

INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds

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ITMA's Position

On

S. 1439 "The Indian Trust Reform Act of 2005"¹

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I. TITLE I – SETTLEMENT OF LITIGATION CLAIMS

The purpose of this Title is to provide a legislative resolution of the *Cobell* litigation. The bill does not provide a settlement figure, however. The intent was to allow the parties to resume discussions on arriving at an agreed upon figure or range for Congress to adopt.

ITMA's position:

- Supports legislation to resolve the litigation.
- Rejects the approach of having Congress arbitrarily "picking a number" and forcing the parties to accept it.
- Supports establishing a fund in the range of a "billions of dollars" drawn from the U.S. Judgment Fund, and specifically prohibiting any usage of or scoring against existing and future funds appropriated for Indian programs.
- Supports the development of a process to determine the size of the settlement, beginning with an agreed upon figure - \$13 billion – which is considered to be the known receipts processed through the system.

II. TITLE II - INDIAN TRUST ASSET MANAGEMENT POLICY REVIEW COMMISSION ("Commission")

Title II would establish this Commission, and includes the following key provisions:

- Requires Commission to review all federal laws and regulations and practices of the Interior Department relating to the administration of Indian trust assets.
- Establishes the composition of the Commission to consist of 12 persons: 4 appointed by the President and 8 appointed by the House and Senate leadership, respectively.
- Empowers the Commission to hold hearings and gather information on improving the management and administration of Indian trust assets.
- Requires the Commission to consult with Indian tribes, the Secretary of Interior, and organizations representing individual Indian owners of trust assets.
- Requires the Commission to submit a report to Congress on improving existing laws and practices, including proposing trust asset management standards.

¹ Summarized from ITMA's Testimony before the Senate Indian Affairs Committee held on March 28, 2006, and from additional input received from ITMA member Tribes.

ITMA's position:

- Generally supports the concept of establishing a commission as a useful tool for a long term review of Indian trust administration.
- The Commission's formation and work should be triggered in relation to the implementation of Title V, BIA and OST Restructuring.
- Commission members should be appointed by, and be strictly a creation of Congress, to ensure the composition of a deliberative body to review DOL's current practices.
- Continues to be concerns with the lack of enforceability of trust administration, and supports the codification of the existing legal framework authorizing a cause of action relating to trust resources or establishing an alternative dispute resolution process.

III. TITLE III – INDIAN TRUST ASSET MANAGEMENT PROJECT

Title III would create a demonstration project enabling up to thirty (30) Indian tribes to submit an application to the Secretary to develop their own Trust Asset Management Plan ("Plan"), unique to their respective situation and specific trust assets. A duly approved plan would enable contracting and compacting tribes to establish their own management systems, practices and procedures that differ from those used by the Secretary, so long as the plan is consistent with all federal laws, treaties and regulations. Each plan would be required to do the following:

- Protect trust assets from loss, waste, and unlawful alienation.
- Promote the interests of the beneficial owner.
- Conform to the preferred use of the beneficial owner, to the extent practicable.
- Protect treaty rights and others relating to use, access or enjoyment.
- Require that any activity be carried out in good faith and with loyalty to the beneficial owner.

ITMA's position:

- Supports the concept and objectives of Title III, with the following recommendations:
 - Incorporate a trigger for automatic approval of a plan if the Secretary does not disapprove the plan within 120 days.
 - Require the Secretary to consider all resources and sources of funding before making a decision to disapprove a tribe's plan on this basis.
 - Direct the Secretary to propose an adequate budget submission that provides sufficient resources and other technical assistance to participating tribes.
 - Require Congressional oversight and evaluation of the implementation and progress of the demonstration project.
 - Direct the Department to provide funding, support and other resources for tribes seeking to assume regulatory primacy through these plans.
 - Harmonize the provisions with the authorities and mandates of the ISDEAA and the American Indian Agriculture Resource Management Act to ensure that the government provides tribes who pursue these plans with sufficient resources and support to ensure that the implementation of the plan is successful.

IV. TITLE IV - FRACTIONAL INTEREST PURCHASE AND CONSOLIDATION PROGRAM

Title IV would amend the Indian Land Consolidation Act to establish incentives for purchasing fractional interests and streamline the process for consolidating fractional interests, as follows:

- Authorize the Secretary to offer more than fair market value as an incentive to encourage voluntary sales of undivided trust of restricted fractionated interests in any parcel of land owned by not less than 20 separate individuals. If an owner agrees to sell such interests, the Secretary is further authorized to include an additional incentive of up to \$2,000 in the offered purchase price.

- Establish a specific process for acquiring highly fractionated lands with 200 or more undivided interests, which includes comprehensive notice and offer requirements. Pursuant to these specific procedures, an offer to such lands would be deemed automatically accepted unless it is affirmatively rejected by the owner.
- Establish a process for the Secretary to make an offer to settle any claim that the owner may have against the United States relating to the specific tract of land, but specifically excludes claims for an accounting described in Title I (settlement of Cobell).
- Provide that any payment a landowner receives under the land repurchase program is not subject to any state or federal income tax and would not affect eligibility for any programs including social security and welfare.
- Provide that 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.

