

ANALYSIS

2003 ITMA Trust Reform Draft Bill *in Relation to* 50 Principles of the Trust Reform & Cobell Settlement Workgroup *and* S.1439 - Indian Trust Reform Act of 2005

I. INTRODUCTION

This comparison document is being submitted to analyze the Intertribal Monitoring Association – National Congress of American Indians ("ITMA–NCAI") driven Trust Reform & Cobell Settlement Workgroup's final product announcing 50 principles to guide Congress in developing legislation to comprehensively resolve the nine year Cobell litigation and reform the federal government's systems for tribal and individual trust management and compare these principles to the work product produced by ITMA two years ago on similar issues.

In analyzing these principles, it is quite evident that ITMA's prior work and efforts in crafting legislation and educating lawmakers and Tribal Leaders on the prevalent trust reform concerns and priorities have made a significant impact in this discourse. This memorandum analyzes how ITMA's prior and continuing efforts have contributed to the overall trust reform movement including its specific efforts to address issues relative to reforming the Individual and Tribal Trust Systems, which account for nearly half of the workgroup's principles.

Before discussing the specifics of this analysis, this memorandum provides pertinent background information summarizing key events that influenced ITMA's draft bill, including ITMA's joint efforts with NCAI and working directly with Tribes, as well as key points of discussion with Administration officials in the Department of the Interior, and ITMA's work with Congress. Finally, this memorandum briefly touches on the S 1439, the Indian Trust Reform Act of 2005, introduced on July 20, 2005 by Senator McCain.

II. BACKGROUND

Although tribally driven initiatives to improve federal management of the Indian trust have occurred for many generations and with respect to ITMA's involvement date back to its establishment in 1990, for purposes of this memorandum, the relevant time frame dates back to the latter part of 2001, immediately prior to the commencement of the 108th Congress.

A. BITAM PLAN

In December 2001, Secretary of the Interior Gale Norton unveiled the Department's plan to reorganize its Indian trust functions principally through the creation of a new "Bureau of Indian Trust Asset Management" ("BITAM"). Indian Tribes across the country universally objected to the BITAM plan opposing its separation of trustee duties into "trust" and "non trust" categories which Tribes believed would effectively dismantle the Bureau of Indian Affairs.

Tribal Leaders nationwide viewed the BITAM plan as a means of diminishing the federal government's trust relationship with Indian Tribal Governments. The Department, however, defended its BITAM plan as a necessary, corrective way to improve its management and administration of the Indian trust. Furthermore, the Department explained that it was under accelerated pressure to take immediate action due to the *Cobell* class action lawsuit filed on behalf of Individual Indian Monies (IIM) account holders against the federal government relating to the government's historic mismanagement of the IIM trust.

B. JOINT DOI-TRIBAL LEADERS TASK FORCE ON TRUST REFORM

Immediately following the announcement of the BITAM plan, Tribes mobilized their efforts to oppose BITAM's implementation and eventually committed to working with the Interior Department on mutually acceptable alternatives. As a result the "Joint Department of Interior/Tribal Leaders Task Force on Trust Reform" was established in early 2002. For nearly 10 months, the Task Force held monthly meetings nationwide to discuss trust reform priorities among the Tribes and to jointly work on a legislative proposal to present to Congress. The Task Force produced a draft bill, but the Tribes and the Department maintained serious difference on a number of issues.

From the inception of the BITAM movement, the ITMA actively monitored and participated in all facets of the Administration's proposal to revamp the Department's administration of the Indian trust. ITMA analyzed and objected to the BITAM plan, and had a lead role in developing the Tribes' initial guiding principles for engaging in the trust reform discussion with the Department. ITMA attended every meeting of the Task Force and was a core part of the legislative drafting process. This activity consumed most of 2002.

Following nearly 10 months of intensive discussions, the Task Force reached an impasse over several key issues in the legislative proposal. For instance, the Department was not willing to agree with the concept of independent oversight of its Indian trust administration and management functions, would not agree to the creation of an Office of Deputy Secretary for Indian Affairs, rejected any enforcement provisions to compel compliance in its management of trust funds and resources, and flatly rejected the establishment of statutory fiduciary standards given its current broken system. The Task Force could not reach consensus on a couple of other key components and the effort stalled and eventually fall apart.

C. ITMA-NCAI TRUST REFORM LEGISLATIVE DRAFTING INITIATIVE

Although the Task Force's efforts were not successful, Tribes continued in their determination to defeat the BITAM plan. At ITMA's October 2002 Annual Meeting, our membership directed that ITMA draft a trust reform bill. The following month, at NCAI's November 2002 Annual Session, NCAI and ITMA decided to join forces in drafting a Tribal trust reform legislative proposal.

A Tribal legislative drafting workgroup immediately formed comprised of attorneys, Tribal Leaders and consultants. The workgroup met numerous times over the next few months and focused on subjects previously discussed and debated by the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform. The workgroup also incorporated many of the concepts included in S. 175, the "Indian Trust Asset and Trust Fund Management and Reform Act of 2003" introduced by Senator McCain along with Senator Daschle and Senator Johnson on January 15, 2003.

As a result of the workgroup's efforts, the ITMA-NCAI Joint Trust Reform draft bill¹ was created to meet the primary objectives and priorities of Tribes that participated in the Joint Task Force efforts, and in response to the input of Tribes nationwide. ITMA also took into consideration its discussions with the respective authorizing committees – House Resources Committee and Senate Indian Affairs Committees, as well as its dialogue with the offices of Senators McCain, Daschle and Johnson, the sponsors of the then-newly introduced trust reform bill, S. 175, Indian Trust Asset and Trust Fund Management and Reform Act of 2003.

