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S. Hrg. 109-194

INDIAN TRUST REFORM ACT

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HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

S. 1439

TO PROVIDE FOR INDIAN TRUST ASSET MANAGEMENT REFORM AND RESOLUTION OF
HISTORICAL ACCOUNTING CLAIMS

JULY 26, 2005
WASHINGTON, DC

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INDIAN TRUST REFORM ACT

TUESDAY, JULY 26, 2005

U.S. Senate,
Committee on Indian Affairs,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m. in room 216, Senate Hart Building, Hon. John McCain (chairman of the committee) presiding.

Present: Senators McCain, Akaka, Dorgan, and Johnson.

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

The Chairman. Good morning. I want to ask the indulgence of my colleagues and the witnesses and those who have joined us today to observe this hearing. All of you know that I do not ordinarily take a lot of time for an opening statement at our hearings and that I encourage our witnesses to be brief in their testimony.

I want to take a few extra minutes to share some of my perspectives on the bill before us. For the past several years, I have heard broad-based concerns from tribal leaders and

members of Congress that the Cobell litigation, which has been pending for nine years, is draining resources from Indian country and creating a poisonous atmosphere for the administration of the Federal Government's trust responsibilities to Native Americans.

In the 107th and 108th Congresses, I introduced legislation that was intended to try to correct some of the problems in the administration of the trust funds and assets. In those bills, the Cobell plaintiffs asked that I include a provision that would allow the litigation to continue to its conclusion. With the support of tribal leaders, I agreed to do so.

In the 108th Congress, the House Committee on Resources and this committee worked with the Cobell plaintiffs and the Departments of the Interior and Justice to identify and enlist the support of two highly qualified mediators to determine if it would be possible to reach an agreement on a settlement of the litigation. I supported that effort. Unfortunately, it did not succeed and neither did any of the bills I introduced.

Earlier this year, with the support of the plaintiffs and defendants in the Cobell litigation, but more importantly with the support of many in Indian country, I said I would make one good attempt at resolving the matter legislatively. If it did not succeed, there are many, many other issues that the committee can attend to.

Last week, Senator Dorgan, my friend and cochairman, joined me in introducing S. 1439, a bill to resolve the historical accounting claims in Cobell v. Norton, and begin to reform the Department of the Interior's trust responsibility. We made it very clear to all parties that the bill was intended to provide a basis for discussion and review of the issues, and we welcome comment and the opportunity to improve it.

However, before anyone had time to read and fully understand the bill, the lead plaintiff in the Cobell case was quoted in the press saying that the bill ``reminded me of the Baker massacre at Black Feet when they gave Heavy Runner this piece of paper. They said, `Hold it up, it will keep you safe.' ''

I can certainly understand that no one would be entirely satisfied with the bill. I can even understand that many would be disappointed. That is the nature of a settlement proposal. No one gets everything they want. There are no clear winners.

This bill embodies a series of proposals. It reflects extensive listening and reflecting on the views of the parties to the litigation, tribal leaders and many other stakeholders from around the country. It cannot credibly be compared to a massacre, even in a figure of speech.

I hope that those who are affected most directly by the settlement of this longstanding dispute will engage constructively in the process. I am disturbed, however, by what I see as a serious misapprehension of some that settlement legislation can be enacted by being forced down the throat of either party. This simply cannot and will not happen. The idea that it might betrays a fundamental lack of understanding of the legislative process in general and the battle ahead for any legislation that would settle the Cobell litigation in particular.

If all of the people testifying here today were to join

hands and reach agreement on every word in the bill, the work before all of us would be just beginning. There are many members of Congress, of the public at large, and in the claimant class who will ask very hard questions about the amount of money we propose to pay in lieu of providing an historical accounting. I think the sizable sum we envision and the manner of its distribution can be defended, but it will have to be defended and unity among those here today is necessary, but by no means sufficient to do that.

