S. HRG. 109–441

SETTLEMENT OF COBELL VERSUS NORTON

JOINT HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

AND THE

COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON POSSIBLE MECHANISMS TO SETTLE THE COBELL v. NORTON LAWSUIT

MARCH 1, 2006
WASHINGTON, DC

Serial No. 109–42

U.S. GOVERNMENT PRINTING OFFICE

26–395 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
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SETTLEMENT OF COBELL VERSUS NORTON

WEDNESDAY, MARCH 1, 2006

U.S. SENATE, COMMITTEE ON INDIAN AFFAIRS, MEETING JOINTLY WITH THE COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES,

Washington, DC.

The committees met, pursuant to notice, at 9:30 a.m. in room 106 Senate Dirksen Office Building, Hon. John McCain (chairman of the committee on Indian Affairs) presiding.

Present from the Senate Committee on Indian Affairs: Senators McCain and Dorgan

Present from the Committee on Resources, House of Representatives: Representatives Pombo, Fortuno, Hayworth, Herseth, Inslee, Kildee, Renzi, Mark Udall, Tom Udall, and Faleomavaega.

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

The CHAIRMAN. Good morning.

I welcome Chairman Pombo and Ranking Member Rahall and other members of the House Committee on Resources to the Dirksen Building. I want to thank you very much for agreeing to convene this important hearing on the settlement of the *Cobell* v. *Norton* litigation, which has been the subject of the legislation being cosponsored by the chairman and ranking members in both chambers.

Because of time constraints this morning imposed by the joint meeting of Congress later this morning, I would respectfully ask that opening statements be limited to chairmen and ranking members. As my colleagues know, the Prime Minister of Italy is addressing a joint session this morning.

The principal purpose of this hearing is to gather views on approaches we might take in valuing the settlement of claims contemplated by S. 1439 and H.R. 4322. On our first panel, we will hear from John Bickerman, who worked as one of the two mediators in the *Cobell* matter during the 108th Congress; Sandra Johnigan, a forensic accountant who has a background in accounting claims; and Stuart Eizenstat, who among his other high profile positions, helped to negotiate financial settlements of class action suits with European banks and other entities involving accounts and other properties that were misappropriated, stolen or otherwise lost in the Holocaust in the years leading up to and during the Second World War.

Ambassador Eizenstat's negotiations in those cases presented many of the same valuation problems that we are confronted with here today. The problems of valuing accounts of claims where documentation is either missing or has been destroyed, where critical information is several decades old, and where a thorough investigation of claims could cost many millions of dollars and take many years to complete, perhaps maybe even billions.

I look forward to hearing from our second panel of witnesses, representatives of the Affiliated Tribes of Northwest Indians, the National Congress of American Indians, United South and Eastern Tribes, and the Great Plains Tribal Chairman's Association, and getting their views and insights on how we might approach the settlement valuation question.

Because we have tight time constraints for this hearing, I am requesting all our witnesses to keep their statements to 5 minutes.

Finally, I would like to mention that the staff of the Committee on Indian Affairs and House Resources Committee recently traveled to Lenexa, KS, to tour the Department of the Interior's underground Indian records repository. At significant cost, the department has been gathering an enormous volume of Indian trust and non-trust records there, logging them into a database, and storing them in a controlled environment for their long-term preservation.

The department employees have contracts for about 220 people at Lenexa to index millions of documents, track thousands upon thousands of transactions in the historical accounting process involved in the *Cobell* litigation. Many of those transactions involve extremely small sums of money derived from tiny fractional interests in land. Surely, there is a better use for these funds in Indian country, and I look forward to working on a bipartisan, bicameral basis to resolve the litigation.

Chairman Pombo, I would like to thank you and Ranking Member Rahall for the hard work you have been doing on this. I think you would agree with me, this is one of the most intransigent issues that we have ever faced, particularly considering the amount of money that has been involved here, and trying to put this thing back together. It has been one of the most daunting challenges I think that we have faced. I want to express my appreciation for the bipartisan, bicameral way that we have tried to address this issue.

I think that you would agree with me, as other members on both sides of the aisle do, that we have to get this thing resolved and sooner rather than later. Thank you, Chairman Pombo. If it is all right with you, after you, Senator Dorgan, and then if Congressman Rahall was here. I guess he is not here.

Go ahead, please.

STATEMENT OF HON. RICHARD W. POMBO, U.S. REPRESENTATIVE FROM CALIFORNIA, CHAIRMAN, HOUSE COMMITTEE ON RESOURCES

Mr. POMBO. Thank you, Senator. I want to express my appreciation to you for holding this joint committee hearing. I cannot remember the last time that the two chairmen and ranking members with jurisdiction over Indian affairs cosponsored identical bills and then held a joint hearing on them. This speaks to the magnitude

of the problem that we are trying to solve, and solving it depends on a bipartisan, bicameral effort.

For years, our two committees have worked steadily in holding hearings and facilitating mediation to try and bring a *Cobell* lawsuit to a happy conclusion. Even though we have been able to introduce settlement bills, we are not there yet. I am disappointed that mediation did not bring about a settlement. This is not through any fault of our mediators. If it were not for the work of John Bickerman and Judge Charles Renfrew, we would not have arrived where we are today.

We, and indeed Indian country, owe them a debt of gratitude for the fine work they have quietly and patiently done, and continue to do, in bringing about a final and fair resolution for thousands of individual Indian account holders.

Today, we are exploring the key issue that will determine the fate of the settlement bill. It is the settlement amount and how it should be distributed. Unless a miracle occurs, neither party in the lawsuit can be expected to offer an acceptable amount to fill in the space that we left blank in our bills. Filling in that blank space is our job, and today's hearing should help us in that task.

If we do not do this, the case will drag through the courts as it has dragged on for the last 10 years. The class of plaintiffs suffers, and all of Indian country suffers because rightly or wrongly, scarce Federal resources meant for important tribal services are being diverted to deal with it. While it may seem unusual for Congress to mandate a settlement, this is a unique type of case because of Congress' power to settle that stems from our constitutional authority over Indian affairs.

It is clear that continuing with the litigation is not in the best interests of individual Indian account holders and of the taxpayers who pay the massive litigation support costs in attorneys fees.

Again, Mr. Chairman, I am pleased we are holding this joint hearing with the distinguished roster of witnesses. I look forward to working with you and Senator Dorgan and Congressman Rahall in passing a settlement bill soon this year.

Thank you.

The CHAIRMAN. Senator Dorgan.

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

Senator DORGAN. Mr. Chairman, thank you. I will be mercifully brief.

It is interesting that we talk about the word "trust," Indian trust, when we refer to these accounts. In fact, "trust" is an inappropriate word when we are dealing with these accounts because that trust was violated by the Federal Government. Report after report, investigation after investigation shows that the Federal Government did a miserable job in keeping the trust funds and properly accounting for those trust funds. It is not surprising to any of us, I suspect, that this litigation ensued.

But the *Cobell* litigation, if it does continue, will eclipse almost everything. It will take years. Massive amounts of money will be spent. I am not sure what the result will be. To the extent that we

can find a way to resolve this in an appropriate way and a satisfactory and a fair way, it makes sense for everybody.

Senator McCain and I and the folks in the House introduced identical legislation to try to begin to address these issues, to encourage the parties to become actively involved in finding some way to reach agreement. My hope is that this hearing will advance that goal one more step. I am really appreciative of members of the House joining us here as well.

The CHAIRMAN. I again would like to extend my appreciation to the members of the House who have taken the giant leap on the other side of the Capitol to join us today. We thank you very much for being here, including my friends from Arizona, New Mexico, and my old friend Dale Kildee.

We would like to begin with our first set of witnesses, which is John Bickerman, the president of Bickerman Dispute Resolution; Stuart Eizenstat; and Sandra Johnigan, who is a CPA.

Mr. Bickerman, we would like to begin with you. I want to thank you for your very hard work on this issue. We are here to learn the benefit of your experience and your recommendations.

We thank all the witnesses for being here today.

STATEMENT OF JOHN BICKERMAN, PRESIDENT, BICKERMAN DISPUTE RESOLUTION, PLCC

Mr. BICKERMAN. Thank you.

Chairman McCain, Chairman Pombo, Vice Chairman Dorgan, Ranking Member Rahall, members of both committees, my name is John Bickerman. I am appearing here on behalf of both myself and Judge Charles Renfrew. Judge Renfrew regrets that he could not be here today due to an unavoidable conflict.

With the permission of the Chair, I would just like to read two very short paragraphs because he and I have worked on this testimony, and it is his testimony as much as mine. I want to make sure that I get his words right. So with your indulgence, I am just going to read two quick paragraphs, and then summarize the rest of my testimony.

Our assignment was to engage the parties in negotiations to seek a resolution of all claims brought by plaintiffs in their class action lawsuit. We were consensually chosen by the parties. Our mission was also much broader than traditional mediation. From the outset, both the parties and congressional staff requested that we periodically report back to Congress regarding our efforts and our progress.

This request was made for three reasons. First, any resolution we achieved through negotiation would likely require congressional action. Second, Congress wanted to know if either plaintiffs or defendants were behaving in a dilatory manner or otherwise negotiating in bad faith. And third and most importantly, Congress wanted to know if a resolution was impossible so that it could decide whether to take action.

Indeed, in October 2004, we reported back to the then-leaders of these two committees and in fact told you that we did not think that a successful conclusion could be made. I am going to read again.

We continue to believe that only congressional action can resolve this dispute for the benefit of the beneficiaries of the IIM Trust, and allow the United States to devote its resources to the traditional services it has provided Indian country. If Congress takes no action, the litigation path will take years, if not decades, to reach finality. Many deserving beneficiaries will have died in the interim. Those beneficiaries who are alive will not be made whole.

We also believe that the Department of the Interior's ability to serve Indian country will be severely compromised. So much of the policy affecting Indian country seems now to be made through the prism of the *Cobell* litigation. We are concerned that the historically beneficial trust relationship between the Federal Government and Indian country is in jeopardy as a result of this litigation.

Now, I will summarize the rest of our testimony.

First, there is no dispute about liability. Courts have proven it. The plaintiffs have been successful in their efforts, and liability is just not an issue anymore. What is an issue and why we are here today is to try to value the liability that the United States has. While there is no serious question about the liability, the gulf that exists between the parties is enormous.

Initially, the plaintiffs took the position that strict common law fiduciary principles ought to apply. "If you can't show it, then you owe it." Based on the calculations that they initially made, that led to a conclusion that the liability of the United States was somewhere between $100 billion to $170 billion.

Now, we believe that those kind of statements have created very unrealistic expectations that make this dispute even more difficult to resolve. More recently, the plaintiffs at a hearing in December suggested that a settlement demand of $27.5 billion, for settlement purposes, was a reasonable demand, based on an error rate of 20 percent, assuming that 20 percent of the funds were not paid to beneficiaries as a measure of rough justice. But again, there is no supporting data.

Similarly, we think the United States' position is somewhat suspect. The department has spent considerable sums tracing the record of transactions. If you follow their testimony to its logical conclusion, you come up with a number of less than $500 million, maybe less than $100 million. So $27.5 billion on one side, and less than $500 million on the other side. That is quite a gulf.

Now, if we try to analyze where the gulf is and why it exists, we believe that there are three potential sources of error. The first source of error is the money was not collected. The second source of error was the money was collected and it was deposited, but it was not properly deposited. And the third is the money was not properly disbursed.

Now, let's take a look at the first issue with respect to the money not being collected. To the best of our knowledge, the administration has not really been able to take a hard and close look at this source of error. These missing funds, (or if the funds were paid late and interest was due on them,) could reflect a very, very significant amount of money. I would describe this as "funds mismanagement." In the legislation there is an effort, to deal with this issue.

Funds mismanagement we believe would be and ought to be covered under any settlement under title I. This is a claim that we think belongs with the general accounting claims.

But we want to distinguish it from what we would describe as "lands mismanagement." Lands mismanagement relates to the underlying assets—the underlying assets of an individual's property was not let out at a fair price, or a lease was not fairly acquired. That is a very individualized, particularized kind of claim, and we do not believe that it is properly part of this litigation.

The plaintiffs have never asserted it was part of this litigation. No evidence has ever been brought to bear on this issue, and that those sort of claims should survive whatever you do. We believe that those kind of claims would be individual claims that would properly be brought in the Court of Claims, and as a result we think they should be able to be brought.

Now, the second potential source of error is that the funds were not properly deposited, and the administration has done a good deal of analyzing that. We do not say anything more about that at this time.

But I do want to talk to you about the fact that ultimately this is an arbitrary solution. There is no right number. As mediators, we are frequently asked to give a number. We often say "based on the legal merits, one number is as good as the other."

By way of example, I have provided at the end of the testimony a bunch of numbers.

The CHAIRMAN. One number is as good as the other, $100 million or——[Laughter.]

Mr. BICKERMAN. No; not exactly. Let me be more specific. Clearly, there is an error rate. Clearly, we know that $13 billion went through the system. Okay? The plaintiffs used a 20-percent error rate. We did some analysis and we said, "let's assume a 20-percent error rate and an interest rate of 3 percent compounded."

What does that lead to? And we made some assumptions. We said, most of the money, and this is an important assumption, that was paid through the system occurred from 1970 forward. Obviously, money that was paid a long time ago is much more valuable now than money paid more recently because of the compound interest effect.

So if you assume that $3 billion was paid prior to 1970, and only $500 million was paid prior to World War II, which we think are reasonable assumptions, then you generate a number of $7.2 billion. If you assume an error rate of 10 percent and an interest rate of 4 percent, you come up with a $5.6-billion number. But if you move that interest rate just a point, and assume the same error rate of 10 percent and assume an interest rate of 5 percent, then the number jumps to $9.8 billion.

What is the point of this? We are not recommending any of these numbers. What we are saying is the thought that we can define with precision the error rate and the interest rate, we can't, but there is a range that the committee ought to be looking at that could resolve this dispute. It is not the administration's number and it is not the plaintiffs' number, but there ought to be a number that you should be able to determine and we do not think that a

lot of time spent on coming up with a methodology will improve the accuracy of a number.

So our recommendation, and here I will, if I can, just read our statement again because Judge Renfrew endorses this. On behalf of Judge Renfrew and myself, we continue to offer our assistance to the committee. We believe that the prompt enactment of S. 1439 and H.R. 4322 is an imperative. It is in the best interest of the plaintiffs, of the United States, and we encourage the committee to schedule these bills for markup as soon as possible.

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

The CHAIRMAN. Thank you very much.

Ambassador Eizenstat, welcome.

STATEMENT OF STUART EIZENSTAT, FORMER AMBASSADOR, COVINGTON AND BURLING

Mr. EIZENSTAT. Thank you, Mr. Chairman.

Chairman McCain, Senator Dorgan, Chairman Pombo, Congressman Rahall, and members of the joint committees, thank you for asking me to testify. I have been asked to testify because of my experience during the Clinton administration where, in addition to holding a series of four international positions, I was simultaneously the leader of the administration's efforts to bring belated justice to Holocaust survivors and other victims of Nazi atrocities, and to return as much as possible their confiscated property from World War II.

I want to make it clear at the outset that I am in no way, underscore no way, trying to compare the Nazi genocide of 6 million Jews and millions of others to the gross mistreatment of America's first residents, Native Americans. Each historical event stands on its own.

But the way in which we sought to provide what I call imperfect justice to victims of the Third Reich in a series of negotiations from 1995 to 2001 have, I believe, some useful lessons on how Congress might provide justice to American Indians in the Government's mishandling of their trust fund assets.

Congress has repeatedly found, in the words of the U.S. Court of Appeals, that these funds were hopelessly and ineptly managed, with the resulting chaos. And that it was not disputed that the Government failed to be a diligent trustee. A 1992 congressional report cited the Interior Department's dismal history of inaction and incompetence.

Despite the very different historical origins of the Indian claims and the Holocaust claims, there are lessons from our work that may be useful as you consider your work on these two important bills. The class action Holocaust cases were brought against French and Swiss banks for Holocaust-era bank accounts never returned to their rightful owners after World War II.

Class action suits were also brought against German and Austrian slave labor companies that employed slave-enforced labor; against German and Austrian and other insurance companies for unpaid insurance policies for confiscated real and personal property and artworks never returned.

In each case, the class action suits were crucial in highlighting the historical wrong, but were unable to resolve it in a judicial con-

text. In each case, the beneficiaries were dying in the Holocaust cases at the rate of 10 percent a year, while the class action litigation droned on. Indeed, our cases were founded in many instances on legal quicksand, as demonstrated by the dismissal of the two major slave labor cases by Federal courts in New Jersey.

In the *Cobell* case, there appears to be a stronger legal argument by the plaintiffs, but the case has been batted around like a volleyball for almost a decade between the District Court and the Court of Appeals, with no benefit to the aggrieved Indians and at great cost to both sides.

So let me suggest the following. First, courts are not suitable instruments for resolving historical wrongs. Class action lawyers may be able to raise a historical wrong, but are incapable of solving the problem themselves.

It was only the intervention of the Clinton administration, and may I say, with the bipartisan support of the Congress, in mediating the Holocaust cases that led to our dramatic results, with $8 billion in settlements for victims, Jewish and non-Jewish alone, indeed the majority non-Jews; payment of 1.5 million slave-enforced laborers; the identification of over 20,000 Holocaust-era bank accounts; payments of thousands of life insurance policies; the return of hundreds of properties and hundreds of pieces of looted art.

So I applaud all of you for your work on this legislation. Legislation is absolutely essential. There will never be a piece of legislation that will satisfy both sides, but legislation will be infinitely preferable to the endless prospect of uncertain litigation.

Second, the way in which you craft the legislation bears striking similarities to the efforts we made in the Holocaust cases. Your legislation, for example, would create a global settlement fund which would be allocated among the claimants. Your concept of allocating that capped amount partly by a per capita amount and partly by a formula, taking into consideration the flow of funds through the benefiaries' IIM accounts, compared to the total throughput of all other beneficiaries, is eminently reasonable.

Permit me to give you several examples from my experience. In the Swiss bank case, we capped $1.25 billion to be divided among an unknown, at that point, number of claimants at the time of settlement. We simply did not know how many people would come forward and claim bank accounts. There was a major controversy in the *Cobell* case about the accounting required and the costs of performing it.

You may wish to note that we created a committee chaired by former Federal Reserve Board Chairman Paul Volcker, which employed four major accounting firms and cost the Swiss banks $200 million in audit fees to get at one million accounts created in Swiss banks from 1938-45.

At the time of our negotiations, indeed at the time of their conclusion, we still did not know the results of the Volcker investigation. So while it was historically useful, and indeed is now important in terms of claims, it did not help us determine how to reach the $1.25-billion settlement.

We also took into account, as we have done in the insurance cases, the interest lost over the decades since the end of World War I by adding 10 times the amount in the bank accounts to the actual

recovery. We came to that figure by employing an eminent economist, Henry Kaufman, who helped us determine the basis of the plus-up.

In the German Holocaust labor cases, we employed a per capita concept in our capped 10 billion Deutschmark, $5 billion settlement. We estimated from records available to us that there were around 1 million surviving laborers in Europe and elsewhere from World War II. We divided that number into the capped amount we negotiated. All slave laborers, and this is a very important point on your per capita issue, all slave laborers were paid the same per capita amount, $7,500, whether they worked for 1 day, 1 year, the entire war; whether they came out healthy or wrecked for life.

Likewise, forced laborers who worked under harsh, but somewhat better conditions, received $2,500, again without any individual hearings. It was impossible to have individual hearings for 1 million-plus people and determine their individual circumstances.

In the Austrian labor cases, we negotiated a $400-million capped fund and allocated again on a per capita basis to forced and slave laborers. We overfunded the account to assure that each category would receive the maximum $7,500 or $2,500 figure.

In the Austrian property settlement, we agreed upon a $210-million capped fund which we called the General Settlement Fund. By the way, it has just been funded 5 years later, a few weeks ago. Here again, we have an unknown number of claimants. It appears now that there will be 19,000.

We agreed in our negotiations that there would be up to a $2-million payment to people whose property was taken in Austria, but that would depend on how many claims there were. It now appears with 19,000 claims, if most of these are validated, and I will get to that in a moment, that they will receive less than that $2 million. So again, there is an element of arbitrariness.

That gets to my third point. We employed a concept we called "rough justice" in our determinations of the amount of the recoveries. As you seek to fill in the blank in your proposed global settlement amount, you might consider the same.

We recognized that there was an arbitrariness to any figure. How do you place a value on the damage done 60 years after a war to a slave or forced laborer? How do you determine how much the Swiss bank should pay for their perfidy in hiding Holocaust era bank accounts for decades from their owners, even taking it into the profits of the bank? Indeed, how do you here measure the injustice to Indians who misplaced their trust in the United States?

We did our best to try to come to reasonable figures, but in the end it was a case of getting the maximum for victims that the offending foreign corporations were willing to pay. It was simply a case of finding the middle ground on which the parties could agree.

You have this unenviable task. There will be no figure that will satisfy both sides. You labor, as I did, with an imperfect set of historical records. Indeed, evidently the state of the trust fund accounts is abysmal. If there is to be an accounting, I believe there must be one that uses statistical analysis and not cost, as the Volcker audit did, a disproportionate amount to what is recovered. But it is far better, as you have done in your legislation, to simply

forget the audit. It is not worth paying money to auditors. Let that money go to the Indians.

So you should simply avoid further costly accounting on an incomplete and poorly managed set of records, some of which are destroyed or otherwise inaccessible. In coming to a number which almost certainly should be in the billions, the committee should take into account the passage of time, the lost investment opportunities, the massive negligence or worse at the Department of the Interior, and the fact that you are really returning their money, not appropriating Government money. This will have to be done for IIM beneficiaries and individual Indians, and should be done as quickly as possible because they will never be able to recover an adequate amount in the courts.

You might also consider on attorneys fees what we did. In all of our agreements, we capped attorneys fees at roughly 1 percent. By the way, in the Swiss cases, some of the leading plaintiffs' attorneys donated their services. So the class action lawyers did not take a disproportionately large percentage of the ultimate recovery.

Now, here for sure, the class action lawyers have spent a very long time and a tremendous amount of effort. They deserve to be compensated. I am not suggesting 1 percent is the appropriate figure here, but I do mention that is a figure that we used.

Fourth, you might consider the institutions we created to administer the Holocaust funds as you consider how to administer these funds. In your legislation, there is a significant dispute, as in the case itself, over who should administer the funds. The plaintiff Indians, with their rightful suspicion of the Interior Department and to a lesser degree the Treasury Department, want the Federal District Court to administer the funds.

I strongly suggest you not do that. Your legislation proposes that the Treasury Department administer the funds. There is frankly a problem in giving either Interior or Treasury such a fiduciary role, given that they are defendants in the cases and in light of their failure to live up to their fiduciary responsibility since 1887.

We created administrative mechanisms. For example, in the Swiss bank case, the claims resolution tribunal functions to this very day under a Federal judge with a special master helping him. The average recovery in bank accounts, by the way, plused-up, is $100,000. In the Austrian property claims, we created administrative tribunals with three persons, one appointed by the Austrian Government, one by the United States Government, the third by the other two.

In the German slave labor cases, a German controlled board makes decisions, but the U.S. Government and the plaintiffs have representation. Insurance claims are processed by an organization headed by former Secretary of State Larry Eagleburger. You might consider in your legislation, establishing an independent administrative tribunal in the Indian cases.

Because of the suspicion on Interior and Treasury, perhaps they could report to the Attorney General, but I understand that there is suspicion of the Justice Department here, so let me make a fresh suggestion. Because of the distrust that the plaintiffs have of all the major departments that might have a role in administration,

permit me to suggest the following, and that is an independent executive branch commission.

You might call it the Indian Claims Settlement Commission, which would be modeled after the U.S. Foreign Claims Settlement Commission, which has done things like certify 5,911 Cuban claims going back to the 1970's, but with authority to adjudicate and pay claims, like those tribunals we created in the German, Austrian, and French Holocaust cases. But avoid at all costs sending this back to the Federal courts.

Sending the administration of the payments back to the courts that have already failed for a decade to resolve the matter is a prescription for further delay in doing justice to Indians. The key is to make rapid decisions in the lifetime of the majority of the claimants, the key consideration here and with aging Holocaust victims.

The regimes we created that are individual claims-based, like the ICHEIC process for insurance or the Swiss Bank Claims Resolution Tribunal, are slow and laborious. It has taken more than 7 years since the Swiss bank case was settled, and more than 3 years after their tribunal was created, because it is a claim by claim enterprise. The more you can do this on a per capita basis, the more you can do rough justice; the more people will be benefited and the more rapidly.

Fifth, I want to address legal certainty and constitutionality. In our cases, we created a unique statement of interest in which the U.S. Government pledged to support the defendants, the foreign corporations, in dismissing all cases on any valid legal ground and stating that there was a national security interest in having the cases dismissed, and that the negotiated settlement we reached go forward. In every single case, Federal courts have deferred to our executive branch statement of interest.

As I understand your proposed bill, you will extinguish claims for mismanagement of funds, but not for improper decisions on land management. I am going to ask you to do something that is uncomfortable. Claims might still be made, I understand, as John said, relating to the mismanagement of the underlying assets. But I am sympathetic to the Department of the Interior's concern that in any settlement, if you do not wipe out all claims, all you are going to do is invite another round of suits for mismanagement of the underlying assets.

As long as you are going to bite the political bullet, go ahead and bite it. Bite it once. Make a larger sum, perhaps, to settle all elements of the claim. You have ample protections built into the legislation to survive constitutional challenge.

I also believe that the Department of the Interior is correct in asserting that Congress should provide clear guidance as to the amounts to which individuals are entitled, rather than leaving the decision of what individuals receive to a formula developed by the Secretary.

I urge you in the strongest terms, do not leave anything to the discretion that you possibly can solve in the legislation. Make it clear. Make the formula clear so that when you set up an administrative mechanism, that administrative tribunal will have clear rules and will not have to spend years trying to develop a system themselves.

Our Holocaust experience demonstrated that the more precise we could be, the fairer and speedier were the administrative tribunals for the benefit of victims.

In conclusion, you are to be congratulated for embarking on a politically courageous course to rectify over 100 years of wrongs committed by our Government against individual Indians who ceded their accounts to the Department of the Interior in the expectation they would be properly managed. Your legislation broadly sets the right course.

Thank you.

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

The CHAIRMAN. Thank you very much, Ambassador. This has been very helpful, I think, to this committee. Don't you agree?

Ms. Johnigan.

STATEMENT OF SANDRA K. JOHNIGAN, CPA, JOHNIGAN, P.C.

Ms. JOHNIGAN. Thank you.

I am pleased to appear before the committee. I am happy that I was requested to appear by the chairman of the committee.

I am going to summarize my testimony that I have prepared, and will go through the major points of my ideas and suggestions.

First of all, though, I would like to say that the basic reason that I believe I am here is that I am representing myself as a forensic accountant, a CPA. I am not a lawyer. I am not an attorney, so I will not be speaking about anything that has to do with legal issues.

My background includes the recent settlement in principle of one of the tribal trust cases that is in the Court of Federal Claims, where I was the lead consultant. I am also working with the Intertribal Monitoring Association on a cooperative effort with the Government in trying to create a methodology for tribal claims settlement in the 1972-92 era.

That information and background, as well as my private trust experience, informs my thinking in what I have presented today.

Generally, where I want to go are the kinds of things that I would suggest if I were working with someone in terms of trying to settle this type of a claim. I am going to go through some of the same kinds of things that I believe are of interest, whether or not you are talking about creating the number in legislation or whether you are looking at the number if you were trying to settle the amount as a set of individual parties, because the number that you are going to put on the table is still going to be a number in legislation that in some level is going to have to be mutually agreed upon within Congress and yourselves as you put the legislation forward.

So there are a couple of key things to me. First, what questions you asked; and second, what you basically do in terms of gaining this mutual agreement about what the process is to come to a conclusion on a number. The questions that I think are most important here to begin with are, what are you trying to settle with this legislation?; what in fact were the plaintiffs trying to resolve with the claim?

In my reading of the information and my background on this, my understanding is the initial claim was for an accounting. I understand there is a dispute with regard to that, as to how that would

be performed. I believe that the most important thing in terms of asking questions about what could inform the creation of a number is to make sure you understand the elements of the accounting that are in fact being considered and argued in this case.

From my perspective, those are pretty simple. I believe you have heard some of that today already in terms of receipts and disbursements. That is about as simple as accounting gets. What are the receipts that came in? What are the amounts that went out? Where I think there is some confusion from reading the record I have to date read, is do we really even agree on the receipts, because the number of $13 billion has been raised a number of times in these conversations about the receipts, and that there is some agreement.

Yet when I read testimony on this subject, as I read the testimony from the assistant secretary, Mr. Cason, it is my understanding that in fact the proposals that they have talked about are regarding the statistical sampling, not necessarily embracing the dollar amount of the receipts.

I think part of that is because of the question that was previously raised. What are receipts beyond those that have actually come in the door? One of the questions that has been raised in the tribal cases and I believe will be raised in this case is the issue of receipts that should have been received, those moneys that should have been received, that were contracted for, but for some reason did not make it into the accounts. The other is what was previously again mentioned with regard to the asset mismanagement, that the fair value of the receipts did not come in. Those are two different kinds of receipts.

I do not think those have been addressed in this discussion of the $13 billion, and I do not think that they are embraced in the statistical sampling that I have seen discussed today.

So those are some of the questions. Do the parties generally agree with the $13 billion of total receipts? If so, do they agree on the timing of the receipts? If there are differences, what are the bases for the differences? Does the $13 billion really represent all claims or all amounts, or does it exclude the amount of receipts for that which should have been received, but was not collected? Are there claims for those additional receipts on fair value?

Those are some of the things that have been discussed. Those are major open questions that have to be addressed, I believe, as you decide what your number should be.

I am not going to go through in this discussion things that could be done with regard to developing information about what should have been received. I have some of that in my written testimony. There is a body of knowledge and approaches that are being developed to date with work on cooperative agreements in the tribal arena with regard to how to do that. That could inform this process if you have an interest in delving into that. The main thing is that there is some mutual agreement on how you would approach that if you are in fact going to calculate a number that includes that.