D. CONGRESSIONAL DYNAMICS IN THE 108TH CONGRESS

Throughout 2003, ITMA's immediate goal was to continue its course in briefing Tribes about the draft bill and securing their input in order to gain broad Tribal support. At the same time, ITMA continued to consult with the respective Senate and House authorizing committees and others to secure sponsors for the bill's formal introduction. The primary targets for introduction were Senator Campbell and Senator Inouye, Chairman and Vice Chairman of the Senate Indian Affairs Committee, respectively.

In the House, potential sponsors were Congressman Don Young (R-AK) and Congressman George Miller (D-CA), formerly the Chairman and Ranking Member of the House Resources Committee, respectively, both of whom remained as senior members of the Committee. Based on ITMA's prior work and strong relationships with Young and Miller and their staffs, ITMA was successful in securing their agreement to introduce and guide the legislation in the House. In addition, ITMA stayed in close contact and communication with Congressman Nick Rahall, Ranking Member of the Committee, who also committed to helping our efforts. Finally, ITMA quickly engaged the newly-appointed Chairman of the House Resources Committee Richard Pombo (R-CA).²

On June 13, 2003, Campbell and Inouye sent Tribal Leaders a letter setting forth a comprehensive framework for addressing both the settlement of *Cobell* and key trust reform issues. Accordingly, the Senate leaders laid out a specific course to address the following trust reform components:

- **Probate Reform** – *"...to stop the hemorrhaging of Indian land fractionation ... by swiftly enacting legal reforms to the Indian probate statute."*

¹ For purposes of this memorandum, this draft bill is referred to as the "ITMA draft bill."

² Prior to Pombo, the House Resources Committee was chaired by Congressman Jim Hansen (R-UT), now retired, who, during his short tenure as Chairman, conducted limited work on Indian affairs matters. Given these circumstances, ITMA had earlier calculated that its interests would be better served by having Young and Miller lead the trust reform effort in the House based on their longstanding experience and work with ITMA on these issues.

- **Land Consolidation** – "to commence an intense effort to reconsolidate the Indian land base by buying small parcels of fractionated Indian land and returning them to tribal ownership."
- **Cobell Settlement** – "...to explore creative, equitable, and expedient ways to settle the *Cobell v. Norton* lawsuit."
- **Trust Reorganization** – "the final, and perhaps most difficult, task is [to reform] the Federal trust management apparatus and how Indian Tribes and the United States go about managing trust assets and resources."

In various meetings, hearings and other public events, Campbell indicated his intention to address these issues in a systematic, separate manner. From ITMA's meeting with Committee staff, we were informed that the Senate Indian Affairs Committee preferred to sequentially address these issues in piecemeal fashion leaving trust reorganization as the final task. We also understood that the Committee had not granted the S. 175 sponsors' request for a hearing on their bill, presumably because the Committee had set its own course on addressing trust reform.

With these developing and evolving considerations in mind, ITMA took a lead role in holding a series of Tribal meetings around the country to discuss the draft bill and to solicit the input of Tribes to further refine and improve our draft bill. ITMA also led the tribal workgroup in its efforts conducting a series of briefings on the draft bill with the Senate Indian Affairs Committee and the House Resources Committee, as well as with the offices of Senators McCain, Daschle and Johnson. Most of this activity occurred through 2003.

During this timeframe, ITMA maintained a constant presence and high visibility with Congress in advancing a purely Tribal trust reorganization legislative proposal. In fact, primarily as a result of these efforts, on July 25, 2003, the sponsors of S. 175 introduced another trust reform bill, S. 1459, the "American Indian Trust Fund Management Reform Act Amendments Act of 2003." which included many aspects of our draft bill. Equally significant, Senator Inouye, the Indian Affairs Committee Vice Chairman, added his support to S. 1459 as an original co sponsor. These sponsors requested both our formal endorsement and effort to advance S. 1459 through the Committee.

Again, given the sensitive, political dynamics at play, ITMA decided to defer endorsement of S. 1459, in favor of continuing to pursue the support of Chairman Campbell to introduce our bill, which many believed, would be key to Committee advancement and future enactment.

In the summer of 2004, ITMA focused its efforts to secure a hearing before the Senate Indian Affairs Committee as a way to spur introduction of our proposal. When a hearing did not materialize that summer, Committee staff informed ITMA that a hearing could possibly occur in the fall of 2004. During this time frame and consistent with Campbell's trust reform plan, the Senate Indian Affairs Committee and the House Resources Committee participated in an intensive mediation process with the *Cobell* plaintiffs and the Department of Interior for the purposes of reaching a negotiated settlement to end the lawsuit. This process consumed a considerable amount of the Committees' time and energy, as well as that of the *Cobell* plaintiffs and counsel.

In spite of ITMA's tremendous amount of work with Tribal Leadership and Congress, by the end of the 108th Congress in 2004, ITMA did not get the hearing we requested nor was our draft bill formally introduced in either the House or Senate. Of the Campbell trust reform agenda, only S.

550 was passed by Congress and signed into law.³ (Consequently, the mediated *Cobell* settlement discussions had collapsed and failed to produce the desired results.) Committee staff explained to ITMA that there simply wasn't enough time in the 108th Congress to complete their trust reform agenda, including resolving *Cobell* and reaching the trust reorganization issues that were the subject of our draft bill.

E. Activity in the 109th Congress

In 2005, ITMA resumed its efforts to secure meaningful tribally driven trust reform legislation. To spearhead the advancement of a Tribal trust reform agenda in the 109th Congress, ITMA Chairman and staff met in January with the Senate Indian Affairs Committee staff. We discussed movement of the ITMA draft bill and ways to advance our interests with the new Senate Indian Affairs Committee leadership. With Senator Campbell's retirement at the end of the 108th Congress, Senator McCain became the Chairman of the Indian Affairs Committee, and Senator Dorgan became the Vice Chairman following Senator Inouye's departure from this post. House Resources Committee Chairman Richard Pombo and Ranking Member Rahall expressed their intention to focus on these issues and work toward a legislative resolution.

