INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

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TESTIMONY

OF THE

INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

BY

THE HONORABLE CHIEF JIM GRAY, CHAIRMAN, ITMA

on S. 1439 'Indian Trust Reform Act of 2005'

before the
Senate Committee on Indian Affairs
Oversight Hearing

July 26, 2005

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following 63 federally recognized tribes: **Absentee Shawnee Tribe, Alabama Quassarte Tribe, Blackfeet Tribe, Central Council of Tlingit & Haida Indian Tribes of Alaska, Chehalis Tribe, Cherokee Nation of Oklahoma, Cheyenne River Sioux Tribe, Chippewa Cree Tribe of Rocky Boy Reservation, Coeur D'Alene Tribe, Confederated Salish & Kootenai Tribes, Confederated Tribes of Colville, Confederated Tribes of Warm Springs, Confederated Tribes of Umatilla, Crow Tribe, Eastern Shoshone Tribe, Ewiiaapaayp Band of Kumeyaay Indians, Fallon Paiute-Shoshone Tribe, Forest County Potawatomi Tribe, Fort Belknap Tribes, Fort Bidwell Indian Community, Fort Peck Tribes, Grand Portage Tribe, Hoopa Valley Tribe, Hopi Nation, Iowa Tribe, Jicarilla Apache Nation, Kaw Nation, Kiowa Tribe, Kenaitze Indian Tribe, Lac Vieux Desert Tribe, Leech Lake Band, Mescalero Apache Tribe, Metlakatla Tribe, Muscogee Creek Nation, Nez Perce Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Ojibwe Indian Tribe, Oneida Tribe of Wisconsin, Osage Tribe, Walker River Paiute Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Picuris, Pueblo of Sandia, Quapaw Tribe, Quinault Indian Tribe, Red Lake Band of Chippewa Indians, Salt River Pima-Maricopa Indian Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Shoshone-Bannock Tribes, Sisseton-Wahpeton Oyate Tribes, Soboba Band of Luiseno Indians, Southern Ute Tribe, Thlopthlocco Tribal Town, Three Affiliated Tribes of Fort Berthold, Tohono O'odham Nation, Turtle Mountain Band of Chippewa, Walker River Paiute Tribe, Winnebago Tribe of Wisconsin, and the Yurok Tribe.**

S. 1439 represents the first and perhaps the only opportunity to settle *Cobell v. Norton* ("*Cobell*") through discussions between trust beneficiaries and the United States Congress, the entity that established the trust and which has plenary, but not unlimited authority to establish the terms of the trust. One of the most positive aspects of this significant legislation is the simple fact that it has been introduced and by whom. As a bi-partisan effort to construct a settlement, the Chairman and Vice-chairman of the Senate Committee Indian Affairs Committee ("SCIA" or "Committee") have demonstrated true political courage and leadership in crafting a bill to address this bitterly controversial issue and the sponsors of S. 1439 deserve thanks and appreciation for this bold step.

ITMA recognizes that a number of the provisions of S. 1439 come directly from the Principles for Legislation ("50 Principles") established by the Trust Reform and *Cobell* Settlement Workgroup ("Workgroup"). These include:

* Obtaining the funding for the settlement from non-programmatic sources, specifically the Judgment Fund;

* Recognition that an adequate accounting in conformity with trust law cannot be performed by the government;

* Recognition that compensation to individual Indian trust beneficiaries should not be applied to determine eligibility for federal programs such as Social Security, Medicaid and Medicare;

* Establishment of a sunset for the Office of Special Trustee ("OST").

Before addressing the specific provisions of the bill, ITMA wishes to commend the Chairman and Vice-Chairman of the Committee for making the Majority and Minority General Counsel available to ITMA throughout the drafting of the Principles developed by the National Trust Reform Workgroup, as well as during our ITMA Member Meeting held in Denver the same week as this hearing. The information provided by these senior members of the Committee's staff addressed a number of questions about how certain provisions of the bill were drafted. This provided those attending the meeting with the opportunity to begin a dialogue with the Committee's staff on these complicated issues.

