

## Analysis of Northwest Tribal Coalition Draft Trust Reform Legislation of March 7, 2005

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The proposed Northwest Tribal Coalition bill is the product of far more considered deliberation than has gone into this “analysis” of it. The views expressed here are solely mine and may not survive “mature reflection,” as one of my favorite federal judges said in reversing himself. I do hope these observations are useful to others who are reviewing it, however, and we can come to something of a “community view” on how much of this we think we can do ... and how much of it we think we can get away with.

### **“SECTION 1. SHORT TITLE”**

Section 1 sets forth the short title of the bill, and provides that, when it becomes law, “This Act may be cited as the ‘American Indian Trust Fund Management Reform Act Amendments of 2005.’” To the extent this measure actually has anything to do with the management of trust funds, it largely recites, rather than amends, lengthy pieces of the American Indian Trust Funds Management Reform Act of 1994. This draft has far more to do with the reorganization of the Department of the Interior, with tribal self-governance, and with the *Cobell* case than it does with trust funds management.

### **“SECTION 2. DEFINITIONS.”**

Section 2 adds a few definitions to the 1994 Act, and a couple of these need some attention. Under this bill the new Section 2 of the 1994 Act would define the term “AUDIT,” as

“... an audit using accounting procedures that conform to generally accepted accounting procedures and auditing procedures that conform to chapter 75 of Title 31, United States Code (commonly known as the ‘Single Audit Act Of 1984’).”

This language doesn’t work -- except for the very important purpose of putting the issue of what we think an audit is squarely before us. What we want is an audit of the type that will require an independent licensed accountant to risk license and reputation by stating an opinion on the accounting procedures the Department has used. This will

require testing those accounting procedures against criteria that are understood in the profession, and that are set forth not in generally accepted “accounting” procedures, but in “generally accepted **auditing** procedures.”

We actually want to say far more about audits, but for purposes of a definition, we want audits that require auditors to comply with **generally accepted government auditing standards (GAGAS) as published by the Comptroller General of the United States, including at a minimum those additional GAGAS reporting standards for financial audits relating to auditors’ compliance, reporting on compliance with the law, with deficiencies in internal controls, fraud, illegal acts, and abuse.** Drafters of our legislation might find guidance here in the Comptroller General’s publication GAO-03-673G Government Auditing Standards.

We want auditors to be required to recite their own compliance in their audit work with the GAO’s generally accepted government auditing standards, which for financial audits go beyond the requirements of the Statements on Auditing Standards (SAS’s) issued by the American Institute of Certified Public Accountants (AICPA).

Finally, with respect to this Section 2 of the draft bill, the reference to the Single Audit Act of 1984 seems misplaced here. The Single Audit Act of 1984 applies to non-Federal entities. And the 1996 amendments to the Single Audit Act did not change that. This measure applies to state and local and tribal governments; but to federal activities? The purpose was to permit entities that operate more than one federal program to satisfy the audit requirements of all their federal programs through the conduct of one, i.e., a **single**, audit. It was not designed to govern financial audits of federal activities.

Furthermore, we should very carefully consider whether we would want the Single Audit Act to apply even to tribes that might be carrying out trust fund management activities. Most audits, even audits for compliance with GASB 34 (the Government Accounting Standards Board Statement No. 34, *Basic Financial Statements and Management’s Discussion and Analysis for State and Local Governments*) would not reach the level of inquiry and reporting we want for trust funds. We are not so concerned with the appropriate treatment and cost basis of curbs and gutters. We want to know whether that official’s (BIA or tribal) trip to Disneyland was paid for unknowingly by an Indian trust fund account owner. And this is not apocryphal (made up). In one case we know it was.

“TRUST ASSET,” is another term defined in the proposed bill in a way that promises mischief if left as is. The draft bill says that a trust asset is “any tangible property,” that is held by the Secretary for the benefit of an Indian under federal law. Without even getting into the sticky issues of whether most of the examples cited in the proposed definition (oil or gas, fish, or wildlife, a water source) can fairly be said to be “held” by the Secretary or anybody else, the greater issue is that the idea of “tangible property” is far too simplistic to be useful here. This is a concept that would greatly simplify life for

the government, but would excuse them from a very large part of their trust responsibility.