In contrast to the Senate Indian Affairs Committee's piecemeal approach in the 108th Congress to separately consider the various trust reform components, early indications from both House and Senate Committees indicated their preference in the 109th Congress to work towards a comprehensive resolution of these issues, including resolving *Cobell* and reforming the federal government's systems for tribal and individual trust management. Towards this end, ITMA and NCAI once again joined forces and included the *Cobell* plaintiffs to advance a comprehensive trust reform approach in the 109th Congress. Specifically, ITMA and NCAI formed a workgroup composed of the *Cobell* Plaintiffs, Tribes, individual Indian allottees, and Indian organizations whose mission was to establish discrete principles that would guide the drafting of legislation to comprehensively address trust reform and *Cobell* settlement in a prompt and fair manner.

The approach to draft and submit trust reform principles rather than a legislative proposal was apparently undertaken in response to a request by the Senate Indian Affairs Committee leaders McCain and Dorgan, and the leaders of the House Resources Committee, Pombo and Rahall. It was widely reported that these lawmakers asked Indian Country to provide a set of principles that would guide the lawmakers' drafting of legislation.

Following months of meetings and securing input from Tribal Leaders, on June 20, 2005, the workgroup announced fifty (50) Principles organized in the following four major areas and supported by the Workgroup's rationale for each one:

- **Historical Accounting of Individual Indian Trust Accounts**
- **Reforming the Individual and Tribal Trust Systems**
- **Indian Land Consolidation, and**
- **Individual Indian Resource Mismanagement Claims**

In analyzing these principles, it is quite evident that ITMA's prior work and efforts in crafting its draft bill and educating lawmakers and Tribal Leaders on the prevalent trust reform concerns and priorities has made a significant impact in this discourse.

³ On October 14, 2003, Senator Campbell introduced S. 550, the "American Indian Probate Reform Act of 2003" which was ultimately enacted into law on October 27, 2004 as Public Law 108-374.

III. KEY ELEMENTS OF ITMA-NCAI DRAFT TRUST REFORM LEGISLATION

Throughout the 108th Congress (2002-2004), ITMA remained vigilant in advocating for the interests of its member Tribes and promoting a Tribal proposal that had been thoroughly vetted throughout Indian country. As detailed above, ITMA worked very closely with Tribal Leaders and many key congressional committees and offices in strategically crafting a proposal in light of the sensitive political dynamics in Congress. The protection, promotion and enhancement of Tribal Sovereignty guided the development of the draft bill. Some of the key highlights include:

- Acknowledging in Congressional findings the inherent sovereign authority of Tribes predating the U.S. Constitution and which forms the backdrop for the unique political and legal trust relationship between the United States and Indian Tribes since the formation of the Union.
- Creating a single line of authority in the Department of Interior to oversee and supervise the management and reform of Indian trust funds and assets.
- Codifying general trustee standards for the Secretary to follow when administering and managing Indian trust funds and assets.
- Revising certain auditing and accounting requirements in the American Indian Trust Reform Management Act of 1994.
- Establishing specific duties of the Secretary to follow when administering or managing both trust resources and "fund-generating" resources.
- Requiring the Department of the Interior to fully integrate the title and recordation systems that account for tribal trust assets.
- Creating a statutory framework allowing Tribes to develop flexible trust fund and resource management plans to strengthen Tribal governance through a Tribe's territory.
- Establishing within the Department of the Interior a Deputy Secretary for Indian Affairs to be comprehensively responsible for trust reform thereby effectively eliminating the Office of Special Trustee and integrating all Indian trust functions.
- Establishing an independent oversight entity to oversee and empowered with discrete functions to compel the Department's proper administration and management of the Indian trust.

Given the trust reform course charted by the Senate Indian Affairs Committee to separately address trust reform issues, ITMA's draft bill did not address probate or fractionation issues. Moreover, based on the position of the *Cobell* plaintiffs in opposition to legislation that affected their interests, the draft bill did not address the settlement or resolution of federal mismanagement of IIM accounts. And finally, the draft bill did not include the settlement or resolution of tribal trust fund mismanagement lawsuits because ITMA was in the process and has continued to work on a separate track regarding these issues.

IV. ANALYSIS OF THE ITMA DRAFT BILL AND THE WORKGROUP'S TRUST REFORM PRINCIPLES.

The following discussion analyzes how ITMA's draft bill addressed many of the objectives of the workgroup's principles, in particular, those relating to reforming the government's management of trust resources and assets which account for nearly half of the workgroup's final product. Accordingly, the relevant trust reform principles are listed below along with the workgroup's

respective rationale followed by a discussion of how ITMA's draft bill addresses or incorporates the essence of both.

1. **PRINCIPLE (14)** - Legislation should affirm and clarify the specific standards for the Administration of trust funds and transactions that involve those funds which prescribe what needs to be done, but not how to do it.

RATIONALE - Standards should be specific and clearly stated in legislation. By setting specific standards, the Department will know exactly what the expectations are in managing the trust. The legislation should make clear that the trust responsibility would not be diminished.

ITMA BILL - *The inclusion of trust standards was a key element of the draft bill and was crafted as a statutory mandate requiring the Secretary's adherence. Accordingly, one of the primary purposes, specifically set forth in Section 2 of the draft bill, is "to provide fiduciary standards for the administration of Indian trust funds and trust assets, to promote and advance tribal self-determination through tribal management of such funds and assets, and for other purposes." The draft bill provides specific provisions setting forth general standards governing the management of trust funds and assets. In accordance with these standards, the bill further defines and places specific duties on the Secretary in her management of trust funds including implementing corrective measures relating to title, recordation and accounting procedures necessary to meet the express fiduciary standards in the management of trust funds.*

The draft bill also requires the Secretary to submit to an annual review of the performance of her administration of the trust fund management duties and responsibilities for management programs, operational systems, and information systems.