In addition, there is another question that has to be addressed even with receipts. That is, work done to date by the U.S. Government in the statistical work appears to be generally from the 1985 period forward. It does not include the older years. Work in some manner is going to need to be done, whether it is in depth or

whether it is analytical, using reports from GAO and other types of information to inform the parties, but something needs to be done to help someone understand how are you going to apply the information that has been accumulated to date, to periods where you have done no work. That is a key issue, I think, in coming up with something that would be considered a relevant and reliable number that you are, even if you are doing it somewhat arbitrarily, having some bases for.

The more open question, I believe, though, however, then is disbursements. Disbursement seems to be a widely battled issue, if you want to call it a battle, with regard to whether or not you need documents; whether or not there is 20 percent of the documents that have not been collected, and therefore there is an amount that should be applied for a claim for the tribal members, or I should say the IIM accounts.

The other side of that is that there is statistical work saying that documents have been found by the government in their work, but again only from 1985 forward, as far as I can tell from the work that has been done for land based accounts.

So there are some questions in this whole area that I think again need to be asked. Do the plaintiffs, who then would be, as you look at this, part of who would be receiving these moneys, agree that the results of the study that have at least been done by the Government for the period that it was done, is that considered something that is acceptable? If there is some mutual agreement there, could you use that at least for the period where it was done?

And second, if there is agreement or not between the parties and therefore informing you as to for the older years, if there is no information that has been created that can be carried back, then you begin to do the arbitrary type of work that we are talking about or we have talked about.

I think any forensic information that is looked at over a long period of time is going to have missing documents. My background in private sector is informed by the fact that I worked on a case where the State of California and all public municipalities of the State of California had sued the Bank of America.

One of the major issues in that had to do with the documents. As the court in preliminary findings in that particular case stated, you could use other means to fill the gap for those kinds of situations where you did not have the documents, but you had data that you could analytically fill the gap with. I think that is important to this type of case.

So I believe in terms of looking at where you are and how you can fill the gap, I have a number of ideas that I believe could be applied. I do not believe that level of detail is appropriate for this hearing today, but I will say that in terms of finding a way to resolve a number, I think the first step is to have the statistical work prepared by the Government that has been prepared to date, be reviewed by an independent party to determine how it could be used for the current period.

I think that the older periods and where there are error rates that could be created based on true problems perceived in periods during the older years where there are known error and known problems, where you create a more robust error rate for those peri-

ods. If that were applied, that would satisfy a lot who believe that the rates that are very low for the more current periods are not applicable to the older years.

So bottomline, from my perspective, if you cannot have mutual agreement of the parties, when you need to have some mutual agreement among yourselves as you are presenting it to Congress as to what the bases would be a number beyond just arbitrarily picking a number from zero to 100, finding something that at least has some bases in the work that has been done to date, and also applied with regard to some of the errors and the problems that are known from the past.

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

Mr. POMBO. Thank you.

I do want to thank all of our witnesses.

We will begin the questions. The Senators had a vote on the floor, and we will begin the questions, and I will begin with the House members.

I will start with Ambassador Eizenstat. In the Holocaust case that you oversaw, you talked about plusing-up some of the payment accounts at a factor of 10. How did you arrive at that? Was that, as you described it, rough justice or was that based on a formula?

Mr. EIZENSTAT. Mr. Chairman, first of all, we only plused-up those things which were tangible, for example, policies and bank accounts. We did not try to plus-up what a worker might have made if he or she had been paid by one of the slave labor companies over a 10-year period.

What we did is we retained the services of economist Henry Kaufman, and he basically took Government bond rates and then calculated what the compound interest would be over that 50-year period. So there was a solid statistical basis for that.

Mr. POMBO. Do you happen to remember what that interest rate was?

Mr. EIZENSTAT. I can get that very easily. It was somewhere around 3 percent, but I can get that. And there again, you do have the issue that has been raised by my colleagues about what time period you are talking about. So what he basically did is just took an average over that period of time.

Now, interestingly for the French cases, the multiplier was 1.7 and the reason, and this provoked a great deal of controversy, the reason was that there was a massive devaluation of the French franc after the war. That was taken into account in coming to a lower multiplier figure. I will be glad to get those precise figures for you, Mr. Chairman.

Mr. POMBO. Thank you.

You also talked about including the land mismanagement claims. We have gotten different advice even from this panel in terms of that. I think in dealing with that particular issue, I would ask Mr. Bickerman, you have suggested not including that. Ambassador Eizenstat has suggested that we do include it. Can you enlighten us as to why you believe it should not be included?

Mr. BICKERMAN. Yes; in fact if I could rely on Ambassador Eizenstat's testimony, I think it is key that you have clear criteria by which to allocate the funds that you are going to allocate. That

is one of the central lessons, I think, we learned from the experience of Ambassador Eizenstat. You can do that with the fund based mismanagement. But the land based mismanagement is very particularized.

Take, for example, the woman who has an oil well on her property, it has been pumping for 40 years, and she is not getting what she thinks would have been a fair return. Well, the investigation would require you to take a look at the lease that she got and the lease that other people got, and was it a fair deal that had been struck. That is very special, specific information.

So if you were to come up with one gross number, it would be very hard to take that number and adequately distribute it among individuals who believe that their assets had been mismanaged. And that is the reason, I believe in trying to wrap up as much as you possibly can in a settlement, but it is for that reason that I think those claims should survive.

Moreover, I think the risk of there being a class action of those type of lawsuits is very minimal. I think because they are such particularized claims, and they are claims for money damages, they have to go to the Federal Court of Claims as opposed to the Federal District Court. That is a more proper venue for them as a result. I also have a hunch that you are not going to have that many claims for mismanagement, but that is an intuition.

Mr. EIZENSTAT. May I comment on that, Mr. Chairman?

Mr. POMBO. Please do.

Mr. EIZENSTAT. In our cases, the government's involved, Germany, Switzerland, Austria, France, et cetera, and their companies, wanted to know if they were paying billions of dollars, that all future claims arising out of World War II would be covered. They called it legal peace. And that was the essence of the settlement we reached. Once we arrived at the figure, the U.S. Government did everything it could to make sure that all claims arising our of World War II would be covered. Otherwise, they would have been paying billions of dollars and still be subject to some creative lawsuit.

Now, I take what John says seriously, about the difference between land based claims and fund based mismanagement. But this legislative window comes once in a lifetime. Once you have gone through the trauma of dealing with this, you are not going to want to take it on again, number one. So you ought to be as inclusive as possible.

No. 2, whatever settlement comes up is going to involve a tremendous amount of money. The government has I think a justifiable reason to say, okay, we want to do this, but we want to make sure that everything is included and that we do not have to spend more money on more defenses for other claims.

No. 3, there is a way of dealing with the concern that John mentioned, and again we did his in our cases. We created in the property cases, again it was a capped fund, but an individualized hearing, unlike the slave labor cases where we could not possibly have individual hearings for 1.5 million people and we simply said, if you are a slave laborer and we defined it, you get $7,500; if you are a forced laborer and we defined it, you get $2,500, regardless of circumstance.

For the property cases and the insurance cases, there are individualized hearings. It takes longer, but there are individualized hearings, but with a capped amount.

So I think that you could have in your legislation a separate settlement amount that would be for these land based claims. Again, it would be perhaps difficult to come to any figure, but no more difficult than it will be for the fund mismanagement claims.

So I think it is eminently doable. We created that system in ours. Don't end up going through all this trauma and end up with still more people going through court processes, taking years of time, everybody's expense, when you could solve everything at the same time.

Mr. POMBO. In that case, you had a capped amount per individual, but you had individual hearings where whatever their claim was, they had the ability to have their day.

Mr. EIZENSTAT. Yes; we did in some, like the Austrian property claims, which are now literally being adjudicated. The first claims are just now being heard. A $210-million cap, we said any individual who lost property could make a claim up to $2 million. The amount you get depends on the value of your claim.

But in the insurance claims the insurance companies agreed that if there is a valid policy, they will pay whatever that face amount is plused-up in the way that I described. But in the German and Austrian cases there was a capped overall amount. In the Swiss bank account, of the $1.25 billion settlement, we set aside $800 million as a cap for claims on real bank accounts, no rough justice, real bank accounts, proven by evidence, but only up to that capped amount.

So there are a variety of ways you can do it, but the point is you can have a capped amount as we did with the Swiss bank accounts. You could cap an amount here for these land based claims. That is, I think, still far fairer to the Indian plaintiffs than going through this whole legislative trauma and then telling them, well, on those claims, go to the Court of Claims or go back to Federal court and start all over again.

Mr. POMBO. Thank you.

I am going to turn this back over to Senator McCain.

The CHAIRMAN. Thank you very much, Chairman Pombo. My colleagues came a long way, so I will be very brief in my questions.

Mr. Bickerman, you don't believe there is going to be a negotiated settlement. Right?

Mr. BICKERMAN. Never.

The CHAIRMAN. Mr. Eizenstat, from your experience with this?

Mr. EIZENSTAT. I have no reason to think, given the mediation that has been done, that there will ever be one, and legislation is the only reasonable outcome.

The CHAIRMAN. Do you agree with that, Ms. Johnigan?

Ms. JOHNIGAN. Yes; I do.

The CHAIRMAN. So Mr. Bickerman, as I understand it, Mr. Eizenstat has come up with three I think strong recommendations, and I would like your views on them. One is the establishment of an independent administrative tribunal; another one is the extinguish claims for mismanagement of funds, and additionally for improper decisions on land management; and third, that Congress

should provide clear guidance as to the amounts to which individuals are entitled, rather than leaving the decision of what individuals receive to a formula developed by the Secretary; Congress shall craft a distribution method with as much clarity and direction as possible.

Do you agree with all three of those recommendations of Mr. Eizenstat?

Mr. BICKERMAN. We have just had a little colloquy on the land mismanagement, and I am not totally in Ambassador Eizenstat's court, but I am beginning to be convinced that if there was enough money, we could come to a conclusion. Maybe that is an alternative way to deal with it.

As to the other two issues, I think they are excellent suggestions. I think the clarity of the criteria is very key, so that the money can get distributed and distributed quickly.

The CHAIRMAN. And you also agree that whatever we come up with, and Chairman Pombo and I do intend, after 10 years, I believe it has been 10 years now, or 12, I am not sure, to come up with legislation and we will be roundly criticized by all participants.

Mr. BICKERMAN. I can guarantee you will be roundly criticized, but I think the right and courageous thing to do is to pick a number and try to end this.

Mr. EIZENSTAT. Tell them to read Bleak House by Charles Dickens. [Laughter.]

Jaundra v. *Jaundra,* and that will be your best defense.

The CHAIRMAN. They did a magnificent job on Masterpiece Theater, in case you missed that.

I want to thank you all very much. Again, I want to say to everyone that reads the record of this that I intend to work closely with Congressman Pombo and the House so that we can come up with a solution which we are fully aware will cause us some difficulties, but this issue has to be brought to some kind of closure. I want to thank again Chairman Pombo, as well as my friend Byron Dorgan and Mr. Rahall for their cooperation. This has to be a bipartisan solution, obviously. Thank you, Chairman Pombo.

Congressman Udall.

Mr. T. UDALL. Thank you, Chairman McCain. Thank you for holding this very important hearing on a matter that is absolutely vital to tribal members. I appreciate all of the panel members and your testimony. I view this as excellent testimony. I think it truly does shed light on the issue that is before us.

Ambassador Eizenstat, one issue similar in the Holocaust cases and the *Cobell* case is the uncertainty of the exact number of account holders and where they or their heirs reside. Many potential American Indian beneficiaries live in desolate areas and extreme poverty. Do you have any suggestion on how we might be able to find people once the Bureau of Indian Affairs files are exhausted? Did you mandate advertising or other avenues to get the word out?

Mr. EIZENSTAT. Thank you. First of all, I have to say there was another Udall with whom I used to testify. It is a sign of my age, I suppose.

Yes, what we did was particularly for the Swiss bank cases, and for the insurance cases, we did a massive notification process. We

used the news media. We put full page ads in major newspapers, radio advertisements. We did a full blown media effort to try to reach account holders.

Now, in addition, we had the advantage, particularly in the bank and insurance cases, of having names assigned to accounts, so we actually created a website with those names. Some, by the way, were misspelled or had German or Swiss spellings, but still we did create a website with the names we knew existed, and advertised that website. That is also a very useful way of presumably, even with the sad state of the records here, there must be some record of individual account holders or trust fund holders.

Mr. T. UDALL. Thank you.

Just one more question, Ambassador Eizenstat. Our committees have been working with the parties of the *Cobell* lawsuit and the mediators, as you are aware. As our mediators can attest, the sides in this dispute have become bitter enemies, with the debate often taking unhealthy and unhelpful turns. We have been told time and time again that the animosity between the sides is the worst that veteran lawyers and mediators have ever seen. I am guessing that at that time you had persons who were taking too hard a line or generally not working in good faith to settle.

How do we get past such situations?

Mr. EIZENSTAT. Well, Chairman McCain alluded to this. We would not have succeeded if we had a mediation involving private parties, even people as eminent as Judge Renfrew and John Bickerman. Our mediation succeeded because of a combination of events, which do not exist here, but for which the legislation will be a substitute.

No. 1, we had the support of the President of the United States, who invested me with the authority to speak on his behalf as the mediator. We had the clout of the U.S. Government. We had the bipartisan support of everyone from Al D'Amato to Chuck Schumer and others in dealing with this. So we knew we spoke with the full authority of the United States.

The plaintiffs' attorneys, I mean, if you want to read my book you can get more of this, but if you think that things were bitter there, the plaintiffs' attorneys took out full page ads in the New York Times and the Wall Street Journal and the Washington Post. One that I can recount was about Bayer, the maker of aspirin, that was also a slave labor manufacturer. The headline effectively was, "If you really want a headache, Bayer, then you won't settle with Ambassador Eizenstat and his negotiations."

I mean, this went all the way. There were all sorts of pressures put on. And not the least of which in the Swiss bank cases and in the German cases, were threats by major pension funds, including CalPERS, Congressman Pombo, in your State, that they would withdraw funds from either Swiss banks or German slave labor companies unless they settled.

So there were all sorts of external pressures. You do not have that here. You do not have a Government appointed mediator, but you have the power of the Congress. When I talked about bipartisan support for what I was doing, you have bipartisan support. It is remarkable, the joint hearing, the joint bills, bipartisan. This speaks volumes and will provide I think a very strong political

message that substitutes for all the influences we had in our Holocaust cases.

Mr. T. UDALL. Thank you very much. I think that my uncle, if he was here, who I think you alluded to testifying before earlier, would say that you may be older, but you are probably wiser. With that, I would like to thank you.

Mr. EIZENSTAT. Since there is not much levity here, in the 1976 primary campaign, all the primary candidates including Jimmy Carter were asked the simple question, what would you do about inflation. And everybody had 10 different answers. Congressman Udall's was the simplest. He said, "I would give it to the Post Office. They can slow anything down." [Laughter.]

Mr. T. UDALL. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. He also said, and I steal his jokes all the time, he also said, "Everything that can possibly be said on this subject has been said, only not everyone has said it." And that certainly applies to this issue, I think. [Laugher.]

Senator Dorgan.

Senator DORGAN. Mr. Chairman, are you referring to the questions I might ask [Laughter.]

First of all, the chairman and I had a vote, as you know, and we were necessarily absent for a bit. The testimony from this panel I think has been really very interesting and very instructive. I think the last thing that you said, Mr. Eizenstat, is important, that the House and Senate working together, Republicans and Democrats working together, is a very powerful statement here.

If we do not resolve this issue, I think Mr. Bickerman said, and perhaps all of you have said it, we are going to be in this predicament for one-half decade, 1 decade, or probably more. And we know already from this year's budget submission by the President that this issue impacts most other issues as well Native Americans.

That is why it is so important for us to do everything we possibly can do to see if we can effect a solution here.

I am going to defer on questions. I will submit questions to the panel, but let me again say that I think your testimony is particularly and especially useful, given all that we have heard at various hearings. I think that you offer some unique judgments and perspectives about these things, and I appreciate very much your being here today.

The CHAIRMAN. Thank you very much.

Mr. Faleomavaega.

STATEMENT OF HON. ENI F.H. FALEOMAVAEGA, U.S. DELEGATE FROM AMERICAN SAMOA

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

I certainly want to thank you and commend you and Chairman Pombo for calling this joint hearing. Not only is it critical, but most important, in all the years that I have tried to follow it with some concern, you know, we have had this issue now, it started off at $2 billion and then the following year there was a bidding that went up to $8 billion to $10 billion in question. So now we are somewhere between $13 billion and $27 billion.

I remember years ago, Mr. Chairman, that Congress even appropriated $20 million just to try to attempt to audit the accounts in question, and came up with absolutely zero results. So I really do think that the initiative that you and Chairman Pombo have taken has been really, really, 10 years, I believe, is long overdue in trying to provide some settlement.

I really do appreciate the testimonies that have been shared with us this morning by Ambassador Eizenstat and Mr. Bickerman and Ms. Johnigan. I want to ask members of the panel just one question. Do you think it was fair for the administration to subtract the legal fees that have been collected over the years to cut the appropriations for the badly needed funding that is needed by Indian country, to be part of this?

I was under the impression this should come under the good faith, what do you call it, clause of United States, of the general fund. But the latest I heard, unless I heard it wrong, whatever amount of money that is being subtracted, that it should be going to the critical needs of current Indian programs, to be taken out of this very issue. I have to disagree.

But I wanted to ask the members of the panel how they feel about this. I do not know if you are aware of the situation.

Mr. BICKERMAN. Yes; I am aware of it. No, I do not think it was fair.

Mr. FALEOMAVAEGA. Well, that should answer it. Thank you very much. [Laughter.]

I have listened with interest to the problem, as Ms. Johnigan said earlier, about just simply the difference between receipts and disbursements. The problem is, as simple as these two terms may be, but it has become so complicated that we found nothing but some real sense of bitterness between the two parties. In fairness to both parties, I believe that Ambassador Eizenstat's suggestions have been very, very valid, very, very similar to the situation of the Holocaust claims.

I wondered also how Congress was able to determine what was the capped amount that we gave to the Japanese Americans when they also had a similar situation. Maybe lesser numbers, but certainly it is something that we ought to look at.

Mr. EIZENSTAT. This was actually, members of the panel and Mr. Chairman, this was actually a useful benchmark for us. Congress in 1988, I believe it was, finally tried to provide some belated justice for Japanese Americans. There again, it was a per capita amount, no individual hearings, $20,000 per claimant. You could have been in a camp in Washington State or California for 1 month or for 1 year or for the whole war. You got $20,000.

Now, obviously there is a degree of arbitrariness to that. But there was also a degree of fairness to it, because had all of those people had to have individual hearings and try to prove what happened to their health and what happened to their livelihoods, they would never have been able to recover. So that $20,000 figure was actually a useful figure when we were trying to determine how much was reasonable to give to a slave and forced laborer.

Mr. FALEOMAVAEGA. I want to say to Ambassador Eizenstat, Mr. Chairman, this also is another complication that we have just, at least hopefully there may be legislation introduced, and it is in ref-

erence to the plight of the Marshallese people when they were, practically all of them, subjected to nuclear radiation during our nuclear testing program after World War II.

To this day, to this day the people of the Marshall Islands still have not been properly compensated or even given proper medical treatment by our Government, which is something that I find very similar to the situation that we find ourselves in among our Native American community.

Do you think, Ambassador Eizenstat and Mr. Bickerman, is it really not the amount that is at issue. It is how we go about in developing a formula. Like you said, we have to bite the bullet, and some way or somehow we just cannot wait another 20 years for this issue to continue on. I get the sense that it has got to be done legislatively because if we leave it to the courts, it is not going to be resolved. Do I get that impression from the members of the panel?

Mr. EIZENSTAT. I was asked only about 10 days ago to testify, so I started reading some of the opinions. I mean, it is amazing that here we are almost 10 years into litigation, the last Court of Appeals decision just 2 months ago, the interpretation, you know, the typical thing of the Court of Appeals, remanded for actions not inconsistent with this opinion. And the plaintiffs and the Government disagree after 10 years, with what the latest decision was by the court.

They have had their chance and they are not going to do it. As I indicated, you cannot have courts settle historical wrongs. They are not created to do that. Their expertise is on case by case adjudication or class actions where people fall in and you have clear evidence. They cannot handle a situation like this where the evidence is poor, the number of claimants is uncertain. This will be batted around between the District Court and the Court of Appeals until all of us are gone and all of the claimants are gone. So legislation is absolutely essential.

The formula has to be precise; do as much on a per capita basis as you can; and again bite the bullet. It is not totally arbitrary. John gave you some ranges. You basically know how much flowed in. It is not clear how much flowed out. The Government itself by its own figures says it is about $500 million that is unaccounted for, that did not get paid out. Even if you just plus that up over however many years you want to do that, you couldn't do it over 120 years, but over a reasonable period of time. You start to get into a range which is understandable.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

The CHAIRMAN. Congressman Inslee.

I am sorry. Go ahead.

Mr. BICKERMAN. I just wanted to respond very quickly. As a mediator, one of our occupational hazards is optimism, but when we first started the discussions, I actually thought that the criteria that both the administration and the plaintiff had for the formula to allocate money was actually pretty close. I am reasonably optimistic that if we can agree on a sum, developing the criteria to distribute that will not be that arduous a process.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. Thank you.

The CHAIRMAN. Congressman Inslee.

Mr. INSLEE. Thank you.

I really appreciate your thoughts. This is most troublesome to many of us because we recognize the literary value of *Jamdyce* v. *Jamdyce*. We also understand of not wanting to continue this scar that so many people in our country have felt and not being treated by their Federal Government. So it really is a tough issue, I think.

I have kind of a general question. If we are looking for resolution, a legislative solution, should we be thinking of Congress picking a number? Or should we be thinking of Congress picking a process to get to that number that should be narrowly defined and achievable through some mechanism that might give the parties more confidence that at least they had their day in court and these decisions were not made just in the back rooms of Congress? What would be the most, and is there any such process that could actually get to a number within our lifetime to achieve that end?

Ms. JOHNIGAN. If I could respond to that first. Obviously, what I was presenting was the idea that there would be a process using what has been done to date and refining it for those pieces that appear to be the most contentious and where the least work has been done, and creating it in such a fashion that it at least provides a basis for why the number was created by Congress.

Whether you pick a number based on that work or you set the process for that number to be created through that work by other parties, so that you could get the legislation through. One way or the other, from my personal perspective, it you want some broader based support for whatever number you are going to create, there needs to be some process behind it besides the arbitrary selection of some portion from the plaintiffs and some portion from what the Government has done today.

That is not to say that I would propose a process that would take a long period of time, but rather look at what has been done and see what would be backfilled into that in a process that would be more streamlined. It would not be something that would make either party happy. It would just, I think, create more of an informed basis for the answer.

Mr. INSLEE. In your proposal, would you view that as being a binding process, that we are going to go through this process, the number will be generated, Congress will adopt it? Or is this just a hearing process you are talking about?

Ms. JOHNIGAN. I would see that as a binding process, if you are going to finish this. I mean, you have to have a binding process that creates a number you are going to have in the legislation that is just the number. Because one of the things that I have heard as people have answered questions today and asked questions, is that there is in some ways always the assumption that a large enough number was created, or a number was created that would actually satisfy some of the issues. Because two of the issues in terms of the accounting, the amounts that should have been received that are not part of the $13 billion throughput, and the amounts that are in dispute in terms of what should have been received that perhaps was from mismanagement.

There has been, as far as I can tell, no real work on that issue at all for the IIM accounts, so that the numbers that are being discussed are being discussed from the standpoint of only that which

is known to be received. That is a very different calculus. As I have worked with the tribal accounts in this area, what I have seen is that you have already some processes in place to calculate what should have been received, but very little has been done on the asset mismanagement where the fair values have not been received.

So I do think there needs to be some thought about a process that says, have we really created a number that is sufficient enough in order to satisfy an allocation that will be considered to be at some level, although somewhat arbitrary, fair. I think that is a process that I highly recommend you go through.

Mr. BICKERMAN. I respectfully disagree with my colleague here. The point of my numbers that I present in my testimony was to show that with just very small changes, these numbers bounce all over the place. I think that a process would give one the false sense of precision when there really isn't precision.

There are so many missing documents. This goes back over 100 years. A process I think would just be delayed justice. I think this has gone on for 10 years. I think it would be infinitely more difficult to negotiate a process than it would be to negotiate a number at this point. If you can negotiate a number, my strong, strong recommendation is you do it.

Mr. EIZENSTAT. There is certainly no reason not to have a small panel of experts as you are going through the legislative process look at the existing data, not start recreating, doing new audits and so forth, and giving you the best judgment they can about the status of things. But you are not going to be much better off at the end of that process. I think to satisfy the fact that you exercised due diligence on the legislative side, it is not a bad idea.

But what would be a genuinely bad idea is to go through this legislation, leave the figure blank and then leave it to some mythical party, a claims commission, to determine what the amount should be. That is what legislation is for.

After all, you really do this in a sense all the time. When you legislate, you create appropriations for amounts, you have to make a rough estimate. How much are Katrina victims entitled to? You appropriate a figure. You try to make the roughest kind of calculation, and then you realize you will come back if you have to another time, but you make the best judgment you can. That is really what you are trying to do here.

So certainly you do not want to be totally arbitrary and blind yourself to the work that has been done. It is probably worth having some type of small group advise you, of looking at the current data, giving you some sense of where that data is, and how confused it is, and giving you the best estimate they can of where things stand.

On the plus-up figure that Chairman Pombo mentioned, there I think we can be much more precise. There is very clear agreement, I think, about how you plus-up accounts over the years. We will be glad to share the figures that we used and the methodology that was used.

So I would really urge in the process, yes, if you want to take a few experts and have them look at the state of things now, fine. But do not think you can create a process that is going to give you

much more clarity than you have now. That is the whole problem, the data does not exist.

Mr. INSLEE. The only concern I would have about that approach is this is not exactly Katrina. The hurricane was caused by either an act of the Creator or global warming, depending on your belief system. This situation is an extinguishment of a property right by the entity that caused it, which is the Federal Government.

Mr. EIZENSTAT. So were the Japanese claims, so were the Holocaust claims. They were all extinguishing a right or a theoretical right by either a legislative or a government mediated process.

Mr. INSLEE. I have made my point.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I thank the witnesses. This has been extremely helpful to us. Thank you.

Mr. EIZENSTAT. I am sure we will be more than happy to continue to work with you during this process, Mr. Chairman.

The CHAIRMAN. Thank you. We would be pleased to do that.

Finally, we have Mike Marchand, who is with the Affiliated Tribes of Northwest Indians and the vice president of the Colville Confederated Tribes; Joseph Garcia is the president of the NCAI; Keller George, who is the president of the United South and Eastern Tribes; and Harold Frazier, the chairman of the Great Plains Tribal Chairman's Association.

I want to apologize to our witnesses because we have to shut down here in just a few minutes. I would like to say that your complete statements will be made part of the record. We appreciate your patience, and I hope you understand that we have a joint session of Congress to be addressed by the Prime Minister of Italy. So if you could briefly summarize and give us your position very rapidly, we would appreciate it. I am sure we will be meeting formally and informally again in the future on this issue.

Mr. Marchand.

STATEMENT OF MIKE MARCHAND, AFFILIATED TRIBES OF NORTHWEST INDIANS AND FIRST VICE PRESIDENT, COLVILLE CONFEDERATED TRIBES

Mr. MARCHAND. Good morning. I am very honored to be here today.

My name is Mike Marchand. I am a councilman with the Colville Confederated Tribes located in Washington State. We are composed of 12 tribes on a reservation that was created in 1872, when our people were forcibly marched from their homeland, at gunpoint in many instances.

The CHAIRMAN. Mr. Marchand, you are going to have to make your opening statement very brief. Please proceed.

Mr. MARCHAND. Well, my only point was that this trust system was imposed on our people. We did not ask for it. There have been comparisons by the administration that this is very much like a commercial banking operation. I would just contend that it is not. We are doing the best we can to work with the system.

ATNI, the Affiliated Tribes of Northwest Indians, is a consortium of 57 tribes in the Pacific Northwest, and our leadership in the Northwest has been discussing this issue and watching the litiga-

tion as best we can. It is the conclusion of most of our leaders in the Northwest that we need to come to a settlement. The parties in the litigation do not appear to be getting any closer to settlement. In fact, they seem to be getting farther and farther away each day.

We believe that it is creating a lot of problems and retaliation against tribal governments. It is creating problems with redefining the trust relationship between our people and the United States. We really think it is really time that we need to draw this to a conclusion.

I would just like to say, I guess briefly, that I think it has really caused a whole change in the climate between the tribe and the United States relations. In the 1960s, we went through a period of termination. Under President Nixon, I think he turned that around to self-determination and 638 contracting. Tribes were given a large voice in their day to day matters in life. I think we have seen a couple, two or three decades of steady progress.

But today, I think things are kind of reversed. It seems like we are going backward again. I think a lot of the solutions that are being imposed on Indian people. Our voices are not listened to anymore. I think there is a real problem with the administration in place today. They do not seem to have a lot of knowledge about life on reservations or how to communicate with our people. I think it is a real problem. I think we have gone backward.

I think a lot of that has kind of spun out of this *Cobell* case because of the litigation.

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

The CHAIRMAN. Thank you very much, sir. I apologize, but we really have to move through the witnesses. I appreciate it. Your written statements will be made part of the record and carefully examined. I thank you and I want to apologize for this time constraint to all the witnesses.

President Joe Garcia.

STATEMENT OF JOSEPH GARCIA, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. GARCIA. Good morning, everyone.

Chairman McCain, Chairman Pombo, Vice Chairman Dorgan, Ranking Member Rahall, and members of the Senate Committee on Indian Affairs and House Resources Committee, thank you, Mr. Chairman, Chairman McCain, and Senator Dorgan for coming to our NCAI meeting yesterday. That was very important, your presence.

