

**Testimony of  
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and  
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before the Committee on Indian Affairs  
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**Native American Trust Issues and Ongoing Challenges**

**Introduction**

Thank you, Mr. Chairman and Members of the Committee, for inviting the Department to testify at this hearing on the Native American Trust program being administered by the Department of the Interior, including the key elements of trust reform and trust asset management. The problems relating to trust asset management that we are working to solve have been over a century in the making.

**Background**

**Current Holdings** -- An understanding of where the Department is now with regard to managing Indian trust assets requires a recognition of the complex issues we have inherited. Trust asset management involves approximately 11 million acres held in trust or in restricted status for individual Indians and nearly 45 million acres held in trust for the Tribes, a combined area the size of Maine, Massachusetts, Vermont, New

Hampshire, Connecticut, Rhode Island, Delaware, Maryland, and the District of Columbia. This land produces income from more than 100,000 active leases for 350,000 individual Indian owners and 315 Tribal owners. Leasing and sales revenues of approximately \$300 million per year are distributed to more than 225,000 open Individual Indian Money (IIM) accounts and revenue of approximately \$800 million per year is distributed to the 1,400 Tribal accounts.

**Trust Functions in Interior** -- Indian trust asset management involves many agencies and offices within the Department, including the Bureau of Indian Affairs, the Office of the Special Trustee for American Indians, the Minerals Management Service, the Bureau of Land Management, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, the National Park Service, and the Office of Surface Mining.

For example, the Bureau of Indian Affairs is responsible for the leasing of trust lands, keeping track of land ownership, lease obligations, and appeals. The Office of the Special Trustee focuses on the management of the actual trust accounts. The Minerals Management Service handles royalty collection and the verification of those payments. The Bureau of Land Management does the official surveys of Indian trust land and tracks the status of actual lease operations on the land.

In short, these agencies must hire, train and retain personnel that:

1. Lease trust lands;

2. Conduct surveys across millions of acres to ensure leases are properly administered;
3. Keep records of leases held by hundreds of thousands of owners;
4. Record differing types of income from differing leases;
5. Review transactions within individual accounts;
6. Identify Indian heirs through complex probate proceedings;
7. Preserve trust records dating back a hundred years; and
8. Ensure the security of complex computer software housing much of this information.

This is not a simple responsibility, and there have been years of debate and litigation over how it should be carried out.

**History of the General Allotment Act** -- One of the most difficult aspects of trust management is the management of the individual Indian money accounts. In 1887, Congress passed the General Allotment Act, which basically allocated tribal lands to individual members of tribes in 80 and 160-acre parcels. The expectation was that these allotments would be held in trust for their Indian owners for no more than 25 years. The intention was to turn Native Americans into private landowners and accelerate their assimilation into an agricultural society. Most Indians, however, retained their traditional ways and chose not to become assimilated into the non-Indian society. Congress extended the 25-year trust period, but finally, by the 1930s, it was

widely accepted that the General Allotment Act had failed. In 1934, Congress, through the first Indian Reorganization Act, stopped the further allotment of tribal lands.

Interests in these allotted lands started to “fractionate” as interests divided among the heirs of the original allottees, expanding exponentially with each new generation. There are now an estimated 1.4 million fractional interests of 2% or less involving 58,000 tracts of individually owned trust and restricted lands. The Department is bound by its trust obligations to account for each owner’s interest, regardless of size. Even though these accounts today might generate less than one cent in revenue each year, each must be managed, without the assessment of any management fees, with the same diligence that applies to all accounts. In contrast, in a commercial setting, these small accounts would be eliminated because of the assessment of routine management fees.

**Prior Review By Congress** -- Over the past 100 years, Congress has reviewed the issue of Indian trust asset management many times. In 1934, the Commissioner of Indian Affairs warned Congress that fractionated interests in individual Indian trust lands cost large sums of money to administer, and left Indian heirs unable to control their own land. “Such has been the record, and such it will be unless the government, in impatience or despair, shall summarily retreat from a hopeless situation, abandoning the victims of its allotment system. The alternative will be to apply a constructive remedy as proposed by the present Bill.” The bill ultimately led to the Act of June 18,

1934 which attempted to resolve the problems related to fractionation, but as we now know did not.