With regard to the rationale that trust reform legislation should not diminish the trust responsibility, the draft bill includes the following provision: "The enumeration of specific standards and duties in the Act shall not relieve the Secretary of fiduciary duties applicable to the administration of Indian trust funds and trust assets, and is not intended to reverse or repeal existing federal statutory or regulatory laws applicable to the United States' administration of Indian trust funds and trust assets, except as expressly authorized in this Act."

2. **PRINCIPLE (15)** - To the extent practicable, the legislation should establish resource-specific, generic standards where possible (e.g. sustained yield requirements for Indian timber).

RATIONALE - An example of this principle can be found in the National Indian Forest Resources Management Act and the American Indian Agricultural Resources Management Act. Both of these acts have "standards provisions" that are specific to these resources.

ITMA BILL - *The draft bill contemplates and establishes a framework for resource-specific standards. In Section 3, the definitions of trust assets and resources, including fund-generating resources, anticipated the application of resources specific standards. And, the provisions setting forth Secretarial duties and responsibilities in managing trust funds and assets direct that these duties be performed on a resource specific basis. The draft bill also requires that within one year of its enactment "the Secretary shall develop resource-specific trust standards that are consistent with the requirements of this Act and prevailing federal and tribal laws"*

3. **PRINCIPLE (16)** - Legislation should clarify that fulfillment of fiduciary duties must be administered in accordance with applicable law, including tribal law.

RATIONALE - The National Indian Forest Resources Management Act and the American Indian Agricultural Resources Management Act both have provisions that expressly require the Secretary to abide by tribal laws in exercising his/her duties. A similar provision should be included in any trust reform/settlement bill.

ITMA BILL – *An important key principle guiding the development of the draft bill was the recognition of the inherent authority of Tribes to exercise sovereign governmental authority of their lands and resources. Accordingly, provisions in Title I specifically provide that that “the proper discharge of the United States' trust responsibility owed to Indian tribes and individual Indian beneficiaries requires, without limitation, that the trustee must exercise the most exacting degree of care, skill, loyalty and candor to require the Secretary to comply `with applicable law including the laws of the Tribe having jurisdiction over a trust asset ...[and in a manner that] promotes and protects tribal control, governance, and self-determination over trust assets of tribes and individual Indians.”*

Similarly, the draft bill includes provisions requiring the Secretary to administer trust resources in accordance with: (i) any standards, goals, and objectives set forth in duly approved tribal resource management plans; and (ii) all applicable tribal laws and ordinances, except in specific instances where such compliance would be contrary to applicable federal law.

In recognition of the varying types of government to government relationships between Tribes and the federal government, the draft bill also establishes an important framework for the fulfillment of specified duties consistent with fiduciary standards in the management of trust assets and resources, including those directly provided by the federal agencies or those administered by Tribes through P.L. 93-638 self-determination contracts or compacts. Indeed, a significant amount of the work in crafting the draft bill was to create a flexible framework for tribal participation in trust resources management in a manner that meets fiduciary trust standards while protecting, promoting and enhancing Tribal sovereign governance. Specifically, in codifying fiduciary standards, the draft bill includes provisions that require the Secretary to carry out trust management duties in a manner that:

- (A) Promotes the interest of the beneficial owner except where inconsistent with tribal law;*
- (B) Supports, to the maximum extent practicable the beneficial owner's intended use of the assets;*
- (C) Complies with applicable law including the laws of the Tribe having jurisdiction over a trust asset; and*
- (D) Promotes and protects tribal control, governance, and self-determination over trust assets of tribes and individual Indians.*

4. **PRINCIPLE (17)** - The legislation shall codify the applicability of the following duties to the Indian Trust:

- a. Duty of loyalty and candor

- b. Duty to Keep and Render Accounts
- c. Duty to Exercise Reasonable Care and Skill
- d. Duty to Administer the Trust
- e. Duty not to Delegate (this does not negatively impact compacting or contracting.)
- f. Duty to Furnish Information
- g. Duty to Take & Keep Control
- h. Duty to Preserve the Trust Property
- i. Duty to Enforce Claims and Defend Actions
- j. Duty to Keep Trust Property Separate
- k. Duty with Respect to Bank Deposits
- l. Duty to Make Trust Property Productive
- m. Duty to Pay Income to Beneficiaries
- n. Duty to Deal Impartially with Beneficiaries
- o. Duty with Respect to Co-Trustees
- p. Duty with Respect to Persons Holding Power of Control

RATIONALE – None.

ITMA BILL – *The draft bill includes provisions which enumerated specific standards and duties similar to the ones listed by the workgroup. One key difference is that while the workgroup principle specifies that these duties apply to the “Indian Trust,” the draft bill more clearly specifies that these duties are owed to Indian Tribes and individual Indian beneficiaries in the management of trust funds and assets. The draft bill also addresses as separate sections, (a) General Standards for administering Indian Trust Funds and Assets, (b) Specific Duties of the Secretary of the Interior when Administering or Managing Trust Funds and (b) Specific duties relating to management of trust resources and fund generating resources.*

5. PRINCIPLE (18) - The legislation should state that in the absence of more specific statutory law or specific agreements between the trustee and the beneficiary, common law duties shall govern the administration of the trust.

RATIONALE - The law on trusts applies to the management of trust assets for Indian beneficiaries. The legislation should clearly state this so that the Department of Interior knows the scope of its duties in administering the trust for Indian beneficiaries.