I. *Cobell* Settlement

Establishing an adequate range for the cost of a settlement

While S. 1439 recognizes that a *Cobell* settlement will involve billions of dollars, the bill stops short of embracing the Workgroup-derived settlement figure of $27.455 billion. ITMA believes that the government has a strong incentive to "lowball" the cost of a settlement before this Committee while using higher estimates of the ongoing costs and contingent liability of this case before other Congressional institutions. By adopting the Workgroup-sponsored settlement figure, the sponsors can send a loud and clear message that the current Administration needs to begin considering and discussing a settlement amount that will be acceptable to Indian Country.

At the same time, ITMA recognizes that we must develop together a model to determine how much to compensate the victims of this injustice. We greatly appreciate the sponsors' recognition that a settlement must be measured in the billions. We must now work on how to develop a rationale for a more specific number. In this process, we must bear in mind that the insurmountable burden of accurately measuring the precise amount of compensation is due completely to the federal government's mismanagement of its own records. In light of this, we believe that it may be worthwhile to work with Committee staff to develop some **models** for calculating a fair and equitable settlement figure. ITMA would be happy to work with the Committee in exploring various models that might be useful in this regard.

Previous Congressional effort to settle *Cobell*

One earlier Congressional effort to settle the *Cobell* case[1] failed spectacularly, in large part because that effort merely adopted the position of one of the parties and attempted to enact it without benefit of hearings or opportunity to be heard by the other party, or by anyone whose rights would have been affected. That effort deserves some attention, both because it reflects the Administration's proposed settlement methodology and because it represents the ease with which the Congress could be misled if the

[1] H.R. 2691, Section 137 (108th Cong., 1st Sess.) (House appropriations bill for Interior and Related Agencies for FY 2004).

committees of jurisdiction are not permitted to exercise the oversight role that the rules of Congress contemplate for them.[2]

H.R. 2691 would have required the Secretary to conduct a "statistical sampling evaluation" of IIM accounts, making such judgments as to feasibility and appropriateness as she deemed appropriate, to determine "the rate of past accounting error," with a 98% confidence level.[3] The Secretary would then make "adjustment" to IIM accounts by applying the calculated "error rate" to "to the average transaction amount for transactions in an account."[4] This approach would have the effect of enacting into law the plan submitted to Congress by the Interior Department on July 2, 2002.[5] This approach has a certain off-handed ring of reasonableness (statistical sampling), validation (98% confidence level), and fairness (apply the error rate to whatever the average transaction amount, whatever it is).

These facile assumptions, however, mask significant flaws in the approach that are neither examined nor disclosed. First, the approach specified in the bill and in the Department's proposal would exclude from the sampling all special deposit, judgment, and per capita accounts.[6] Money in these accounts represented more than one-half the entire IIM portfolio.[7] And money in those accounts, likely most of it in fact, does belong to account holders. Statistical sampling of a judgment sample of less than one-half the portfolio is simply not an appropriate method of estimating losses from the portfolio as a whole.

Secondly, this approach would have the effect of applying a factor determined by the mere incidence of clerical or computational error to make restitution, without regard to the magnitude of those errors. There is no rational relation between these two elements, even for the sampled accounts. Suppose, for example, that a sample account contains

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[2] Indian country has been cautioned, if the current legislative effort represented by S.1439 is not successful, that the appropriations committees will likely work changes in the law governing the *Cobell* case. That is precisely what H.R. 2691, *id.,* proposed to do, notwithstanding House Rule XXI(2)(b) that provides, "A provision changing existing law may not be reported in a general appropriation bill, … except germane provisions that retrench expenditures … and except rescissions"

[3] H.R. 2691, *n.*19, *supra,* Section 137 (b), p. 85.

[4] *Id.*, section 137(d)(1), p. 86.