A huge, or at least a hugely valuable, chunk of our trust estate consists of “intangible,” property or property rights. And a huge chunk of the responsibility for protecting it lies outside the “Secretary” of Interior’s domain. A single salmon milling around in international waters of the deep blue sea off the coast of Alaska, before heading back to a gravel-bottomed stream 1,000 miles inland in the Lower 48, represents a “trust asset,” probably of several tribes. And the responsibility for protecting that trust asset belongs not only to the “Secretary” of the Interior, but at least also to the Secretary of Transportation (who has the Maritime Administration and the Pipeline and Hazardous Materials Safety Administration), to the Secretary of Commerce (who has the National Marine Fisheries Service), to the Secretary of Homeland Security (who just took the Coast Guard from the Department of Transportation), to the Attorney General (who has the U.S. Marshals Service), and to the Secretary of State (who has the responsibility for negotiating with the Canadians to ensure that our fish or its brother actually has a chance to make it back to American waters). Now, whether that “trust asset,” is the fish itself, or its brother, or the right to catch it, or maybe just the right to try to catch it, or even more “intangible,” maybe just the right to make sure that fish reaches its gravel-bottomed stream so it can breed and die ... well, you get the idea. The point is we don’t want a federal law that excuses all these other officials from a duty of using their resources to protect that trust asset. We really don’t want to have to define just what it is here. We just want to make sure we don’t employ a definition that gives all these officials a chance to deny they have any responsibility for protecting it.

More importantly, maybe, to the non-fish-eating segment of our beneficiary population are other “intangible” aspects of our assets. We know for a fact that we can maintain ownership of our land for generations without a clear title status report, or an accurate survey, or an inventory of all the assets contained in, on, and under it. We also know that we can lose it in a single wave of the hand on the courthouse steps if we do not assert, defend, and otherwise protect the tax status of it. The tax status of our land, though not exactly “tangible,” is indisputably a “trust asset,” no less valuable to us than a tax credit to a corporation.

Not in addition to these “intangible” trust assets, but maybe a distinct class of incorporeal assets, are those inchoate (or unrealized) assets like monetary claims or unquantified water rights. Think bankruptcy or estates ... both good examples of sources of great loss to the Indian trust estate. We should insist that it is indisputably the duty of our trustee to identify, pursue, and collect on legitimate claims of our estate. We tend to think of this in terms of a current renter or lessee, but not beyond that. The government has an inclination to and even has regulations to honor claims **against** our trust estate, but very little inclination to identify, and collect on claims **for** our estate. We need to be careful not to use a definition that excuses these trustee failures.

### **“SECTION 3. RESPONSIBILITIES OF SECRETARY.”**

The first subsection of Section 3 of the draft bill, ADMINISTRATION AND MANAGEMENT, would add to the law a list of specific duties of the Secretary. These seem innocuous enough, at first glance, but actually might have been suggested by the Department to give itself an A+ on the next test. These would include maintaining “adequate systems” for accounting for and reporting fund balances; providing adequate controls over monies in and out; providing for timely reconciliations; determining accurate balances; providing periodic account statements; using the Federal Register to publicize policies and procedures for fund management; supervising and training staff; and managing natural resources “within the boundaries of Indian reservations and trust land.” We have no quarrel with any of these laudable requirements. But putting such mushy requirements into a reform law almost guarantees we will devote a good deal of time to fights about what is an “adequate” system, what constitutes a “timely” reconciliation; what level of training or supervision meets the high standard of “adequate;” or just what intervals of time constitute an acceptable periodicity for the production of account statements. Think about the time we have devoted to the meaning of the seemingly simple word “consultation.” To the extent we know what we want here, or to the extent we want to eliminate the Department’s room to shuck and jive, we should avoid these nebulous adjectives. This is our chance to say we want monthly, or quarterly, or fortnightly, instead of “periodically.”

The second subsection of Section 3, “ACCOUNTING FOR DAILY AND ANNUAL BALANCES OF INDIAN TRUST FUNDS,” seems to retain nearly verbatim the current requirements of the 1994 Act, except that under this new Act, the Secretary seems to get a four-month holiday from requirements that have been in the law since 1994. It appears that these requirements as restated in the proposed bill before us won’t kick in until “20 business days after the close of the second quarter after the date of enactment.” Maybe that extension is inadvertent.

