

## Section-by-Section Description of Northwest Tribal Coalition Draft Trust Reform Legislation of March 7, 2005

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This draft legislation takes as its starting point S. 1549 of the 108<sup>th</sup> Congress as introduced by Senators McCain and Daschle, which in turn was developed in response to tribal opposition to Secretary Norton's BITAM proposal. This draft legislation consists of 13 sections, as follows:

**Section 1** merely contains the title of the proposed Act, namely, the "American Indian Trust Fund Management Reform Act Amendments of 2005."

**Section 2** adds to the "Definitions" section of the 1994 Act the terms "audit," "tribal government," "trust asset," "trust funds," and "trustee." This section also contains conforming amendments for renumbering paragraphs of the 1994 Act to reflect the amendments contained in this measure.

**Section 3** is titled "Responsibilities of Secretary," and amends a corresponding provision (Section 102) of the 1994 Act. These amendments would specify a number of specific duties for the Secretary in administering trust fund accounts, and further state that the Secretary is responsible for "managing natural resources located within the boundaries of Indian reservations and trust land." This section would maintain the specific duties already in the 1994 Act to account for daily and annual balances and provide specified information in quarterly reports. This section also maintains the requirement for auditing annually all funds with more than \$1,000, and adds a provision that smaller funds be grouped for audit.

**Section 4** of the ATNI bill adds to Title I of the 1994 Act a new section titled "Affirmation of Standards." In this section, Congress "affirms" that the standards required of the Secretary in carrying out the trust responsibility include "the highest degree of care, skill, and loyalty –" in carrying out a variety of specified tasks including protection and preservation of assets, respects and promotes the Indian owner's or owners' interests and preferences in managing assets, enforces all leases or other use agreements, remedies trespass, hiring people, confirming that contracting and compacting tribes protect and manage prudently Indian trust assets, promotes tribal control and self-determination over tribal trust land and resources, provides oversight of

trust responsibility performance, both the Secretary's own and that of tribes, and handles income efficiently and accurately. This new section would also require the Secretary to maintain a system of records that includes a rather lengthy list of required data relating to lands, resources, monies, losses, and uses. This records system would also be required to permit Indian owners ready access and information while protecting the "privacy of that information." This section would require the Secretary to invest trust funds to ensure they are "reasonably productive," and to confer with Indian owners regarding administration and management of trust assets. Finally, this new section would require the Secretary to protect treaty-based "rights-of-access and resource use on traditional tribal land," such as hunting, fishing and gathering rights.

**Section 5** of the draft bill amends that section of the 1994 Act that permits tribes to withdraw trust funds managed by the Secretary. This draft bill would eliminate that provision of the 1994 Act that removes "trust responsibility or liability of the United States ..." upon the withdrawal of funds from the Secretary's management. This bill, instead, would provide that a tribe may manage trust funds and trust assets without terminating either the trust responsibility of the Secretary or the trust status of the assets or funds. A final provision of this section of the draft bill states that nothing in this (otherwise barren) subsection diminishes or impairs "the trust responsibility of the United States with respect to the Indian people."

**Section 6** of the draft bill amends the Title of the 1994 Act dealing with the Special Trustee. This draft bill eliminates the Office of Special Trustee and creates a position of "Deputy Secretary for Indian Affairs," to be appointed by the President and subject to the advice and consent of the Senate. All the duties of the Assistant Secretary for Indian Affairs and of the Special Trustee are transferred to the new Deputy Secretary. In addition, all matters carried out by the Commissioner of Indian Affairs related to "trust asset and trust fund management and reform" would become subject to the authority of the new Deputy Secretary. A serving Assistant Secretary might avoid Senate confirmation to the new post if the Secretary approves the elevation of that official within 180 days of enactment. The new Deputy Secretary would have overall authority over all Indian trust matters in all Interior Department agencies. In addition to responsibility for and oversight of all duties of the Assistant Secretary, the Special Trustee, and the Commissioner of Indian Affairs, the new Deputy Secretary will be specifically required to develop and accurate inventory of all trust funds and trust assets; to ensure that all trust funds are audited at least annually, "and more frequently" as the Deputy Secretary may determine; to make sure that other senior officials of the Department provide the Secretary with accurate and current information relating to Indian trust funds and assets; to provide for regular consultation with account holders; and generally to oversee and coordinate the management of trust assets by the Department.

**Section 7** of the draft bill would add a section to Title III of the 1994 Act by creating a five-year demonstration project for tribal management of trust assets and authorize any tribe to enter into an agreement with the Secretary for that purpose. Tribes would be authorized to prescribe their own trust management principles and

procedures in such a plan, and the Secretary would be required to approve the proposed tribal standards unless they were found to be inconsistent with federal law. Participating tribes and the Secretary would agree to joint evaluation and reporting regimes, and to dispute resolution procedures.

**Section 8** of the draft bill would require the Federal Mediation and Conciliation Service to appoint a mediator to attempt negotiated settlement of the *Cobell* case. If the parties can achieve a negotiated agreement within 8 and one-half months of enactment, “The provisions of the agreement shall be adopted by the District Court ...” If only a partial agreement can be reached, that partial agreement would be required to be adopted by the court. If the parties cannot reach agreement within that time, the mediator will within 90 days thereafter, propose settlement recommendations to the court. The district court would then have 180 days after receipt of the mediator’s recommendations to review the recommendations, conduct additional proceedings, and make a final adjudication “consistent with the report and recommendations of the Mediator.”

**Section 9** is a blank section reserved for language dealing with a process for resolving tribal trust claims against the United States, and contemplates the creation of a “tribal claims commission.”

**Section 10** provides that tribal laws governing heirship and probate shall be “the prevailing law governing such issues,” and contemplates more detailed language to be added at a future date.

**Section 11** provides simply that “The Deputy Secretary shall have independent legal counsel to resolve conflicts involving trust matters.”

**Section 12** provides that the Secretary shall promulgate regulations “in consultation with interested Indian tribes” to carry out the provisions of the Act.

**Section 13** appears to be a savings provision that states nothing the Act will diminish or otherwise impair either the trust responsibility of the United States “with respect to the Indian people,” or any rights or agreements under the self-determination or self-governance statutes.