

To: Tribal Trust Reform Work Group

From: Tim Martin, United South and Eastern Tribes (USET)
Michael Willis, Hobbs, Straus, Dean & Walker

Re: Comparison of the Tribal Work Group Trust Principles with S. 1439

The following chart represents the preliminary analysis we conducted prior to preparing USET's testimony on Senate Bill S. 1439. While this reflects only an initial crosswalk of the principles and the terms of S. 1439, we hope this may be useful to you as you carry out your analysis and strategy for improving upon that bill.

Trust Principle (June 20, 2005)	S. 1439 approach
1. Settlement funds from Claims Judgment Fund	Adopts principle 1. Section 103(a)(2) appropriates settlement funds from the judgment fund (31 U.S.C. § 1304).
2. Express recognition that adequate accounting cannot be performed by law	Adopts principle 2. Section 101(3).
3. Settlement figure should be lump sum amount reflecting an "aggregate correction" of accounts	Adopts both elements of principle 2. Section 101(7) notes that settlement appropriate in lieu of performing an accounting and assuming liability for errors due to mismanagement. Section 103(a)(2) provides for lump sum amount (to be determined).
4. Settlement amount of \$27.5 billion	The settlement amount is still to be determined. Section 103 places dollar figure in the billions.
5. Settlement should not individualize claims of beneficiaries (i.e., not a <i>Pigford</i> -type settlement where beneficiaries must prove individual claims).	Adopts principle 5. Section 104 makes two sets of payments available to claimants – per capita [section 103(a)(1)(A)] in addition to formula driven payments [section 103(a)(1)(B)]. Beneficiaries are entitled to payment, providing they release United States of the obligation to provide an accounting.

6. Settlement amount must be fair, with class representatives' consent.	This principle is protected by the process itself. The bill will not move forward without such consent.
7. Settlement must be paid into court registry.	Rejects principle 7. Special Master is to be appointed by Sec. of Interior to administer [Sec 103(b)] special claims settlement fund within the Treasury's general fund.
8. Monies rec'd by individual not considered in determining eligibility for income-based program, nor be taxable.	Adopts principle 8. See Section 110(c).
9. Rulings of Cobell Court shall be followed.	Given timeline for the hearing, we cannot determine as additional research is required. The principles refer to 80 published decisions, but do not discuss the content of those decisions.
10. Rule 23 fairness hearing required	Takes alternative approach by providing jurisdiction to federal courts for three distinct methods for beneficiaries to challenge the distribution. Section 105 (error in share determination); Section 106 (error in valuation); Section 107 (constitutional takings claims).
11. Severability clause to allow legislation to proceed without the Cobell provisions.	No such clause. The bill will not move forward without Cobell settlement. Settlement of the Cobell litigation is a primary purpose of the legislation.
12. Proposed language for settling historical claims.	This principle simply restates in paragraph form the terms of principles 1-11.
13. Address the unique situation of Osage	Adopts principle 13 [Section 101(9) and Section 101(10)]
14. Affirm and clarify standards	Takes alternative approach by assigning a Commission the task of proposing standards [Section 204(c)(3)]; see also discussion of standards in Demonstration Project [Section 304(c)].
15. Establish resource-specific standards	Takes alternative approach – see above regarding principle 14.
16. Fiduciary duties must be administered in accordance with applicable law, including tribal law.	Adopts in Demonstration Project. Section 304(c)(1)(A) and (B). Not included in Section 503 or 504 (which would be the logical placement)
17. Codify trust duties	Not in the bill, except that Demonstration project identifies duties [Section 304(c)(2)]
18. Common law duties govern in absence of statute	Not included in bill. Yet, this is the existing prudential rule regardless of this bill.

19. Cause of action in federal court	Not addressed.
20. Executive Branch oversight entity	Not addressed. Instead provides for advisory Commission in Title II to issue recommendations. No policing role for the Commission.
21. Executive Branch oversight entity should not interfere with tribal govts	Not addressed
22. Oversight entity should not engage in management functions.	Not addressed.
23. Oversight should be separate from DOI	Not addressed.
24. Independent audits and corrective measures	Largely adopts this principle. See Title VI.
25. Independent entity governed by presidential appointees	Takes alternative approach. The Commission includes appointees by President and Congress (but this Commission is temporary and does not play a policing role)
26. Permanent Deputy Secretary needed to coordinate and administer for all DOI	Adopts principle 26 (Under-Secretary, rather than Deputy Secretary [Sections 503 and 504])
27. Consultation with tribes regarding Deputy Secretary appointment and Indian preference application	Adopts Indian preference in Under-Secretary's staff [Section 506]; consultation not express, but contemplates elevation of existing AS-IA.
28. Deputy Secretary has primary responsibility to fulfill fiduciary duties and shall employ independent trust counsel	Adopts this principle [Section 503(c)], but not the independent trust counsel aspect
29. Deputy Secretary shall assume oversight responsibilities of OST and sunset OST	Adopts. [Section 503(c)(3) and Section 504(e),(f)&(g)]
30. No diminishment of ISDEAA rights and responsibilities	Adopt this principle and affirms ISDEAA rights in Title III [See, e.g., Section 304(a)(2)(D); Section 304(a)(3)]
31. Permit and support tribal, reservation-specific plans	Adopts. See Title III Demonstration Project.
32. Protect sovereign authorities and reserved rights	Does not include in Section 503, rather, only in Title III [Section 304(c)(2)(D); Section 304(b)]
33. Support government-to-government agreements and provide remedies to protect interests of allottees	Adopts government-to-government terms. See Section 504(c)(4)(B) and 504(c)(6) (intergovernmental relations and consultation with Indians); Addresses allottee concerns, not with remedies, but requirement to carry out trust functions in good faith and loyalty to beneficial owner

	[Section 304(c)(2)(E)]
34. Same duties and standards of conduct apply.	Adopts. Section 305(a) and (c).
35. Allottee right of action.	Not addressed
36. Amend laws to promote land consolidation	Adopts. See Title IV.
37. Voluntary buy back should be expanded for highly fractionate land (greater than 50 owners)	Adopts. See amendments to 25 USC § 2212(e) (but defines highly fractionated as 200 or more owners).
38. Incentives for land consolidation among individuals where less fractionated	Not addressed (25 USC § 2216 remains unchanged)
39. Enforceable rights and standards re informed consent	Adopts. See notice, acceptance, withdrawal, appeal and judicial review provisions in Title IV.
40. Repurchasing undivided fee interests	The proposed amendment to 25 USC § 2212(e) seems to do this by implication, however 25 USC § 2216 has not been amended.
41. Land consolidation payments should not diminish eligibility for income-based programs	Adopts. See amendments to 25 USC § 2212(h)
42. Whereabouts unknown notification	Not addressed.
43. Use of liens	Does not appear to be addressed as 25 USC 2212(b) is not modified by S. 1439
44. Tribal government repurchasing fractionated lands	Not addressed
45. Promote tribal land ownership systems while preserving rights of allottees	This principle is reflected in the intent of Title IV, but not expressly
46. Adequate funding and staffing for land consolidation	Separate appropriations for buyback program, but no specific terms
47. Fix appraisal system	Not addressed
48. Fair offer to individual Indians for resource mismanagement claims	Not addressed
49. Individual resource claims	Not addressed
50. No involuntary termination of right to seek individual redress for mismanagement of resource	Adopts. Section 109 provides for release of IIM accounting claims only.