The third subsection of this section deals with audits. We definitely want audit requirements. We definitely have audit requirements in the 1994 Act already. We definitely have expressed some concerns with the present audit regime. We do want more targeted audit coverage. And we want more extensive audit coverage. Some stratification of accounts for audit purposes, as is suggested in the draft bill, might well help achieve that objective. We want more access to the reports of auditors, not only access to audit reports but to management letters, too. In fact, we want access to all concerns raised by auditors. If these audit reports are going to be used to imbue confidence in the Department’s trust fund management, then we want an explicit acknowledgement of auditor awareness of third party reliance on the audit reports. If we don’t get an *opinion*, we want an affirmative requirement for a negative assurance ... or a statement the auditor is not willing to give one. This section on audits doesn’t get us where we want to go, but it does put the subject into the bill. Our drafters might find useful guidance here in the audit provisions of Sarbanes-Oxley regarding auditor duties, auditor independence, auditor rotation, etc.

This subsection also uses the term “statistical sampling,” which we should ban” from our vocabulary for the duration of this exercise. The draft bill would enshrine this concept in

trust funds legislation. This is a buzz word that has been used, either as a club or as a siren song, against us by the government for more than a dozen years now. It has occasionally been picked up by drafters on our side, but never to good effect. The Department has proposed it as a methodology for reaching settlement. The appropriations committee of the House has proposed to use it as a means of forcing closure. Statistical sampling relies on concepts of “significance” for making assertions about a group (population) of items ... it could be the incidence of albinism in platypus litters or the “error rate” in trust fund account statements. In either case, fundamental rules must be observed if the conclusion is to be valid, and even statistically valid results can be used to mask important anomalies. A single error in recording one thousand transactions is an error rate of one-tenth of one percent. That is probably statistically insignificant in any population of anything. The Department and the appropriations committee have both proposed to use the “error rate” discovered in “statistical sampling” as a basis for making adjustments to account balances. This might be an innocent misuse of the science of probabilistics or application of statistical methods on the part of the political figures who have proposed it. It is almost certainly **not** an innocent misapprehension on the part of those government contractors and career employees who have put it into the minds of at least the last three Administrations and at least the last five Congresses. What if that single error was for \$7,775,000? That is the approximate amount of Indian trust funds stolen by a crook in Kansas City. Most of us would be far more interested in the **size** of the error than in the **percentage rate** of error. This is a money matter. We must never let anyone involved with trust reform to persuade us to substitute notions of **statistical** significance for matters of **economic** significance. Moreover, if the theft were properly recorded as a theft (which it emphatically was not; it was covered up) it would not be an accounting error at all. And if were recorded as an accounting error, it very probably would not be caught at all in a statistical sampling, and would almost certainly be a statistically insignificant error if it were caught. Statistical sampling is a useful tool. A competent auditor might well use it in appropriate circumstances for appropriate purposes. But let us not enshrine the notion in law for those who have so assiduously tried to misuse it for the last dozen years. We are not yet arrived where we can accept at face value, as in our best interests, suggestions that emanate from the trustee’s camp. This law we are trying to pass might help get us there, but not if we fall for the easy use of buzz words that might sound sophisticated, but mask ignoble ends.

#### **Section 4. AFFIRMATION OF STANDARDS**

This section contains the single most effective statement of the entire bill. This section does impose some specific standards for trust administration. ITMA has urged for years in particular the overarching requirement proposed here that the Secretary’s duties require utilization of “**the highest degree of care, skill, and loyalty—**” This is not unreasonable, and it is far preferable to the “ordinary prudent man” standard that we too often hear in this context. We must keep this language as an overarching trust standard in whatever statute we get through Congress. And this standard must always be used to measure the “appropriate,” “reasonable,” and other mushy language that will undoubtedly be suggested by the government.

Overall, in this section, we should give some thought to what we are demanding in legislation against what we really think we can expect in a world in which scarcity has not yet been eliminated. Most of this litany of requirements is a recitation of things that are either not broken, or are on the “to do” or “To Be” or “FTM” agenda already. We should give a little more thought to what we think is broken. For instance, this section would be the place to include here a requirement that nonrenewable resources are to be managed with a view to maximizing revenues from their disposition (something the government disputes); that existing Indian forestry statutes requiring application of the principles of sustained yield are valid trust standards; that grazing lands are to be managed in accordance with scientific principles of range management, etc. We want to be careful not to load down our statute with a long list of make-work, ministerial functions that any bureaucracy can elevate to a high art requiring all the time and budget of an agency simply because they are listed in a statute.

