paid more than a billion dollars on judgments and settlements for its repeated failures to protect and properly manage trust assets. The costs of continued failure will far outweigh the costs of finally fixing the system. Trust reform must cease to be reactive. Therefore, the Nez Perce Tribe also opposes any reprogramming of monies within the fiscal year 2002 BIA budget to fund the proposed BITAM until Congress and Tribes have had an opportunity to review the final trust reform proposal. Funneling monies will not provide accountability and will only threaten those programs which remain under BIA oversight.

The future of trust management must include increased protection and tribal control over Indian lands and resources, and a federal system that provides technical assistance and trust oversight—not additional federal bureaucracy. This system, driven by self-determination rather than a paternalistic regime, must meet the unique needs of individual Tribes in each part of the country. The role of the federal government as trustee is to protect the long tern viability of tribal lands and resources and to ensure that any action is consistent with tribal control and tribal needs. The current BIA reorganization plan encompasses none of these goals.

The Nez Perce Tribe is not opposed to trust reform. In fact, the Tribe strongly supports the need to make major changes to the trust asset management system. However, Secretary Norton's plan is not the answer. Therefore, the Nez Perce Tribe urges the Department of the Interior to withdraw the proposed reorganization plan until full meaningful consultation has occurred with Tribes and urges Secretary Norton to redefine the goals of trust reform to better meet the needs of Tribes and Indian people without sacrificing the federal trust relationship.

[A position statement submitted for the record by the Tribal Chairmen follows:]

TRIBAL CHAIRMANS'

POSITION STATEMENT ON THE

PROPOSED REORGANIZATION OF THE DEPARTMENT'S TRUST RESPONSIBILITY FUNCTIONS

PRESENTED TO:

HONORABLE GALE NORTON
SECRETARY OF THE INTERIOR
U.S. DEPARTMENT OF THE INTERIOR

TRIBAL CONSULTATION ON INDIAN TRUST ASSET MANAGEMENT
MINNEAPOLIS, MINNESOTA
DECEMBER 20, 2001

The undersigned Tribal Chairman are opposed to the proposed reorganization of the Bureau of Indian Affairs and the creation of the Bureau of Indian Trust Asset Management. We oppose any reorganization of trust resource or trust asset management functions without full tribal consultation and participation based on our government-to-government relationship with the United States.

As you know from the Albuquerque, New Mexico consultation, the accelerated attempt to reorganize the Bureau of Indian Affairs and create a new Assistant Secretary for the Bureau of Indian Trust Asset Management to undertake the trust-related functions of the BIA and non-oversight functions of the Office of the Special Trustee for American Indians is not acceptable to tribes. This is particularly true in the Rocky Mountain Region where there are seven (7) federally recognized tribes that compose a land base of approximately eleven million (11,000,000) acres held in trust by the federal government. This land base being approximately one-fifth (1/5) of the fifty-four million (54,000,000) acres of trust lands in the United States.

The undersigned Tribal Chairman respectfully remind you of the United States' commitment to consultation with Indian tribes contained in Executive Order No. 13175 titled "Consultation and Coordination with Indian Tribal Governments." The Executive Order requires federal agencies to consult with Indian tribes on federal policies which have tribal implications. Our Tribes strongly feel the proposed reorganization plan clearly constitutes "actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." In addition, the "Bureau of Indian

Affairs Government-to-Government Consultation Policy" sets forth the guidelines for consultation between the BIA and Indian tribes.

We believe the November 15, 2001 news release regarding the structural changes to the BIA was completely contrary to the process outlined in the consultation policy. At a minimum, the consultation policy requires the BIA to conduct: 1) pre-decisional scoping; 2) development of the Bureau proposal; and 3) implementation of final federal action. Madame Secretary, rather than risk the accusations of repudiating the federal policy of government-to-government consultation, we request the Department of the Interior to immediately halt any further development and/or implementation of the proposed plan and allow the Tribes to form a Tribal Task Force similar to the previous Joint Tribal/BIA/DOI Advisory Task Force on Reorganization of the Bureau of Indian Affairs formed in 1990.