While they do not like to talk about it in public, the fact remains that both parties to the case face very serious legal risks if the litigation continues. Some aspects of the strong opinions of the District Court, often cited by plaintiffs, have been rejected by the Court of Appeals, which is much more selectively cited. The burden of proof that the Court of Appeals has established for the claims appears to comport with the precedent, but imposes a very real and substantial challenge to each and every claimant in the class.

While the parties may not agree on how much risk each faces, they should agree that they risk facing years and years and years of litigation during which time the individual plaintiffs stand to receive nothing, save the further draining of resources away from programs such as education and public safety and towards the Office of Special Trustee.

The defendants face year after year of painstaking efforts to reconstruct the past, while simultaneously trying to cope with seemingly inexhaustible demands to do more and better with limited resources appropriated by Congress. I am well aware of the hardships experienced every day by the individuals who have not been and are not being treated fairly in the administration of their trust funds and assets. I have visited them in their homes and on the lands in the Southwest, the Northwest and the Great Plains. I, too, would like to see them achieve some justice in their lifetimes, and I would like to believe that at the end of the day, the individuals who struggle through the drama of the litigation on both sides, I would like to see them made as whole as is possible in the circumstances we all confront.

I understand that the plaintiffs have reacted negatively to the proposal that the settlement funds to be made available by Congress would be distributed by a special master, as opposed to having the court distribute the funds and determine attorneys fees. While the legislation does not specify a dollar amount, it does make clear that the resolution will be for billions of dollars at a minimum for the class of hundreds of thousands described in the bill. The bill proposed that each receive thousands of dollars in per capita payments alone. This is at a minimum.

In addition to per capita payments, the legislation envisions that many claimants will receive much more than this in formula payments, depending on what they were likely to have lost as a result of the Department of the Interior's mishandling of their individual Indian money accounts.

If the Federal Government is going to make this money available to attempt to right a wrong perpetrated over many years of mismanaging accounts, it does not strike me as unreasonable that the legislation resolve the class action for

historical accountings and remove it from the court for a prompt and fair distribution to claimants. Congress did this for the families of the victims of the 9-11 attacks. It is not a flawless way to proceed, but it has been demonstrated to be fair and prompt.

I look forward to hearing the witnesses' statements today. We are considering very complex issues, and S. 1439 can be significantly improved, but it must be with the agreement of both parties to the Cobell litigation and with the support of tribes from around the Nation. Although no tribe is a direct party to the litigation, it is evident to even the most casual observer that all tribes have been and are being affected by it.

Let's start to put our efforts into finding a way to move forward together. We have an opportunity to try to make some genuine progress on the issues that are addressed in S. 1439. Let's all approach it with the seriousness it deserves and leave the rhetoric to others. We will not have this opportunity again anytime soon.

[Text of S. 1439 follows:]

<GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT>

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

Senator Dorgan. Mr. Chairman, thank you very much.

Let me echo your comments about some of the more intemperate remarks that have been made about our draft proposal. It is important to point out that this litigation, the Cobell litigation, affects not just the individuals that are a party to the litigation. It will affect all Indian people all across this country. In the future, we can spend billions of dollars doing historical accounting, sending the money to accountants, legions of accountants and lawyers to do the historical accounting, or we can find some way to resolve this. But the fact is, this issue is going to affect Indian health care, Indian housing, Indian education unless we find some way to address it.

Now, we drafted a piece of legislation. We said it was a start, a draft. We left the money issue blank in the larger numbers. We drafted this influenced by many of the principles developed by the work group that was organized by the National Congress of American Indians and Chairman Tex Hall and the Intertribal Monitoring Association. When we put it out there, we clearly indicated, look, this is just a step we hope in the right direction.

Indian people have been cheated, bilked and defrauded over a long period of time. I understand that. I agree with that. This country needs to deal with that. It has been the case with respect to trust accounts. Senator McCain and I and other members of the committee cannot undo that. We wish we could, but we can't. So the question is, what do we do now?

Well, there are two choices. We can be actively involved trying to reach some kind of legislative solution to this that is acceptable to everyone, or hopefully acceptable to most. Or we can just say, we have a lot of other things we ought to work

on. You all just handle it. Let the courts handle it. We cannot pass legislation. We have too many discordant voices out there. It cannot be done, so that will not be our agenda. We will just not move legislation. Whatever the courts decide, they decide. Whatever money we have to pony up for accountants and attorneys, we will do it. But we cannot provide the leadership on something that is insoluble.