We have a lot of tribal leaders here this week. I think it is important that they hear the dialog that you provided. I will now move on to the testimony part.

The National Congress of American Indians strongly believes that it is time for Congress to move forward with a fair settlement for the *Cobell* v. *Norton* litigation. Tribal leaders throughout the country support the goals of the *Cobell* plaintiffs. At the same time, tribes are concerned about the impacts of the litigation upon the ability of the United States to deliver services to tribal communities and to support Federal policies of tribal importance.

As you know, hundreds of millions of dollars have been diverted for this effort, and we continue to battle for years and years. Continual litigation will continue to cost millions of dollars. The continued historical accounting activities by the department may cost billions and are very unlikely to achieve satisfactory results.

Three years ago, NCAI passed a resolution stating that it is in the best interest of the tribes and individual account holders that tribal leaders participate in a *Cobell* settlement, and development of an effective system for management of trust assets in the future. Former NCAI President Tex Hall worked very hard over the last 3 years to push for a settlement, and I plan to continue that effort.

Earlier this year, the NCAI executive committee passed another resolution on the settlement litigation. First, we want to mention that NCAI supports S. 1439. We also support H.R. 4322, and the efforts of Senators McCain and Dorgan and Congressmen Pombo and Rahall in introducing this legislation.

Second, NCAI strongly urges the *Cobell* plaintiffs, the Department of the Interior and the Congress to increase their efforts to develop a viable settlement proposal for the *Cobell* litigation. Specifically, we would encourage settlement options that will engage the participation of individual Indian account holders. I believe that is what we are hearing today.

Third, NCAI urges the Senate Committee on Indian Affairs and the House Resources Committee to move forward with the markup of the legislation, based on the comments received from Indian country, and to develop a more definitive settlement proposal for the *Cobell* litigation than what is currently found in title I. We encourage you to continue to consult Indian country as you move forward to the markup of the bill.

Cobell litigation has had some positive effects. It has focused attention on the important issue of trust reform. However, there are also increasing costs and side effects that the litigation has caused, and that is provided in the written testimony. So we want Congress to either put a stop to these unreasonable burdens on the tribes, or to settle the litigation, and the settling the litigation is the thing that we would propose as well.

I will conclude my remarks at this point, in the interest of time. Thank you.

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

The CHAIRMAN. Thank you very much.

Mr. President, we look forward to working with you, and congratulations on your new position, as I mentioned before.

Mr. GARCIA. Thank you.

The CHAIRMAN. President George.

STATEMENT OF KELLER GEORGE, PRESIDENT, UNITED SOUTH AND EASTERN TRIBES

Mr. GEORGE. Thank you, Senator McCain, and also thank you Chairman Pombo, Vice Chairman Dorgan, and Ranking Member Rahall.

We thank you for this opportunity to briefly give some insights on this case. *Cobell* litigation has been going on for over 10 years. But I want to urge your committees to seize the opportunity to settle the *Cobell* case now and reform the DOI's administration of

trust-related functions by acting on S. 1439 and H.R. 4322 this session.

As to the *Cobell* provisions of these bills, title I includes a section that will specifically identify an amount that will be made available to settle the case. Ideally, it should be up to the plaintiffs and the Government to agree upon a settlement account. Previous witnesses have said that probably is not going to happen, but we call upon the Congress to act very swiftly so to come to a conclusion because we know that if it does not, it will erode the trust responsibility that the United States Government has toward Indian tribes.

As USET member tribes, we will stand with you in your efforts to seek a resolution of the *Cobell* lawsuit and to implement needed reforms to DOI's administration of trust functions. The choice we face today is clear. Millions more can be spent on litigation and an accounting that likely will tell us little more than we already know, while the trust relationship continues to erode, or legislation can be enacted that settles the lawsuit in a fair and equitable manner, and implements much-needed reform on DOI's management of trust resources.

USET member tribes strongly believe that the second choice is far better an option.

Thank you.

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

The CHAIRMAN. Thank you very much.

I believe Congresswoman Herseth would like to acknowledge the next witness.

Ms. HERSETH. Thank you, Mr. Chairman.

I thank you and my good friend from North Dakota, Mr. Dorgan, as well as my Chairman on the House Resources Committee, Mr. Pombo, for this opportunity. I appreciate the opportunity to introduce Chairman Harold Frazier, also a good friend, chairman of the Cheyenne River Sioux Tribe, whose members predominantly reside in North Central South Dakota. I am working with Chairman Frazier not only in his capacity as chairman of the Cheyenne River Sioux Tribe, but also as chairman of the Great Plains Tribal Chairman's Association.

I would commend his testimony to you as someone who has been focused and tenacious in his efforts, as well as approaching settlement negotiations in the *Cobell* lawsuit in good faith, in working hard to meet the objectives that I know you have, that Ranking Member Dorgan has, that Chairman Pombo and Ranking Member Rahall have. But that any settlement really reflect to the best interests of Indian country.

So I appreciate the opportunity to introduce him to you today.

The CHAIRMAN. Thank you very much.

Welcome, sir.

STATEMENT OF HAROLD FRAZIER, CHAIRMAN, GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

Mr. FRAZIER. Thank you, Congresswoman Herseth.

I want to begin by thanking Senators McCain and Dorgan and Congressmen Pombo and Rahall for having this joint hearing. I will get right to the points.

I think it is essential that a settlement amount comes from a claims judgment fund and not from the BIA budget or any other Federal program or budgets that serve Indian people. Section 102, this section would bar tribal landowners and heirs from any recovery from claims prior to 1994. It is important that the settlement only, that we go beyond. There have been a lot of issues that have been done to a lot of our people in the past, especially the ones who have served our country in wars and protecting our rights and our freedom.

It is also important that the settlement only addresses individual accounting claims, and not any land based or asset claims. Our concerns are for Congress to protect the budgets of the tribal programs from being robbed to pay attorney fees.

All the regulations resulting from this act may be subject to negotiated rulemaking. That will ensure that a bureaucratic process is not used to misconstrue the provisions of the act.

We urge congressional leaders to write the appeal section to streamline the appeal process and allow class action appeals and allow the claimant to appeal in local courts and consolidate the appeal claims.

Again, we strongly urge congressional leaders to be crystal clear in section 110(d) that tribal trust accounts are inclusive of tribal IIM accounts. This clarification would avoid any misinterpretation that tribes should not be considered claimants for purposes of settlements.

I thank you for this opportunity and I urge you to maintain the principle of inclusive decision making when addressing all areas of trust reform. It is important that tribal leaders should be at the table when trust reform is being discussed. We are the ones who have the most to lose.

Thank you.

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

The CHAIRMAN. Thank you very much.

Chairman Pombo.

Mr. POMBO. Mr. Chairman, any questions I have I will submit in writing to our panel. Thank you.

The CHAIRMAN. Senator Dorgan.

Senator DORGAN. Mr. Chairman, I will do that, too. Let me just say that as has always been the case with us on the Committee on Indian Affairs, and I am sure our House counterparts, consultation is really important. Consultation is critical. I think the witnesses today have provided some excellent statements. We are sorry for the brevity, but we intend to continue to be involved with you and to consult closely with you as we try to resolve these issues.

So thank you very much for being here.

The CHAIRMAN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Mr. Chairman, just shortly, to commend members of the panel for their testimony. I would like to make emphasis again in the spirit of bipartisanship, that this should really not be a politicized issue, and I sincerely hope and look forward to working with you and our Chairman Pombo and Mr. Rahall on our side, and Mr. Dorgan. Hopefully in this Congress we will make some form of a settlement in this legislation.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Congressman Inslee.

Mr. INSLEE. I have no questions. I just want to say, of all the times we have ever had an obligation to have close relationships with the tribes and an open dialogue, this is the time. I hope that we will all fulfill that obligation.

Thank you.

The CHAIRMAN. Thank you.

Congresswoman Herseth.

Ms. HERSETH. I also will submit my questions for the record, but just thank the panel of witnesses for their leadership and for their willingness to offer their insights on the pending legislation.

The CHAIRMAN. I want to thank the witnesses. I want to thank the members who came to this important hearing. We will be moving forward. Chairman Pombo and I have agreed, as we have already, that a bipartisan, bicameral piece of legislation will be moving forward soon on this issue. As we go through this process, we would very much appreciate your continued participation and input. I can assure you, you will not like the outcome.

Mr. GARCIA. Mr. Chairman.

The CHAIRMAN. Go ahead.

Mr. GARCIA. Mr. Chairman, if I can make one more statement.

I would like the panel to know, as well as the Congressmen to know that the statements that were made earlier with Mr. Bickerman and Mr. Eizenstat, I think the formula and the ideas they presented are very, very, very good, and that will help focus on the settlement. And so we would support those efforts.

The CHAIRMAN. You know, that means a lot to us, Joe, and I thank you, because we think they gave us a very good framework to work on, and we are very grateful for your conditioned approval. Thank you.

This hearing is adjourned.

[Whereupon, at 11:10 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF CHARLES RENFREW AND JOHN BICKERMAN

Chairman McCain, Chairman Pombo, Vice Chairman Dorgan, Ranking Member Congressman Rahall, members of the Senate Committee on Indian Affairs, and the House Resources Committee, my name is John Bickerman and I appear here today on behalf of myself and Charles Renfrew. Judge Renfrew regrets that he cannot be here today due to an unavoidable conflict but wants to assure the committee that the comments I am about to deliver are his as well. We have worked on this testimony together and they accurately reflect our joint views.

First, I would like to provide some background about our role, for it has not been the traditional role in which mediators normally serve. Two years ago this month, the staff of your committees contacted both of us to inquire about our interest in assisting the parties in the *Cobell* v. *Norton* dispute reach a consensual settlement. We were interviewed separately by the plaintiffs' counsel and senior officials from the Departments of the Interior and Justice, but with the strong encouragement by the committee's staffs that the parties should engage in mediation. Soon thereafter both the plaintiffs and the administration chose us to help them. Funding for our services was provided by the Department of Justice, but we were assured we would have complete independence in our actions and, indeed, we have enjoyed the traditional independence and neutrality that neutral mediators require. Although we had not met prior to this assignment, Judge Renfrew and I have worked together seamlessly and have been in complete accord with respect to all aspects of the mediation and the testimony we present today.

Our assignment was to engage the parties in negotiation to seek a resolution of all claims brought by plaintiffs in their class action lawsuit now pending in the United States District Court for the District of Columbia. But our mission was also broader than traditional mediation. From the outset, both the parties and Congressional staff requested that we periodically report back to Congress regarding our efforts and our progress. This request was made for three reasons: first, any resolution we achieved through negotiation would likely require Congressional action; second, Congress wanted to know if either the plaintiffs or the defendants were behaving in a dilatory manner or otherwise negotiating in bad faith; and third, Congress wanted to know if a resolution was impossible, so that it could decide whether to take action. In most mediations, confidentiality of the negotiations is a bedrock principle. In this case, very little of the content of our discussions remained confidential. Indeed, we were expected to periodically disclose our conclusions to Congress.

Although we are both experienced in mediating complex, high conflict public disputes, neither one of us could have predicted the difficult task we were about to face. Never before had we seen the level of acrimony or the inability to agree on even the simplest of logistical or procedural matters. We could not even get the parties to sign a mediation agreement that set out basic ground rules for the parties' conduct. Although we made some small progress, especially in the area of developing a model to resolve the information technology disputes regarding the security

of Individual Indian Money [IIM] Trust data, within 6 months, we realized that a negotiated resolution was impossible.

In October 2004, we met with the leaders of the two Congressional authorizing committees to report our conclusions and urge that Congress take the lead in crafting a resolution. We continue to believe that only Congressional action can resolve this dispute for the benefit of the beneficiaries of the IIM Trust and allow the United States to devote its resources to the traditional services it has provided Indian country. If Congress takes no action at this time, the litigation path will take years if not decades to reach finality. Many deserving beneficiaries will have died in the interim. Those beneficiaries who are alive will not be made whole. We also believe that the Department of the Interior's ability to serve Indian country will be compromised. So much of the policy affecting Indian country seems now to be made through the prism of the *Cobell* litigation. We are concerned that the historically beneficial trust relationship between the Federal Government and Indian country is in jeopardy as a result of this litigation.

There is no dispute that the historical conduct of the United States in managing and accounting for the IIM Trust has been flawed. The Federal District Court of the District Columbia has so held and its judgment has been affirmed by the Court of Appeals. Indeed, Congress recognized the problem when it passed the Indian Trust Fund Management Reform Act, P.L. No. 103–412, 108 Stat. 4239 (codified as amended at 25 U.S.C. § 162a et seq. & § 4001 et seq.) in 1994. More than 10 years later, the problem persists. Substantial sums have been spent trying to fix a system that, without legislative changes, may be beyond repair. The pending legislation will go a long way toward addressing the underlying structural problems and compensating IIM beneficiaries for the Government's past negligence by restating the account balances for individual beneficiaries. Without legislation to fix the system, the problem will grow exponentially. However, we confine our testimony to title I and, specifically, how to value the Plaintiffs' Claim.

While there is little serious dispute over the question of liability, the gulf that divides the parties over the magnitude of the liability is enormous. The most vexing problem facing your committees is properly valuing the claims and assigning a number that adequately compensates the IIM beneficiaries for the discrepancies between what is in their trust accounts and what should have been there. This is a hard task for which good, reliable data may not readily exist. But the difficulty and the imprecision of deriving a figure should not deter Congress from making a decision now and advancing the very fine legislation that your committees have drafted.

As mediators we are accustomed to seeing the validity of the arguments of both sides to a dispute. This case is no different. We believe that the arguments of both the administration and the plaintiffs regarding the amount of adjustment that needs to be made are both partially correct and partially flawed.

Initially, we understood the plaintiffs' position to be that strict common law fiduciary principles ought to apply. Absent the United States showing that funds were collected and paid to beneficiaries, the Government was obligated to restate the IIM individual accounts to the full amount in dispute plus interest. They said, "If you can't show it, you owe it." In public statements in Indian country plaintiffs' counsel and the lead plaintiff have told beneficiaries that the amount that they are entitled to receive exceeds $100 billion and is in the range of $170 billion. We believe that these statements have created unrealistic expectations that have complicated efforts to resolve this dispute. More recently, the plaintiffs presented a settlement demand of $27.5 billion, assuming for settlement purposes, a 20-percent rate of funds not paid to beneficiaries as a measure of "rough justice," but without data supporting this rate. Testimony of Elouise C. Cobell before the House Committee on Resources Hearing on H.R. 4322, Indian Trust Reform Act of 2005, December 8, 2005, at 7. As we show later in this testimony the choice of assumptions regarding the distribution of unpaid funds over the course of the trust fund, the "error rate," the rate of interest used, and whether the interest is compounded annually dramatically impact the settlement value. The values chosen by the plaintiffs appear to us to be without foundation.

The position of the United States is also suspect. The Department of the Interior has spent considerable funds to trace the record of transactions in the IIM system to determine if the payment made to the accounts of trust fund beneficiaries accurately reflects what should have been paid. The possible outcomes include both underpayments and overpayments. The preliminary results of this investigation are that the observed error rate is very small. Testimony of James Cason, Associate Deputy Secretary and Ross Swimmer, Special Trustee for American Indians on the *Cobell* Lawsuit, before the House Committee on Resources Hearing on H.R. 4322, Indian Trust Reform Act of 2005, December 8, 2005, at 3–5. Indeed, taken to its logical conclusion, Department of the Interior estimate of a settlement value would

be far less than $500 million. This calculation may also be based on arbitrary and false assumptions.

We believe that there are three potential sources of error in the IIM system: (1) money was not collected; (2) money was not properly deposited; and, (3) money was not properly disbursed. With respect to the money that was not collected, funds due IIM beneficiaries either never made it into the system in the first place or may have been collected late. The missing funds or the interest due beneficiaries for late payments could reflect a significant amount of money. This is particularly true in the land-based IIM accounts.

We would designate this type of error as "funds mismanagement." We believe fund mismanagement is sufficiently related to the claims in the pending litigation that it should be resolved under title I of the proposed legislation. But, fund mismanagement should be distinguished from "land mismanagement." By contrast, land mismanagement would encompasses claims by individual beneficiaries over the failure of the United States to negotiate a fair compensation for their oil, mineral, grazing, real estate, or other assets that have been held in trust by the United States. We do not believe that these land mismanagement claims should be part of the resolution of the *Cobell* litigation. These claims have never been asserted by plaintiffs and are much more susceptible to individualized proofs and thus capable of being more accurately evaluated.

The second potential source of error is that once in the system, the funds were not properly deposited in the beneficiaries' trust accounts. This has been the focus of the efforts of the Department of the Interior to value the plaintiffs' claim. While analyzing the administration of funds that have been received by the Department is a good start, it is not sufficient. Moreover, the Government appears not yet to have included in its analysis the land-based accounts where logically many more of the errors should arise. Because the analysis by the Office of Special Trustee only considers the second step of the process and does not analyze land-based accounts, we believe its estimates significantly understate the true exposure of the United States.

The third source of error is whether beneficiaries actually received the disbursements that they were intended to receive. Did the beneficiaries get their checks and cash them? We have been advised by the Department of Treasury that the amount of checks that go un-cashed is relatively small. Nonetheless, there is no way of knowing whether these checks reached the intended payees.

Frequently, as mediators we are asked to value a settlement in a dispute. In many instances the value of a case may depend on the litigation risk or the probability of a party prevailing at trial. What seems certain to us is that there will not be a quick end to this litigation. If Congress does not act, we believe that there will be many more rounds of appeals. Inevitably, one of the parties will petition the Supreme Court for review. By then, many of the IIM beneficiaries will be dead.

There is no perfect or "night" number. Especially, as in this case, where missing documents may make an accurate assessment impossible, an arbitrary number may be the best path to a settlement. Consequently, we do not favor an extended effort to develop and apply a methodology to arrive at a number. We do not believe that it is worth the time and expense of such an effort because, at best, a methodology will only give the appearance of precision. It is our opinion that there are too many unknown and unknowable pieces of information that would be needed to support an analysis of a settlement value.

What we do know is this: The parties seem to agree that approximately $13 billion should have been paid to beneficiaries over the time the IIM trust has been in existence. Neither side disagrees that a portion of these funds was indeed paid to the IIM beneficiaries. Where there is disagreement is in calculating the amount still owed trust beneficiaries. Other factors influence greatly the calculation of a settlement. Because of the time-value of money, moneys not paid a long time ago can greatly increase the total liability calculation. However, the Department of the Interior reports that the vast bulk of funds that went through the IIM system did so in the last 30 years. This seems like a reasonable conclusion that has been supported by verifiable data.

By way of example and for illustrative purposes only—we want to be clear that we are not recommending a specific settlement value—we calculated the amount that the IIM Trust would need to be restated using various assumptions. According to the Department of the Interior figures, $10 billion of the $13 billion in IIM Trust receipts were realized after 1970. We further assumed that only $500 million of Trust Fund assets moved through the IIM Trust prior to World War II. Assuming a 20-percent error rate, a 3-percent compound interest rate, the fund would need to be restated by $7.2 billion. If we change our assumptions and consider a 10-percent error rate and a 4-percent compound interest rate, the restated balance is $5.6

billion. Raising the compound interest rate to 5 percent, but holding the error rate at 10 percent yields a value of $9.8 billion. The point of this exercise is not to recommend a settlement but to show the significant fluctuations in value with small changes in assumptions, especially the compound interest rate. Parenthetically, we note that the use of a compound interest rate is a hotly contested issue between the parties. If simple interest was used, these values would fall. Indeed, what these calculations show is that a final settlement is extremely arbitrary depending on the assumptions one uses. We do not believe that more time and analysis will yield a result that is more precise or less arbitrary.

An alternative approach would be to look at the avoided costs associated with the Office of Special Trustee. Since 2001, the Office of Special Trustee has received more than $3 billion. If this litigation is not settled, how much more will Congress spend to comply with its legal obligations to perform an accounting? We believe that these funds would be better directed to the IIM beneficiaries.

On behalf of Judge Renfrew and myself, we continue to offer our assistance to both committees in whatever roles you see fit for us to serve. We believe that the prompt enactment of S. 1439 and H.R. 4322 is an imperative and we encourage the committees to schedule these bills for markup as soon as possible.

Thank you again for the opportunity to testify today. I will be pleased to answer any questions the committees may have.

Restatement of IIM Trust
Using Different Assumptions

Error Rate	Compound Interest Rate	Restated Balance (billion)
20%	3%	$7.2
10%	4%	$5.6
10%	5%	$9.8

TESTIMONY OF STUART E. EIZENSTAT
BEFORE
UNITED STATES SENATE COMMITTEE
ON INDIAN AFFAIRS
AND
UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE
ON RESOURCES

WASHINGTON, D.C.

MARCH 1, 2006

Chairman McCain, Ranking Member Senator Dorgan, Chairman Richard Pombo, Ranking Member Congressman Rahall, and members of the Senate Committee on Indian Affairs and the House Committee on Resources, thank you for inviting me to testify before your Committees today on S. 1439 and H.R. 4322, introduced by Chairman McCain, with Senator Dorgan as an original co-sponsor and Chairman Pombo and Congressman Rahall respectively, aimed, among other things at bringing belated, but welcome justice to American Indians whose trust accounts have been mismanaged in the past by the U.S. Department of the Interior, and to reform the administration of trust assets for Indian tribes and individual Indians.

I have been asked to testify because of my experience during the Clinton Administration, when in addition to holding a series of four senior international positions, I was simultaneously the leader of the Administration's efforts to bring belated justice to Holocaust survivors and other victims of Nazi atrocities and confiscation of property from World War II--initially as Special Envoy of the State Department on Property Restitution in Central and Eastern Europe and later as Special Representative of the President and Secretary of State on Holocaust-Era Issues. I wish to make it clear at the outset that in no way am I trying to compare the Nazi genocide of six million Jews and millions of others to the gross mistreatment of America's first residents, Native Americans. Each historical event stands on its own. But the way in which we sought to provide what I have called "imperfect justice" to victims of the Third Reich in a series of negotiations from 1995 to 2001 has some useful lessons in how the Congress might provide justice to American Indians in the mishandling of their trust funds assets by the U.S. Government.

Congress has repeatedly found, in the words of the United States Court of Appeals for the District of Columbia (December 10, 2004), that there was "hopelessly inept management of the IIM accounts" with "resulting chaos." In its November 15, 2005, decision the Court of Appeals stated that "it is not disputed that the government failed to be a diligent trustee," as "report after report excoriated the government's management of the IIM trust funds."

A 1992 Congressional report cited the Interior Department's "dismal history of inaction and incompetence." In 1994, Congress, embarrassed by this record, passed the Indian Trust Fund Management Reform Act imposing upon the Secretary of the Interior duties to manage the IIM accounts, and affirming the government's obligation to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or investment pursuant to the" 1938 Act.

Despite the very different historical origins of the Indian claims and the Holocaust claims, there are many lessons from our work that may be important for Congress to consider, some of which are already incorporated into S. 1439 and H.R. 4322. I am limiting my testimony to Title I.

The class action Holocaust cases were brought against Swiss and French banks for Holocaust-era bank accounts never returned to their rightful owners after the War, and, in some cases, drawn down by the banks with fees over decades. The Swiss banks were also accused of taking looted Jewish assets from the Germans for deposit; Class action suits were also brought against German and Austrian companies which employed slave and forced labor during World War II;

German and Austrian insurance companies; and against Germany and Austria for confiscated real and personal property never returned. In each instance, the class action suits were crucial in demonstrating the historical wrong, but are unable to resolve it in a judicial context. In each case, beneficiaries were dying--in the Holocaust cases at the rate of 10 percent per year--while the class action litigation droned on.

In our Holocaust actions, two slave labor cases were dismissed on the same day by Federal Judges Greenaway and Debovoise in New Jersey on a variety of grounds, including the statute of limitations and post-War treaties; Judge Edward Korman, the Federal judge in the Eastern District of New York, who presided over the Swiss bank cases, never ruled on the motions to dismiss, preferring to see our negotiations play out, but indicated suspicion about the legal basis of the claims, except as to actual bank accounts. The only case in which a motion to dismiss was denied was in the French bank case, and that on a dubious ground of a possible continuing conspiracy by the French banks.

In the Cobell case, while there appear to be strong legal arguments by the plaintiffs, the case has been batted around like a volley ball for almost a decade between the District Court and the Court of Appeals, with no benefit to the aggrieved Indians and at great cost to both sides. It is like the infamous case in a Dickens novel.

In fact, courts are not suitable instruments to resolve historical wrongs. Class action lawyers may be able to raise a historical wrong, but are incapable of solving the problem themselves. It was only the direct intervention of the Clinton Administration in mediating the Holocaust cases that led to our dramatic results--$8 billion in settlements for victims, Jewish and non-Jewish alike; payment by private companies to some one-and-half million surviving laborers (most non-Jewish); the identification of over 20,000 Holocaust-era Swiss bank accounts and the disgorgement of thousands of these to their owners or heirs; the payment of thousands of life insurance policies; the return of property and/or compensation for its confiscation; the return of hundreds of pieces of looted art work.

So, too, I applaud Senators McCain and Dorgan and Congressmen Pombo and Rahall for sponsoring legislation that intervenes to find a legislative solution that will never satisfy both sides, but will be infinitely preferable to the endless prospect of uncertain litigation.

Second, the way in which S. 1439 and H.R. 4322 would seek to settle the Cobell litigation and to bring a measure of justice to long suffering Indian country and Native Americans bears striking similarities to the approach we took in the Holocaust cases. Your legislation would create a Global Settlement Amount, in a so far unspecified amount, which would be allocated among the claimants. Your concept of allocating the capped amount partly by a per capita amount and partly by a formula amount, taking into consideration the flow of funds through the beneficiary's IIM account ("through-put") compared to the total through-put of all other beneficiaries seems eminently reasonable. Permit me to give you several examples from my experience.

In the Swiss bank case, a capped sum of $1.25 billion was agreed upon, to be divided up among an unknown number of claimants at the time of the settlement, with $800 million set aside for claims against actual Holocaust-era claims, and the balance for looted assets and other claims. If any sums were left over from the $800 million, as seems almost certain, that will be allocated by Judge Korman in a still unspecified way. There has been a major controversy in the Cobell case about the nature of the accounting required and the cost of performing it. The Committees may wish to know that the Committee of Eminent Persons, chaired by former Federal Reserve Board Chairman Paul Volcker, employed four major accounting firms, at a cost of over $200 million to the Swiss banks, and examined some one million accounts opened between 1938-1945. At the time of our negotiations, we did not know the results of that audit, although we had intimations that several hundred million dollars of accounts would have a possible or probable Holocaust relationship.

We took into account interest lost over the decades since the end of World War II by adding ten (10) times the amount in the account to the recovery. The eminent economist Henry Kaufman helped with the determination of the basis of the "plus-up".

In the German Holocaust labor cases, we employed a per capita concept in our capped 10 billion DM ($5 billion) settlement. We estimated from records available to us that there were around one million surviving laborers. We divided that number into the capped amount we negotiated. All slave laborers (defined as those who were being worked to death, as evidenced by being forced to live in a concentration camp or ghetto on the Red Cross list) were paid the same per capita amount ($7500 per person), regardless of the length of time, circumstances, or nature of their slave labor. Likewise, forced laborers, who worked under harsh but somewhat better conditions, all received $2500. It was impossible to have individual hearings for each of some one and a half million workers. Because there were more surviving laborers than we estimated, the per capita payments were less than we hoped.

Similarly, in the Austrian labor cases, we negotiated a $400 million capped fund, and allocated it per capita to Austrian slave and forced laborers on a per capita basis. With the German experience behind us, we over-funded the account to assure different categories of laborers received either $7500 or $2500, depending upon their circumstance. Indeed, there was an overage, as there were fewer laborers in this case than we estimated.

In the Austrian property settlement, we agreed upon a $210 million capped fund, called the General Settlement Fund (this has finally been funded only in the past several weeks, five years after our U.S.-Austrian agreement). Here, again, we had an unknown number of claimants and we agreed that each would get up to $2 million per person. There are now over 19,000 claimants, and, it appears, they will receive less than the maximum payment. The compensation is in lieu of the return of the actual confiscated property. The only *in rem* recovery comes for those whose property is held by the state. We had an earlier $150 million moveable property settlement, paid on a per capita basis to all Austrian Holocaust survivors, on the theory that they lived in leased apartments and/or owned leased businesses, which had been uncompensated after World War II.

For insurance payments, we also added a factor of ten (10) to the face value of the policies to take into account the passage of time.

Third, we employed the concept of "Rough Justice" in our determinations of the amount of the recovery. As you seek to fill-in the blank in your proposed Global Settlement Amount, you might consider doing the same.

Thus, we recognized that there was a certain arbitrariness in any figure. How do you place a value on the damage done 60 years after the War to a slave or forced laborer? How do you determine the capped amount for German slave and forced labor companies? How do you determine how much the Swiss banks should pay for their perfidy in hiding Holocaust-era bank accounts for decades from their owners and heirs, often taking them into the profits of the bank? This is where the concept of Rough Justice came into play, a concept actually proposed by attorneys for the Swiss banks, and employed in that and all subsequent agreements.

We did our best to try to come to some reasonable figure, but in the end, it was a case of getting the maximum for Holocaust victims that the offending foreign corporations were willing to pay. In the Swiss case, I employed a stratagem of asking each side for a range of their maximum and minimum and for what they believed the other side's maximum and minimum would be. I worked within those numbers and actually proposed a figure very close to the one Judge Korman later used to settle the cases. Again, while the Volcker audits were proceeding, we did not know their result at the time. With the German, Swiss, and French cases, it was simply finding the middle ground on which the parties could agree.

You have this unenviable task. There will be no figure that will satisfy both sides. You labor, as I did, with an imperfect set of historical records. Evidently, the state of the trust fund accounts is abysmal.

If there is to be an accounting, I believe that it must be one that can use statistical analysis and not cost out of proportion to what amounts it will uncover. But it is far better, as you have done in your legislation, to simply avoid further costly accounting on an incomplete and poorly managed set of records, some of which have been destroyed or otherwise are inaccessible.