ITMA BILL – *The subject of inclusion of common law was highly debated in the development of the draft bill. Many expressed the need not to incorporate, by reference or generally, common law standards or duties because in certain circumstances, general common law standards or duties, could interfere with Tribal governance. Instead, the draft bill not only specifies duties with respect to resources and asset management, but also includes provisions that require the Secretary to carry out trust management duties in a manner that:*

- (A)*** *Promotes the interest of the beneficial owner except where inconsistent with tribal law;*
- (B)*** *Supports, to the maximum extent practicable the beneficial owner's intended use of the assets;*
- (C)*** *Complies with applicable law including the laws of the Tribe having jurisdiction over a trust asset; and*

(D) Promotes and protects tribal control, governance, and self-determination over trust assets of tribes and individual Indians.

6. PRINCIPLE (19) - The legislation should reaffirm that Indian beneficiaries have a cause of action in federal courts for breach of fiduciary duties and granting of equitable and legal relief.

RATIONALE - The Department of Interior is the trustee of lands, natural resources, and trust funds for Tribes and individual Indians. These beneficiaries must have the right to redress if the trustee fails to meet its trust duties.

ITMA BILL - *The draft bill does not include a private right of action for trust fund and asset mismanagement. As more fully described below, the draft bill included provisions establishing an oversight body to oversee federal administration and management of the Indian trust, and has built in-measures to apply as much pressure and accountability to compel the Department to comply with the fiduciary management standards and duties specified in the draft bill.*

7. PRINCIPLE (20) - An independent Executive Branch entity is needed to provide oversight and enforcement authority for federal trust administration.

RATIONALE - The Department is engaged in trust management of assets and resources. Consequently, the Department is subject to strict fiduciary standards just as any private trustee is subject to such standards. Private trustees are subject to State and/or Federal regulation. The reasoning giving rise to government oversight of private trustees also applies to the Department in exercising its trust asset/resource management duties. There is an inherent conflict in self-regulation. Thus, an independent entity with oversight and enforcement authority over the Department of Interior is needed.

ITMA BILL – *The draft bill includes a section establishing the “Commission for Oversight of the Administration of the Indian Trust” for the purpose of overseeing the Federal Government’s administration of the Indian trust funds and assets. The draft bill places the Commission in the Executive Branch and provides for a the President to appoint with the consent of Congress a membership of five full-time members, who shall serve on a full-time basis, including a Chairperson and four associate members. With respect to enforcement authority, the draft bill empowers the Commission to conduct audits, engage in fact-finding, issue recommendations to the Secretary and Congress, and oversee the Department’s budget, all for the purpose of compelling the Secretary’s compliance with the strict fiduciary standards and duties in the bill. In the exercise of its fact-finding powers, the draft bill authorizes the Commission to make recommendations to the Department, and to inform the Inspector General any evidence of federal nonfeasance or malfeasance.*

8. PRINCIPLE (21) - The independent Executive Branch entity should not diminish the inherent sovereign authority of tribal governments to make their own laws, nor should it interfere with tribal management of tribal land and other tribal resources where Tribes assume these responsibilities through self-determination contracting or compacting.

RATIONALE - There is some concern that an independent entity could impact a Tribe’s ability to make their own laws and be governed by them. Specifically, Tribes are concerned that an

independent entity could impact a Tribe's ability to enact land use laws. Management of trust assets/resources should be executed in conformance with tribal laws.

ITMA BILL - *Nothing in the draft bill's provisions relating to the oversight Commission would authorize or relinquish any powers or authorities of Tribes. However, the draft bill built in tribal input into the Commission composition by requiring that at least three members shall be enrolled Tribal members who must have significant experience in trust management, financial and fiduciary investment management, as well as Federal Indian Law and policy*

9. PRINCIPLE (22) - The legislation should prohibit the independent Executive Branch entity from engaging in any trust management functions.

RATIONALE - The historical function of the BIA is trust asset/resource management. Any entity that oversees trust management cannot actively manage the trust as this would also create a conflict of interest. An independent entity's functions must be limited to oversight and enforcement functions.

ITMA BILL - *The provisions in the draft bill limit the Commission's functions to those that are purely oversight in nature and which are intended to compel the Department's adherence to strict fiduciary standards in its management of trust funds and assets.*

10. PRINCIPLE (23) - The legislation should require that the independent entity be separate from the Department of the Interior and not under its control.

RATIONALE - Again, a trustee cannot regulate itself. This also means that a sub-entity of the Department cannot regulate the Department. An independent regulatory entity necessarily means complete autonomy from the Department.

ITMA BILL - *The draft bill establishes the Commission as an independent body separate from the Department and its trust management structure. While the Department has a seat on the Commission, its members are subject to the removal only by the President for neglect of duty, malfeasance in office or for other good cause shown.*

11. PRINCIPLE (24) - The legislation should charge the independent entity with ensuring that proper audits are conducted in accordance with generally accepted auditing standards. The independent entity should then be required to review the audits and ensure that corrective measures are taken.

RATIONALE - Audits ensure that trusts are properly managed and that accounts are accurate. When the audit reveals that the accounts are not accurate or that they have not been properly managed, then corrective measures can and should be taken. The trust managed by the Department of Interior should be subject to the same scrutiny as private trust which is subject to regulatory audits.

ITMA BILL - *The draft bill includes the following audit review provision:*

The Commission shall receive and review any audit or review completed by the Department or the Inspector General relating to Indian trust funds. The Commission shall provide recommendations to the Deputy Secretary on appropriate actions, if any, that should be taken in response to the audit or

review. Further, the Commission may request the Inspector General or the General Accounting Office to examine any audits or reviews regarding the Indian Trust completed by the Department. Further, the Commission shall inform the affected Tribe regarding any evidence of nonfeasance or malfeasance discovered by the Commission.

The draft bill also empowers the Commission to monitor the Department's compliance within applicable regulations required by this bill, and to take "any corrective actions agreed to by the Secretary." Moreover, the draft bill directs the Commission to "review any annual performance audit prepared with respect to the Indian trust fund management functions of the Department." Finally, the draft bill authorizes the Commission to "review the annual budget proposal of the Department and report to the Congress as to the adequacy of resources requested to manage the Indian trust in accordance with the standards adopted in this Act.