In 1990, the BIA Reorganization Task Force held extensive consultation sessions in Indian Country. This is the standard set by previous administrations particularly when an extensive reorganization is proposed. The makeup of the Task Force comprised of 36 tribal leaders (3 representatives from each Region) who were nominated by the tribes and appointed by the Secretary. The undersigned Tribal Chairman strongly urge you to consider a similar structure in terms of the makeup of this task force. The rationale behind using three (3) tribal representatives from each region is that tribes access BIA delivery of services either by direct services, 638 contracts or Self-Governance compacts. Having three (3) tribal representatives from each region allows for representation of this spectrum of BIA delivery of services in each region. We firmly believe that we have a lot at stake with trust reform since the tribes within our region hold substantial trust acreage and trust assets. As such, we stand ready to assist

on a government-to-government basis with the trust reform efforts of the Department.

RECOMMENDATIONS:

1. Trust reform efforts of the Department must be based on our government-to-government relationship with the United States with tribal governments participating on a equal level with the federal government;

2. Trust reform must be tribally-driven in order to be effective, as such, the task force must be comprised of tribal leaders from each region;

3. The task force must be comprised of three (3) tribal leaders from each regional area with the tribes selecting the tribal representatives within their respective regions, one of which represents each of the three (3) methods of BIA service delivery;

4. By January 15, 2001, the Department of the Interior provide to the undersigned Tribal Chairman its' proposed plan and all related planning documents; and

5. Secretary Norton be present at the Rocky Mountain Regional Consultation to properly effectuate our government-to-government relationship with the consultation to be held in Billings, Montana as soon as possible.

Dated December 21, 2001 and signed by:

Alvin Windy Boy, Sr., Chairman
Chippewa Cree Tribe

D. Fred Matt, Chairman
Confederated Salish and Kootenai Tribes

Ben Speaks Thunder, President
Ft. Belknap Community Council

Anthony Addison,Sr.,Chairman
Northern Arapaho Business Council

TRUST REFORM COMMENTS AND RECOMMENDATIONS BY THE CHIPPEWA CREE TRIBE

PRESENTED BY

ALVIN WINDY BOY, SR., CHAIRMAN

ON BEHALF OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION

TRIBAL CONSULTATION ON INDIAN TRUST ASSET MANAGEMENT

FEBRUARY 1, 2002

WASHINGTON, D.C.

I. INTRODUCTION

Trust reform is nothing new for Indian Country. This is particularly true for Self–Governance tribes since our efforts began with our frustration of the BIA's mismanagement with carrying out Bureau programs on our respective reservations. The Chippewa Cree Tribe supports trust reform, however tribes need to play a substantial part in defining, developing and delivering any meaningful attempt at trust reform within the Bureau of Indian Affairs (BIA).

We believe the first thing we need to do is not buy into this "divide and conquer" mentality of the current administration. We need to strategize with our friends in Congress to slow this "court-driven" trust reform effort by the current administration and strategize with our legal people so that the Cobell litigation cannot be used by the Department as this driving force for their trust reform efforts. In order to do this we need to operate on parallel tracks and continue with the trust reform efforts which are currently incomplete:

1. CONGRESSIONAL INTERVENTION
   1. House Resource Hearing (2/6/02)
   2. Senate Indian Affairs Committee Hearing (2/26/02)
   3. Legislative initiative:
      a. trust reform legislation
      b. appropriations rider to prohibit DOI fiscal year 2002 or 2003 funds to be used for the BITAM proposal
2. LEGAL INTERVENTION
   1. Tribal Leaders Task Force file a statement or notice to Judge Lamberth regarding the Task Force's support of the litigation and concerns with the DOI's proposed reorganization plan and its potential impacts on tribal trust reform
   2. Amicus brief in Cobell litigation; and
   3. Tribal trust mismanagement lawsuits
3. DEVELOPMENT OF A TRIBALLY–DRIVEN TRUST RESOURCE AND ASSET MANAGEMENT REFORM PLAN