In coming to a number, which almost certainly should be in the billions (reminding me of the demand by one of the leading class action lawyers, Mel Weiss, in the Swiss bank case that there could be no settlement without a "b" after the number!), the Committees should take into account the passage of time, the lost investment opportunities, the massive negligence--or worse--of the Interior Department, the fact that you are really returning their money, and similar factors. In coming to such a number you will have still done more justice for the IIM beneficiaries and for individual Indians than they could ever hope to obtain from the courts.

Also, your legislation will assure, as did our Holocaust negotiations (in which the class action lawyers got only about 1 percent of the total recovery), that the class action lawyers do not take a disproportionately large percentage of the ultimate recovery. You will also avoid the costs to the government of a massive audit. It is better, as we argued in the Swiss bank cases, to use that money for victims, than to pay it to auditors.

Fourth, you might consider the institutions we created to administer the Holocaust funds we obtained. In the Cobell case and in your legislation, there is a significant dispute over who should administer the settlement. The plaintiff-Indians, with their rightful suspicion of the Interior Department, and to a lesser degree, the Treasury Department, want the Federal District Court to administer the funds. The legislation proposes that the Treasury Department administer the funds.

There frankly is a problem with having either Interior or Treasury have such a fiduciary role, given that they are defendants in the cases, and in light of their failure to live up to their fiduciary responsibilities since 1887.

We created administrative mechanisms. In the Swiss bank case, a Claims Resolution Tribunal functions under Judge Korman, with a Special Master helping him. Average recoveries, after the plus-up for the decades of delay, is around $100,000. In the Austrian property claims, we created administrative tribunals with three persons, one appointed by the Austrian government, one by the U.S. government, and the third by the other two. In the case of the German slave and forced labor case, a German-controlled board makes policy decisions, but the U.S. government and the plaintiffs' have representatives. The insurance claims are processed by an organization headed by former Secretary of State Lawrence Eagleburger (ICHEIC), which has come in for substantial criticism for its pace of decisions and costs, although its performance has markedly improved. I have found that the purely administrative panels work most efficiently.

Congress might consider establishing an independent administrative tribunal in the Indian cases, independent of the Interior and Treasury Departments, perhaps reporting to the Attorney General of the United States in the Justice Department. Sending the administration of the payments back to the courts that have failed to resolve the matter for a decade is a prescription for future delay in doing justice to Indians.

The key is rapid decision-making in the lifetime of the majority of the claimants, a key consideration for aging Holocaust victims. I would think the same would apply to Indian claims. I believe you are on the right course to have these claims paid out of the Claims Judgment Fund.

It is important to realize that those regimes we created which are individual claims based, like the Swiss bank settlement's Claims Resolution Tribunal and the ICHEIC process, are slow and labored. For example, it has been more than seven years since the Swiss case was settled and more than three years after the Tribunal was created, yet the claims process has still not been concluded. The ICHEIC process is expensive and slow. Therefore, the more the Indian payments can be made on a per capita basis, without individual payments, the better.

Fifth is the issue of legal certainty and constitutionality. We were very concerned about how to constitutionally cut-off claims for those who did not wish to join in our government-to-government settlements. At the same time, the defendants in our cases rightly demanded "legal peace" before paying over billions of dollars. They did not wish to make such payments and then be sued yet again. While the vast majority of class action lawyers did support our settlement and voluntarily dismissed their claims, there were a few outliers. In the Swiss case, their appeals delayed a final settlement for several years, to the great detriment of aging Holocaust survivors. In the subsequent German, Austrian, and French cases we learned our lesson. We created a unique "Statement of Interest" in which the U.S. government pledged to support the defendants in dismissing all cases on any valid legal ground, and stating that there was a national security interest in having the cases dismissed and the negotiated settlement go forward. In every case, without exception, the federal courts have deferred to our Executive Branch Statement of Interest.

As I understand your proposed bill, you would extinguish claims for mismanagement of funds, but not for improper decisions on land management. Claims might still be made relating to the mismanagement of the underlying asset. I realize there may be objections to having the legislation cover both elements. I also recognize that you are limiting claims of land mismanagement to individual cases. But, I am sympathetic to the Interior Department's concern that any settlement would not cover all claims, and that there will still be elements of the Cobell litigation that will continue ad infinitem. It seems to me better to bite the bullet once and for all and pay a larger sum to settle all elements of the case. You have built in ample protections to challenge the distribution of the settlement funds to survive constitutional challenge.

I believe the Interior Department is correct in asserting in their December 8, 2005 statement by James Cason and Russ Swimmer that Congress shall provide "clear guidance as to the amounts to which individuals are entitled, rather than leaving the decision of what individuals receive to a formula developed by the Secretary. Congress shall craft a distribution method with as much clarity and direction as possible." The less discretion given to the Executive Branch the more efficient will be the payment program to long suffering Indians. Our Holocaust experience demonstrated that the more precise our negotiated agreements, the fairer and speedier were the administrative tribunal decisions for the benefit of victims.

In conclusion, you are to be congratulated for embarking on a politically courageous course to rectify over 100 years of wrongs committed by our government against individual Indians who ceded their accounts to the Interior Department in the expectation they would be properly managed. Your legislation broadly sets the right course.

I hope my suggestions will prove helpful as you work to perfect your bills.

* * * * *

Stuart E. Eizenstat was President Jimmy Carter's Executive Director of the White House Domestic Policy Staff and Chief Domestic Policy Adviser from 1977 - 1981. In the Clinton Administration from 1993 - 2001, he was US Ambassador to the European Union, Under Secretary of Commerce, Under Secretary of State, and Deputy Secretary of Treasury. During this time he was the Administration's leader in dealing with all Holocaust restitution issues.

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Statement of Harold Frazier, Chairman
Great Plains Tribal Chairman's Association
Before
The Senate Committee on Indian Affairs
And
The House Committee on Resources
on the Settlement of *Cobell v. Norton*

March 1, 2006

As Chairman of the Cheyenne River Sioux Tribe and the Great Plains Tribal Chairman's Association, I am pleased to present this testimony on S.1439/H.R. 4322 and the settlement of *Cobell v. Norton*. I commend Senators McCain and Dorgan, as well as Representatives Pombo and Rahall, for introducing S.1439 and its companion bill, H.R. 4322, respectively. This ground-breaking legislation would provide fundamental changes in the federal government's management of Indian trust resources and provide a method for settlement of *Cobell v. Norton*, a case that has embroiled most of Indian Country for close to ten years.

In July of last year, I testified as to the effects of the *Cobell* lawsuit before the Senate Committee of Indian Affairs, specifically on the Department of Interior's reorganization of the Bureau of Indian Affairs (BIA) and the Office of the Special Trustee (OST). I also testified before the House Committee on Resources precisely one year ago today on the same subject. My testimonies reflected the nearly universal view that settlement of *Cobell* is necessary and prudent, as the case has been a fiscal drain on vital resources that would otherwise be dedicated to tribal governments for law enforcement, healthcare and other social programs. However, I noted that, like most Great Plains tribes, the Cheyenne River Sioux Tribe is a tribal account holder and has many members who are Individual Indian Money account holders as well. Consequently, my testimonies stressed that any settlement of the watershed case should balance the interests of both tribal and individual account holder interests and recognize that such a balance is an essential element to a successful out-of-court resolution. I also stressed that, in addition to settlement of the *Cobell* case, there also needed to be fundamental reform of the BIA's management of Indian trust resources. Finally, I emphasized that any reform of trust management needs to reflect the fact that "one size does not fit all," and that the needs of the Great Plains Region were far different from the needs of other Regions.

I thank the Committees for the opportunity to testify on this topic again. It is clear that S.1439/H.R. 4322 reflects many tribal views and concerns, particularly in the provisions dealing with the Indian trust resource management demonstration project, creating a new office of the Under Secretary for Indian Affairs, and restructuring the BIA and the OST. Today, after having studied the bills more closely, considered other tribal viewpoints and positions on the bills, as well as caucused with my Great Plains tribal colleagues on the effects of the bills on our Region, I am pleased to present the Great Plains Tribal Chairman's Association's position on Title I of S.1439/H.R. 4322.

Before I begin my testimony, I would like to commend my colleagues from the United South and Eastern Tribes and the Affiliated Tribes of Northwest Indians for taking a joint position on these bills. I would like to share this new position with my Great Plains tribal colleagues with the intent of achieving common ground. For this reason, I respectfully request that the record for written comments on the remainder of the bill remain open for a reasonable period after the conclusion of this hearing.

Title I would resolve the costly and protracted *Cobell* lawsuit and addresses settlement of claims for an accounting of IIM accounts held by individuals. We endorse and support an equitable and timely settlement of the *Cobell* lawsuit, which we believe Title I endeavors to do. For instance, we applaud the principle underlying **Section 103(a)(2)**, which authorizes the settlement amount from the Claims Judgment Fund (31 U.S.C. §1304) so that such funds would not be unfairly scored against any agency. Indeed, as a result of the *Cobell* lawsuit, the Department of the Interior has been involved in a costly reorganization of its offices that has gutted the BIA and poured those funds into an office that does not listen to or answer to tribes, the OST. To fund this reorganization, the Department stripped aware scarce resources from programs for essential governmental services that are relied upon by tribes for functions like law enforcement, education, welfare assistance and other vital programs, and has redirected those funds to pay for the Department's management of the trust. For years, tribal governments have been forced to make due with inadequate funding as a result of the need for reform due to *Cobell* despite overwhelming need at the local level for critical governmental services. This redirecting of funding strikes at the very heart of our government-to-government relationship with the United States, and often pits tribes against each other in competition for basic services funding. Moreover, the Department's willingness to use program funds to pay for trust-related issues was illustrated in the worst way in late January 2006 when the Department took $3 million from the BIA programs to pay a portion of a $7 million dollars attorney fee award that the *Cobell* Plaintiffs' received from the court. This latest shift of resources away from BIA programs is illustrative of the critical need to settle *Cobell* as expeditiously and as fairly as possible for the greater good of Indian Country.

It should be made clear that in drawing this conclusion we do not take a position on the merits of the *Cobell* lawsuit. To the contrary, we simply stress that the time has come to put an end to the Department's siphoning of Indian program dollars under the auspices of "reform" due to *Cobell*, which is only made possible through an equitable legislative settlement.

While we generally endorse Title I, we bring the Committees' attention to sections of Title I that we believe require further consideration and amendment.

First, the definition of "claimant" under **Section 102** should be amended to reflect those IIM account holders whose interests were created by virtue of the General Allotment Act of 1887. As currently drafted, the legislation does not take into account those individuals whose accounts were lost prior to the American Indian Trust Fund Management Reform Act of 1994. For instance, in 1905 the Burke Act authorized the Indian Commissioner to issue fee patents under the General Allotment Act of 1887 and other allotment Acts; Indian allotment holders were deemed "competent" and were arbitrarily issued fee patents. Some individuals then lost their land through county tax proceedings, some of which was later put back into trust. Another claim that would be cut off by the 1994 date includes claims from the six year period when non- Indians were allowed to run their cattle

for free on land owned by individual Indians. For purposes of recognizing these claims and others, we suggest amending Section 102 to reflect these claims.

Second, **Section 103** requires that a portion of the Settlement Fund be used to pay attorneys' fees and other administrative fees necessary to carry out the settlement. We believe it is reasonable that a small percentage of the Fund be used for administrative fees; however, we feel it would be inequitable if attorneys' fees for actions under Section 104 of the Act are deducted from the Fund as the general source of recovery for all claims. We respectfully request that another federal source of funds be targeted as a source for these fees. In addition, as drafted, the Act specifies that 80% of the amount in the Fund shall be used to make payments to claimants in accordance with Section 104. Every effort should be made to increase this percentage, starting with reducing the percentage (12%) dedicated to paying attorneys' fees for individuals who seek further redress under Sections 106 and 107. Similarly, we strongly encourage the Committees to consider capping the amount of overall attorneys' fees to reflect market trends, bearing in mind that, as drafted, these fees come directly out of account holders' settlement fund.

Third, **Section 104** sets out the terms for general distribution of the Fund to claimants and provides that the heir of a claimant shall receive the entire amount distributed to the claimant. Since the Act does not define "heir" or otherwise provide a scheme for distribution in the event of death of the original claimant, we suggest that a definition be added to reflect that an heir include lineal descendants. In addition, subpart (c) should enable a tribe to assist the Department in locating missing and claimants by providing relevant information on the claimant. We believe this would not only enhance the possibility of locating the missing claimant, but also provide a degree of due process if the information provided by Interior is disputed. Finally, we recommend that all regulations promulgated under the Act be subject to negotiated rulemaking.

Fourth, **Sections 105-107** lay out three different appeal processes in three different courts for appeals based on three different kinds of claims based on share distribution, valuation of claims and Title I constitutionality. In all three types of appeals, there are no provisions for appeal rights for those claimants that are considered to be "whereabouts unknown." Moreover, for claims relating to method of valuation and constitutionality, class actions are prohibited, and the act of filing an appeal prevents the appellant from receiving any payment under Section 104. Thus, unless the individual wins his/her appeal, they receive nothing. We believe that these sections, taken together, strongly discourage any claimant from appealing the settlement amount, how the settlement was arrived at, and the constitutionality of applying Title I to his/her claim. These sections should be rewritten to streamline the appeal process, allow class action appeals, and allow the claimant to appeal in local courts and consolidate the claims that their appeal is based on. Furthermore, if a claimant appeals and loses, in the interest of fairness, he/she should still be able to receive a payment under Section 104.

Finally, the Great Plains Tribal Chairman's Association, which represents tribes that are also IIM account holders, appreciates that tribal trust claims are preserved by **Section 110(d)** and that those claims will be unaffected by settlement of the class action lawsuit. However, it is not undisputedly clear from the language of Section 110 that tribal trust accounts are inclusive of tribal IIM accounts. We suggest that the language that tribal IIM claims "seeking an accounting, money damages or any other relief relating to a tribal trust account or trust asset or resource" be clarified to avoid any misinterpretation that tribes should not be considered claimants for purposes of settlement under the Act. This section is particularly important as the Tribe has other potential claims that go beyond simple claims for historical accountings of IIM accounts. In addition, we should point out that Section 110 does not contemplate settlement of claims by "whereabouts unknown" claimants and thus does not foreclose all claims as contemplated under the Act. We suggest that this omission be addressed by way of amendment.

Conclusion

The Great Plains Tribal Chairman's Association acknowledges that settlement of *Cobell v. Norton* is in the best interest of tribal and individual IIM accountholders. However, any settlement must recognize the rights of both types of beneficiaries and balance their interests so that a fair and equitable resolution can be accomplished.

In closing, I would like to thank the members of Senate Committee on Indian Affairs and the House Committee on Resources for holding this hearing today and allowing me to express the voices of the Great Plains Tribal Chairman's Association-Tribes on the impact of Title I on our people.

Joe Garcia, President of the National Congress of American Indians and Governor, Ohkay Owingeh (San Juan Pueblo)

Testimony before the Senate Committee on Indian Affairs and the House Committee on Resources

Joint Oversight Hearing on the Settlement of *Cobell v. Norton* March 1, 2006

Chairman McCain, Chairman Pombo, Vice-Chairman Dorgan, and Ranking Member Rahall, I thank you for your invitation to testify today before this extraordinary joint hearing of the Senate Committee on Indian Affairs and the House Resources Committee. I would like to express my appreciation to the leadership and the members of both Committees for their commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The National Congress of American Indians strongly believes that it is time for Congress to move forward with a fair settlement for the *Cobell v. Norton* litigation. Tribal leaders support the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting at the Department of Interior. At the same time, tribes are concerned about the impacts of the litigation upon the capacity of the United States to deliver services to tribal communities and to support the federal policy of tribal self-determination. Significant financial and human resources have been diverted by DOI in response to the litigation. The contentiousness of the litigation is also creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Continued historical accounting activities by the Department may cost billions and are very unlikely to achieve a satisfactory result. Because of this, three years ago NCAI passed a resolution stating that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX-03-040. My predecessor, NCAI President Tex Hall, worked very hard over the last three years to push for a settlement and I plan to continue that effort.

Earlier this week the NCAI Executive Committee considered a resolution from our Annual Session. I am attaching to my testimony our new resolution where NCAI takes three positions. First, NCAI supports S. 1439 and H.R. 4322 and the efforts of Senators McCain and Dorgan and Congressmen Pombo and Rahall in introducing the legislation. Second, NCAI strongly urges the *Cobell* plaintiffs, the Department of Interior, and the Congress to increase their efforts to develop a viable settlement proposal for the *Cobell* litigation. Specifically we would encourage settlement options that will engage the participation of individual Indian account holders in the discussion -- structured in a way so that the Indian account holder can understand what it will mean. Third, NCAI urges the Senate Committee on Indian Affairs and the House Resources Committee to move forward with a mark up of the legislation based on the comments received from Indian country and to develop a more definitive settlement proposal for the *Cobell* litigation than what is currently found in Title I. We encourage you to continue to consult with Indian Country concerning technical amendments to the legislation, but also to move forward to mark up a new bill.

Tribal leaders recognize that the *Cobell* litigation has had some very positive effects. It has focused attention on the important issue of trust reform whereas previously the Department was able to ignore it or brush it under the rug. However, there are also increasing costs or side effects of the litigation which is now entering its tenth year. DOI and Congress are engaging in "divide and conquer" by imposing the costs of the litigation on the tribes and on the budget for Indian programs. It is unconscionable that Indian people are made to pay for correcting the accounts that were mishandled by the federal government in the first place. We want the Congress to either put a stop to these unreasonable burdens on the tribes or to settle the litigation. The side effects of the litigation include:

1) An enormous impact on the budget for Indian programs over the last six to eight years – at this time we are losing approximately $100 million annually out of Indian programs to pay for the accounting and the reorganization reforms that tribes opposed;
2) The Office of Special Trustee has grown into a very large and expensive bureaucracy that far exceeds its intended mission and impedes routine decision making on trust issues;
3) The federal government now looks at Indian issues through the lens of liability rather than a focus of helping Indian people. They are extremely risk averse and fight anything that even remotely looks like a trust responsibility. This is spilling over to other issues like limitations on land to trust acquisitions and the Indian Health Care Improvement Act;
4) An embattled mindset has developed at the Department of Interior that impedes dialogue with the tribes and Indian people that they are intended to serve. With some justification they are concerned that anything they say in public be used against them in court;
5) The Department has become single minded on trust reform and the litigation in a way that distracts significantly from their efforts in other extremely important areas like law enforcement, education, transportation and economic development;
6) As a result of court orders, the BIA has had no e-mail or ability to use websites and the internet for four years. Like everyone else, Indian tribes and Indian people have become significantly dependent on the exchange of electronic information. This is a major reason that communications and information sharing and collection are suffering at the Department;
7) The growth of tribal self-determination has been hindered as the Interior has shifted to more centralized and defensive decision making. The goal of the federal self-determination policy is for tribal governments to increasingly exercise their sovereignty to make decisions and advance tribal priorities. The role of the federal government should be evolving into a partner that performs the federal functions and provides resources and technical assistance. This partnership is critical to the advancement of Indian tribes, but it is not growing in the way that it should – for all the reasons above.

We are concerned that continued litigation will result in a lose-lose-lose result for the federal government, the Indian account holders, and the tribes. The Department has already started the accounting process and is gearing up to spend hundreds of millions if not billions in an effort that will take at least the next ten years. This will result in nothing more than an accounting statement for Indian account holders and not a penny in compensation – although the accounting procedures will certainly be litigated and the entire effort could be delayed and restarted repeatedly. All of the side effects listed above would continue and likely intensify for the tribes. The only likely winners in continued litigation are the accountants and document scanning companies. This is clearly a case that cries out for a more pragmatic solution and settlement.

I would like to provide you with some of the comments that we have collected on S. 1439 and H.R. 4322 as you proceed to mark up the bill. As you know, NCAI President Tex Hall and Inter Tribal Monitoring Association Chairman Jim Gray facilitated a Workgroup last year to develop recommendations for *Cobell* settlement and related fixes to the trust management system. After S. 1439 was introduced last year, this Workgroup met on several occasions to discuss the specifics of the legislation and the following is a summary of suggested changes. This is only a brief overview of the comments that received significant discussion by the Workgroup and had some degree of consensus among the tribal leaders. I would encourage you to solicit further comments from all tribal leaders and tribal organizations.

Title I – Settlement of Litigation Claims

Based on many hearings, the bill includes findings that an accounting for IIM accounts may be impossible because of missing data and may cost billions of dollars to perform, and as a result it is appropriate for Congress to provide a monetary settlement to IIM account holders. We strongly agree with these findings. The bill does not specify the settlement amount and we would encourage you to develop a specific settlement proposal based on what you learn in this hearing today. We believe that it is important to structure the settlement proposal in a way that will bring the voices of the individual Indian account holders into the discussion and find a practical solution that satisfies their need for a fair settlement.

The plaintiffs have raised objections to distribution methodology outlined in the bill, and would like the district court to be given a lump sum and the authority to distribute as the court sees fit. A related concern was raised that a lump sum with no distribution guidelines could create significant complications and additional litigation. Under the class action rules of the Federal Rules of Civil Procedure, when the class is distributing money damages where the plaintiffs are not identically situated, the individuals must be allowed the opportunity to withdraw and bring their own litigation against the lump sum.

Title II – Indian Trust Asset Management Policy Review Commission

This section would establish a commission to review the laws and regulations and practices of the Department of Interior relating to the administration of Indian trust assets. After conducting the review, the commission would develop recommendations and submit a report to Congress on changes to federal law that would improve the management and administration of Indian trust assets. The Commission appears to be modeled on the 1970's Indian Policy Review Commission that issued a very influential report that led to a number of important laws that benefit tribes, including the Indian Finance Act, the Indian Health Care Improvements Act, the Indian Elementary and Secondary Education Act, the Indian Self-Determination and Education Assistance Act and the Indian Child Welfare Act.

This Title does not meet our goal to establish a true oversight commission and explicit trust standards to govern the administration of our trust assets. Our understanding is that the sponsors believed that a broad expansion of federal liability would create insurmountable opposition to the bill. Instead, it appears that the sponsors want to establish a process for developing standards that could be implemented by Congress at some point in the future. There was some support for having a careful review of trust laws that would facilitate legislative action in the future.

Title III – Indian Trust Asset Management Project

This section would create a demonstration project where an Indian tribe may develop its own trust asset management plan that is unique to the trust assets and situation on a particular reservation. The plan would identify the trust assets, establish objectives and priorities, and allocate the available funding. Contracting and compacting tribes may identify the functions performed by the tribe and establish their own management systems, practices and procedures that the tribe will follow so long as consistent with all federal laws, treaties and regulations.

The bill would establish standards that the Secretary must apply to the management plans before they may be approved -- including that the plan must protect trust assets, promote the interests of the beneficial owner, protect treaty rights, and be carried out in good faith and with loyalty to the beneficial owner. The tribes that are currently under Section 131 are eligible to participate in this demonstration project, plus an additional 30 Indian tribes.

The requirement for Secretarial approval of Trust Asset Management Plans would give the Secretary a very broad discretionary authority to refuse. This is in contrast to related federal legislation such as the Indian Self-Determination and Education Assistance Act (ISDEAA) which grants narrower authority to the Secretary to disapprove a tribal contract or compact. Tribes have faced a long history of bureaucratic decision making by the Department – highly risk averse, lengthy delays, preservation of federal bureaucracy and occasionally outright conflicts of interest with the tribes. The approval authority of the Secretary should be amended to more closely resemble the type of language that is found in the ISDEAA – the Secretary should be required to approve the plan unless she makes findings that that plan is inconsistent with the trust responsibility, treaties, or is otherwise inconsistent with federal law.

Under Section 304(b)(3), the plan is considered disapproved if the Secretary does not approve or disapprove a proposed plan within 120 days. This seems to be unduly prejudiced against plan approval. Under Section 304(b)(1)(B)(3), the Secretary can disapprove a plan if the cost exceeds available funding. This potentially creates two types of problems (a) since appropriations are made annually, there seems to be an implication that Plans will have to be renegotiated each year; and (b) the capacity of tribes to obtain funding by combining Interior funding with non DOI sources may be diminished.

Section 304(a)(3) seems to provide some flexibility for tribes to develop their own administrative systems, but then may remove flexibility by requiring that the systems adhere to regulations enacted by Interior. The reference to regulations should be deleted, or a provision for waiver of regulations should be included as in the ISDEAA.

The demonstration project still seems to require Secretarial approval for actions taken to implement Trust Asset Management Plans. The demonstration project could include expedited approval or elimination of requirements for approval so long as functions or actions are taken in accordance with Trust Asset Management Plans.

Finally, there may be a need to consider how the demonstration project fits into the budget development or evaluation systems employed by OMB (currently PART under GIPRA) so that the performance measures fit into budget development procedures.

Title IV – Fractional Interest Purchase and Consolidation Program

The heart of the trust problem is the historic fractionation of title to individual lands. Some allotments now have upwards of 1500 owners, and this creates enormous problems in administration and putting land to use. Because the value of each interest can be extremely small, this section would create incentives for voluntary sales of fractionated interests by allowing the Secretary to offer more than fair market value. This is an extremely important program for resolving the trust issues and putting Indian lands back into a manageable form. Any land acquired by the Secretary under this section would be held in trust for the tribal government that exercises jurisdiction over the land involved.

The bill provides that any payments that landowners receive under the land repurchase program would not be subject to state or federal income tax and would not affect eligibility for any programs including social security and welfare. This is an important provision because it removes a disincentive to participation by landowners.

For land with more than 200 undivided interests, if the Secretary follows certain procedures, including notice by certified mail, the offer would be deemed accepted unless it is affirmatively rejected by the owner. The "automatic acceptance" provision for lands with more than 200 owners is new and raises concerns about unfair treatment of land owners. This provision should be removed or deferred to give the newly invigorated voluntary purchase program time to work. The legislation should reconsider the federal liens on repurchased lands. In most cases the costs and headaches of administration of these liens significantly outweighs their value. The bill should do more to provide new programs for individual land owner repurchase and consolidation.

Under the bill, the Secretary would be authorized to offer to any individual owner a settlement of any natural resource mismanagement claim that they may have (as opposed to the accounting claims. This provision does not appear to be funded and should be considered in conjunction with Title I and the *Cobell* settlement.

Title V – Restructuring Bureau of Indian Affairs and Office of Special Trustee

This title of the bill is strongly supported because it includes the tribal priority of eliminating the Office of Special Trustee and creating a single line of authority. This title would create a new position of "Under Secretary for Indian Affairs" who would replace the Assistant Secretary. The Office of Special Trustee for American Indians would be terminated in 2008 and the functions of the Special Trustee would be transferred to the Under Secretary. All positions in the office of the Under Secretary would be subject to Indian preference. The Office of Under Secretary would create a single line of authority for all functions that are now split between the BIA and the OST, and the Under Secretary would also have the responsibility to supervise any activities related to Indian affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service.

The bill only indirectly addresses the need for reorganization at the lower levels and the need to devote more resources to the reservation level. The elimination of OST should free up budget for line positions, and the Trust Asset Management Plans can be a tool for devoting resources to the reservation level.

Although many tribes would prefer that the position be a Deputy Secretary, the primary focus of the Workgroup was placed less on clarifying the necessary authorities and responsibilities of the position. Our suggestions for these authorities and responsibilities are the following.

1) Responsibilities:
   a. Report directly to the Secretary on matters pertaining to Indian Affairs.
   b. Provide a single line of authority and accountability for coordination and policy direction for all programs and agencies of the Department of Interior, (a) inform decision makers as to the implications of their action for the trust obligations of the United States; and, (b) coordinate with Assistant Secretaries and agency heads to improve service delivery to Indians.
   c. Represent, protect and advocate for Indian interests through all bureaus and agencies of the Department (avoid listing specific agencies). This responsibility is not limited to activities pertaining to trust administration, but rather encompasses all programs providing services to Indians and the capacity for Indian tribes to exercise federally reserved rights.
   d. Provide guidance and oversight for the demonstration project to be established under Title III of S. 1439. Generally ensure progress made under Self-Determination and Self-Governance programs in all efforts to restructure programs of the Department to deliver services to Indians; support and advance tribal self-determination, contracting an compacting for all Departmental programs affecting Indians.
   e. Serve as a liaison with federal agencies outside the Department of Interior on matters pertaining to Indian Affairs (e.g. Departments of Commerce, Treasury, Agriculture, EPA, and FERC). This includes (a) advocating for Indian interests; (b) ensuring that Agencies are informed of trust obligations; (c) reviewing and commenting on proposed policies; and (d) improving coordination and promoting integration of federal programs that provide services to Indians. Should include a provision requiring other federal agencies to coordinate with Under Secretary.

2) Authorities:
   a. Provide policy direction on matters pertaining to Indian Affairs to all entities of the Department of Interior and authority to coordinate activities of such entities to improve the effectiveness and efficiency of service delivery to Indians.
   b. Coordinate with federal entities outside the Department to ensure that decision makers are informed as to the potential implications of their actions on the trust obligations of the United States, minimize potential for conflict, and improve the effectiveness and efficiency of service delivery to Indians.
   c. Retain Trust Counsel.
   d. Provide the Under Secretary with sufficient authority to establish a position of trust counsel and draw upon such agency expertise as may be necessary to fulfill duties and responsibilities. Minimize the need to force agencies outside the BIA & OST to place staff under the Under Secretary – so as to maintain access to staff in other agencies with specific expertise. Emphasis should be placed not on direct supervision, but rather on providing policy guidance to ensure collaboration, coordination, and efficient, effective service delivery by the bureaus and agencies of the Department of Interior.