12. PRINCIPLE (25) - The legislation should require the independent entity to be governed by presidential appointees for five year terms from a list of nominated candidates.

RATIONALE - Five year terms signal that the appointee is not necessarily beholden to the President that appointed him/her.

ITMA BILL - *The draft bill sets forth provisions relating to the Commission's membership, qualifications, removal and vacancy processes, as well as the initial and permanent terms and duration of for its membership. Accordingly, the draft bill specifies that the term of office of the members shall be three years, and of the initial members, two members, including the Chairperson, shall have a term of office of three years; two members shall have a term of office of two years; and one member shall have a term of office of one year. These provisions were modeled on the statutory establishment of the National Indian Gaming Commission.*

13. PRINCIPLE (26) - Legislation should create the permanent position of the Deputy Secretary to be responsible for Indian Affairs including the management and administration of the Indian trust. The trust functions of BLM, OTFM, MMS, and other federal agencies with fiduciary responsibilities within Interior should also come under the jurisdiction of the Deputy Secretary.

RATIONALE - There has been widespread support among Tribes and the Department on the creation of a Deputy Secretary of Interior for Indian Affairs. A similar proposal for a Deputy Secretary is included in S. 1459. The creation of this position would address a major issue that has been raised in every significant study of trust management at Interior, including the EDS Report and by the Cobell court: the lack of clear lines of authority and responsibility within the Department to ensure accountability for trust reform efforts by the various divisions of the Department of Interior. The two major entities responsible for trust assets and accounting are the Bureau of Indian Affairs and the Office of Special Trustee. The lines of authority, responsibility and communication between these two entities have been uncertain and at times have come into direct conflict. In addition, the Minerals Management Service, the Bureau of Land Management, and the U.S. Geological Service all play important roles in trust management, and various responsibilities are spread throughout the Office of Hearings and Appeals, the Office of American Indian Trust, and the Office of Historical Accounting. Nearly every agency in the Department of Interior has some significant trust responsibilities. At this

time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies. This absence has particularly hurt the progress of those issues that cut across agencies, such as the development of a system architecture that integrates trust funds accounting with the land and asset management systems of the BIA, BLM and MMS (as required by the 1994 Act).

ITMA BILL - *The draft bill includes a section that would establish an Office of the Deputy Secretary for Indian Affairs in the Department of the Interior, intended to create a direct line of authority to oversee and coordinate trust management reforms, and to ensure that management reforms are implemented across all agencies of the federal government that carry out trust management duties. The draft bill specifically delineates the duties of the Deputy Secretary.*

14. PRINCIPLE (27) - Legislation should require that tribal leaders be consulted with respect to the appointment of the Deputy Secretary and Indian preference shall apply to the Office of the Deputy Secretary.

RATIONALE - The appointment of a Deputy Secretary that knows Indian Country and its issues is critical to gaining the respect and confidence of tribal leaders. Tribal leaders know who is knowledgeable in regard to issues faced by Indian country and could provide necessary expertise and insight concerning potential candidates for the position. Indian preference requirements have been intentionally avoided by the Office of the Special Trustee. Tribal leaders believe that OST has violated Indian preference by failing to abide by it in employment and contracting. Thus, the legislation should remove all doubt about the applicability of Indian preference to this office by expressly stating that it applies.

ITMA BILL - *The draft bill includes provisions establishing within the Department the position of Deputy Secretary for Indian Affairs who shall report directly to the Secretary, and further providing that the Deputy Secretary shall be appointed by the President, by and with the advice and consent of the Senate. The draft bill does not include language requiring tribal consultation. This particular issue was highly debated both by the joint task force and during the Tribal Leaders' discussions. Because this appeared to be one of the issues the Department had taken a hard line opposition position to based on constitutional grounds (to the point of suggesting the threat of presidential veto), no language was incorporated that would qualify the President's appointment of this Deputy Secretary.*

15. PRINCIPLE (28) - The legislation should expressly state that the Deputy Secretary shall have the primary duty to fulfill the fiduciary duties of the Secretary of the Interior and protect the interests of Indian beneficiaries including the authority to employ independent trust counsel to advise on ensuring compliance with trust duties.

RATIONALE - The legislation should expressly state this to make it clear that the Deputy Secretary's primary duty is to protect the trust of the Indian beneficiaries. Independent trust counsel is necessary so that the Deputy Secretary can consult counsel for the trust in regard to the Deputy Secretary's duty to the trust. Independent trust counsel would be especially helpful to advise the Deputy Secretary when he or she has competing duties that conflict with his or her trust duties

ITMA BILL – One of the key stated purposes of the draft bill’s establishment of the Office of Deputy Secretary for Indian affairs is “to ensure the implementation of all Indian trust-related reforms necessary for the proper discharge of the Secretary’s trust responsibilities and duties to Indian tribes and individual Indians.” The draft bill’s enumeration of duties inure to the benefit of Tribal and individual interests. However, there is no specific language that expressly states that the Deputy Secretary’s primary duty is to protect the trust of the Indian beneficiaries. With respect to independent counsel to advise the Deputy Secretary, the draft bill includes language that requires the Deputy Secretary in any “legal proceeding” where the United States and a Tribe or individual Indian beneficiary are opposing parties, to initiate the drafting of a memorandum of law which makes the strongest legal argument on behalf of the Tribe or the individual Indian beneficiary which shall be available to the United States and the opposing party litigant.” This provision was intended to address the Secretary’s competing duties that may create a conflict with the discharge of her trust duties owed to Indian trust beneficiaries. This provision was based on the Nixon Administration’s 1970 proposal to create an Indian Solicitor’s Commission.

16. PRINCIPLE (29) - The independent entity should assume the oversight responsibilities of the OST and the Deputy Secretary should assume OST management and administrative responsibilities. Legislation should sunset the Office of the Special Trustee.