II. KEY ISSUES IN TRUST REFORM

The Chippewa Cree Tribe supports trust reform, however tribes need to play a substantial part in defining, developing and delivering any meaningful attempt at trust reform within the Federal Government, in particular within the Department of the Interior (DOI), Bureau of Indian Affairs (BIA). As such, we need to ask ourselves two (2) very important basic questions:

a. WHAT IS TRUST REFORM?
   i. Trust reform concerns both TRIBAL TRUST RESOURCES AND TRIBAL TRUST ASSETS and the reform is the management of the trust resources and trust assets by the FEDERAL GOVERNMENT (DOI) and the TRIBES.
   ii. And within TRIBAL TRUST RESOURCES AND TRUST ASSETS are INDIVIDUAL TRUST RESOURCES AND TRUST ASSETS and the reform is the management of the individual trust resources and trust assets by the DOI and the Tribes.
   iii. Trust reform will concern many aspects in the management of both tribal trust and individual trust resources and assets. The key will be to reconcile the roles of DOI and the TRIBES in the management of the trust resources and assets while taking into consideration the INDIVIDUAL'S interest in context of the larger tribal interests.
   iv. A key issue will be reconciling the roles of the FEDERAL GOVERNMENT (DOI), The TRIBAL GOVERNMENT (TRIBES) and the INDIVIDUALS in the management of the trust resources and assets. Our tribe is not an allotted reservation so we do not have many of the issues

other allotted reservations have, however we do have IIM accounts for our people as well as the Tribe.

v. We believe that key to successful trust reform will be between the FEDERAL GOVERNMENT and the TRIBES. This is because the TRIBES govern over the INDIVIDUAL trust resources and to a limited extent over the management of the trust assets as well.

vi. In summary, tribal trust resources and assets are the larger of the pie, if you will, containing approximately 89% of the pie while individual trust resources and assets contain 11% of the pie. We have a classic case of the tail wagging the dog, so to speak, when INDIVIDUAL TRUST RESOURCE AND ASSET MANAGEMENT is leading the charge as in the COBELL litigation. This is fine and trust reform still needs to occur, however we need to understand that trust reform must first occur at the TRIBAL TRUST RESOURCE AND ASSET level.

1. Tribal trust resource and asset management (89%)
2. Individual trust resource and asset management (11%)

b. HOW DO WE ACHIEVE TRUST REFORM?

1. Once everybody is on the same page on what is trust reform, then need to agree on a process to achieve trust reform. We have seen many tribes and organizations propose organizational structures and reform measures. This is great and we need to incorporate all recommendations and other relevant information into our process for trust reform.

i. The process as we understand is to work with the Tribal Leader's Task Force and develop a trust reform plan that is conducive to Indian Country's needs. And in order to do this we need set the agenda and gather the necessary information and technical resources.

ii. Right now, the process is being driven by the litigation. This is okay because sometimes litigation is necessary to stimulate the parties to do something. In fact, the litigation has brought all the interested parties to the table to achieve trust reform because prior to this DOI hired EDS to tell them how to achieve trust reform. Now we have the necessary parties at the table and now we can go forward and take EDS recommendations into consideration with all the other relevant information and recommendations as well.

iii. Next, we need to gather and distribute all the necessary information and recommendations from everyone including:

a. Treaties, statutes, agreements, and anything else which delineates a trust responsibility or trust duty upon the federal government to the tribes;
b. Tribal recommendations; and
c. All other DOI information such as HLIP (old and new), EDS reports and any other relevant reform plans and initiatives.

III. COBELL V. NORTON—IIM TRUST MANAGEMENT REFORM

We agree with the Dear Tribal Leaders Letter, dated January 5, 2002 from the Native American Rights Fund (NARF) which expresses concerns with the DOI proposed reorganization plan. Basically, the NARF letter states that

> "DOI's proposal to reorganize is not a good faith effort to improve trust management, but rather a last minute and poorly thought out attempt to convince the Court (Judge Royce C. Lamberth) that appointment of a receiver to reform the IIM trust in unnecessary."