3) Appointment:
   a. Require tribal consultation
   b. Eliminate the exception (503(b)(2)) which allows the Assistant Secretary of Indian Affairs to become the Under Secretary without the advice and consent of the Senate

4) Office of Trust Reform Implementation and Oversight -- Separate operational responsibilities from oversight functions:
   a. Consider redesignating the current OST or ASIA as an Office of Trust Reform Implementation (OTRI). Define the role of the OTRI as the entity responsible for developing policies, procedures, and programs for trust administration and making them operational within the BIA; require that programs and functions currently under the supervision of the OST be transferred to the BIA once they become operational; establish a sunset date for completion of the work.
   b. Establish a separate entity (Office of Trust Administration Oversight?) responsible for oversight; include an ombudsman position with authority to investigate and report to the Under Secretary on recommended resolution to problems and issues related to trust administration.

5) Provide guidelines for organizational restructuring:
   a. Objectives for restructuring: (a) consolidation of functions and operational authorities at the BIA field office levels; (b) clarify lines of authority for Departmental personnel responsible for delivering services to Indians and those responsible for providing oversight of trust administration.
   b. Require tribal involvement when restructuring national, regional, and agency operations to provide local flexibility in allocating available resources (including measures to provide oversight for trust administration). Develop guidelines for tribal involvement (include a separate section of S. 1439 describing requirements for consultation, including timelines, participants, and agenda control?).
   c. Consider merits of integrating local consultation process with development of agreements with tribal governments containing specific, locally-driven performance standards for trust administration.
   d. Tribal contracting and compacting is not to be diminished, but should rather be enhanced.
   e. Trust administration functions should be performed in accordance with tribal law and management of reservation-specific resource management plans, unless otherwise prohibited by federal law.

Title VI – Audit of Indian Trust Funds

This section would require the Secretary of Interior to prepare financial statements for individual Indian, tribal and other Indian trust accounts and prepare an internal control report. The section would also direct the Comptroller General of the United States to hire an independent auditor to conduct an audit of the Secretary's financial statements and report on the Secretary's internal controls. We strongly support this provision and the importance of an independent source of the audit function that will protect both account holders and the federal government.

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The National Congress of American Indians
Resolution #EWS-06-004

TITLE: Support for S. 1439, the Indian Trust Reform Act of 2005 and Settlement of the "Cobell" Class Action Trust Fund Accounting Litigation

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, 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 federal government has a longstanding comprehensive trust responsibility to Indian tribes based on treaties, the Unites States Constitution, federal statutes, executive orders and judicial decisions; and

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

WHEREAS, significant financial and human resources have been diverted by DOI in response to the litigation; and

WHEREAS, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship and address other pressing needs confronting Indian country; and

WHEREAS, the litigation and historical accounting are severely impacting the capacity of the Bureau of Indian Affairs to deliver services to tribal communities and to support the federal policy of tribal self-determination; and

WHEREAS, Indian tribes have significant concerns about the growth of the Office of Special Trustee into a large bureaucracy that far exceeds its intended mission and impedes the delivery of realty services in Indian country; and

WHEREAS, Senators McCain and Dorgan introduced S. 1439, the "Indian Trust Reform Act of 2005," on July 20, 2005 and Congressmen Pombo and Rahall introduced an identical bill, H.R. 4322, on November 15, 2005; and

WHEREAS, there is strong support among tribal leaders for the Title III, the Indian trust asset management plans, Title IV, the incentives for land consolidations,

Title V, the reorganization of the BIA and OST under a single line of authority, and Title VI, procedures for auditing; and

WHEREAS, Title I proposes to settle the Cobell litigation and creates a methodology for distribution but does not specify an amount; and

WHEREAS, given the timeframes for the 109th Congress and the pending changes in Committee leadership, there is concern about the lack of progress in coming to a realistic and politically achievable settlement proposal for the Cobell litigation under Title I.

NOW THEREFORE BE IT RESOLVED, that the NCAI supports S. 1439 and H.R. 4322 and the efforts of Senators McCain and Dorgan and Congressmen Pombo and Rahall in introducing the legislation and encourages Congress to continue to consult with Indian Country concerning technical amendments to the legislation; and

BE IT FURTHER RESOLVED, that NCAI strongly urges the Cobell plaintiffs and the Department of Interior and the Congress to increase their efforts to develop a viable settlement proposal for the Cobell litigation and settlement options that are understandable and will engage the participation of individual Indian account holders; and

BE IT FINALLY RESOLVED, that the NCAI urges the Senate Committee on Indian Affairs and the House Resources Committee to move forward with a mark up of the legislation based on the comments received from Indian country and to develop a more definitive settlement proposal for Title I.

CERTIFICATION

The foregoing resolution was adopted at the Winter Session of the National Congress of American Indians, held at the Wyndham Washington, D.C. on February 27, 2006 with a quorum present.

President

ATTEST:

Recording Secretary

UNITED SOUTH AND EASTERN TRIBES, INC.
711 Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214
Telephone: (615) 872-7900 • Fax: (615) 872-7417

TESTIMONY OF KELLER GEORGE, PRESIDENT

UNITED SOUTH AND EASTERN TRIBES, INC. (USET)

Before

THE SENATE COMMITTEE OF INDIAN AFFAIRS
AND
THE HOUSE RESOURCES COMMITTEE

On the Settlement of *Cobell v. Norton*

MARCH 1, 2006

Chairmen McCain and Pombo, Vice-Chairman Dorgan, Ranking Member Rahall and distinguished members of the Senate Committee on Indian Affairs and House Resources Committee:

My name is Keller George. I am President of the United South and Eastern Tribes, Inc. (USET) and USET representative from the Oneida Indian Nation. On behalf of its 24 member tribes, USET has closely followed the *Cobell* case over the past ten years and the Department of Interior's (DOI) subsequent reorganizationS. Along with USET Executive Director James T. (Tim) Martin, I represented the tribes of the Bureau of Indian Affairs (BIA) Eastern Region on the DOI/Tribal Trust Reform Task Force (Task Force). USET has testified on trust reform matters several times, most recently in July 2005 to provide preliminary comments on S. 1439.

I thank your Committees for the opportunity to testify on this topic again. USET member tribes believe strongly that Congress must resolve the *Cobell* Indian trust litigation. Congress must do so fairly and it must do so now – not only for the individual beneficiaries but also for the sake of tribes and the protection of the trust relationship.

After ten years of litigation, the *Cobell* class action litigation has exposed an extensive history of federal government mismanagement of the Indian trust. For over a hundred years, the federal government failed to properly account for individual Indians' trust funds. The loss and destruction of trust records has made an historical accounting with any prospect of accuracy impossible. It is clear, however, that the amount owed to the class of individual Indians runs into the billions of dollars.

Without Congressional involvement the *Cobell* case could go on for many more years - leaving many beneficiaries to pass on without seeing any of the funds that are rightfully theirs and tending to enrich attorneys rather than claimants – this alone is cause enough for immediate

Congressional action. But it is also the destructiveness of the DOI's response to the *Cobell* lawsuit that has demanded USET's active engagement in trust reform and that compels our testimony here today. USET calls upon your Committees to mobilize this Congress to act now to protect the rights of tribes, beneficiaries, and most of all, the trust relationship.

Blaming the *Cobell* lawsuit for the need for reform, the DOI has for years been involved in costly and numerous reorganizations that have gutted the BIA and reconfigured the Office of the Special Trustee (OST) into a trust-focused organization that does not listen or answer to tribes. Any new funding for the trust relationship has served only to expand the Office of the Special Trustee's (OST) bureaucracy. The DOI has stripped away scarce BIA resources from programs for essential governmental and life-sustaining services that are relied upon by the tribes and individuals. DOI has redirected those funds to pay for the mismanagement of the trust and costs associated with the *Cobell* case. DOI continues to carry out these activities without meaningful tribal consultation or involvement.

The DOI's willingness to use program funds to pay for trust related issues was illustrated in the worst way in late January when the DOI took $3 million from BIA programs to pay a portion of a $7 million dollars attorney fee award that the *Cobell* Plaintiffs' received from the court. This latest shift of resources away from BIA programs is alarming to USET member tribes and represents a new low for the DOI in the case. USET passed a resolution at our annual "Impact Week" meeting last month urging DOI to seek a supplemental appropriation to restore funding to programs affected by the attorney fee payment. I have attached a copy of that resolution for the record.

But the problem is not just about the DOI's pilfering of program funds to pay for attorney fees and the infrastructure to better manage the trust, it is also about the DOI's systematic efforts to further limit the United States' trust responsibility administratively and legislatively. Over the past few years the DOI has fought hard to limit to the greatest extent possible the United States' liability on all fronts. For instance, the DOI has been directly involved in this Administration's efforts not to support Indian legislation that does not specifically limit the trust relationship and the United Sates' liability. The Administration's inaction on the tribally-proposed amendments to Title IV of the

Indian Self-Determination Act is but one example. Most recently, the DOI announced a Regulatory Initiative in which the agency proposes to revise over 200 pages of regulations that impact Indian lands. It is no surprise to USET or others who have been following these issues that many of the proposals seek to significantly limit or even eliminate the United States' liability.

The DOI's actions have made USET member tribes very concerned about the serious negative impacts that a continuation of the *Cobell* case will have on Indian affairs in the short and long terms. Keep in mind that the relief sought in this case is for an accounting, not money damages. Continuation of this litigation for 10-15 more years may be valuable for accountants and attorneys, but may provide limited or no financial recovery for individual beneficiaries. Moreover, individual beneficiaries will suffer as funding and services for Indian programs are reduced. Even if class members benefit from a financial settlement in the next decade, this victory will be empty indeed if at the same time the trust relationship is eroded legislatively and administratively to such an extent that it becomes practically meaningless.

USET's member tribes urge your Committees to seize the opportunity to settle the *Cobell* case now and reform the DOI's administration of trust related functions by acting on S. 1439 and H.R. 4322 this session.

USET previously testified in July 2005 in support of the legislative framework for resolving these issues offered by Senators McCain and Dorgan in S. 1439. USET also submitted detailed comments on S. 1439 and H.R. 4322 in December 2005. Since then USET has engaged in extensive analysis and consultation with the leadership of the Affiliated Tribes of Northwest Indians (ATNI) regarding our views on the two bills. Those consultations have been fruitful and I'm honored to tell you today that USET and ATNI have reached agreement on a joint proposal. With my written testimony, I have attached USET and ATNI's draft recommendations for modifications to S. 1439 and H.R. 4322. USET and ATNI's joint recommendations draw from our member tribes' commitment to support your efforts to resolve the *Cobell* lawsuit and to refine the bills' proposed institutional reforms so that we can embark on a new era of trust relationships that is driven by and responsive to the beneficiaries of the trust – the Indian tribes.

I will take a few minutes to highlight a few key issues that the USET-ATNI proposal addresses:

Title I.

This Title covers settlement of the *Cobell* case and includes a section that will specifically identify an amount that will be made available to settle the case. Ideally, it would be up to the parties to agree upon a settlement amount. Here, the parties to the case have vastly different views about the amount at stake and mediation efforts have failed to bring them any closer together on this critical question. Therefore, identifying a fair and politically acceptable settlement amount is critical for the success of this legislation. USET and ATNI are not in a position to propose what that amount should be, but the next panel should provide you with a basis to identify an appropriate settlement amount. We believe that the Committees are in the best position to identify a fair and politically acceptable amount to be inserted in this Title and we urge you to do so before the next version of this legislation is produced.

The USET-ATNI proposal also calls for settlement funds to be authorized and appropriated over a number of years to maximize the settlement's impact in Indian Country over time and to make amounts available immediately so that elderly, ill and impoverished beneficiaries can better meet their needs.

Title II.

Trust reform is a complex matter with significant implications for the federal government, Indian tribes and individual Indian beneficiaries. For this reason, USET and ATNI support the Policy Review Commission created by Title II of the bills. Additionally, we believe the bills must further delineate the Commission's duty to review and assess DOI practices related to trust management and administration, particularly with respect to the DOI's bifurcation of responsibility at the local field office level. By "stove-piping" its lines of accountability and decision-making authority between trust and non-trust functions, DOI has created inefficiency and duplication in the

administration of its trust responsibility. I urge your Committees to respond to tribes' call for a single point of decision-making authority and accountability at their BIA field office by expressly designating this issue as one for further review by the Commission.

Title III.

The tribal trust asset management demonstration project contained in Title III is strongly supported by USET and ATNI member tribes. The bottom line is that Indian self-determination works and it can work well in the context of managing trust assets. The tribes' greater authority to determine how best to deliver program services to their members has resulted in better – and more – services being provided. USET is confident that management of trust functions will benefit from this demonstration project. Moreover, we expect it will foster an array of best management practices to be utilized for the wide range of trust resources managed in Indian Country. To fully achieve these objectives, however, USET and ATNI believe several aspects of Title III require reconsideration and revision.

First, the procedural terms for the approval, disapproval and appeal of trust asset management plans must be made consistent with the same procedural terms that apply for contracting or compacting under the Indian Self-Determination and Education Assistance Act. For instance, in the bills a management plan is deemed disapproved absent Secretarial approval. By contrast, under the Self-Determination Act, a tribal proposal is deemed approved if the Secretary does not act within the statutory time frame. Additionally, judicial review of the Secretary's disapproval of a plan in these bills requires exhaustion of administrative remedies and Administrative Procedures Act review (which gives deference to the agency). By contrast, the Self-

Determination Act provides for immediate judicial review and places the burden of proof on the Secretary.

Second, the bills should set some targets and/or criteria whereby the demonstration project may be evaluated and through which resource-specific standards will be established. Standards must be developed in a manner that allows for flexibility, reflecting the diversity that exists among tribes as well as the diversity among the resources – both of which the Secretary has a trust responsibility to safeguard. USET and ATNI support the demonstration project for respecting this diversity and allowing tribes to establish best management practices that can be reinforced and replicated. In order to assure that the demonstration project benefits all tribes, however, the legislation must establish mechanisms for disseminating these best practices and codifying resource-specific standards.

Third, as drafted, the demonstration project lacks a mechanism for reporting results to the Congress. The joint USET-ATNI proposal requires the Secretary to present Congress with an annual report on the demonstration project (to be submitted to tribes for their comments) that would serve as a basis for an annual oversight hearing.

Title IV.

USET and ATNI support the manner in which the proposed legislation would expand the voluntary buy back program for highly fractionated shares by permitting the purchase of shares at greater than fair market value. USET and ATNI urge that substantial funding for the program be

made available so that this process can reverse the devastating policy introduced through the Allotment Act by restoring tribal trust lands.

Title V.

By elevating the Assistant Secretary-Indian Affairs to the position of Under-Secretary and eliminating the OST, the legislation should improve coordination of trust activities within the DOI and establish decision-making authority and accountability under one executive authority. Yet, the devastating effect introduced by the DOI's transferring operational functions to the OST will not be resolved simply by eliminating that office. Not only must OST be eliminated, but the legislation must also reverse the costly and duplicative stove-piping that DOI has caused by splitting authorities at the local level between staff that perform Indian trust functions and staff that perform Indian program functions. The legislation should require that the Indian trust and Indian program functions of the BIA be reconsolidated at the field office level.

USET and ATNI also urge the Committees to establish legislative terms for improved accountability and oversight of the DOI's performance of trust duties. The *Cobell* lawsuit has served as the impetus for important DOI reforms and the settlement of the case should not be the end of independent review of DOI performance. Rather, a more systematic monitoring and policing role is needed to assure that reforms identified through this legislation and the recommendations issued by the Policy Review Commission (established in Title II) are given effect by the DOI.

USET and ATNI also believe that the bills should establish a new Assistant Inspector General for Indian Trust to carry out investigation and audit responsibilities associated with the

DOI's implementation of the trust responsibility. This proposal does not require the creation of a new executive agency or charging another agency with policing of the DOI. Rather, the proposal utilizes the DOI's existing accountability mechanism to ensure that the DOI is acting consistent with its fiduciary trust responsibilities.

Before closing, let me stress USET's view that all the reform in the world will not improve trust asset management and administration unless those functions receive adequate funding. DOI vacancies and under-staffing, particularly in BIA offices responsible for the implementation of trust activities, demonstrate why the DOI has failed to meet its trust obligations. USET is committed to working with you to assure that DOI budget requests do not cut funding for programs essential to carry out Indian programs and the trust responsibility.

USET member tribes stand with you in your efforts to seek a resolution of the *Cobell* lawsuit and to implement needed reforms for the DOI's administration of trust functions. The choices that we face today are clear: millions more can be spent on litigation and an accounting that likely will tell us little more than we already know while the trust relationship continues to erode, or legislation can be enacted that settles the lawsuit in a fair and equitable manner and that implements much needed reform on the DOI's management of trust resources. USET member tribes strongly believe that the second choice is by far the better option.

Thank you for the opportunity to share USET member tribes' views on these critical issues. I would be glad to answer any questions that you may have about USET's views on the settlement of the *Cobell* lawsuit or with respect to other titles of these

UNITED SOUTH AND EASTERN TRIBES, INC.

USET Resolution No. 2006:022

OPPOSITION TO USE OF BUREAU OF INDIAN AFFAIRS FUNDS TO PAY FOR ATTORNEYS FEES IN *COBELL V. NORTON, ET AL*, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CIVIL ACTION NUMBER 96-1285 (RCL)

WHEREAS, United South and Eastern Tribes, Incorporated (USET) is an intertribal organization comprised of twenty-four (24) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leaderships; and

WHEREAS, over the past ten (10) years, the *Cobell v. Norton* et al, U.S. District Court for the District of Columbia, Civil Action Number 96-1285 (RCL) litigation has been underway on behalf of 500,000 American Indian/Alaska Native (AI/AN) beneficiaries and has exposed extensive history of federal government mismanagement of the Indian trust; and

WHEREAS, in the fall of 2005 the Native American Rights Fund, the *Cobell* plaintiffs' lawyers, petitioned the District Court asking for the payment of interim attorneys' fees and expenses incurred through a portion of the case pursuant to the Equal Access to Justice Act; and

WHEREAS, on December 19, 2005 the District Court awarded the *Cobell* plaintiffs attorneys fees in the amount of $4.5 million and expenses in the amount of $2.5 million for a total fee award of approximately $7 million; and

WHEREAS, on January 26, 2006, Acting Assistant Secretary Jim Cason issued a letter informing Tribes that because the Department of the Interior (DOI) did not adequately budget to immediately pay the attorneys fees awarded, the DOI has paid the fee award out of various Indian programs, including $3 million out of the Bureau of Indian Affairs (BIA) ($2 million from the tribal attorneys fees account and $1 million generated from an across the board retention of all program funds); $2 million from the Office of Historical Trust Accounting, and $300,000 to $400,000 from the Office of Special Trustee (the Department of the Treasury paid the remaining $1.8 million); and

WHEREAS, USET has testified before Congress in 2002, 2003 and 2005 expressing their opposition to using BIA funds to pay for the federal government's *Cobell* litigation costs or for the Department's reorganization of trust functions; and

WHEREAS, USET member Tribes are outraged that the DOI has taken funding from dramatically under-funded BIA programs to pay for attorneys fees in the *Cobell* case and strongly oppose this DOI reprogramming; therefore, be it

RESOLVED the USET Board of Directors strongly opposes the DOI's use of any funds from BIA programs to pay for attorneys' fees in the Cobell case; and, be it further

RESOLVED the USET Board of Directors urges the DOI to seek a supplemental appropriation from Congress to restore the program budgets affected by the attorney fee payment, and, be it further

USET Resolution No. 2006:022

RESOLVED the USET Board of Directors authorizes the USET Executive Director to investigate the appropriate legal history and recourse available to rectify this decision by the DOI; and, be it further

RESOLVED the USET Board of Directors authorizes the USET Executive Director to take any and all available and necessary steps, including legal action if availed, to notify the judge in the *Cobell* case of USET's opposition to payment of fees from BIA programs now and in the future.

CERTIFICATION

This resolution was duly passed at the USET Impact Week Meeting, at which a quorum was present, in Arlington, VA, on Thursday, February 9, 2006.

Keller George, President
United South and Eastern Tribes, Inc.

Eddie L. Tullis, Secretary
United South and Eastern Tribes, Inc.

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DRAFT

Joint Proposal

Affiliated Tribes of Northwest Indians
And
United South and Eastern Tribes, Inc.

For
109th CONGRESS
2nd Session
Relating to:
S. 1459
H. R. 4322

To provide for Indian trust asset management reform and resolution of historical accounting claims, and for other purposes.

A BILL

To provide for Indian trust asset management reform and resolution of historical accounting claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title- This Act may be cited as the `Indian Trust Reform Act of 2005'.

(b) Table of Contents- The table of contents for this Act is as follows:

TITLE I--SETTLEMENT OF LITIGATION CLAIMS

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TITLE I--SETTLEMENT OF LITIGATION CLAIMS

SEC. 101. FINDINGS.

Congress finds that --

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(1) Congress has appropriated tens of millions of dollars for purposes of providing an historical accounting of funds held in Individual Indian Money accounts;
(2) as of the date of enactment of this Act, the efforts of the Federal Government in conducting historical accounting activities have provided information regarding the feasibility and cost of providing a complete historical accounting of IIM account funds;
(3) in the case of many IIM accounts, a complete historical accounting--
(A) may be impossible because necessary records and accounting data are missing or destroyed;
(B) may take several years to perform even if necessary records are available;
(C) may cost the United States hundreds of millions and possibly several billion dollars; and
(D) may be impossible to complete before the deaths of many elderly IIM account beneficiaries;
(4) without a complete historical accounting, it may be difficult or impossible to ascertain the extent of losses in an IIM account as a result of accounting errors or mismanagement of funds, or the correct amount of interest accrued or owned on the IIM account;
(5) the total cost to the United States of providing a complete historical accounting of an IIM account may exceed --
(A) the current balance of the IIM account;
(B) the total sums of money that have passed through the IIM account; and
(C) the enforceable liability of the United States for losses from, and interest in, the IIM account;
(6)(A) the delays in obtaining an accounting and in pursuing accounting claims in the case styled Cobell v. Norton, Civil Action No. 96-1285 (RCL) in the United States District Court for the District of Columbia, have created a great hardship on IIM account beneficiaries; and

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(B) many beneficiaries and their representatives have indicated that they would rather receive monetary compensation than experience the continued frustration and delay associated with an accounting of transactions and funds in their IIM accounts;

(7) it is appropriate for Congress, taking into consideration the findings under paragraphs (1) through (6), to provide benefits that are reasonably calculated to be fair and appropriate in lieu of performing an accounting of an IIM account, or assuming liability for errors in such an accounting, mismanagement of IIM account funds (including undetermined amounts of interest in IIM accounts, losses in which may never be discovered or quantified if a complete historical accounting cannot be performed), or breach of fiduciary duties with respect to the administration of IIM accounts, in order to transmute claims by the beneficiaries of IIM accounts for undetermined or unquantified accounting losses and interest to a fixed amount to be distributed to the beneficiaries of IIM accounts;

(8) in determining the amount of the payments to be distributed as described in paragraph (7), Congress should take into consideration, in addition to the factors described in paragraphs (1) through (6)--

(A) the risks and costs to IIM account beneficiaries, as well as any delay, associated with the litigation of claims that will be resolved by this title; and

(B) the benefits to IIM account beneficiaries available under this title;

(9) the situation of the Osage Nation is unique because, among other things, income from the mineral estate of the Osage Nation is distributed to individuals through headright interests that belong not only to members of the Osage Nation, but also to members of other Indian tribes, and to non-Indians; and

(10) due to the unique situation of the Osage Nation, the Osage Nation, on its own behalf, has filed various actions in Federal district court and the United States Court of Federal Claims seeking accountings, money damages, and other legal and equitable relief

SEC. 102. DEFINITIONS.

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In this title:

(1) ACCOUNTING CLAIM - The term `accounting claim' means any claim for an historical accounting of a claimant against the United States under the Litigation.

(2) CLAIMANT - The term `claimant' means any beneficiary of an IIM account (including an heir of such a beneficiary) that was living on the date of enactment of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.).

(3) IIM ACCOUNT - The term `IIM account' means an Individual Indian Money account administered by the Bureau of Indian Affairs.

(4) LITIGATION - The term `Litigation' means the case styled Cobell v. Norton, Civil Action No. 96-1285 (RCL) in the United States District Court for the District of Columbia.

(5) SECRETARY - The term `Secretary' means the Secretary of the Treasury.

(6) SETTLEMENT FUND - The term `Settlement Fund' means the fund established by section 103(a).

(7) SPECIAL MASTER - The term `Special Master' means the special master appointed by the Secretary under section 103(b) to administer the Settlement Fund.

SEC. 103. INDIVIDUAL INDIAN ACCOUNTING CLAIM SETTLEMENT FUND.

(a) Establishment -

(1) IN GENERAL - There is established in the general fund of the Treasury a fund, to be known as the `Individual Indian Accounting Claim Settlement Fund'.

(2) INITIAL DEPOSIT - The Secretary shall deposit into the Settlement Fund to carry out this title not less than $ XX,000,000,000 from funds appropriated under section 1304 of title 31, United States Code. Settlement funds shall be authorized and appropriated in amounts divided evenly over the next three fiscal years and in a manner that would not be scored against any agency, nor should any agency appropriations be diminished to satisfy any

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judgment and until payments are made to claimants the funds shall be maintained in an interest-bearing account.

(3) SUBSEQUENT DEPOSIT - The Secretary shall make subsequent deposits to the Settlement Fund that may be necessary to satisfy claims that are not included in the Initial Deposit.

(b) Special Master - As soon as practicable after the date of enactment of this Act, the Secretary shall appoint a Special Master to administer the Settlement Fund in accordance with this title.

(c) Distribution-

(1) IN GENERAL - The Special Master shall use not less than 80 percent of amounts in the Settlement Fund to make payments to claimants in accordance with section 104.

(2) METHOD OF VALUATION AND CONSTITUTIONAL CLAIMS - The Special Master may use not to exceed 12 percent of amounts in the Settlement Fund to make payments to claimants described in --

(A) section 106; or

(B) section 107.

(3) ATTORNEYS' FEES - The Special Master may use not to exceed $ 100,000,000 of amounts in the Settlement Fund to make payments to claimants for attorneys' fees in accordance with section 108.

(d) Costs of Administration - The Secretary may use not more than 1 percent of amounts in the Settlement Fund to pay the costs of--

(1) administering the Settlement Fund; and

(2) otherwise carrying out this title.

SEC. 104. GENERAL DISTRIBUTION.

(a) Payments to Claimants -

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(1) IN GENERAL - Not later than 1 year after the date on which the Secretary publishes in the Federal Register the regulations described in subsection (d), the Special Master shall distribute to each claimant from the Settlement Fund an amount equal to the sum of--

(A) the per capita share of the claimant of 80 percent of the amounts described in section 103(c)(1); and

(B) of 20 percent of the amounts described in section 103(c)(1), the additional share of the claimant, to be determined in accordance with a formula established by the Secretary under subsection (d)(1).

(2) HEIRS OF CLAIMANTS -

(A) IN GENERAL- An heir of a claimant shall receive the entire amount distributed to the claimant under paragraphs (1) and (3).

(B) MULTIPLE HEIRS - If a claimant has more than 1 heir, the amount distributed to the claimant under paragraphs (1) and (3) shall be divided equally among the heirs of the claimant.

(3) RESIDUAL AMOUNTS - After making each distribution required under sections 106, 107, and 108, the Special Master shall distribute to claimants the remainder of the amounts described in paragraphs (2) and (3) of section 103(c), in accordance with paragraph (1)(B).

(b) Requirement for Distribution - The Special Master shall not make a distribution to a claimant under subsection (a) until the claimant executes a waiver and release of accounting claims against the United States in accordance with section 109.

(c) Location of Claimants -

(1) RESPONSIBILITY OF SECRETARY OF THE INTERIOR - The Secretary of the Interior shall provide to the Special Master any information, including IIM account information, that the Special Master determines to be necessary to--

(A) identify any claimant under this title; or

(B) apply a formula established by the Secretary under subsection (d).

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(2) CLAIMANTS OF UNKNOWN LOCATION -
(A) IN GENERAL - The Special Master shall deposit in an account, for future distribution, amounts under this title for each claimant who--
(i) is entitled to receive a distribution under this title, as determined by the Special Master; and
(ii) has not been located by the Special Master as of the date on which a distribution is required under subsection (a)(1).
(B) LOCATION OF CLAIMANTS -
(i) RESPONSIBILITY OF SECRETARY OF THE INTERIOR - The Secretary of the Interior shall provide to the Special Master any information and assistance necessary to locate a claimant described in subparagraph (A)(ii).
(ii) CONTRACTS - The Special Master may enter into contracts with an Indian tribe or an organization representing individual Indians in order to locate a claimant described in subparagraph (A)(ii).
(d) Regulations -
(1) IN GENERAL - The Secretary shall promulgate any regulations that the Secretary determines to be necessary to carry out this title, including regulations establishing a formula to determine the share of each claimant of payments under subsection (a)(1).
(2) FACTORS FOR CONSIDERATION - In developing the formula described in paragraph (1), the Secretary shall take into consideration the amount of funds that have passed through the IIM account of each claimant during the period beginning on January 1, 1980, and ending on December 31, 2005, or another period, as the Secretary determines to be appropriate.

SEC. 105. CLAIMS RELATING TO SHARE DETERMINATION.

(a) In General - Subject to subsection (b), any claimant may seek judicial review of the determination of the Special Master with respect to the amount of a share payment of a claimant under section 104(a)(1).

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(b) Requirements- A claimant shall file a claim under subsection (a)--
(1) not later than 180 days after the date of receipt of a notice by the claimant under subsection (c); and
(2) in the United States district court for the district in which the claimant resides.
(c) Notice - The Secretary shall provide to each claimant a notice of the right of any claimant to seek judicial review of a determination of the Special Master with respect to the amount of the share payment of the claimant under section 105.
(d) Subsequent Appeals- A claim relating to a determination of a United States district court relating to an appeal under subsection (a) shall be filed only in the United States Court of Appeals for the District of Columbia.

SEC. 106. CLAIMS RELATING TO METHOD OF VALUATION.