#### **“Section 5. Indian Participation in Trust Fund Activities.”**

This section is a little problematic as written. Tribes should be allowed to manage trust properties under existing self-government, self-governance, contracting and compacting laws. We have not persuaded the Congress or the government, however, that it is reasonable to permit a tribe to manage trust funds without diminishing the trust responsibility of the Secretary. This was a difficult issue in developing the 1994 Act, and we ultimately authorized tribes to take trust funds under their own management, releasing the Secretary from liability when they did so. Once a tribe has control of the money, we don’t have a good answer to the question of why we should also have recovery against the Secretary if the money gets plunked down on red 17 at the local casino and a black number comes up. We probably cannot expect a different result even the tribe makes an investment that the top 50 investment advisers in the country say is perfectly prudent ... and they all turn out to be wrong. In short, we need to be prepared to be imaginative ... and flexible in negotiating this section.

#### **“Section 6. DEPUTY SECRETARY FOR INDIAN AFFAIRS.”**

In some respects this section is one-third of the real guts of the proposed legislation. And it seems to be a carefully aimed shot at a bird that flew the coop three years ago. This section would eliminate the Special Trustee, and transfer responsibility for all present duties of the Special Trustee, the Assistant Secretary, and the Commissioner of Indian Affairs to a newly created office of Deputy Secretary for Indian Affairs. In addition, this new official would have responsibility for overseeing all Indian trust matters within the Department. In effect, this Deputy Secretary would have line authority over all the agencies in the Department with the possible exception of the Office of Insular Affairs (or whatever the Territorial Office is now called). Is creation of this office worth fighting for in its own right? Or is it merely a place to put the duties of the current Special Trustee, which is eliminated by this section?

Or is our real objective the elimination of the position of special trustee? And, if so, perhaps we should carefully consider what the discrete elements of that position are ...

and where we would prefer they reside. Do we want trust funds back in the Bureau? Do we want Indian preference to apply wherever Indian affairs are administered in the Department? Do we want trust officers eliminated? Do we want deputy superintendents eliminated? Do we want trust records back in the Bureau? Do we want historical accounting back in the Bureau? If so, we should make those changes clear. Just creating one big box to dump the contents of another big box into doesn't really seem to change anything but the name. And we should be prepared to consider just how much effort we want to put into rearranging the boxes again, as opposed to concentrating on duties, functions, and standards.

### **“Section 7. TRIBAL MANAGEMENT OF TRUST ASSETS DEMONSTRATION PROJECT.”**

This section seems to be another one-third of the guts of the proposed bill, and it basically requires the Secretary for a five year period to negotiate and enter into agreement with any tribe that chooses to do so to undertake direct tribal administration and management of trust resources and assets, including appropriated funds for those purposes. These agreements would contain negotiated standards and reporting regimes against which the Secretary and participating tribes could gauge performance, as well as dispute resolution conditions precedent to litigation on the agreements. The Secretary would be permitted to refuse to agree to tribally proposed standards in such agreements only if he or she found those standards to be inconsistent with federal law.

This program or something much like it could work very well, and it does not seem to be greatly unlike the presently authorized self-governance program. We can expect the government to insist on releases from liability to the extent the Secretary is required by law to accept “tribal standards” for trust administration. And we can expect to have to deal with some delicate issues arising from the extent to which the federal government will be requested to surrender its ability to administer trust services or fulfill trust duties to individuals. Especially, where federal trust obligations to Indian individuals, or even where non-Indian entities have rights in Indian trust property that pre-date the present tribal governments, owners of those pre-existing rights might well dispute that their rights are in any way “derivative” of a government that did not exist when their rights came into being.

### **“Section 8. MEDIATOR.”**

This section appears to be the final one-third of the real guts of the proposed legislation, and this section would legislate an end to the *Cobell* case within fifteen months or so of enactment. It would give the parties a chance to reach a settlement within six months or so, and direct the judge to enter the agreement as a judgment. If the parties fail to reach an agreement, it would give a federal mediator three months to propose a resolution to the judge, and the judge another six months to chew on it and then be required by this law to enter a judgment consistent with the mediator's recommendations. The existing law regarding class action litigation presumably will be put aside for this purpose.

If no settlement agreement is reached, this provision will almost certainly be litigated for a period of years. This seems to be an exercise of the judicial power of the United States by the Congress, if it were to be enacted. Legislation dealing with process regarding settlement is one thing. Legislation telling a federal judge whose recommendations to adopt in a judgment seems problematic. In any event, settlement legislation that guarantees further litigation hardly seems the best alternative available. A statutory requirement that parties who have been in mediation for more than a year should be required to enter into mediation seems a bit behind the power curve.