[5] DEPARTMENT OF THE INTERIOR, REPORT TO CONGRESS ON THE HISTORICAL ACCOUNTING OF INDIVIDUAL INDIAN MONEY ACCOUNTS, prepared Pursuant to Conference Report 107-234 (July 2002).

[6] H.R. 2691, *n.* 19, *supra,* Section 137(k), p. 89.

[7] As of December 31, 2000, $69.5 million were contained in 9,013 per capita accounts; 33,205 judgment accounts contained $80.8 million; and special deposit accounts contained $67.9 million. The total amount of all IIM accounts was reported as $416.2 million. DEPARTMENT OF INTERIOR REPORT, *n.5, supra,* at A-10.

100 transactions with an average transaction amount of $40 for the period reviewed, and two "accounting errors" representing a combined dollar loss of $1,000 to the account. The "rate of past accounting error" would be two one-hundredths, or 2%. Applying the "error rate" of 2% to the average transaction amount of $40 would result in an adjustment of eighty cents ($.80) to the account against a *known* loss of $1,000.00. This account would be settled for .00008 cents on the dollar, or less than one one-hundredth of a penny on the dollar.

For these reasons, ITMA has insisted that every proposal for settlement of the accounts at issue in the *Cobell* case should be transparent, with an opportunity for full examination of underlying assumptions. The Department has attempted to foist onto tribal and individual account holders the use of "statistical sampling" and resulting "error rates" for more than ten years.[8] In its deliberations, the Congress must not allow sheer repetition to become accepted wisdom. In particular, Congress must not be misled into accepting "statistical significance" as a reflection of "economic significance."

<u>Establishing a settlement distribution framework</u>

In this area S. 1439 includes provisions that are not consistent with the Principles. The discussion in Denver on July 28, 2005 included a very candid discussion about the factors that were taken into account as this section was drafted. For example, any settlement legislation that will be enacted into law must take a wide range of congressional views into consideration and appeal to a broad cross-section of Congress. It is at least arguable that a majority of Congress might not support a bill that simply appropriated funds into a court registry with no guidance as to their disposition. At the Denver meeting the respective SCIA general counsel's seemed receptive to the idea that the Chairman and Vice-Chairman were not completely opposed to considering a more "judicial-centric" distribution mechanism. In the final analysis, it will be important that the distribution scheme enjoy the confidence of affected parties. That confidence will be in direct proportion to the clarity and specificity for payment contained in the statute.

[8] *See,* SWIMMER, ROSS, "… if the projected error rate holds, the accounting errors are likely to be bar less than the billions suggested by the plaintiffs." TULSA WORLD (July 17, 2005, p. G-2).

Establishing an allocation methodology

The more clarity Congress can provide about how settlement funds will be distributed, the more amenable Indian Country may be to alternatives to the simple process of depositing the settlement funds in the court registry. As introduced, S. 1439 provides too great a degree of discretion to the proposed Special Master. Even if there were widespread agreement about the proposed formulation of the office of the Special Master, which there is not, there would still be widespread unease about the factors the Special Master can or will take into consideration in allocating settlement funds. ITMA believes this question is best addressed in legislation. Unquestionably, a great deal of work must be done to craft clear standards for the distributing entity to follow. History shows that such an effort will yield substantial rewards by minimizing unproductive disputes between the intended beneficiaries of the settlement fund and the entity charged with its distribution.

Attorney's Fees

The framework for compensating attorneys does not reflect the common practice for compensated counsel in similar class action cases. This case has certainly seen more than its share of controversy. In the end, even representatives of the Department of Interior have acknowledged that the suit has focused attention on an often-ignored part of America's responsibility as a trustee. However Congress should eventually decide to treat the matter of attorneys' fees, the method should be fully transparent so that all members of the class, the government, and the Congress are fully aware of the methodology put forth. ITMA understands that plaintiffs agreed during the hearing to provide the Committee with further information on the contractual arrangements between the attorneys and the class representatives of the beneficiary class.