In 1992, the House Committee on Government Operations filed a report entitled "Misplaced Trust: the Bureau of Indian Affairs' Management of the Indian Trust Fund." That report listed the many failures of the Bureau of Indian Affairs to manage properly Indian trust funds. It pointed out that GAO audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 had found fault with management of the system. The report notes that Arthur Andersen & Co. 1988 and 1989 financial audits stated that "some of these weaknesses are so pervasive and fundamental as to render the accounting systems unreliable."

The House Report cites an exchange between Chairman Mike Synar and then Interior Inspector General James Richards in which Mr. Richards states:

"I think the Bureau of Indian Affairs will not change until there is some political consensus in that it must change. It is the favorite \* \* \* target of everyone who is shocked by ineptitude and its insensitivity. Yet when we try to restructure it either from a Congressional sense or from an Executive sense, there are always naysayers and there never develops a political sense for positive change."

In 1984, a Price Waterhouse report laid out a list of procedures needed to make management of these funds consistent with commercial trust practices. One of these recommendations was considering a shift of BIA disbursement activities to a commercial bank. This set in motion a political debate on whether to take such an action. Congress stepped in and required that BIA reconcile and audit all Indian trust accounts prior to any transfer to a third party. BIA contracted with Arthur Andersen to prepare a report on what would be entailed in an audit of all trust funds managed by BIA in 1988. Arthur Andersen prepared a report stating it could audit the trust funds in general, but it could not provide verification of each individual transaction.

Arthur Andersen stated that it might cost as much as \$281 million to \$390 million in 1992 dollars to audit the IIM accounts at the then 93 BIA agency offices. The Committee report states in reaction to that:

“Obviously, it makes little sense to spend so much when there was only \$440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken.”

The Committee report then moves on to the issue of fractionated heirships which Congress has made several attempts to correct. The report notes that in 1955 a GAO audit recommended a number of solutions including eliminating BIA involvement in income distribution by requiring lessees to make payments directly to Indian lessors, allowing BIA to transfer maintenance of IIM accounts to commercial banks, or imposing a fee for BIA services to IIM accountholders. The report then states the Committee's concern that BIA is spending a great deal of taxpayers' money administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances of less than \$50.

In many ways, the problems and potential solutions remain the same as they did when this report was published.

### **Current Challenges in Trust Management**

As you can see, the problems we are currently facing are not new ones. First, the Department is not well structured to focus on its trust duties. Trust responsibilities are spread throughout the Department. Thus, trust leadership is diffuse. The Bureau of Indian Affairs (BIA) itself has a long history of decentralized management. Each of the 12 BIA Regional offices and 85 BIA agency offices has developed policies and

procedures that are unique to its region and to the Tribes and individuals it serves. As a result, the BIA often does not have clear and unified policies and procedures relating to trust management.

Second, the planning systems related to trust are inadequate. The American Indian Trust Fund Management Reform Act of 1994 (the 1994 Trust Reform Act) required the development of a comprehensive strategic plan for all phases of the trust management business cycle that would ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with that Act. The court in *Eloise Pepion Cobell, et al. v. Gale A. Norton, et al.* (the *Cobell* litigation), also required information on the Department's plan for remedying problems identified by the court. These two responsibilities evolved into the development of the original High-Level Implementation Plan (HLIP) dated July 1, 1998. The HLIP was revised and updated on February 29, 2000. However, the Eighth Quarterly Report that the Department submitted to the Court on January 16, 2002 states:

"As described in prior submissions to the Court, the Department now views the High Level Implementation Plan (HLIP), by which trust management reform progress was measured and reported to the Court, to be obsolete. As reflected in the introduction, HLIP milestones have become increasingly disconnected from the overall objectives of trust reform. The HLIP is now outdated. Many of its identified activities have

been designated as being completed; however, little material progress is evident. More fundamentally, the HLIP does not reflect an adequately coordinated and comprehensive view of the trust reform process. A continuing re-examination of ongoing trust reform is needed along with clarification of trust asset management objectives.”