RATIONALE - The eventual elimination of OST is necessary for the efficient and productive management of trust assets. OST was never created to manage trust assets but to simply “oversee” the management of trust assets. Thus, the duty to manage trust assets should be transferred back under the Deputy Secretary and the independent entity would be charged with the responsibility of overseeing the management of the trust by the Deputy Secretary.

ITMA BILL – The draft bill’s provisions establishing the Office of Deputy Secretary for Indian Affairs supersedes congressional establishment of OST thereby effectively eliminating and folding its functions into this new office.

17. PRINCIPLE (30) - The legislation should not diminish the rights and responsibilities set forth in the Indian Self-Determination Act.

RATIONALE - Pursuant to the Indian Self-Determination Act, the United States cannot diminish its trust responsibilities to Tribes and individual Indians. This includes tribal management of trust assets.

ITMA BILL – The draft bill includes express provisions authorizing Tribes to use the authority granted under the Indian Self-Determination and Education Assistance Act to manage Indian trust funds and trust assets without terminating the trust responsibility of the Secretary or the trust status of funds and assets.

18. PRINCIPLE (31) - With respect to federal laws relating to use or management of tribal trust assets, legislation should permit and support the development of tribal, reservation-specific plans that provide specific standards for management of tribal trust resources.

RATIONALE - As mentioned above, the National Indian Forest Resources Management Act and the American Indian Agricultural Resources Management Act address tribal management of these resources. The modern federal policy of tribal self-determination supports Tribes having greater authority to manage their tribal trust assets.

ITMA BILL – In addition to the draft bill’s framework authorizing Tribes to use self-determination contracting and compacting authority as a flexible means to develop reservation specific plans that address a Tribe’s unique needs, there is language throughout the draft bill that contemplate the utilization of resource specific trust management standards and plans.

19. PRINCIPLE (32) - Legislation should protect the sovereign authorities and reserved rights of Tribes to regulate the lands within their jurisdictions.

RATIONALE - In addition to federal laws that specifically provide for tribal management of trust assets, Congress should respect the sovereignty and reserved rights when considering the scope of legislation.

ITMA BILL – The overriding intent and policy of the draft legislation is the protection and promotion of Tribal Sovereignty. Throughout the bill, from its central purpose to the findings, enumeration of fiduciary standards and execution of specific trust management duties, the draft bill was carefully tailored to protect the sovereign autonomy of Tribes over their lands and resources. The draft bill does not have an express clause relating to the “reserved rights” of Tribes to regulate the lands within their jurisdictions.

20. PRINCIPLE (33) - Legislation should support government-to-government agreements between a Tribe and the United States for management of all trust resources within the Tribe’s jurisdiction, provided that the agreements ensure processes and remedies to protect the interests of allottees, including allottees of other Tribes.

RATIONALE - Tribes should have expanded opportunities to manage assets in Self-Determination contracts and compacts.

ITMA BILL - The draft bill employs self-determination contracting and compacting as the primary avenue for government-to-government agreements between a Tribe and the United States for management of all trust resources within the Tribe’s jurisdiction. The draft bill does not include provisions that specify processes and remedies available to allottees and enforceable against a Tribe.

21. PRINCIPLE (34) - Irrespective of what entity is administering individual Indian trust assets, the same duties and standards of conduct apply. Notwithstanding, Tribes involved in self-determination or self-governance management and administration can utilize alternative means to carry out fiduciary duties so long as they meet the generally applicable standards.

RATIONALE - The rights of individual Indians to the highest standards of trust administration should not change, regardless of what entity is administering them.

ITMA BILL - With respect to the administration of trust funds, the draft bill imposes exacting fiduciary standards intended to be applicable to the federal management of trust funds or to tribal management under self-determination contracting or compacting.

22. PRINCIPLE (35) - Legislation should ensure that individual allottees can bring claims for failure to discharge fiduciary duties in managing individual trust assets.

RATIONALE - The management of individual trust assets must be enforceable in court where mismanagement of those assets occurs.

ITMA BILL - *As stated above, the draft bill does not include provisions creating a private right of action against the federal government, nor does it include language that would expressly authorize legal actions against directly against Tribes for trust or asset mismanagement. This issue was strenuously opposed by the Department whose officials maintained that until the trust systems were appropriately fixed, the Administration could not subject agree to express liability. The draft bill's focus is the comprehensive institution of technical and legal reforms to fix the broken trust systems.*

V. TRUST REFORM LEGISLATION IN THE 109TH CONGRESS

Today, Senator McCain introduced S. 1439, the Indian Trust Reform Act of 2005, which includes the following Titles:

- Title I. Settlement of Litigation Claims – including Provisions for the Osage Nation
- Title II. Indian Trust Asset Management Policy Review Commission
- Title III. Indian Trust Asset Management Demonstration Project Act
- Title IV. Fractional Interest Purchase and Consolidation Program
- Title V. Restructuring Bureau of Indian Affairs and Office of Special Trustee
- Title VI. Audit of Indian Trust Funds

Of notable differences in S. 1439 relative to the work of the ITMA draft bill, are provisions in Title III which would significantly limit tribal participation in the trust asset management framework. In particular, S. 1439 would permit a maximum of 30 Tribes to be eligible and to participate in the Indian Trust Asset Management Demonstration Project, and only for an 8 year period. This is a major departure from both the ITMA draft bill and from McCain's own prior legislation (S. 175), and will likely be of considerable concern to many Tribes.

The structure of Title III's approval process was likely influenced by the framework on the Tribal Energy Resources Agreements in the Indian Energy Title, in terms of S. 1439's provisions establishing the selection and notice criteria for selection of participating Tribes, crafting timeframes for application submissions and procedures for acknowledging or appealing departmental approval or disapproval decisions on the applications, and the inclusion of procedures to terminate the plan. Other than language that provides interested Tribes to obtain from the Department technical assistance in the preparation of their applications, it's hard to discern without a more thorough analysis or understanding of the possible rationale or incentives encouraging a Tribe to participate in the program.