That is one approach. We have chosen not to try to move down that road because we think that is counterproductive for the country, but most importantly we believe it is counterproductive for Indian people. We think for the tribes and the individuals involved in the case and for all Indians all across this country, who I think still suffer from a bona fide emergency in health care, housing and education, we need to do better. That is why we have decided to try to advance working with the working group, advance something that we think constructively could intercept and respond to this.

Does anybody in this room think that spending \$8 billion, \$10 billion, or \$12 billion for accountants and lawyers and historical accounting is the right way to address this? That is unbelievable.

So we have two choices. We can either decide to proceed and work with people in a constructive way, or we can decide, don't bother us; we can't do it. And so you all go figure it out with the courts and let the lawyers and the accountants get rich and everybody else is going to suffer the consequences. I hope we choose the former, but I must say that I was not very impressed the other day reading some of the statements. There is so much shrill noise, crowd noise on some of these issues that it will make it very hard to proceed.

Let me also as I conclude say that there are also some important leadership out there in Indian country as well who really feel that this needs to get resolved in the right way for Indian people. We want to work with them. This will not be easy, but Chairman McCain and I and other members of the committee have decided we have a responsibility to try. We are going to try as hard as we can to see if we cannot find a way to do this, but we can't do it without your help.

Mr. Chairman, thank you very much.

-----excerpt-----

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

Mr. Gray. Mr. Chairman, Mr. Vice Chairman, and members of the committee, I am here in my capacity as chairman of the Inter-Tribal Monitoring Association, and as cochairman of the Trust Reform and Cobell Settlement Work Group. I also serve as principal chief of the Osage Nation.

The Nation will provide its own separate written testimony about S. 1439 in light of our unique hybrid situation.

The Chairman. Without objection, all written statements will be made part of the record.

Mr. Gray. Thank you.

Those of you have worked to establish the principles for resolving Cobell, reforming the broken Federal trust system, have strongly held convictions about solutions to this decades-old problem. We may come from different regions of the country, have varying trust resources and have different stories to tell about the harm we have suffered, but we all share the same critical and overriding objective: a meaningful settlement of the Cobell litigation that helps to both undo the damage done and ensure that it does not happen again.

There is no doubt in my mind, Mr. Chairman and Mr. Vice Chairman, that we share the objective of justice for the past and certainty for the future. There can be no question that this bill represents the first and perhaps the only opportunity we will have to settle this case through discussions with the U.S. Congress, the entity that established the trust and which has preliminary, but not unlimited authority to establish the terms of the trust.

As tribal leaders, we have the responsibility to make the most of this extraordinary opportunity. This bill represents the committee's commitment to this objective as well. We must be successful in this effort, for if we are not, the growing rift between Indian tribes and the United States will become an entrenched gulf.

Consequently, I would like to note at the outset that one of the most positive aspects of this significant legislation is the simple fact that it has been introduced and by whom. I, for one, view the chairman's and vice chairman's commitment to this effort as evidenced by the introduction of S. 1439 to be a very positive step and pledge to work with you in a frank, pragmatic and reasonable manner to make this the best legislation it can be.

You have both demonstrated true political courage and leadership in crafting a bill to address this bitterly controversial issue, and you deserve thanks and appreciation from all of us for this bold step.

As to the bill you have introduced, I want to underscore in my testimony today the key element that we believe is right, and then close with a few thoughts of where we can go to improve the bill. Let me begin with the things that we believe are right in S. 1439.

First, in your bill the funds for settlement do not come from programmatic funding of other Federal activities. This is a very important element of the bill that is absolutely correct. Unquestionably, funds to settle the injustice against individual Indian money account holders cannot come from Indian programs. We believe the explicit reference in S. 1439 to the judgement fund sends a clear message that there is no legitimate argument that the cost of this settlement should be charged or borne by any distinct part of the Federal Government or Federal beneficiary.