(a) In General - Not later than 1 year after the date of enactment of this Act, a claimant may seek judicial review of the method of distribution of a payment to the claimant under section 104(a).
(b) Requirements- A claim under subsection (a)--
(1) shall not be filed as part of a class action claim against any party; and
(2) shall be filed only in the United States Court of Federal Claims.
(c) Available Amounts-
(1) IN GENERAL - The Special Master shall use only amounts described in section 103(c)(2)(A) to satisfy an award under a claim under this section.
(2) PAYMENTS TO CLAIMANTS - A claimant that files a claim under this subsection shall not be eligible to receive a distribution under section 104(a).
(d) Effect of Claim- The filing of a claim under this section shall be considered to be a waiver by the claimant of any right to an award under section 104.

SEC. 107. CLAIMS RELATING TO CONSTITUTIONALITY.

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(a) In General - Any claimant may seek judicial review in the United States District Court for the District of Columbia of the constitutionality of the application of this title to an individual claimant.

(b) Procedure-

(1) JUDICIAL PANEL - A claim under this section shall be determined by a panel of 3 judges, to be appointed by the chief judge of the United States District Court for the District of Columbia.

(2) CONSOLIDATION OF CLAIMS -

(A) IN GENERAL - The judicial panel may consolidate claims under this section, as the judicial panel determines to be appropriate.

(B) PROHIBITION OF CLASS ACTION CASES - A claim under this section shall not be filed as part of a class action claim against any party.

(3) DETERMINATION - The judicial panel may award a claimant such relief as the judicial panel determines to be appropriate, including monetary compensation.

(c) Available Amounts-

(1) IN GENERAL - The Special Master shall use only amounts described in section 103(c)(2)(B) to satisfy an award under a claim under this section.

(2) PAYMENTS TO CLAIMANTS - A claimant that files a claim under this subsection shall not be eligible to receive a distribution under section 104(a).

(d) Effect of Claim- The filing of a claim under this section shall be considered to be a waiver by the claimant of any right to an award under section 104.

SEC. 108. ATTORNEYS' FEES.

(a) In General - The Special Master may use amounts described in section 103(c)(3) to make payments to claimants for costs and attorneys' fees incurred under the Litigation before the date of enactment of this Act, or in connection with a claim under section 104, at a rate not to exceed $ 1,000 per hour.

(b) Requirements-

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(1) IN GENERAL - The Special Master may make a payment under subsection (a) only if, as of the date on which the Special Master makes the payment, the applicable costs and attorneys' fees have not been paid by the United States pursuant to a court order.
(2) ACTION BY ATTORNEYS - To receive a payment under subsection (a), an attorney of the claimant shall submit to the Special Master a written claim for costs or fees under the Litigation.

SEC. 109. WAIVER AND RELEASE OF CLAIMS.

(a) In General - In order to receive an award under this title, a claimant shall execute and submit to the Special Master a waiver and release of claims under this section.
(b) Contents- A waiver and release under subsection (a) shall contain a statement that the claimant waives and releases the United States (including any officer, official, employee, or contractor of the United States) from any legal or equitable claim under Federal, State, or other law (including common law) relating to any accounting of funds in the IIM account of the claimant on or before the date of enactment of this Act.

SEC. 110. EFFECT OF TITLE.

(a) Substitution of Benefits-
(1) IN GENERAL - The benefits provided under this title shall be considered to be provided in lieu of any claims under Federal, State, or other law originating before the date of enactment of this Act for--
(A) losses as a result of accounting errors relating to funds in an IIM account;
(B) mismanagement of funds in an IIM account; or
(C) interest accrued or owed in connection with funds in an IIM account.
(2) LIMITATION OF CLAIMS - Except as provided in this title, and notwithstanding any other provision of law, a claimant shall not maintain an action in any Federal,

State, or other court for an accounting claim originating before the date of enactment of this Act.

(3) JURISDICTION OF COURTS -

(A) IN GENERAL - Except as otherwise provided in this title, no court shall have jurisdiction over a claim filed by an individual or group for the historical accounting of funds in an IIM account on or before the date of enactment of this Act, including any such claim that is pending on the date of enactment of this Act.

(B) LIMITATION - This paragraph does not prevent a court from ordering an accounting in connection with an action relating to the mismanagement of trust resources that are not funds in an IIM account on or before the date of enactment of this Act.

(b) Acceptance as Waiver - The acceptance by a claimant of a benefit under this title shall be considered to be a waiver by the claimant of any accounting claim that the claimant has or may have relating to the IIM account of the claimant.

(c) Receipt of Payments Have No Impact on Benefits Under Other Federal Programs- The receipt of a payment by a claimant under this title shall not be--

(1) subject to Federal or State income tax; or

(2) treated as benefits or otherwise taken into account in determining the eligibility of the claimant for, or the amount of benefits under, any other Federal program, including the social security program, the medicare program, the medicaid program, the State children's health insurance program, the food stamp program, or the Temporary Assistance for Needy Families program.

(d) Certain Claims- Nothing in this title precludes any court from granting any legal or equitable relief in an action by an Indian tribe or Indian nation against the United States, or an officer of the United States, filed or pending on or before the date of enactment of this Act, seeking an accounting, money damages, or any other relief relating to a tribal trust account or trust asset or resource.

TITLE II--INDIAN TRUST ASSET MANAGEMENT POLICY REVIEW COMMISSION

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SEC. 201. ESTABLISHMENT.

There is established a commission, to be known as the `Indian Trust Asset Management Policy Review Commission,' (referred to in this title as the `Commission'), for the purposes of--

(1) reviewing trust asset management laws (including regulations) in existence on the date of enactment of this Act governing the management and administration of individual Indian and Indian tribal trust assets;

(2) reviewing the management and administration practices of the Department of the Interior with respect to individual Indian and Indian tribal trust assets; and

(3) making recommendations to the Secretary of the Interior and Congress for improving those laws and practices.

SEC. 202. MEMBERSHIP.

(a) In General - The Commission shall be composed of 7 members, of whom--

(1) 3 shall be appointed by the President;

(2) 1 shall be appointed by the Majority Leader of the Senate;

(3) 1 shall be appointed by the Minority Leader of the Senate;

(4) 1 shall be appointed by the Speaker of the House of Representatives; and

(5) 1 shall be appointed by the Minority Leader of the House of Representatives.

(b) Qualifications- The membership of the Commission shall include--

(1) at least 3 members who are representatives of federally recognized Indian tribes with reservation land or other trust land that is managed for--

(A) grazing;

(B) fishing; or

(C) crop, timber, mineral, or other resource production purposes;

(2) at least 1 member (including any member described in paragraph (1)) who is or has been the beneficial owner of an individual Indian monies account; and

(3) at least 3 members who have experience in—

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(A) Indian trust resource (excluding a financial resource) management;
(B) fiduciary investment management;
(C) financial asset management; and
(D) Federal law and policy relating to Indians.
(4) not more than 4 members of the commission shall be members of or registered to vote with the same political party.
(c) Date of Appointments-
(1) IN GENERAL - The appointment of a member of the Commission shall be made not later than 90 days after the date of enactment of this Act.
(2) FAILURES TO APPOINT - A failure to make an appointment in accordance with paragraph (1) shall not affect the powers or duties of the Commission if sufficient members are appointed to establish a quorum.
(d) Term; Vacancies-
(1) TERM - A member shall be appointed for the life of the Commission.
(2) VACANCIES - A vacancy on the Commission--
(A) shall not affect the powers or duties of the Commission; and
(B) shall be filled in the same manner as the original appointment was made.

SEC. 203. MEETINGS AND PROCEDURES.

(a) Initial Meeting - Not later than 30 days after at least 5 of the 7 members of the Commission have been appointed, the Commission shall hold the initial meeting of the Commission to--
(1) elect a Chairperson; and
(2) establish procedures for the conduct of business of the Commission, including public hearings.
(b) Subsequent Meetings - The Commission shall meet at the call of the Chairperson.
(c) Quorum - 5 members of the Commission shall constitute a quorum, but a lesser number of members may hold hearings.

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(d) Chairperson - The Commission shall elect a Chairperson from among the members of the Commission.

SEC. 204. DUTIES.

(a) Reviews and Assessments - The Commission shall review and assess--
(1) Federal laws (including regulations) applicable or relating to the management and administration of Indian trust assets; and
(2) the practices of the Department of the Interior relating to the management and administration of Indian trust assets, including review and assessment with respect to consolidating responsibility, decision-making and supervision of trust functions and non-trust functions at the local field office level.
(3) other public trust policies similar in nature to Indian trusts and land status and analyze them for beneficial practices that can be included in recommendations for the improvement of the management and administration of Indian trust funds and assets by the Department of the Interior
(b) Consultation - In conducting the reviews and assessments under subsection (a), the Commission shall consult with--
(1) the Secretary of the Interior;
(2) federally recognized Indian tribes; and
(3) representatives of the interests of individual owners of Indian trust assets.
(c) Recommendations- After conducting the reviews and assessments under subsection (a), the Commission shall develop recommendations with respect to--
(1) changes to Federal law that would improve the management and administration of Indian trust assets by the Secretary of the Interior;
(2) changes to Indian trust asset management and administration practices that would--
(A) better protect and conserve Indian trust assets;
(B) improve the return on those assets to individual Indian and Indian tribal beneficiaries; or

(C) improve the level of security of individual Indian and Indian tribal money account data and assets; and

(3) proposed Indian trust asset management standards that are consistent with any Federal law that is otherwise applicable to the management and administration of the assets.

(d) Report - Not later than 18 months after the date on which the Commission holds the initial meeting, the Commission shall submit to the Committee on Indian Affairs of the Senate, the Committee on Resources of the House of Representatives, and the Secretary of the Interior a report that includes--

(1) an overview and the results of the reviews and assessments under subsection (a); and

(2) any recommendations of the Commission under subsection (c).

SEC. 205. POWERS.

(a) Hearings - The Commission may hold such hearings, meet and act at such times and places, take such testimony, and receive such evidence as the Chairperson determines to be appropriate to carry out this title.

(b) Information From Federal Agencies-

(1) IN GENERAL - The Commission may secure directly from a Federal agency such information as the Chairperson determines to be necessary to carry out this title.

(2) PROVISION OF INFORMATION - On request of the Chairperson, the head of a Federal agency shall provide information to the Commission.

(c) Access to Personnel- For purposes of carrying out this title, the Commission shall have reasonable access to staff responsible for Indian trust asset management and administration of--

(1) the Department of the Interior;

(2) the Department of the Treasury; and

(3) the Department of Justice.

(d) Postal Services - The Commission may use the United States mail in the same manner and under the same conditions as other Federal agencies.
(e) Gifts - The Commission may accept, use, and dispose of gifts or donations of services or property to the same extent and under the same conditions as other Federal agencies.

SEC. 206. COMMISSION PERSONNEL MATTERS.

(a) Compensation of Members -
(1) NON-FEDERAL EMPLOYEES - A member of the Commission who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the performance of the duties of the Commission.
(2) FEDERAL EMPLOYEES - A member of the Commission who is an officer or employee of the Federal Government shall serve without compensation in addition to the compensation received for the services of the member as an officer or employee of the Federal Government.
(b) Travel Expenses - A member of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for an employee of an agency under subchapter I of chapter 57 of title 5, United States Code, while away from home or regular place of business of the member in the performance of the duties of the Commission.
(c) Staff -
(1) IN GENERAL - The Chairperson may, without regard to the civil services laws (including regulations), appoint and terminate an executive director and such other additional personnel as are necessary to enable the Commission to perform the duties of the Commission.

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(2) CONFIRMATION OF EXECUTIVE DIRECTOR - The employment of an executive director shall be subject to confirmation by the Commission.
(3) COMPENSATION -
(A) IN GENERAL - Except as provided in subparagraph (B), the Chairperson may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of title 5, United States Code, relating to classification of positions and General Schedule pay rates.
(B) MAXIMUM RATE OF PAY - The rate of pay for the executive director and other personnel shall not exceed the rate payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.

SEC. 207. EXEMPTION FROM FACA.

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission if all hearings of the Commission are held open to the public.

SEC. 208. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this title.

SEC. 209. TERMINATION OF COMMISSION.

The Commission and the authority of the Commission under this title shall terminate on the date that is 2 years after the date on which the Commission holds the initial meeting of the Commission.

SEC. 210. TRIBAL TRUST REFORM TASK FORCE.

The Secretary shall establish and appoint the Tribal Trust Reform Task Force within sixty days of the termination of the Commission. The Tribal Trust Reform Task Force shall be appointed by the Secretary and shall consist of the Under

Secretary for Indian Affairs and 12 members representing federally recognized tribes on a regional basis to be distributed evenly from the geographical make up of Indian Country. The Task Force may at the discretion of the Secretary terminate on the date that is 4 years after the date on which the Task Force holds the initial meeting. The Secretary may designate the Under Secretary for Indian Affairs as the Chair and the only Department representative as a member of the Task Force. The Secretary may appoint any members of the Indian Trust Asset Management Policy Review Commission who may fulfill the purpose of the Task Force and meet the geographical requirements for the membership of the Task Force.

The Task Force shall:

(1) serve as an advisor to the Department for implementing Trust Reform recommendation of the Commission; and,

(2) assist the Department in evaluating the processes of implementing Trust Reform policies and directives; and,

(3) provide recommendations that may improve Trust Reform management on an ongoing basis; and,

(4) assist the Department in the processes of soliciting evaluating and incorporating Tribal input into Department actions; and

(5) provide reports and make recommendations relating to the Departments progress in developing and implementing activities to improve the management and administration of the federal trust responsibility. The reports may be submitted to the appropriate committees of the House and Senate every six months.

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TITLE III--INDIAN TRUST ASSET MANAGEMENT DEMONSTRATION PROJECT ACT

SEC. 301. SHORT TITLE.

This title may be cited as the `Indian Trust Asset Management Demonstration Project Act of 2005'.

SEC. 302. DEFINITIONS.

In this title:
(1) PROJECT - The term `Project' means the Indian trust asset management demonstration project established under section 303(a).
(2) OTHER INDIAN TRIBE - The term `other Indian tribe' means an Indian tribe that--
(A) is federally recognized;
(B) is not a section 131 Indian tribe; and
(C) submits an application under section 303(c).
(3) SECRETARY - The term `Secretary' means the Secretary of the Interior.

(4) SECTION 131 INDIAN TRIBE - The term `section 131 Indian tribe' means any Indian tribe that is participating in the demonstration project under section 131 of title III, division E of the Consolidated Appropriations Act, 2005 (Public Law 108-447; 118 Stat. 2809).

SEC. 303. ESTABLISHMENT OF DEMONSTRATION PROJECT; SELECTION OF PARTICIPATING INDIAN TRIBES.

(a) In General - The Secretary shall establish and carry out an Indian trust asset management demonstration project, in accordance with this title.
(b) Selection of Participating Indian Tribes-

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(1) SECTION 131 INDIAN TRIBES - A section 131 Indian tribe shall be eligible to participate in the Project if the section 131 Indian tribe submits to the Secretary an application under subsection (c).

(2) OTHER TRIBES -

(A) IN GENERAL - Any other Indian tribe shall be eligible to participate in the Project if--

(i) the other Indian tribe submits to the Secretary an application under subsection (c); and

(ii) the Secretary approves the application of the other Indian tribe.

(B) LIMITATION -

(i) 30 OR FEWER APPLICANTS - If 30 or fewer other Indian tribes submit applications under subsection (c), each of the other Indian tribes shall be eligible to participate in the Project.

(ii) MORE THAN 30 APPLICANTS -

(I) IN GENERAL - If more than 30 other Indian tribes submit applications under subsection (c), the Secretary shall select 30 other Indian tribes to participate in the Project.

(II) PREFERENCE - In selecting other Indian tribes under subclause (I), the Secretary shall give preference to other Indian tribes the applications of which were first received by the Secretary.

(3) NOTICE-

(A) IN GENERAL - The Secretary shall provide a written notice to each Indian tribe selected to participate in the Project.

(B) CONTENTS - A notice under subparagraph (A) shall include--

(i) a statement that the application of the Indian tribe has been approved by the Secretary; and

(ii) a requirement that the Indian tribe shall submit to the Secretary a proposed Indian trust asset management plan in accordance with section 304.

(c) Application -

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(1) IN GENERAL - To be eligible to participate in the Project, an Indian tribe shall submit to the Secretary a written application in accordance with paragraph (2).

(2) REQUIREMENTS - The Secretary shall take into consideration an application under this subsection only if the application--

(A) includes a copy of a resolution or other appropriate action by the governing body of the Indian tribe, as determined by the Secretary, in support of or authorizing the application;

(B) is received by the Secretary by the date that is 180 days after the date of enactment of this Act; and

(C) states that the Indian tribe is requesting to participate in the Project.

(d) Duration - The Project shall remain in effect for a period of 8 years after the date of enactment of this Act.

(E) REPORT --

(1) IN GENERAL --

(A) Report Demonstration Project Progress Implementation and Recommended Legislation - Not later than one year after the effective date of this title, the Under Secretary, in consultation with the appropriate committees of Congress and the Director of the Office of Management and Budget, shall submit to Congress a report on the progress of the implementation of and processing of the demonstration projects as a result of this Act. Additionally the Secretary may at that time submit any recommendations relating to improving the implementation of this section. The report shall be submitted annually thereafter along with the Under Secretary's testimony before the appropriate committees of Congress on the President's budget request.

SEC. 304. INDIAN TRUST ASSET MANAGEMENT PLAN.

(a) Proposed Plan -

(1) SUBMISSION -

(A) IN GENERAL - Not later than 120 days after the date on which an Indian tribe receives a notice from the Secretary under section 303(b)(3), the Indian tribe

shall submit to the Secretary a proposed Indian trust asset management plan in accordance with paragraph (2).

(B) TIME LIMITATIONS -

(i) IN GENERAL - Except as provided in clause (ii), any Indian tribe that fails to submit the Indian trust asset management plan of the Indian tribe by the date specified in subparagraph (A) shall no longer be eligible to participate in the Project.

(ii) EXTENSION - The Secretary shall grant an extension of not more than 60 days to an Indian tribe if the Indian tribe submits a written request for such an extension before the date described in subparagraph (A).

(2) CONTENTS - A proposed Indian trust asset management plan shall include provisions that --

(A) identify the trust assets that will be subject to the plan, including financial and nonfinancial trust assets;

(B) establish trust asset management objectives and priorities for Indian trust assets that are located within the reservation, or otherwise subject to the jurisdiction, of the Indian tribe;

(C) allocate trust asset management funding that is available for the Indian trust assets subject to the plan in order to meet the trust asset management objectives and priorities;

(D) if the Indian tribe has contracted or compacted functions or activities under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) relating to the management of trust assets--

(i) identify the functions or activities that are being performed by the Indian tribe under the contracts or compacts; and

(ii) describe the proposed management systems, practices, and procedures that the Indian tribe will follow; and

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(E) establish procedures for nonbinding mediation or resolution of any dispute between the Indian tribe and the United States relating to the trust asset management plan.

(3) AUTHORITY OF INDIAN TRIBES TO DEVELOP SYSTEMS, PRACTICES, AND PROCEDURES - For purposes of preparing and carrying out a management plan under this section, an Indian tribe that has compacted or contracted activities or functions under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), for purposes of carrying out the activities or functions, may develop and carry out trust asset management systems, practices, and procedures that differ from any such systems, practices, and procedures used by the Secretary in managing the trust assets if the systems, practices, and procedures of the Indian tribe meet the requirements of the laws, standards, and responsibilities described in subsection (c).

(4) TECHNICAL ASSISTANCE AND INFORMATION - The Secretary shall provide to an Indian tribe any technical assistance and information, including budgetary information, that the Indian tribe determines to be necessary for preparation of a proposed plan on receipt of a written request from the Indian tribe. The Secretary shall develop a program that encourages the eligible tribes to utilize department expertise for proposal development to advance their resource needs and lessen the need for utilizing the administrative or district court appeals process.

(b) Approval and Disapproval of Proposed Plans -

(1) APPROVAL -

(A) IN GENERAL - Not later than 90 days after the date on which an Indian tribe submits a proposed Indian trust asset management plan under subsection (a), the Secretary shall approve or disapprove the proposed plan.

(B) REQUIREMENTS FOR DISAPPROVAL - The Secretary shall approve a proposed plan unless the Secretary determines that--

(i) the proposed plan fails to address a requirement under subsection (a)(2);

~~(ii) the proposed plan includes 1 or more provisions that are inconsistent with subsection (c);~~ or

(ii) ~~(iii)~~ the cost of implementing the proposed plan exceeds the amount of funding available for the management of trust assets that would be subject to the proposed plan.

(2) ACTION ON DISAPPROVAL -

(A) NOTICE - If the Secretary disapproves a proposed plan under paragraph (1)(B), the Secretary shall provide:

(i) (~~to the Indian tribe~~) a written notice of the disapproval, including any reason why the proposed plan was disapproved.

(ii) identification of the technical assistance available to the tribe should it wish to resubmit the plan pursuant to subparagraph (B).

(iii) the Indian tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, except that the Indian tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a federal district court pursuant to subparagraph (B)(4) of this section.

(B) ACTION BY TRIBES - An Indian tribe the proposed plan of which is disapproved under paragraph (1)(B) may resubmit an amended proposed plan not later than 90 days after the date on which the Indian tribe receives the notice under subparagraph (A).

(3) FAILURE TO APPROVE OR DISAPPROVE - If the Secretary fails to disapprove a proposed plan within 90 days (or within any agreed to extension) it is deemed ~~approve or disapprove a proposed plan in accordance with paragraph (1), the plan shall be considered to be dis~~approved ~~under clauses (i) and (ii) of paragraph (1)(B)~~. At any time during the review period the Secretary may approve the proposal and award the requested contract.

(4) (~~JUDICIAL REVIEW -- An Indian tribe may seek judicial review of the determination of the Secretary in accordance with subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the `Administrative Procedure Act') if --~~

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~~(A) the Secretary disapproves the proposed plan of the Indian tribe under paragraph (1) or (3); and~~

~~(B) the Indian tribe has exhausted any other administrative remedy available to the Indian tribe.~~) Civil Actions –

(A) CIVIL ACTIONS; CONCURRENT JURISDICTION, RELIEF – The United States district courts shall have original jurisdiction over any civil action or claim against the Secretary arising under this title and, subject to the provisions of subsection (D) of this section and concurrent with the United State Court of Claims, over any civil action or claim against the Secretary for money damages arising under agreements authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including, money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this title or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse the Secretary's declination of a plan,comtract, compact, or funding agreement under tnis title, or to compel the Secretary to award and fund an approved plan, contract, compact or agreement).

(B) REVISION OF AGREEMENTS – The Secretary shall not revise or amend a plan, agreement, contract or compact under this title without the tribe's consent.

(C) APPLICATION OF LAWS TO ADMINISTRATIVE APPEALS – Section 504 of title 5, and section 2412 of title 28 shall apply to administrative appeals filed pursuant to this title.

(D) APPLICATION OF CONTRACT DISPUTES ACT – The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to disputes arising under this title, except that all administrative appeals relating to such disputes shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

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(E) BURDEN OF PROOF – With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the tribe's proposed plan (or provision thereof) under subsection (b) of this section.

(c) Applicable Laws; Standards; Trust Responsibility-

(1) APPLICABLE LAWS - An Indian trust asset management plan, and any activity carried out under the plan, shall not be approved unless the proposed plan is consistent with --

(A) all Federal treaties, statutes, regulations, Executive orders, and court decisions that are applicable to the trust assets, or the management of the trust assets, identified in the plan; and

(B) all tribal laws that are applicable to the trust assets, or the management of trust assets, identified in the plan, except to the extent that the laws are inconsistent with the treaties, statutes, regulations, Executive orders, and court decisions referred to in subparagraph (A).

(2) STANDARDS - Subject to the laws referred to in paragraph (1)(A), an Indian trust asset management plan shall not be approved unless the Secretary determines that the plan will --

(A) protect trust assets from loss, waste, and unlawful alienation;

(B) promote the interests of the beneficial owner of the trust asset;

(C) conform, to the maximum extent practicable, to the preferred use of the trust asset by the beneficial owner, unless the use is inconsistent with a treaty, statute, regulation, Executive order, or court decision referred to in paragraph (1)(A);

(D) protect any applicable treaty-based fishing, hunting and gathering, and similar rights relating to the use, access, or enjoyment of a trust asset; and

(E) require that any activity carried out under the plan be carried out in good faith and with loyalty to the beneficial owner of the trust asset.

(F) provides, consistent with the laws of the recognized tribal government for the reservation encompassed by the trust asset management plan, a due process system for the

consideration and determination or mitigation of any adverse impact on the use of the interest held by an allottee, or any successor in interest to an allottee, as a result of the implementation of the trust asset management plan.

(3) TRUST RESPONSIBILITY - An Indian trust asset management plan shall not be approved unless the Secretary determines that the plan is consistent with the trust responsibility of the United States to the Indian tribe and individual Indians.

(d) Termination of Plan-

(1) IN GENERAL - An Indian tribe may terminate an Indian trust asset management plan on any date after the date on which a proposed Indian trust asset management plan is approved by providing to the Secretary--

(A) a notice of the intent of the Indian tribe to terminate the plan; and

(B) a resolution of the governing body of the Indian tribe authorizing the termination of the plan.

(2) EFFECTIVE DATE - A termination of an Indian trust asset management plan under paragraph (1) takes effect on October 1 of the first fiscal year following the date on which a notice is provided to the Secretary under paragraph (1)(A).

SEC. 305. EFFECT OF TITLE.

(a) Liability - Nothing in this title, or a trust asset management plan approved under section 304, shall independently diminish, increase, create, or otherwise affect the liability of the United States or an Indian tribe participating in the Project for any loss resulting from the management of an Indian trust asset under an Indian trust asset management plan.

(b) Effect on Other Laws - Nothing in this title amends or otherwise affects the application of any treaty, statute, regulation, Executive order, or court decision that is applicable to Indian trust assets or the management or administration of Indian trust assets, including the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).

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(c) Trust Responsibility - Nothing in this title diminishes or otherwise affects the trust responsibility of the United States to Indian tribes and individual Indians.

TITLE IV--FRACTIONAL INTEREST PURCHASE AND CONSOLIDATION PROGRAM

SEC. 401. FRACTIONAL INTEREST PROGRAM.

Section 213 of the Indian Land Consolidation Act (25 U.S.C. 2212) is amended--
(1) by redesignating subsection (d) as subsection (h); and
(2) by inserting after subsection (c) the following:
(d) Purchase of Interests in Fractionated Indian Land -
(1) INCENTIVES - In acquiring an interest under this section in any parcel of land that includes undivided trust or restricted interests owned by not less than 20 separate individuals, as determined by the Secretary, the Secretary may include in the offered purchase price for the interest, in addition to fair market value, an amount not less than $100 and not to exceed $350, as an incentive for the owner to sell the interest to the Secretary.
(2) SALE OF ALL TRUST OR RESTRICTED INTERESTS - If an individual agrees to sell to the Secretary all trust or restricted interests owned by the individual, the Secretary may include in the offered purchase price, in addition to fair market value and the incentive described in paragraph (1), an amount not to exceed $2,000, as the Secretary determines to be appropriate, taking into consideration the avoided costs to the United States of probating the estate of the individual or an heir of the individual.
(e) Certain Parcels of Highly Fractionated Indian Land-
(1) DEFINITION OF OFFEREE - In this subsection, the term `offeree' does not include the Indian tribe that has jurisdiction over a parcel of land for which an offer is made.
(2) OFFER TO PURCHASE -

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(A) IN GENERAL - If the Secretary determines that a tract of land consists of not less than 200 separate undivided trust or restricted interests, the Secretary may offer to purchase the interests in the tract, in accordance with this subsection, for an amount equal to the sum of--

(i) the fair market value of the interests; and

(ii) an additional amount, to be determined by the Secretary, not less than triple the fair market value of the interest.

(B) REQUIREMENT - The Secretary shall make an offer under subparagraph (A) not later than 3 days before the date on which the Secretary mails a notice of the offer to the offeree under paragraph (3).

(3) NOTICE OF OFFER -

(A) IN GENERAL - The Secretary shall provide to an offeree, by certified mail to the last known address of the offeree, a notice of any offer to purchase land under this subsection.

`(B) INCLUSIONS- A notice under subparagraph (A) shall include in plain language, as determined by the Secretary--

`(i) the date on which the offer was made;

`(ii) the name of the offeree;

`(iii) the location of the tract of land containing the interest that is the subject of the offer;

`(iv) the size of the interest of the offeree, expressed in terms of a fraction or a percentage of the tract of land described in clause (iii);

`(v) the fair market value of the tract of land described in clause (iii);

`(vi) the fair market value of the interest of the offeree;

`(vii) the amount offered for the interest in addition to fair market value under paragraph (2)(A)(ii);

`(viii) a statement that the offeree shall be considered to have accepted the offer for the amount stated in the notice unless a notice of rejection form is deposited in

the United States mail not later than 90 days after the date on which the offer is received; and

`(ix) a self-addressed, postage pre-paid notice of rejection form.

`(4) TREATMENT OF OFFER -

`(A) IN GENERAL - An offer made under this subsection shall be considered to be accepted by the offeree if--

`(i) the certified mail receipt for the offer is signed by the offeree; and

`(ii) the notice of rejection form described in paragraph (3)(B)(ix) is not deposited in the United States mail by the date that is 90 days after the date on which the offer is received.

`(B) REJECTION - An offer made under this subsection shall be considered to be rejected by the offeree if--

`(i) the notice of rejection form described in paragraph (3)(B)(ix) is deposited in the United States mail by the date that is 90 days after the date on which the offer is received; or

`(ii) the certified mail receipt for the offer is returned to the Secretary unsigned by the offeree.

`(5) WITHDRAWAL OF ACCEPTANCE; NOTICE -

`(A) WITHDRAWAL OF ACCEPTANCE - A person that is considered to have accepted an offer under paragraph (4)(A) may withdraw the acceptance by depositing in the United States mail a notice of withdrawal of acceptance form by the date that is 30 days after the date of receipt of the notice under subparagraph (B).