For those Tribes that decide to make prepare and application to participate in the program, the bill requires that they follow an application and review process to demonstrate that their Tribal management plan meets five (5) substantive requirements set forth in the act, including:

- Identification of the trust assets subject to the plan, including financial and non-financial trust assets.
- Establishment of trust asset management objectives and priorities for Indian trust assets located within the reservation, or subject to the Tribe's jurisdiction.

- Disclosure of both the availability of funding and how specific funds will be allocated to meet the trust asset management objectives and priorities in the Tribe's plan.
- In situations where the Tribe has contracted or compacted functions under the Indian Self-Determination and Education Assistance Act relating to the management of trust assets, the Tribe's plan must also (i) identify the functions or activities that the Tribe is performing under the contracts or compacts; and (ii) describe the proposed management systems, practices, and procedures that the Tribe will follow. AND
- Establishment of procedures for nonbinding mediation or resolution of any dispute between the Tribe and the United States relating to the trust asset management plan.

In addition to these requirements, a participating Tribe must also ensure that its plan is not inconsistent with any of the act's provisions which detail "applicable laws, standards; trust responsibility" – thereby effectively requiring that the Tribe's plan comply with or include all of the following:

- A citation to 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.
- A citation to 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 above.
- Certification by the Secretary that the Tribe's plan will--
 - (i) Protect the trust assets from loss, waste, and unlawful alienation.
 - (ii) Promote the interests of the beneficial owner of the trust asset.
 - (iii) 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 cited in the plan.
 - (iv) Protect any applicable treaty-based fishing, hunting and gathering, and similar rights relating to the use, access, or enjoyment of a trust asset. And
 - (v) 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. And
- Determination by the Secretary that the Tribe's plan is consistent with the trust responsibility of the United States to the Tribe and individual Indians.

Even if a Tribe meets the above requirements and satisfies specific compliance with applicable laws, trust standards and the trust responsibility, a Tribe's plan could nevertheless be subject to disapproval if the Secretary determines that 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."

Finally, the bill's Tribal asset management plan provisions also include a number of broad savings clauses regarding:

- **Liability** - *"nothing in this title, or a trust asset management plan ... 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."*
- **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." And*
- **Trust Responsibility** - *"nothing in this title diminishes or otherwise affects the trust responsibility of the United States to Indian tribes and individual Indians."*

When read in its entirety, the legislation provides no tangible benefits for the Tribe to participate in the Tribal asset management program assuming a Tribe would be willing to expend the time, energy and resources to develop a plan and comply with the approval procedures and requirements.

The bill's only express incentive would be limited to Tribes that have already compacted or contracted activities or functions under the Indian Self-Determination and Education Assistance Act. Accordingly, the bill provides that these Tribes "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 specified in the bill." However, given the broad savings clauses, the legislation's framework for Tribal management plans do not confirm or expand a Tribe's authority to regulate within its territory.

Clearly, the bill was not drafted to address the delicate jurisdictional concerns over non-members and on fee lands within a Tribe's reservation or territory. Assuming that the bill had contained these types of sovereignty protection measures, it could be expected that a Tribe would be willing to expend the time and resources to participate in this program. However, because the bill's Tribal trust asset management plan framework would subject Tribes to additional, expensive and burdensome processes for Tribal management of trust assets, it's difficult to determine what additional benefits a participating Tribe would gain under this title that it doesn't already have under Indian Self-Determination and Education Assistance Act or pursuant to its existing inherent sovereign authority.

Another significant departure from McCain's trust reform legislation in the 108th Congress is the establishment of an Office of Under Secretary in Title V. McCain had previously advocated for the establishment of an Office of Deputy Secretary and ITMA's draft bill supported this concept. The reorganization provisions in s. 1439 contemplate that the current Assistant Secretary for Indian Affairs would assume the Under Secretary post. The provisions in Title V also authorize the Under Secretary to supervise Indian affairs related activities across affected Interior's offices

and bureaus, and require tribal consultation.

The bill effectively terminates the Office of Special Trustee as of December 31, 2008, and sets forth a process for the transfer of OST functions (not completed) to the Under Secretary. The bill also includes provisions to assist the Under Secretary in this transition process. The bill has an express provision requiring the Under Secretary to apply Indian preference in the appointment or hiring of employees, a requirement broadly supported by Tribes.

Of notable absence, however, is the inclusion of trust standards to govern the Department's management and administration of the Indian trust. Instead, the bill imposes the following general duties on the Under Secretary:

- To manage and administer Indian trust resources in accordance with any applicable federal law;
- To take steps to protect the security of data relating to Individual Indian and Indian Tribal Trust Accounts; and
- To take any other measure the Under Secretary determines to be necessary with respect to Indian affairs.

These requirements appear to be significantly "lean" compared to the specific requirements and standards, including a determination that the availability and sufficiency of funds, that a Tribe would have to meet under the bill's Tribal asset management section. At a minimum, the bill should also subject the Department to the same requirements, duties, standards and certifications, especially in light of the fact that the whole trust reform movement is for the purposes of address the historic and ongoing federal mismanagement of the Indian Trust.

VI. CONCLUSION

The observations in this memorandum are preliminary and are specific to provisions relating to the ITMA draft bill and are not intended to form a position on the legislation recently introduced. ITMA and others will need to fully analyze and carefully consider all of the provisions in this bill, and secure additional input and recommendations from Tribal Leaders.

One of the purposes of this memorandum is to document ITMA's recent efforts in the trust reform arena. Clearly, ITMA has been and continues to be at the forefront of these very challenging, complex and politically delicate issues.