Unfortunately, the DOI's legal strategy is to conquer and divide tribes over the IIM litigation. We agree that Tribes definitely have a concern with the impact of the appointment of a receiver for the IIM accounts and the trust reform efforts by the DOI in relation to IIM trust resources and trust assets. However, we must keep in mind that the Cobell litigation concerns issues related to IIM funds.

IV. DOI TRUST REFORM REPORTS

The Tribal Leaders Task Force should take the EDS reports under advisement and consider how reliable they are and the separately analyze issues reviewed by EDS. This will require EDS to present their findings and recommendations to the Task Force and allow Task Force members to ask questions in regards to the reports and outcomes by EDS. In addition, the Task Force should consider other trust reform efforts in the past such as the report generated by the 1990 BIA Reorganization Task Force.

a. TAAMS & BIA DATA CLEANUP ASSESSMENT
b. TRUST REFORM ASSESSMENT

V. RECOMMENDATIONS TO INCLUDE IN TRIBAL TRUST REFORM EFFORTS

The Chippewa Cree Tribe recommends the following outline as a start to true, meaningful trust reform of the BIA. We firmly believe that no reorganization of the BIA can take place until we have reviewed all previous trust reform efforts which have occurred in at least the last ten (10) years and thoroughly evaluated the impacts of these efforts on our trust resources and trust assets.

Here are our recommendations to include in the process of achieving an alternative trust reform plan to present to the Secretary rather than the overhaul of the BIA which is currently be proposed by the Department.

A. TRIBAL SOVEREIGNTY, SELF–GOVERNMENT AND TRUST RESPONSIBILITY
   1. SECRETARY OF INDIAN AFFAIRS TO HAVE CABINET STATUS
   2. DELEGATION OF AUTHORITIES TO TRIBAL/AGENCY LEVEL
   3. NO REDUCTION OF CURRENT FUNDING LEVELS AND EXEMPTION OF ANY BUDGET REDUCTIONS BY OMB
   4. ANY SAVINGS DUE TO TRUST REFORM WHICH RESULT IN REDUCTIONS TO EITHER CENTRAL OR REGIONAL OFFICES MUST BE TRANSFERRED TO TRIBAL/AGENCY LEVEL

B. ORGANIZATIONAL REFORM
   1. RE–EVALUATE THE OFFICE OF SPECIAL TRUSTEE SINCE THE OFFICE HAS BEEN INEFFECTIVE SINCE ITS INCEPTION
   2. RE–EVALUATE THE OFFICE OF TRUST FUNDS MANAGEMENT
   3. BRING AS MUCH RESOURCES AND RESPONSIBILITIES TO THE TRIBE/REGION/AGENCY LEVEL
   4. CONSIDER MOU'S BETWEEN TRIBES AND BIA IN THE MANAGEMENT OF TRIBAL TRUST RESOURCES AND TRUST ASSETS

C. REGULATORY REFORM
   1. DEVELOP TRIBAL TRUST RESOURCE AND TRUST ASSET MANAGEMENT STANDARDS
   2. FORMULATE TRIBAL TASK FORCE TO IDENTIFY TRUST FUNCTIONS (INHERENT AND NON–INHERENT) AND FUNDING ASSOCIATED WITH SPECIFIC TRUST FUNCTIONS
   3. IDENTIFY COMPACTABLE TRUST FUNCTIONS ASSOCIATED WITH TRUST RESOURCE AND TRUST ASSET MANAGEMENT
   4. APPROVE TITLE IV AMENDMENTS

D. BUDGET REFORM
   1. COMPLETE TRIBAL SHARES PROCESS INCLUDING CENTRAL OFFICE SHARES
   2. TRIBAL MEANINGFUL PARTICIPATION IN BUDGET FORMULATION
   3. BUDGET REQUESTS BASED ON UNMET NEEDS
   4. EXEMPTION FROM MANDATORY BUDGET REDUCTIONS