ITMA's position:

- Supports authorizing the Secretary to offer greater than fair market value as a way to provide meaningful incentives for individuals with very small parcels of land that are otherwise not economically viable, for ultimate return back to the Tribe.
- Recommends specific changes:
 - Provide that all land a Tribe acquires within the boundaries of the reservation be taken immediately into trust, as a means to promote land consolidation.
 - Remove the "automatic acceptance" of an offer for sale of lands with more than 200 owners because it raises concerns about unfair treatment of landowners.
 - Remove the application of federal liens on repurchased lands because the cost and administrative burdens of these liens significantly outweigh their value.
 - Authorize the Secretary to make land acquisition grants, given the compelling congressional policies and goals of eliminating further Indian land fractionation, and consolidating the land base of tribal governments.
 - Provide more incentives for individual land owner repurchase and consolidation opportunities in order to encourage the further loss of lands from trust status.
- As a related matter, supports S. 1501, the Crow Tribe Restoration Act, a tribal specific proposal to reduce fractionated interests and consolidates tribal lands.

V. TITLE V – RESTRUCTURING THE BUREAU OF INDIAN AFFAIRS (BIA) AND OFFICE OF SPECIAL TRUSTEE (OST)

Title V would restructure the BIA and OST by creating a new position of "Under Secretary for Indian Affairs" ("US-IA") with the following functions and duties:

- Creates a single line of authority under the Office of US-IA for all BIA and OST functions by replacing the Assistant Secretary and sun-setting OST by 2008.
- Authorizes the US-IA to be responsible for supervising any and all activities related to Indian affairs that are carried out by the Bureau of Reclamation, the Bureau of Land Management, and the Minerals Management Service.
- Requires all positions within the Office of the US-IA be subject to Indian preference.
- Recognizes and directs the need to devote more resources and funding to the reservation level.

ITMA's position:

- Supports Title V to consolidate all Indian affairs functions under a single line of authority.
- Supports authorizing the Secretary to offer greater than fair market value as a way to provide meaningful incentives for individuals with very small parcels of land that are otherwise not economically viable, for ultimate return back to the Tribe.
- Recommends specific changes, under each heading:

Purposes:

- Include as a purpose: “to improve and enhance the delivery of services to Indians.”
- Include as a purpose: “to provide a single line of authority and accountability for coordination and policy direction on Indian affairs for all programs and agencies of the Department and for Inter-Departmental activities affecting or involving Indian Affairs.”

Appointment:

- Require tribal consultation in the appointment of the US-IA.
- Remove the exception (503(b)(2)) which allows the Assistant Secretary of Indian Affairs to become the US-IA without the advice and consent of the Senate.

Responsibilities:

- Require the US-IA to inform decision makers across the Department as to the implications of their action for the trust obligations of the United States.
- Require the US-IA to represent, protect and advocate for Indian interests through all bureaus and agencies of the Department, not just those enumerated in the bill or those pertaining to trust administration, but would also encompass all programs providing services to Indians.
- Require the US-IA to exercise guidance and provide oversight for the demonstration project to be established under Title III.
- Require the US-IA to foster and promote progress under Self-Determination and Self-Governance programs for all Departmental programs affecting Indians.
- Designate the Office of US-IA to serve as a liaison with federal agencies outside the Department of Interior on matters pertaining to Indian Affairs, and direct the US-IA to:
 - i. Advocate for Indian interests;
 - ii. Ensure that Agencies are informed of trust obligations;
 - iii. Review and comment on proposed policies; and
 - iv. Improve coordination and promote integration of federal programs that provide services to Indians.

Authorities:

- Authorize the US-IA to retain outside counsel and to establish a position of trust counsel.
- Authorize the US-IA to utilize all budgetary savings achieved by incorporating OST’s functions under the single line of authority, and to use the Trust Asset Management Plans in Title III as the vehicle for devoting those resources to the reservation level.
- Authorize the US-IA to provide policy direction and to coordinate on matters with all entities in the Department with regard to Indian Affairs to improve the effectiveness and efficiency of service delivery to Indians.
- Authorize the US-IA to coordinate with federal entities outside the Department on Indian affairs matters.

Separate trust reform operational and oversight functions:

- Establish an Office of Trust Reform Implementation (OTRI) to develop policies, procedures, and programs for trust administration and make them operational in the BIA; transfer programs and functions currently under the supervision of the OST to OTRI; and establish a sunset date for completion of the work.
- Establish an Office of Trust Administration Oversight as an ombudsman position to investigate and report to the Under Secretary on recommended resolution to trust related problems and issues.

Guidelines for organizational restructuring:

- Specify objectives for restructuring, including (a) consolidating functions and operational authorities at the BIA field office levels; and (b) clarify the lines of authority for delivering services to Indians and those responsible for providing oversight of trust administration.
- Require tribal involvement in the restructuring of national, regional, and agency operations to provide local flexibility in allocating available resources and oversight for trust administration.
- Specify that tribal contracting and compacting are not to be diminished, but should be enhanced.
- Require trust administration functions to be performed in accordance with tribal law and management of reservation-specific resource management plans, unless otherwise prohibited by federal law.

VI. TITLE VI: AUDIT OF INDIAN TRUST FUNDS

Title VI would require the Secretary to prepare financial statements for individual Indian, tribal and other Indian trust accounts and prepare an internal control report, and would direct the Comptroller General to hire an independent auditor to conduct an audit of the Secretary's financial statements and prepare a report on the Secretary's internal controls.

ITMA's position:

- Supports Title VI, and recommends the following changes:
 - Specify the following purposes for requiring financial statements: “to promote and foster meaningful communication of financial information and transparency in the administration of trust funds and the sources of those funds.”
 - Empower the Comptroller General with both the authority and the responsibility to ensure broad audit coverage of all categories or stratified trenches of trust funds.
 - Require public availability of audit reports, audit findings, and management letters.
 - Require negative assurances or third-party assurance statements from auditors regardless of whether they are government employees or contract workers.