Second, S. 1439 takes clear and affirmative steps toward reducing and eliminating several of the primary causes of the mismanagement mess. In particular, the bill addresses two causes: The fractionated ownership of allotted lands and the absence of clear executive responsibility for Federal trust activities.

The fractionation component of the bill demonstrates your

commitment to a comprehensive effort to put this sad history and allotment policy and its nefarious consequences behind us. The creation of an Under Secretary position should result in the coordination of Federal policies throughout the Department of the Interior through the focus of the Federal Government's trust obligation. The recognition of this trust responsibility underscores the legitimacy of every interaction between the Federal Government and Indian tribes and their members. These and other provisions demonstrate that this bill is concerned with both settling the past and taking steps to fix the future.

Third, the bill recognizes that a fair settlement for hundreds of thousands of individuals who have suffered for years or decades will need to be resolved with a payment involving billions of dollars. With a class of claimants that includes hundreds of thousands of individuals, a settlement of even hundreds of millions of dollars would amount to nothing more than a token payment for each individual. Your bill recognizes that such a token payment will be a constitutionally questionable act of confiscation, not the legitimate act of a trustee.

Even if such a patently inadequate payment might be permissible, it would neither be fair or adequate to bring the crisis to an immediate resolution we must strive to achieve.

There are a number of tribal leaders like myself who look forward to developing a legislative proposal that we can recommend to Indian country. As you have heard from others today, we are not yet at that point. But both the sponsor statements upon introduction clearly demonstrated that neither the chairman or vice chairman assume that this bill was intended to be anything more than a starting point.

I look forward to our dialog. In this dialog, we must face each tough issue together. There will be likely to be many, and resolve them pragmatically, but also in a manner mindful of the terrible injustice we are all committed to rectify. Ultimately, we must succeed. No amount of effort or accomplishment in any other area in this committee's jurisdiction will make up for the cost of not achieving a settlement.

So where do we go from here? First, we must begin with a dialog with the sponsors and their staff to develop an understanding of whether certain provision of S. 1439 constitute mere place holders, necessary components of settlement legislation, or concessions to the legislative environment. For example, there is a great deal of mistrust of both the Departments of the Interior and Treasury within Indian country. Allowing either department to exercise the scope of discretion that would be permitted under the current version of the bill could allow the very individuals who are the most antagonistic to the objectives of this process to control most or nearly all of the elements of the distribution of a settlement fund.

There may come a day when there is enough trust in Indian country to structure the settlement in this fashion, but we are not at that point today. In fact, we are far from it. If there are reasons why a judicially managed distribution is presently perceived as either unworkable or unacceptable, we need an open dialogue to analyze and address those concerns.

Similarly, we must develop together a model to determine

how much to compensate the victims of this injustice. We greatly appreciate the sponsors' recognition that a settlement must be measured in the billions. We must now work on how to develop a rationale for a more specific number. In this process, we must bear in mind that an insurmountable burden of accuracy measuring the precise amount of compensation is due completely to the Federal Government's mismanagement of its own records.

In light of this, we believe that it may be worthwhile to work with committee staff to develop some models for calculating a fair and equitable settlement figure. One proposed model would calculate a compensation amount using an inputted error rate times account activity. Adjusted for interest and inflation, this idea has some genuine merit and together we should explore its viability.

There are a number of other issues that concern ITMA members, which includes allottees. We will provide you with more detailed comments as to these in the near future. We have a meeting in Denver that is scheduled this week to address this area specifically. There is a great deal more to say and discuss. Some of these discussions will probably be somewhat heated, but we must remember that we are all working in good faith and to a common end. We represent a lot of people who have a lot of stake in this issue, but when tribal leaders get home, no one wants to know whether we won any arguments. They want to know if they will be compensated in their lifetimes for acknowledged injustices, whether their parents will get justice before they die.

To the chairman and vice chairman, I thank you for giving them some hope that this will be the case.

Thank you and I would be happy to answer any questions.

The Chairman. Thank you.