`(B) NOTICE - The Secretary shall provide to any person that is considered to have accepted an offer under paragraph (4)(A), by certified mail, restricted delivery, to the last known address of the person, a preaddressed, postage prepaid withdrawal of acceptance form and a notice stating that--

`(i) the offer made to the person is considered to be accepted; and

`(ii) the person has the right to withdraw the acceptance by depositing in the United States mail the notice of withdrawal of acceptance form by the date that is 30 days after the date on which the notice was delivered to the person.

`(6) NOTICE OF ACCEPTANCE AND RIGHT TO APPEAL - The Secretary shall provide to any person that has been served with a notice under paragraph (5)(B) and fails to withdraw the acceptance of the offer in accordance with paragraph (5)(A), by first class mail to the last known address of the person, a notice stating that--

`(A) the offer made to the person is considered to be accepted and not timely withdrawn; and

`(B) after exhausting all administrative remedies, the person may appeal any determination of the Secretary in accordance with paragraph (7).

`(7) JUDICIAL REVIEW - A person described in paragraph (6) may appeal any determination of the Secretary with respect to--

`(A) the number of owners of undivided interests in a tract of land required under paragraph (2);

`(B) the fair market value of a tract of land or interest in land;

`(C) the date on which a notice of rejection form was deposited in the United States mail under paragraph (4)(B)(i); or

`(D) the date on which a notice of withdrawal of acceptance form was deposited in the United States mail under paragraph (5)(A).

`(f) Offer to Settle Claims Against the United States-

`(1) IN GENERAL - The Secretary may make an offer to any individual owner (not including an Indian tribe) of a trust or restricted interest in a tract of land to settle any claim that the owner may have against the United States relating to the specific tract of land of which the interest is a part (not including a claim for an accounting described in title I of the Indian Trust Reform Act of 2005).

`(2) REQUIREMENTS - An offer to settle claims under this subsection shall--

`(A) be in writing;

`(B) be delivered to an individual owner by the Secretary in person or through first class mail; and

`(C) include --

`(i) the name of the individual owner;

`(ii) a description of the tract of land to which the offer relates;

`(iii) the amount offered to settle a claim of the individual owner;

`(iv) the manner and date by which the individual owner shall accept the offer;

`(v) a statement that the individual owner is under no obligation to accept the offer;

`(vi) a statement that the individual owner has the right to consult an attorney or other advisor before accepting the offer;

`(vii) a statement that acceptance of the offer by the individual owner will result in a full and final settlement of all claims, known and unknown, of the individual owner (including the heirs and assigns of the individual owner) against the United States relating to the tract of land identified in the offer; and

`(viii) a statement that the settlement proposed by the offer does not cover any claim for an accounting described in title I of the Indian Trust Reform Act of 2005.

`(3) ACCEPTANCE - No acceptance of an offer under this subsection shall be valid or binding on the individual owner unless the acceptance--

`(A) is in writing;

`(B) is signed by the individual owner;

`(C) is notarized; and

`(D) is attached to a copy of, or contains all material terms of, the offer to which the acceptance corresponds.

`(4) LIMITATION - No offer to purchase an interest under this section or any other provision of law shall be conditioned on the acceptance of an offer to settle a claim under this subsection.

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`(5) OTHER LAWS - The authority of the Secretary to settle claims under this subsection shall be in addition to, and not in lieu of, the authority of the Secretary to settle claims under any other provision of Federal law.

`(g) Borrowing From Treasury -

`(1) ISSUANCE OF OBLIGATIONS -

`(A) IN GENERAL - To the extent approved in annual appropriations Acts, the Secretary may issue to the Secretary of the Treasury obligations in such amounts as the Secretary determines to be necessary to acquire interests under this Act, subject to approval of the Secretary of the Treasury, and bearing interest at a rate to be determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities to the obligations.

`(B) LIMITATION - The aggregate amount of obligations under subparagraph (A) outstanding at any time shall not exceed $ 2,000,000,000.

`(2) FORMS AND DENOMINATIONS - The obligations issued under paragraph (1) shall be in such forms and denominations, and subject to such other terms and conditions, as the Secretary of the Treasury may prescribe.

`(3) REPAYMENT -

`(A) IN GENERAL - Revenues derived from land restored to the Tribe under this Act shall be used by the Secretary to pay the principal and interest on the obligations issued under paragraph (1).

`(B) ASSURANCE OF REPAYMENT - The Secretary shall ensure, to the maximum extent possible, that the revenues described in subparagraph (A) provide reasonable assurance of repayment of the obligations issued under paragraph (1).

`(4) AUTHORIZATION OF APPROPRIATIONS - There are authorized to be appropriated to the Secretary for each fiscal year beginning after the date of enactment of this subsection such sums as are necessary to cover any difference between--

`(A) the total amount of repayments of principal and interest on obligations issued to the Secretary of the Treasury under paragraph (1) during the previous fiscal year; and

`(B) the total amount of repayments described in subparagraph (A) that were contractually required to be made to the Secretary of the Treasury during that fiscal year.

`(h) Receipt of Payments Have No Impact on Benefits Under Other Federal Programs - The receipt of a payment by an offeree under this title shall not be--

`(1) subject to Federal or State income tax; or

`(2) treated as benefits or otherwise taken into account in determining the eligibility of the offeree for, or the amount of benefits under, any other Federal program, including the social security program, the medicare program, the medicaid program, the State children's health insurance program, the food stamp program, or the Temporary Assistance for Needy Families program.'.

TITLE V--RESTRUCTURING BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE

SEC. 501. PURPOSE.

The purpose of this title is to ensure a more effective and accountable administration of duties of the Secretary of the Interior with respect to providing services and programs to Indians and Indian tribes, including the management of Indian trust resources.

SEC. 502. DEFINITIONS.

In this title:

(1) BUREAU - The term `Bureau' means the Bureau of Indian Affairs.

(2) OFFICE - The term `Office' means the Office of Trust Reform Implementation and Oversight referred to in section 503(c).

(3) SECRETARY - The term `Secretary' means the Secretary of the Interior.
(4) UNDER SECRETARY - The term `Under Secretary' means the individual appointed to the position of Under Secretary for Indian Affairs, established by section 503(a).

SEC. 503. UNDER SECRETARY FOR INDIAN AFFAIRS.

(a) Establishment of Position - There is established in the Department of the Interior the position of Under Secretary for Indian Affairs, who shall report directly to the Secretary.
(b) Appointment -
(1) IN GENERAL - Except as provided in paragraph (2), the Under Secretary shall be appointed by the President, by and with the advice and consent of the Senate.
(2) EXCEPTION - The officer serving as the Assistant Secretary for Indian Affairs on the date of enactment of this Act may assume the position of Under Secretary without appointment under paragraph (1) if--
(A) the officer was appointed as Assistant Secretary for Indian Affairs by the President by and with the advice and consent of the Senate; and
(B) not later than 180 days after the date of enactment of this Act, the Secretary approves the assumption.
(c) Duties - In addition to the duties transferred to the Under Secretary under sections 504 and 505, the Under Secretary, acting through an Office of Trust Reform Implementation and Oversight, shall--
(1) carry out any activity relating to trust fund accounts and trust resource management of the Bureau ~~(except any activity carried out under the Office of the Special Trustee for American Indians before the date on which the Office of the Special Trustee is abolished),~~ in accordance with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.);
(2) develop and maintain an inventory of Indian trust assets and resources;

(3) coordinate with the Special Trustee for American Indians to ensure an orderly transition of the functions of the Special Trustee under section 505;
(4) supervise any activity carried out by the Department of the Interior, including--
(A) to the extent that the activities relate to Indian affairs, activities carried out by--
(i) the Commissioner of Reclamation;
(ii) the Director of the Bureau of Land Management; and
(iii) the Director of the Minerals Management Service; and
(B) intergovernmental relations between the Bureau and Indian tribal governments;
(5) to the maximum extent practicable, coordinate activities and policies of the Bureau with activities and policies of--
(A) the Bureau of Reclamation;
(B) the Bureau of Land Management; and
(C) the Minerals Management Service;
(i) and these departments shall coordinate their activities and policies with the Under Secretary so as to mitigate potential impacts on the trust responsibilities of the department and United States relating to federally recognized Indian tribes and their resources.
(6) provide for regular consultation with Indians and Indian tribes that own interests in trust resources and trust fund accounts;
(7) manage and administer Indian trust resources in accordance with any applicable Federal law;
(8) take steps to protect the security of data relating to individual Indian and Indian tribal trust accounts; and
(9) take any other measure the Under Secretary determines to be necessary with respect to Indian affairs.
(10) after the appointment of the Under Secretary, the Under Secretary shall join with the Special Trustee to develop a plan for transition of all authority and activity of the Office of

Special Trustee to the Under Secretary and submit the plan to the appropriate committees of Congress as an element of the transition report in Sec. 504 subsection (m). The plan for transition shall include a date for implementation during fiscal year 2007 and shall take effect no later than September 30, 2007.

SEC. 504. TRANSFER OF FUNCTIONS OF ASSISTANT SECRETARY FOR INDIAN AFFAIRS.

(a) Transfer of Functions - There is transferred to the Under Secretary any function of the Assistant Secretary for Indian Affairs that has not been carried out by the Assistant Secretary as of the date of enactment of this Act.

(b) Determinations of Certain Functions by the Office of Management and Budget- If necessary, the Office of Management and Budget shall make any determination relating to the functions transferred under subsection (a).

(c) Personnel Provisions-

(1) APPOINTMENTS - The Under Secretary may appoint and fix the compensation of such officers and employees as the Under Secretary determines to be necessary to carry out any function transferred under this section.

(2) REQUIREMENTS - Except as otherwise provided by law--

(A) an officer or employee described in paragraph (1) shall be appointed in accordance with the civil service laws; and

(B) the compensation of the officer or employee shall be fixed in accordance with title 5, United States Code.

(d) Delegation and Assignment-

(1) IN GENERAL - Except as otherwise expressly prohibited by law or otherwise provided by this section, the Under Secretary may--

(A) delegate any of the functions transferred to the Under Secretary by this section and any function transferred or granted to the Under Secretary after the date of enactment of this Act to such officers and employees of the Office as the Under Secretary may designate; and

(B) authorize successive redelegations of such functions as the Under Secretary determines to be necessary or appropriate.

(2) DELEGATION - No delegation of functions by the Under Secretary under this section shall relieve the Under Secretary of responsibility for the administration of the functions.

(e) Reorganization - The Under Secretary may allocate or reallocate any function transferred under this section among the officers of the Office, and establish, consolidate, alter, or discontinue such organizational entities in the Office, as the Under Secretary determines to be necessary or appropriate.

(f) Rules - The Under Secretary may prescribe, in accordance with the provisions of chapters 5 and 6 of title 5, United States Code, such rules and regulations as the Under Secretary determines to be necessary or appropriate to administer and manage the functions of the Office.

(g) Transfer and Allocations of Appropriations and Personnel-

(1) IN GENERAL - Except as otherwise provided in this section, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to, or to be made available in connection with, the functions transferred by this section, subject to section 1531 of title 31, United States Code, shall be transferred to the Office.

(2) UNEXPENDED FUNDS - Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(h) Incidental Transfers-

(1) IN GENERAL - The Director of the Office of Management and Budget, at any time the Director may provide, may make such determinations as are necessary with regard to the functions transferred by this section, and make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations,

and other funds held, used, arising from, available to, or to be made available in connection with such functions, as are necessary, to carry out this section.
(2) TERMINATION OF AFFAIRS - The Director of the Office of Management and Budget shall provide for the termination of the affairs of all entities terminated by this section and for any further measures and dispositions as are necessary to effectuate the purposes of this section.
(i) Effect on Personnel -
(1) IN GENERAL - Except as otherwise provided by this section, the transfer pursuant to this section of full-time personnel (except special Government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for a period of at least 1 year after the date of transfer of the employee under this section.
(2) EXECUTIVE SCHEDULE POSITIONS - Except as otherwise provided in this section, any person who, on the day preceding the date of enactment of this Act, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without a break in service, is appointed to a position in the Office having duties comparable to the duties performed immediately preceding such appointment shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of the service of the person in the new position.
(3) TERMINATION OF CERTAIN POSITIONS - Positions whose incumbents are appointed by the President, by and with the advice and consent of the Senate, the functions of which are transferred by this title, shall terminate on the date of enactment of this Act.
(j) Separability - If a provision of this section or the application of this section to any person or circumstance is held invalid, neither the remainder of this section nor the application of the provision to other persons or circumstances shall be affected.

(k) Transition - The Under Secretary may use--
(1) the services of the officers, employees, and other personnel of the Assistant Secretary for Indian Affairs relating to functions transferred to the Office by this section; and
(2) funds appropriated to the functions for such period of time as may reasonably be needed to facilitate the orderly implementation of this section.
(l) References- Any reference in a Federal law, Executive order, rule, regulation, delegation of authority, or document relating to the Assistant Secretary for Indian Affairs, with respect to functions transferred under this section, shall be deemed to be a reference to the Under Secretary.
(m) Report on Reorganization and Transition Progress and Recommended Legislation- Not later than 180 days after the effective date of this title, the Under Secretary, in consultation with the appropriate committees of Congress and the Director of the Office of Management and Budget, shall submit to Congress a report on the progress of the reorganization and transition as a result of this Act any recommendations relating to additional technical and conforming amendments to Federal law to reflect the changes made by this section. The report on reorganization and transition shall become an annual report that will be submitted along with the Under Secretary's testimony before the appropriate committees of Congress on the President's budget request.
(n) Effect of Section -
(1) CONTINUING EFFECT OF LEGAL DOCUMENTS - Any legal document relating to a function transferred by this section that is in effect on the date of enactment of this Act shall continue in effect in accordance with the terms of the document until the document is modified or terminated by--
(A) the President;
(B) the Under Secretary;
(C) a court of competent jurisdiction; or
(D) operation of Federal or State law.
(2) PROCEEDINGS NOT AFFECTED - This section shall not affect any proceeding (including a notice of proposed rulemaking, an administrative proceeding, and an

application for a license, permit, certificate, or financial assistance) relating to a function transferred under this section that is pending before the Assistant Secretary on the date of enactment of this Act.

SEC. 505. OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS.

(a) Termination - Notwithstanding sections 302 and 303 of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4042; 4043), the Office of Special Trustee for American Indians shall terminate on ~~(the effective date of this section)~~ September 30, 2007.

(b) Transfer of Functions - There is transferred to the Under Secretary any function of the Special Trustee for American Indians that has not been carried out by the Special Trustee as of ~~(the effective date of this section)~~ September 30, 2007. The Special Trustee shall develop a plan for transition of all authority and activity of the Office of Special Trustee to the Under Secretary and submit the plan to the appropriate committees of Congress jointly with the Under Secretary as an element of the transition report in Sec. 504 subsection (m). The plan for transition shall include a date for implementation during fiscal year 2007 and shall take effect no later than September 30, 2007.

(c) Determinations of Certain Functions by the Office of Management and Budget- If necessary, the Office of Management and Budget shall make any determination relating to the functions transferred under subsection (b).

(d) Personnel Provisions-

(1) APPOINTMENTS - The Under Secretary may appoint and fix the compensation of such officers and employees as the Under Secretary determines to be necessary to carry out any function transferred under this section.

(2) REQUIREMENTS - Except as otherwise provided by law--

(A) any officer or employee described in paragraph (1) shall be appointed in accordance with the civil service laws; and

(B) the compensation of such an officer or employee shall be fixed in accordance with title 5, United States Code.

(e) Delegation and Assignment-
(1) IN GENERAL - Except as otherwise expressly prohibited by law or otherwise provided by this section, the Under Secretary may--
(A) delegate any of the functions transferred to the Under Secretary under this section and any function transferred or granted to the Under Secretary after the effective date of this section to such officers and employees of the Office as the Under Secretary may designate; and
(B) authorize successive redelegations of the functions as are necessary or appropriate.
(2) DELEGATION - No delegation of functions by the Under Secretary under this section shall relieve the Under Secretary of responsibility for the administration of the functions.
(f) Reorganization - The Under Secretary may allocate or reallocate any function transferred under subsection (b) among the officers of the Office, and establish, consolidate, alter, or discontinue such organizational entities in the Office as the Under Secretary determines to be necessary or appropriate.
(g) Rules - The Under Secretary may prescribe, in accordance with the provisions of chapters 5 and 6 of title 5, United States Code, such rules and regulations as the Under Secretary determines to be necessary or appropriate to administer and manage the functions of the Office.
(h) Transfer and Allocations of Appropriations and Personnel-
(1) IN GENERAL - Except as otherwise provided in this section, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to, or to be made available in connection with the functions transferred by this section, subject to section 1531 of title 31, United States Code, shall be transferred to the Office.

(2) UNEXPENDED FUNDS - Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(i) Incidental Transfers -

(1) IN GENERAL - The Director of the Office of Management and Budget, at any time the Director may provide, may make such determinations as are necessary with regard to the functions transferred by this section, and make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, as are necessary, to carry out this section.

(2) TERMINATION OF AFFAIRS - The Director of the Office of Management and Budget shall provide for the termination of the affairs of all entities terminated by this section and for any further measures and dispositions as are necessary to effectuate the purposes of this section.

(j) Effect on Personnel-

(1) IN GENERAL - Except as otherwise provided by this section, the transfer pursuant to this section of full-time personnel (except special Government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for a period of at least 1 year after the date of transfer of the employee under this section.

(2) EXECUTIVE SCHEDULE POSITIONS - Except as otherwise provided in this section, any person who, on the day preceding the effective date of this section, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without a break in service, is appointed to a position in the Office having duties comparable to the duties performed immediately preceding such appointment, shall continue to be

compensated in the new position at not less than the rate provided for the previous position, for the duration of the service of the person in the new position.
(3) TERMINATION OF CERTAIN POSITIONS - Positions the incumbents of which are appointed by the President, by and with the advice and consent of the Senate, and the functions of which are transferred by this title, shall terminate on the effective date of this section.
(k) Separability - If a provision of this section or the application of this section to any person or circumstance is held invalid, neither the remainder of this section nor the application of the provision to other persons or circumstances shall be affected.
(l) Transition - The Under Secretary may use--
(1) the services of the officers, employees, and other personnel of the Special Trustee relating to functions transferred to the Office by this section; and
(2) funds appropriated to those functions for such period of time as may reasonably be needed to facilitate the orderly implementation of this section.
(m) References- Any reference in a Federal law, Executive order, rule, regulation, delegation of authority, or document relating to the Special Trustee, with respect to functions transferred under this section, shall be deemed to be a reference to the Under Secretary.
(n) Report on Reorganization and Transition Progress and Recommended Legislation- Not later than 180 days after the effective date of this title, the Under Secretary, in consultation with the appropriate committees of Congress and the Director of the Office of Management and Budget, shall submit to Congress a report on the progress of the reorganization and transition as a result of this Act any recommendations relating to additional technical and conforming amendments to Federal law to reflect the changes made by this section. The report on reorganization and transition shall become an annual report that will be submitted along with the Under Secretary's testimony before the appropriate committees of Congress on the President's budget request.
(o) Effect of Section -

(1) CONTINUING EFFECT OF LEGAL DOCUMENTS - Any legal document relating to a function transferred by this section that is in effect on the effective date of this section shall continue in effect in accordance with the terms of the document until the document is modified or terminated by--

(A) the President;

(B) the Under Secretary;

(C) a court of competent jurisdiction; or

(D) operation of Federal or State law.

(2) PROCEEDINGS NOT AFFECTED - This section shall not affect any proceeding (including a notice of proposed rulemaking, an administrative proceeding, and an application for a license, permit, certificate, or financial assistance) relating to a function transferred under this section that is pending before the Special Trustee on the effective date of this section.

(p) Effective Date - This section shall take effect on December 31, 2008.

SEC. 506. REVIEW AND OVERSIGHT OF THE INDIAN TRUST

(A) ASSISTANT INSPECTOR GENERAL FOR THE INDIAN TRUST –

(1) ESTABLISHMENT – An Assistant Inspector General for the Indian Trust shall be established within the Office of the Inspector General in the Department of Interior.

(2) APPOINTMENT – Appointment shall be made in accordance with the Inspector General Act of 1978 and applicable laws and regulations governing the civil service.

(3) DUTIES AND RESPONSIBILITIES – The duties and responsibilities of the Assistant Inspector General for the Indian Trust are as follows:

(a) oversee internal investigations, performance reviews, audits, and appeals with respect to the United States' trust responsibilities to American Indian tribes and individuals as provided for in the American Indian Trust Fund Management Reform Amendments Act of 2005.

(b) initiate, conduct and supervise audits and investigations in the Department of Interior as the Assistant Inspector General for the Indian Trust considers appropriate for good cause shown whether the requests for such investigations come from Depatment officials, Indian tribes or individual Indian beneficiaries.

(c) when Indian tribes and individual Indian beneficiaries provide a written request for action from the Assistant Inspector General for the Indian Trust, a response as to whether or not the requested action will be carried out must be provided within 30 days of receipt of the request. For decisions not to carry out the requested action, a detailed explanation of the grounds for the Assistant Inspector General's decision must be provided.

(4) APPLICABILITY TO INDIAN TRIBES - The responsibility for supervision of programs and operations of the Department described in paragraphs (3)(a), (3)(b) and (3)(c) shall not extend to tribes or tribal organizations carrying out trust programs, functions, services and activities pursuant to Title III or this Act or pursuant to agreements under the ISDEAA. The Assistant Inspector General shall not investigate, audit, enforce or otherwise exercise any duties or responsibilities authorized in this section with respect to tribes or tribal organizations carrying out trust management programs, functions, services and activities except:

(1) where there is a clear violation of trust management standards recognized in federal law or as set forth in agreements entered into pursuant to Title III of this Act or pursuant to the ISDEAA; or

(2) upon the request of a tribe or tribal organization

(4) REPORTING TO CONGRESS – The Assistant Inspector General for the Indian Trust shall provide an annual report to the Senate Committee on Indian Affairs and the House Resources Committee which shall include, but not be limiteds to, the duties and responsibilities identified in this subsection.

(a) The Assistant Inspector General shall be available to appear at annual hearings to discuss the report and its implications.

(B) ANNUAL CONGRESSIONAL OVERSIGHT HEARING

(1) The Senate Committee on Indian Affairs and the House Committee on Resources shall hold an annual oversight hearing on American Indian Trust issues, including the Assistant Inspector General's annual report.

(2) Additionally the committees shall consider other appropriate topics for the annual oversight hearings based on consultation with Indian tribes, individual Indian beneficiaries and agency officials.

DRAFT

(SEC. 507)HIRING PREFERENCE.

In appointing or otherwise hiring any employee to the Office, the Under Secretary shall give preference to Indians in accordance with section 12 of the Act of June 8, 1934 (25 U.S.C. 472).

SEC. 508 (7). AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this title.

TITLE VI--AUDIT OF INDIAN TRUST FUNDS

SEC. 601. AUDITS AND REPORTS.

(a) Financial Statements and Internal Control Report-

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(1) FINANCIAL STATEMENTS - For each fiscal year beginning after the enactment of this Act, the Secretary of Interior shall prepare financial statements for individual Indian, Indian tribal, and other Indian trust accounts in accordance with generally accepted accounting principles of the Federal Government.
(2) INTERNAL CONTROL REPORT - Concurrently with the financial statements under by paragraph (1), the Secretary shall prepare an internal control report that--
(A) establishes the responsibility of the Secretary for establishing and maintaining an adequate internal control structure and procedures for financial reporting under this Act; and
(B) assesses the effectiveness of the internal control structure and procedures for financial reporting under subparagraph (A) during the preceding fiscal year.
(b) Independent External Auditor -
(1) IN GENERAL - The Comptroller General of the United States shall enter into a contract with an independent external auditor to conduct an audit and prepare a report in accordance with this subparagraph.
(2) AUDIT REPORT - An independent external auditor shall submit to the Committee on Indian Affairs of the Senate, and make available to the public, an audit of the financial statements under subsection (a)(1) in accordance with--
(A) generally accepted auditing standards of the Federal Government; and
(B) the financial audit manual jointly issued by the Government Accountability Office and the Council on Integrity and Efficiency of the President.
(3) ATTESTATION AND REPORT - In conducting the audit under paragraph (2), the independent external auditor shall attest to, and report on, the assessment of internal controls made by the Secretary under subsection (a)(2)(B).
(4) PAYMENT FOR AUDIT AND REPORT -
(A) TRANSFER OF FUNDS - On request of the Comptroller General, the Secretary shall transfer to the Government Accountability Office from funds made available

for administrative expenses of the Department of Interior the amount requested by the Comptroller General to pay for an annual audit and report.

(B) CREDIT TO ACCOUNT -

(i) IN GENERAL - The Controller General shall credit the amount of any funds transferred under subparagraph (A) to the account established for salaries and expenses of the Government Accountability Office.

(ii) AVAILABILITY - Any amount credited under clause (i) shall be made available on receipt, without fiscal year limitation, to cover the full costs of the audit and report.

SEC. 602. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this title.

END

TESTIMONY
OF
SANDRA K. JOHNIGAN, CPA, CFE
BEFORE THE
UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS AND THE
UNITED STATES HOUSE COMMITTEE ON RESOURCES
REGARDING
SETTLEMENT OF *COBELL V. NORTON*

MARCH 1, 2006

I am pleased to appear today, at the request of the Chairmen of these distinguished Committees, to present testimony on the settlement of *Cobell v. Norton*. This testimony is based on my experience as a forensic accounting specialist. Relevant experience includes private sector trust accounting disputes and, recently, Tribal trust fund disputes. During the last year and a half I have had the opportunity to participate as the lead accounting consultant for the Confederated Tribes of the Warm Springs Reservation in a trust funds dispute with the United States Government. As described in a February 21, 2006 filing in the Court of Federal Claims, the parties have reached a settlement in principle on the Phase I issues in the matter. Since February of 2005 I have also been engaged by the InterTribal Monitoring Association (ITMA) as the lead accounting consultant for a cooperative effort to develop a methodology to use in the settlement of Tribal trust fund accounts for the 1972 to 1992 time period. The participating Tribes are involved in a negotiation with the United States Government to use the methodology mutually developed. My resume is included at Attachment A.

Introduction

My testimony is intended to address forensic accounting issues and approaches that may be of use in the settlement of ***Cobell v Norton***. I am not an attorney and want to emphasize that my testimony is not meant to cover any legal issues. As I mentioned, I have been engaged as a consultant for certain Tribes, on Tribal trust issues. I have not been engaged by either side to assist in the ***Cobell v Norton*** case.

In my experience, the first key to a successful resolution of a dispute is asking the right questions. Asking questions does not change the underlying facts in a matter, but it can help to identify which facts are relevant to the resolution. Every matter comes equipped with facts, generally far too many of them. There are some facts that both sides agree upon, and others that are called "facts" by one side and "unproved allegations" by the other side. Framing the right questions, and answering them, can strip away the "static" and uncover the facts that can actually be used to reach a resolution.

The second key to a successful resolution of a dispute is getting the parties to mutually develop a process to answer those questions. Unless both parties have reason to believe the process is unbiased, the resulting "answers" will not be acceptable as a basis for resolution.

I have seen that process work in the Tribal cases in which I am currently engaged as well as private sector trust disputes. That experience is the reason for my testimony here today. I do not presume to have answers for the Cobell dispute. What I do hope to do is assist in the development of questions, and a process for answering them, that may help to resolve the dispute.

Background

It is my understanding that Title I of S. 1439 and H. R. 4322 are intended to

> "provide benefits that are reasonably calculated to be fair and appropriate in lieu of performing an accounting of an IIM [Individual Indian Monies] account, or assuming liability for errors in such an accounting, mismanagement of IIM account funds (including undetermined amounts of interest in IIM accounts, losses in which may never be discovered or quantified if a complete historical accounting cannot be performed), or breach of fiduciary duties with respect to the administration of IIM accounts, in order to transmute claims by the beneficiaries of IIM accounts for undetermined or unquantified accounting losses and interest to a fixed amount to be distributed to the beneficiaries of IIM accounts",

The amounts determined in the above effort are to be distributed taking into consideration:

> "the risks and costs to IIM account beneficiaries, as well as any delay, associated with the litigation of claims that will be resolved by this title; and ...the benefits to IIM account beneficiaries available under this title"

To accomplish the above goal an amount of money is proposed as an Initial Deposit into the Settlement Fund. This amount is currently listed as $[___],000,000,000 It is my understanding that the Plaintiffs have proposed an amount of $27.5 billion. It is also my understanding that the Defendants have rejected this amount as materially differing from their belief as to an appropriate amount.

To analyze the positions of the parties, a fair question is what the bases are for amounts that the parties propose. Knowing the bases with some level of specificity will provide the needed data to determine how the bases can be verified or adjusted to provide individual Indians, the United States Government Department of Interior and Congress with an understanding of the relevance and reliability of an agreed upon or proposed amount. Testimony to the United States Committee on House Resources provided by Eloise Cobell and Associate Deputy Secretary James Cason provided some information about how the Plaintiffs developed the $27.5 billion number and the United States' view of the amount. It provides some insight into the above numbers. Where applicable I have included information from their testimony in the following discussion.

What Are the Parties Attempting to Resolve and Therefore What is the Legislation Attempting to Resolve?

A critical first question is "what are the parties attempting to resolve"? Without a clear understanding of the issues being addressed in the litigation, legislation could provide settlement for only a portion of what is at the heart of the dispute.

The Plaintiffs initially asked the Department of Interior to provide an "accounting". The nature of what is required for such an accounting is in dispute, but the general concept provides a useful framework for discussion. Generally an accounting calls for:

1. Determining all receipts,
2. Determining all disbursements
3. Computing the difference between all receipts and disbursements; for each required reporting period to determine the outstanding balance based on the accounting and
4. Comparing the computed accounting balance to the historical balance that exists in the account

5. Resolving any difference between the balance determined from the accounting and the recorded balance as it exists in the account.