Share determination and disqualification

Additional clarity is necessary to remove any question that a mere dispute over "share determination" under section 105 of S. 1439 will not disqualify an individual from participating in the distribution under section 104. This is the apparent inference to be drawn from this section because it does not specifically state that a dispute will lead to disqualification, as is provided in sections 106 and 107. If this is the intent of S. 1439, additional clarity should not present a difficulty.

II. Trust Reform

Trust principles

The Indian Trust Management Policy Review Commission proposed by S. 1439 could provide a means for bringing trust management closer to compliance with the trust principles described in our recommended Principles. ITMA notes with dismay, however, that any such benefits to trust reform will not occur until several years into the future. This fact is in stark contrast with the admonition received from the Committee earlier in the year that neither *Cobell* settlement nor trust reform could proceed unless both proceeded in tandem. The approach in S.1439 as written puts real trust reform off until after this Congress adjourns. In addition, ITMA strongly recommends that the bill direct the Commission to analyze the Department's current policies and practices in light of the trust standards included in the 50 Principles we have proposed. At a minimum, these principles provide a starting point for developing an appropriate basis for meeting the government's high trust management responsibility.

Trust Management Demonstration Project ("Demonstration Project")

This section of S. 1439 represents a recognition of some of the 50 Principles. Several changes to this provision can and should be included immediately. Other changes can be addressed after further discussions with stakeholders, including the Department of Interior. Immediate changes include amendments to clarify the right and the means for "direct service" tribes to participate in the Demonstration Project. Additional discussions may be necessary to address several additional items including the need to ensure that the interests of beneficial owners of trust resources will be taken into account under both the development of and implementation of an Indian Trust Asset Management Plan. ITMA also encourages Committee staff to work with the Department to find ways to create additional incentives for Indian tribes to participate in this project.

III. Land Consolidation

ITMA recognizes the need for affirmative steps to be taken to reduce fractionated ownership of allotted lands. In the past the Committee has worked hard to focus

legislation on the highly fractionated parcels of land. Individuals should also be provided the opportunity to participate in the consolidation program.

IV. Restructuring the Bureau of Indian Affairs ("BIA") and Office of Special Trustee ("OST")

Simply moving the current functions of OST into another newly created office, however, raises the question of elevating form over substance. The creation of an Under Secretary position should improve the coordination of federal policies throughout the Department of Interior. ITMA would like to work with the Committee to ensure that the Under Secretary has the authority to fulfill the federal government's trust obligation without being saddled with actual operation of the functions that officer is charged with overseeing, as is the situation with the current OST. The recognition of this trust responsibility underscores the legitimacy of every interaction between the federal government and Indian tribes and their members. These and other provisions demonstrate that this bill is concerned with both settling the past and taking steps to fix the future.

V. Annual Audit

ITMA strongly agrees with the need to upgrade and formalize the internal controls and audits of trust resources. The audit requirement provides an important starting point for providing Indian trust beneficiaries with additional confidence that federal management of trust resources will improve. Placing audit responsibility with an arm of Congress, the settlor of the trust and overseer of trustee performance, is a highly appropriate first step in developing that confidence.

Funding for this function should not be derived from either trust resources or programmatic funds. In addition, ITMA does not believe that any funding for trust functions can or should be derived from trust assets or proceeds until such time as Congress is satisfied that any such charges are reasonable, equitable, accountable, and fully understood by the beneficiaries, such as Congress has taken pains to ensure with the administrative fees charged to timber sale operations. This concern has implications for administrative fees, irrigation charges, and rents derived from land consolidation purchases. ITMA looks forward to an opportunity to make sure the Committee is adequately briefed on our concerns in this matter.

Conclusion

ITMA looks forward to developing a legislative proposal that can be supported by Indian Country. S. 1439 is not yet at that point. As both of the bill's sponsors made clear when introducing S. 1439, neither the Chairman nor Vice-Chairman assumed that this bill was intended to be anything more than a starting point. We accept that starting point gratefully. Thank you again, for your joint leadership and your initiative.