### **“Section 9. RESOLUTION OF TRIBAL CLAIMS.”**

This section is left blank, but reflects the prospect that a mechanism for resolving pending tribal claims can also be a part of this legislation. It is pretty clear that at least some tribes think this should be included, and apparently some Congressional staff have expressed similar sentiments. So far as is publicly known, however, no tribe presently in court has expressed this view. And the government has not indicated publicly that this matter must be addressed in any legislation that will be acceptable to the Administration. This section might well be a suggestion to fix something that no one actually involved thinks is broken.

Some presently litigating tribes have already reached settlement of their claims, and are awaiting implementing legislation quite apart from this measure. Other tribes have settled portions of their claims, and have written agreements with the government to litigate remaining questions and incorporate the judgments received into their settlements. Several tribes are presently working collaboratively with the government under formal ADR (alternative dispute resolution) agreements signed by the parties, assigned to mediators (in some cases other judges acting as mediator), and subject to mutually agreed timetables for settlement efforts. It seems virtually a certainty that any legislative measure to govern tribal claims would undermine these and other existing mechanisms and proceedings that tribes themselves are pursuing according to their own lights and in exercise of their own sovereignty.

### **“Section 10. FRACTIONATED HEIRSHIPS AND HEIRSHIP.”**

This proposed section contemplates more detailed language to follow, and presently provides only that tribal law shall govern heirship and probate. That subject, if pursued in this legislation, will eventually implicate the ongoing “sovereignty initiative” that NARF and tribes have been working on for several years, and might not lend itself to the timeframe provided for the current legislative effort. As proposed, this section seems to conflict with the latest amendments to the Indian Land Consolidation Act, and does not seem to address other means presently under consideration for ameliorating the evils of allotment, such as encouraging voluntary consolidation, removing present disincentives for participating in buyback programs, or creating incentives for land transfers, relinquishments, exchanges, sales, etc.

### **“Section 11. INDEPENDENT LEGAL COUNSEL FOR TRUST ISSUES.”**

This provision is intended to provide the newly created Deputy Secretary for Indian trust matters with legal counsel outside the Office of the Solicitor, and apparently to repeal *sub silentio* (without mentioning it) or surreptitiously (sneakily) the current law which states that “On and after June 26, 1946, the legal work of the Department of the Interior shall be performed under the supervision and direction of the Solicitor of the Department of the Interior, who shall be appointed by the President with the advice and consent of the Senate.” 43 U.S.C. 1455.

Our cause might well be better served eventually by concentrating more on the standards for trust administration than on creating more disputants. It is a generally well-settled principle elsewhere in trust law, for instance, that a trust beneficiary is entitled to the advice counsel provides to the trustee in the administration of the trust. That is adamantly refused to us now by government attorneys who cheerfully concede that they don’t think that rule applies to them; that their advice is meant for the trustee alone, and not for the beneficiary; and that their sole and unmitigated duty is to protect and defend the Secretary. It is likewise the black letter law of the land that attorneys in the employ of the federal government are to be held to the same professional standards as attorneys in the state or jurisdiction where they practice. Attorneys for the government defy that statute openly. And, finally, it is the law elsewhere that the attorney-client privilege belongs exclusively to the client. Yet, Justice Department attorneys blithely invoke their statutory authority to control litigation to which the United States is a party to assert attorney-client privilege, even over the objections of their putative “clients,” such as the Secretary of Interior. Perhaps, these are the kinds of issues that we should consider addressing in this legislation, with sanctions for violation; for presumptions; for preclusion of certain defenses or objections; or for default judgments when trial schedules are subverted or ignored, etc.

### **“Section 12. REGULATIONS.”**

This provision simply provides that the Secretary will develop necessary regulations to implement this Act and future amendments to it “in consultation with interested Indian tribes.” To the extent this simply restates existing law, it is harmless as well as meaningless. To the extent it is intended to change existing law, it is problematic. If it is meant to exclude all participation in rulemaking except for “tribes,” this is tantamount to an amendment to the Administrative Procedure Act and may well invoke the jurisdiction of the Judiciary Committees of Congress, as well as the Indian committees. To the extent it is intended merely to require an open decision-making process, perhaps we should say specifically what we think should be required. To that end, this section could require, for instance, that all implementing policies or procedures adopted be promulgated as regulations having the force and effect of law under the Negotiated Rulemaking Act, or something to that effect.

### **“Section 13. MISCELLANEOUS SAVINGS PROVIION.”**

This section simply states that this Act will not reduce, accidentally or otherwise, the nation's trust responsibility to Indian people, nor will it reduce any tribe's rights under self-determination laws and agreements. And that's a good thing.

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Document not Reviewed by Board*