The Plaintiffs' expectation appears to be that there will be an amount computed that is owed to the individual Indian account holders and that the resolution will be payment to those account holders. The Department of Interior's position appears to be that work to date does not support a significant amount of funds due to individual Indian monies (IIM) account holders. In order to break this impasse, it may help to focus on the individual elements of the "accounting", and what the appropriate questions might be, related to each element.

Receipts

It is not clear from the testimony in December whether the parties have even agreed on the total receipts involved. Eloise Cobell stated in her December 8, 2005 testimony: "Since both sides agree that the government should have paid roughly $13 billion into the individual Indian Trust accounts since 1887..." However, Assistant Secretary James Cason did not specifically discuss the $13 billion of receipts. He did discuss the statistical approach they are applying and suggested that results to date support exempting Judgment and Per Capita funds from any proposed legislation. He then discussed the remaining "land based accounts" and described a 99% completion rate for the sampled and high dollar (over $100,000) items selected for testing. His discussion indicated that there are relatively small "difference rates" for the sample period. It should be noted that the sample period he refers to appears to have started no earlier than 1985. He does not describe the effect of those rates on the more than 100 year accounting period, nor the need for adjustment of the rates, if applicable, due to differences in systems and management during earlier periods.

Therefore, questions to address for receipts include:

- Do the parties generally agree with the $13 billion of total receipts? If so, do they agree on the timing of the receipts? If there are differences, what are the bases for the differing amounts?
- Does the $13 billion (or some other agreed upon amount) represent only what is known to be recorded?
- Are there claims for additional amounts that should have been received but were not (such as non collection of surface leases that were contractual obligations.)?

There is another type of receipt that could produce claims, i.e. amounts that would have been received absent alleged mismanagement of assets, such as leases entered into at less than fair market value. According to Assistant Secretary James Cason's December 2005 testimony the Plaintiffs' proposed settlement amount does not include resolution of such claims.

In other words, even an apparently simple term such as "total receipts" involves at least three subsets, each with its own questions: 1) amounts shown as being recorded, 2) amounts that should have been received but were not, and 3) amounts that were recorded but which should have been for greater amounts. Each subset will in turn have its own questions, depending upon what is driving the estimates and what documentation is available to answer the questions. If the parties can agree upon the questions in sufficient detail, they will be a long way toward working out a "mutually agreed upon" system for answering the questions.

Claims for what "should have been received" will need to be explicitly addressed in any settlement. The following is a further consideration of these claims.

Amounts That Should Have Been Received But Were Not

If there is an expectation that the receipts should also include what "should have been received but were not" for existing transactions and contracts, then the work performed requires more than an analysis of already recorded receipts. For Tribal trust accounts during the 1972 to 1992 time frame Arthur Andersen performed a certain agreed upon procedures (AA Project) to test this concern for a limited number of contracts and Tribes. This specific work in the AA Project was called "Fill the Gap". Work in this area:

- Requires an understanding of the resources managed in Trust for the account holder;
- Development of the universe of transactions that result in receipts to the account holder for the managed resources
- Development of a method to account for the receipts that should have been received from that universe.

Resources managed in Trust for the individual Indians will generally mirror the type of resources that are described in the AA Project for the Tribal accounts. During the AA Project these resource transactions were identified as:

- Surface Leases – e.g. allotments for grazing and agricultural [the growing of crops] purposes
- Oil and Gas Royalties
- Coal Royalties – the same approach would be considered for other extractive minerals such as sand & gravel.
- Timber Sales – e.g. sale of standing, dead or down timber [stumpage revenues]
- Other Surface Leases – e.g. hunting, fishing and right-of-way permits.

In developing approaches in the current ITMA project as well as for any large forensic investigation, an analysis of each of the revenue systems combined with some kind of sampling to determine error rates is a logical approach. Any sampling in this area will likely provide more confidence to those concerned with errors if it is stratified for selected attributes during selected time periods expected to result in error.

The parties would be well served to agree on a mutual approach to determining the attributes that could result in error, especially in the years when the document retention is expected to be low and the efforts to provide an accounting too prohibitive. If this has not already been done in the current sampling, then the selected attributes could be derived from several sources including perceived defects in each revenue collection system as well as anomalies in data entry.

If the parties could agree on what constitutes the proper periods, accounting system changes, particular area offices requiring closer scrutiny and other issues that they may determine, the work could be performed based on mutual agreement to resolve a significant question in the application of any current statistical work performed. That question is simply, why would the work on the electronic record period (starting in 1985) provide a reliable and relevant factor to apply to prior years that were manual and operated with different approaches and personnel?

Any error rates developed both for the current periods and the prior periods could be applied to groups of individual claimants. This would allow for the fact that not all individuals had identical sources of revenues. In addition to assisting in the development of an amount for the settlement process, such information could also be considered for use in determining the distribution process.

Receipts Recorded But Which Should Have Been for Greater Amounts

The concept of claims for what "should have been received" as related to alleged asset mismanagement will need to be explicitly addressed in any settlement. This type of claim is as previously discussed focused on trust management not obtaining fair value for resources and other non cash or contractual issues. As discussed previously, it does not appear to be included in the settlement amounts discussed by the Plaintiffs.

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Disbursements

Eloise Cobell stated, "The proposed settlement makes a generous assumption on behalf of the government. It assumes for purposes of calculation that the government has enough records to prove that it accurately made 80 percent of the payments it was supposed to have made to trust beneficiaries and that it made them on time." In contrast, Assistant Secretary James Cason in his testimony refers to samples in which supporting documents could be found for 99% of the tested transactions, with relatively small difference rates. However, as noted previously, the sample appears to be based on a period going back to at most 1985.

Therefore, questions to address for disbursements include:

- Do the Plaintiffs agree that the results of the study referred to by Assistant Secretary James Cason can be used to evaluate disbursements for the period tested?
- If not, can the parties mutually agree upon an approach to test the disbursements for the period in question? (If possible, this might involve a modified use of data already assembled as opposed to a totally new test.)

- Does the U.S. Government agree that the results of the study can not necessarily be extrapolated to earlier periods that involved different government systems?
- If so, can the parties agree on an approach to sample prior periods and extrapolate from the results?

Any forensic search for information over long periods of time, whether in a private sector trust arrangement or the trust arrangement established for Indian funds, is unlikely to provide complete information. The quantity and quality of such record retention will be highly dependent on the systems and processes that were in place over time, size and complexity of the systems and processes and the number of years under review when data was collected and recorded manually.

The cases I have worked on have helped to educate me with regard to some of the issues about the quality of records for Trust Funds held for Tribes as opposed to private sector Trust accounts. The following is a brief summary[1] of some of the process background that may be important in considering alternative solutions to determining an amount to settle ***Cobell v Norton***.

> Before 1950 the responsibility for the maintenance of both Tribal and Individual Indian accounting records took place at the Agency level. Besides sending one copy of its monthly records to the BIA Central Office, each agency was responsible for the forwarding of its monthly reports to the Indian Claims Division of the General Accounting Office for an administrative audit. This practice ended in 1950-51.

[1]Provided by Paul J. Gillis, based on his over 40 years of providing forensic accounting support related to Indian Tribal Claims.

In 1950 the Congress of the United States enacted legislation that revised the accounting system of the Government. Pursuant to that revision the primary responsibility for maintenance of the accounting records for both Tribal and Individual financial transactions was moved to the Area Office level.

In 1964-5 the BIA began to keep financial records by computer. It was at this point the BIA Central Finance Office West in Albuquerque, New Mexico began keeping records for the Tribes and Individuals. By 1971 the computer operations were such that the BIA Central Finance Office could assume the primary responsibility for maintenance of the financial records.

However, both the Agency and Area Office levels continued to maintain some duplicate or supporting records. With records being maintained at three different levels, Agency, Area Office and Central Office, discrepancies arose between the three sets of records as to transactions and as to balances of accounts. It may be worth noting that discrepancies in the financial records were noted as early as1929 by the Comptroller General of the United States in an audit report submitted to the U.S. Senate.

The BIA employed agency-wide accounting systems to capture financial transactions. That is to say, each Agency or Area Office did not employ its own practices. They all followed a uniform system that was standard throughout the BIA. The practices and procedures employed within each system were adapted to meet the particular circumstances regarding the collection of revenues from different sources.

The above system description is to provide some understanding of the changes over time that might affect the accuracy of the record keeping. As more controls were put in place over time this would understandably improve the operations. The issue for disbursements in this matter is the possibility that payments were not properly recorded, or otherwise were paid for the benefit of others than the IIM account holder. The existence of a document supporting the disbursement is of course evidence, depending on the quality of the document. However, the absence of a specific document does not necessarily demonstrate that the payment was inappropriate. In a private trust dispute in which I participated as the lead accounting consultant (State of California and all Political Subdivisions vs Bank of America et al), the court found in a preliminary finding that gaps in records could be filled with other sources or records and that an accounting could be determined through statistical sampling or reconstruction, pending the presentation of the results. We learned in that forensic investigation that covered over 40 years that the reasons for non payment were more important than finding the source documents.

To rely on other sources and to use statistical results from periods with more complete document retention is probably not a completely satisfying answer to those who believe they are due funds. Consequently, some other approaches to show whether over time certain errors were or were not made in the accounts that would be unrelated to true disbursements should be reviewed. These could include:

- Test to determine whether transactions [entries] on the Control Accounts are supported by the aggregate dollar value of entries made to the IIM accounts of the individual Indians within an Agency or an Area Office.

- Test to determine whether large dollar and/or year-end transactions to the Control Accounts are for payments and not

> entries to control accounts to get the account balances into agreement at all three levels: the Central Office, the Area Offices, and the Agencies. Such entries would not reflect actual financial transactions, but would merely be adjusting for unlocated errors and omissions.

In this matter one of the most difficult issues is accounting for periods where complete records are not available or the attempt to obtain the records would require unreasonable effort. Consequently, sampling that has already been performed is an important source of information to help develop attributes that suggest a higher susceptibility to error. The determination of the cause of errors should then be considered for any proposed extrapolation to other periods. It will help to develop the criteria and investigation procedures to determine or test the likely change in such errors in prior, untested periods.

A source of already available information that might assist the parties in analyzing earlier periods are audits that the GAO performed. The GAO began field and operational audits by 1951 or earlier. Thus, there exists a fifty year record of objective analysis of the BIA's operations.

- The audits were carried out contemporaneously with the financial operations that were being audited rather than many years later when records could have been lost and personnel familiar with the systems were no longer available for questioning.

- The audits included both the audits of operations at specific sites [Agencies, Area Offices, etc.] as well as the audit of bureau wide operations [the harvesting of timber, investment practices, mineral extraction, the leasing of lands, etc.].

- The GAO audits also included reviews of the financial systems utilized by the BIA, including the adequacy of their design, their suitability to their intended purposes, and the problems encountered in the actual application and operations of the systems.

Accordingly, it may be worth while for the parties to review the audit findings set out in the GAO audit reports. These findings may enable the parties to arrive at agreed methodologies.

What does that mean to the settlement of ***Cobell v Norton***? I believe the statistical sampled work that has been completed for the IIM accounts should be reviewed by both parties to determine the usefulness for the periods tested and the extent it can be used for extrapolation to prior periods.

The issues are the same as they were for receipts. The parties need to mutually agree to an approach to use the available data or else agree upon methods for developing new data relevant to the current periods. They also need to agree on methods for testing older periods and/or applying extrapolation to them.

Other

I have not discussed the review of interest earned and received on the IIM accounts. Interest is a receipt and as such is subject to the same questions of whether it was recorded at all and, if so, for the appropriate amount. In some ways this aspect is easier to test. The rate paid is known from the Bureau of Indian Affairs records, the balances that should have been outstanding as computed in the accounting (whether through a full accounting or a sampling method) would be analyzed to see if the interest rate applied to those amounts would in fact result in the amount received. If not, an adjustment would need to be made for that amount. This is a more mechanical exercise once there is

agreement on the amount that should be in the accounts. There could, however, be a separate question as to whether the rate paid was appropriate.

Date: February 27, 2006

Attachment A

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Ms. Johnigan has over 36 years of experience, of which 19 were with Arthur Young & Company (now Ernst & Young, LLP) where she was an audit partner, the National Office Chair of the Thrift Industry Group and the Real Estate Industry Group and Co-Chair of the Financial Services Group. Since 1990 she has provided litigation consulting and forensic investigation services through Johnigan, P.C. Engagements during this period have ranged from providing expert testimony to providing case management for law firms, such as coordinating the work of accounting and consulting professionals in preparation for trial and mediation.

Engagements have included such matters as the duties of officers and directors of publicly held companies, investigation of fraud, and the application of generally accepted auditing standards and generally accepted accounting principles to a wide variety of issues including internal controls, financial instruments, sub prime lending and revenue recognition for high tech companies. Forensic accounting matters have also included the reconstruction of municipal bond trust accounting records.

She is a member of the American Institute of CPAs (AICPA) Council. In addition she is a member of the AICPA Business Valuation and Forensic and Litigation Services Executive Committee. She participates in the AICPA's antifraud initiatives and in 2004 completed a three year term as chair of the AICPA Forensic & Litigation Services Committee which has oversight for a number of task forces including fraud. She has also participated in American Arbitration Association panels, as member and chair. See below for additional detail.

[2] Johnigan, P.C. has met the criteria for certification as a Women's Business Enterprise (WBE) and is certified as a WBE by the Women's Business Council – Southwest.

PROFESSIONAL AND SERVICE AFFILIATIONS

- Certified Public Accountant: Oklahoma 1970; Texas 1972; New York 1981
- Association of Certified Fraud Examiners
  Member and certified 1993 to present
- American Institute of Certified Public Accountants
  AICPA Council – elected 2004 for a three year term
  AICPA Forensic and Litigation Services Volunteer of the Year - 2004
  AICPA Business Valuation and Forensic and Litigation Services Executive Committee – appointed 2004 for a one year term
  AICPA Forensic & Litigation Services Committee:
  Chair - 2001 to 2004; Member - 1998 to 2001
  Editorial Adviser, "The Journal of Accountancy" – 2004 to present
  Editorial Adviser, "The CPA Expert" – 2001 to present
  Chair, 2001 AICPA National Conference on Advanced Litigation Services
  AICPA Savings and Loan Committee
  Chair - 1983 to 1986; Member – 1982
- Texas Society of Certified Public Accountants
  Member, Professional Standards Committee appointed 2004
  Chair, Professional Standards Subcommittee on Accounting Standards, 2004 to present
  Member, TSCPA Litigation Services Member Section Committee 1999 to 2002
- American Arbitration Association (AAA)
  Approved panel member 1993 to present
  Participated in panels as both member and chair
- Federal Savings and Loan Advisory Committee
  Member - 1986 to 1987
- Friends of the Dallas Public Library
  Currently member of Board of Directors, Executive Committee, Financial Oversight Committee and Treasurer

EXPERIENCE AND EDUCATION

- JOHNIGAN, P.C., owner 1990 to present
  See opening description
- COAST-TO-COAST FINANCIAL CORPORATION
  President and Director 1988 to 1990
- ARTHUR YOUNG & COMPANY (now Ernst & Young LLP) 1969 to 1988
  Partner in National Office, New York, 1981 to 1988.
  Co-Chair, Financial Services Group 1983 to 1988
  Chair, Thrift Industry Group, 1983 to 1988.
  Chair, Real Estate Industry Group, 1986 to 1988.
  In addition, responsibilities included assisting clients in evaluating potential acquisitions, negotiating acquisitions, and coordinating post acquisition activities, as well as consulting on accounting and regulatory issues including meetings with SEC and other regulators.
  Staff accountant, Manager, Principal in audit practice, primarily in Dallas, 1969 to 1981.
- UNIVERSITY OF TULSA, Graduated BSBA 1969, Major: Accounting

PREPARED STATEMENT OF MIKE MARCHAND, FIRST VICE PRESIDENT, AFFILIATED TRIBES OF NORTHWEST INDIANS

Chairman McCain, Chairman Pombo, Senator Dorgan, Representative Rahall, and members of the Senate Committee on Indian Affairs and the House Committee on Resources, my name is Mike Marchand, I am the First Vice President of the Affiliated Tribes of Northwest Indians [ATNI] and a member of the Colville Tribal Council. On behalf of ATNI, I thank you for your leadership on the trust reform issue and this hearing today. We are grateful for the work that has gone into S. 1439 and H.R. 4322, the Indian Trust Reform Act of 2005. ATNI supports enactment of this legislation and we are hopeful that the Congress will act on it this year.

I am delighted to be here today with Keller George, the president of the United South and Eastern Tribes [USET]. USET has been in the forefront of tribal efforts to bring about meaningful reform of the management and administration of the Federal trust responsibility. For the last several months, ATNI and USET have been working together to develop recommendations for amendments to S. 1439 and H.R. 4322. We hope to be able to forward to the committees our joint proposals for amendments in the next few weeks. We look forward to working with the committees to help ensure enactment of legislation this year.

We are very pleased that the committees are examining ways to place a value on the claims in the *Cobell* v. *Norton* case. Even though the case seeks an accounting for the IIM funds and the Federal District Court is powerless to award damages to the plaintiffs, everyone who is familiar with the case has known for years that funds will be required to settle the case. This understanding is reflected in title I of S. 1439 and H.R. 4322 and by this hearing today. The plaintiffs have estimated the value of the claim to be somewhere between $27.8 billion and $170 billion. The Departments of the Interior, Justice, and Treasury have not been willing to openly state an estimate of value for the claims.

The Department of the Interior has indicated that it might cost as much as $10 to $12 billion to do an itemized accounting for the IIM funds. That estimate led ATNI, among others, to suggest that an appropriate value for the claim might be in the range of $14 billion on the premise that it would be far better to provide the funds that would otherwise be paid to accounting firms to the account holders themselves. And to further complicate the search for a solution, the November 15 decision in the U.S. Court of Appeals for the Washington, DC Circuit held that the Department of the Interior can use statistical sampling to determine what is owed, which has led some to estimate the cost for the accounting problem to be around $350 million.

We do not know what the correct method is for valuing the claims in the *Cobell* case, nor do we know the value of those claims. What we do know is to date:

(A) there has been no success in getting the parties together to negotiate a compromise settlement figure.

(B) that if the present course is left unchanged it is not at all likely that the IIM account holders will receive any compensation during the lifetime of many, especially those who need it most.

(C) we will continue to see an erosion of the gains that tribal governments have made under the policies of self-determination and self-governance.

We understand that it will be necessary for the committees to place a value on the settlement of the plaintiff's claims in order to move S. 1439 and H.R. 4322 through the legislative process. We do not know which method would be best in the *Cobell* case, but we will work with the committees to assess the options. We trust the committees to be fair in their evaluation of those options.

We note with interest that the Congress has appropriated over $3 billion since 2001 to provide for the defense of the *Cobell* case and the reform and restructuring of the administration of the trust funds and assets by the Department of the Interior. Most of this money has been provided to the Office of Special Trustee—an office that was created in the Trust Reform Act of 1994 and was intended to be temporary. That is a lot of money to spend in a short period of time, particularly when it is provided in the absence of a defined plan and for poorly understood purposes. It is clear that the tribes have not supported or requested these appropriations because in most instances they involve the reallocation of funds that are desperately needed for education, law enforcement, and for fighting epidemics of alcohol and substance abuse. It has been more than a little difficult to get the administration and the Congress to focus on these areas in light of the significant commitment of appropriations to the Department's response to the *Cobell* case.

We are also seeing the very nature of the trust responsibility redefined by the Department in response to the *Cobell* case. In some instances the changes that have been made or that are underway run directly counter to the Congressional policies

of self-determination and self-governance and undermine the huge investment of fiscal resources that the Congress has made in those policies since 1975. In effect the *Cobell* litigation has come to hold the tribes and the Congress hostage to the Department's assessment of what it must do in order to comply with the real or anticipated orders of the Federal District Court. We are weary of policies that are developed in the context of advancing an adversarial position in the *Cobell* litigation and are concerned of the implications if this is allowed to continue any longer.

There has been some improvement in the day-to-day administration of trust funds and trust assets by the Department. Those changes are welcome, even if the cost benefit ratio is not. At the same time, we are mindful of the fact that those who were supposed to be served by the *Cobell* litigation have received little. IIM account holders who have been told that they are owed tens of billions, or hundreds of billions of dollars are no closer to being made whole today than they were the day before the *Cobell* case was filed 10 years ago. Scores of account holders have died since the case was filed. Without a settlement the litigation is likely to go on for another decade or more. And, even if the plaintiffs prevail, the Federal District Court cannot make the account holders whole.

Only the Congress or the U.S. Court of Federal Claims can provide financial relief to the account holders. Only the Congress can provide the direction for the real reform that is needed to ensure the proper management of the trust funds and assets. And, only the Congress can ensure that the tribal governments have the opportunity to assume the day-to-day responsibility for the protection and enhancement of the corpus of the trust.

It has been 10 months since this legislation was first introduced and this is its third hearing. To date the administration and the Department have had ample opportunity to lead or be an active participant but have done next to nothing to work with the plaintiff's tribes or the committees to find a workable solution. We stand prepared to work with the committees to arrive at a value for the *Cobell* claims and to work for the prompt enactment of S. 1439 and H.R. 4322. We ask that the committees schedule these bills for markup in the next 30 days.

Thank you again for the opportunity to testify today. I will be pleased to answer any questions the committees may have.

Confederated Tribes of the Umatilla Indian Reservation

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Testimony

of

Antone C. Minthorn, Chairman, Board of Trustees

Confederated Tribes of the Umatilla Indian Reservation

before the

Senate Committee on Indian Affairs

and the

House Committee on Resources

Joint Oversight Hearing on the Settlement of Cobell v. Norton

March 1, 2006

Submitted March 14, 2006

The Honorable Chairman McCain, Chairman Pombo, Senator Dorgan, Representative Rahall and members of the Senate Committee on Indian Affairs and the House Committee on Resources:

On behalf of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), we welcome this opportunity to provide comments on S.1439 and H.R. 4322, the Indian Trust Reform Act. The CTUIR is closely following S.1439 and H.R. 4322 because we support a fair settlement of the Cobell v. Norton (Cobell) lawsuit, and the removal of the shadow that lawsuit has cast over the management of Indian Affairs and programs in recent years. Equally important are other titles in the Bill regarding the management of Indian Affairs within the Interior Department, the management of allotted trust assets and expansion of the Secretary's authority to purchase fractionated interests in trust lands that will benefit the United States in its trust and management obligations for trust lands, as well as for tribes and their members in their ownership management and use of their trust lands.

The CTUIR recognizes that this joint oversight hearing on the Settlement of Cobell is focused on Article I of the S. 1439 and H.R. 4322, which address the settlement of the Cobell litigation. Because CTUIR tribal members have not experienced the historic recordkeeping, financial mismanagement and other problems that the Cobell litigants have identified, it does not appear that the CTUIR has a huge stake in the Cobell suit. Nonetheless, the CTUIR strongly supports a fair and prompt settlement of the litigation so that Indian landowners receive what they are owed, and the Interior Department and Tribal governments can get back to addressing the numerous challenges that confront Indian Country. For example, we are receiving information that the Department of Interior has determined that FY '06 attorney's fees funds to

support water rights settlement negotiations will be diverted to pay the Department's attorney's fees obligations to the Cobell plaintiffs ordered by Judge Lamberth. If this is correct, this will directly and adversely impact the CTUIR, which is diligently working with the Interior Department, State of Oregon, local governments and other water rights stakeholders to address Umatilla Basin water needs and to craft a CTUIR water rights settlement. The United States owes a trust obligation to the CTUIR and our members which goes beyond the proper management of IIM accounts and includes the obligation to protect the land, water and fisheries we reserved in our Treaty of 1855, 12 Stat. 945.

The Board of Trustees, the governing body of the CTUIR, by Resolution 05-091, adopted on September 12, 2005, set forth the following CTUIR positions on S.1439 and H.R. 4322. These are presented in the relative order of importance to the CTUIR.

1. Title IV – Fractional Interest Purchase and Consolidation Program. Title IV is the most important title in S.1439 and H.R. 4322 to the CTUIR. The Umatilla Indian Reservation, created pursuant to our Treaty of 1855, was described in the Treaty as encompassing 500,000 acres, but was surveyed by the United States to only include 245,000 acres. Thirty years after the Treaty was negotiated, Congress enacted legislation diminishing our Reservation and issuing allotments to Tribal members. As a result, our Reservation was reduced from 245,000 acres to approximately 125,000 acres in 1888. Thereafter, approximately ½ of the diminished Reservation was patented in fee and eventually lost or sold to non-Indians. The management and usage of trust allotments have become challenging because of the fractionated ownership of these allotted lands. Our Reservation contains allotment parcels that have up to two hundred owners of an 80 acre parcel with shares as small as 1/10,000. This makes management and usage of these allotments nearly impossible and, this problem will exponentially worsen with each passing generation. Accordingly, the CTUIR strongly supports the expanded authority in Title IV for the purchase of undivided interests in trust allotments and the transfer of title to the Tribe.

The CTUIR would like to point out that the owner notification provisions, as currently contained in the bill, will create significant impediments in accomplishing the purposes of this Title. As OST has learned in the management of IIM accounts, the substantial number of "whereabouts unknown" individuals has created a roadblock to their efforts of streamlining the management of these accounts and they have proposed a whole new section to the trust regulations to deal with this issue. BIA realty staff have dealt with this, as well as the shear numbers of owners for years in trying to consummate leases to bring idle lands into production. The CTUIR would recommend that Title IV allow for alternate forms of acceptable notification, such as newspaper (including tribal newspapers) publication of names of people to whom an offer has been made, maintain a web site with this information or other alternatives to registered mail. The CTUIR is looking forward to working with you and your staff in developing alternatives that will work, given the realities of land ownership in Indian Country.

The CTUIR strongly encourages you to take action on Title IV of S.1439 and H.R. 4322 as a free standing Bill in the event S.1439 and H.R. 4322 are held up. The enactment of Title IV is in the interests of both the United States and Tribal governments. Purchasing these small undivided interests would save federal funds required to manage and probate these increasingly fractionated interests, and would make Indian lands more usable by Tribes and their members by

consolidating ownership of trust lands. The enactment and implementation of Title IV should not be delayed by the difficulties involved in settling the Cobell lawsuit.

2. Title III – Establishment of Tribal Trust Asset Management Demonstration Project. The CTUIR has aggressively pursued the opportunities under the Indian Self-Determination and Educational Assistance Act to contract to provide services previously provided by the BIA and IHS. The Tribe was a leader in the development of the concept of allowing tribes to roll several separate 638 contracts for the provision of different programs up into a single 638 agreement. This concept was incorporated into the law in the1994 amendments. The CTUIR now has a self-governance compact with both the BIA/DOI and the IHS. In addition, the Tribe is actively investigating the assumption of all natural resource and realty functions that are currently provided by the BIA. Tribal self-determination is a primary purpose of our tribal government under our Tribal Constitution. For that reason, the CTUIR strongly supports Title III which would authorize tribes to develop their own trust management plan to address the trust assets located on our own Reservation and would be extremely interested in participating in this project. We urge that the bill permit every tribe that is interested and capable of developing and administering such plans be able to participate in the demonstration project.

3. Title I – Settlement of *Cobell* Litigation Claims. As indicated above, while the CTUIR does not believe many of its members have substantial concerns regarding the management of their IIM accounts, the CTUIR believes that the settlement of the Cobell litigation would be good for all of Indian Country. In that context, the CTUIR has taken the following positions with regard to Title I:

a. The CTUIR supports a full and fair settlement of the Cobell lawsuit.

b. The CTUIR urges that a Cobell settlement be developed and implemented in a timely fashion so that living IIM account holders can receive and enjoy the IIM account proceeds to which they are entitled.

c. It is critical that the funds deposited into the Individual Indian Accounting Claim Settlement Fund be appropriated pursuant to the Federal Judgment Fund Act, 31 U.S.C. §1304, so as to prevent reductions in funding to Indian programs funded by the Bureau of Indian Affairs and Indian Health Service.

d. Finally, settlement payments received by IIM account claimants should not be subject to federal or state income taxes nor counted as income for purposes of determining the account holder's eligibility for federal or state social service programs.

4. Title V – Restructuring Bureau of Indian Affairs and Office of Special Trustee. The CTUIR supports the establishment of the Under Secretary for Indian Affairs so as to consolidate management responsibility for Indian programs and services within Interior. In addition, the CTUIR has long been concerned about the shift of BIA funding to the OST. The CTUIR supports the elimination of OST so that the funding and Tribal programs management is administered by a single office within the DOI. The CTUIR believes that such a consolidation could save significant amounts of money that could be used for on the ground services by eliminating the dual administrative functions. As an example, the BIA/Tribal Budget Advisory

Council has recommended the separate BIA/OST Information Technology be combined and that such a consolidation could save at least $10 million dollars. Finally, the CTUIR supports the provision of Indian employment preferences in filling positions within the Under Secretary's office.

5. Title II – Indian Trust Asset Management Policy Review Commission. The CTUIR is in agreement that there is a definite need to clearly establish trust standards for the management of individual Indian and tribal trust assets and that the establishment of the Review Commission, as proposed, could provide the basis for those standards. The CTUIR believes the Commission should be required to also focus on the protection of tribal trust assets reserved by treaty, such as reservation homeland, reserved water rights, fish and wildlife resources needed to honor treaty reserved hunting and fishing rights, etc., not just focus on income producing assets as is currently the case. In meeting this obligation the Commission should be required to meet with regional tribal organizations in all regions.

6. Title VI – Audit of Indian Trust Accounts. The CTUIR supports the provisions of this Title and believes that the provision of annual statements, as well as the auditing of such statements and trust management practices by an external auditor should go a long way to preventing a repeat of the practices and circumstances that led to the Cobell litigation in the first place. These requirements are nothing more than standard industry practice.

We appreciate the opportunity to provide you with the comments of the CTUIR regarding S.1439 and H.R. 4322. On behalf of the CTUIR, we commend you for your introduction of S.1439 and H.R. 4322 and your willingness to legislate a settlement of the Cobell lawsuit and to address the management of Indian programs and trust assets. We look forward to working with the Senate Committee on Indian Affairs and the House Resources Committee to address these important issues.

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