Third, the Department’s longstanding approach to trust management has been to manage the program as a government trustee, not a private trustee. Today, judicial interpretation of our trust responsibilities is moving us toward a private trust model. The Department agrees that our trust duty requires a better way of managing than has been done in the past. The current structure of the Department is not suitable for carrying out the expectations of the tribes, the Congress, or the courts. To meet this level of expectation will require more funding and resources than have been historically provided to the Department.

Fourth, the Trust Asset and Accounting Management System software known as TAAMS, which the Department had hoped would go a long way to solving trust problems, has yet to achieve many of its objectives. Interior began developing TAAMS in 1998 from an off-the-shelf program, intending for it to be a comprehensive, integrated, automated national system for title and trust resource activities. Using this software, Interior employees would record key information about land ownership, leases, accounts receivable income, and so forth. In November 2001, the

Department's contractor, Electronic Data Systems (EDS), found that the current land title portion of TAAMS provides useful capabilities, but recommended deferring any further effort on the realty and accounting portions.

In addition, Departmental information technology security measures associated with Indian trust data lack integrity and are not adequate to protect trust data or to comply with Office of Management and Budget requirements. In fact, on December 5, the court ordered the Department to disconnect all computers from the Internet that housed or provided access to Indian trust data. The Department then disconnected nearly all of its computer systems from the Internet because they are interconnected.

Finally, the challenges related to fractionated interests in allotted land continue. These interests expand exponentially with each new generation to the point where now we have single pieces of property with ownership interests that are less than .000002 of the whole interest.

**The Cobell Litigation** -- On June 10, 1996, five plaintiffs filed suit against the Departments of Treasury and Interior, alleging breach of trust with respect to the United States' handling of individual Indian money (IIM) accounts. The Court in this action bifurcated the issues for trial. In the first trial, in December 1999, the Court ruled that the Department was in breach of four trust duties. The Court declared, among other things, that the 1994 Trust Reform Act requires: (1) Interior and Treasury to provide

plaintiffs an accurate accounting of all money in their individual Indian money trust without regard to when the funds were deposited; and (2) retrieval and retention of all information concerning the trust necessary to render an accurate accounting. The Court also ordered Interior to file a revised High-Level Implementation Plan (HLIP) to remedy these breaches. This decision was affirmed by the D.C. Circuit Court of Appeals on February 23, 2001. The second trial, dealing with historical accounting has not yet been scheduled.

Most recently, on November 28, 2001, the Court issued an order to show cause why civil contempt should not lie against Secretary Norton and Assistant Secretary McCaleb, in their official capacities, on four counts:

- Failure to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project.
- Committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000 until January 2001.
- Committing a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999.

- Committing a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Cleanup.

On December 5, 2001, the Court ordered the Department to disconnect from the Internet all of the Department's computer systems that house or provide access to Indian trust data. This was followed on December 6, 2001, by a supplemental order to show cause why Secretary Norton and Assistant Secretary McCaleb should not be held in civil contempt, in their official capacities, for issues related to computer security of IIM trust data. The contempt trial has been underway since December 10, 2001.

### **Tackling the Problems**

To address the difficult challenges of trust reform, a number of actions have been initiated in the last year.

**Strengthening Departmental Management** – A high priority for the Secretary has been to identify and recruit seasoned managers who can objectively assess the facts and problems and propose practical solutions so that we fulfill our fiduciary duties to account for the trust assets of Native Americans. The Secretary's trust management team started coming on board July 4, 2001, with the most recent member joining the Department on November 26, 2001. The team is engaged in a day-to-day decision

process related to trust reform and trust asset management. Those that have worked with the new team can attest to their extraordinary work ethic, management experience, seasoned leadership and creativity in undertaking complicated tasks. (See Appendix A)

**Developing a New Trust Management Strategic Plan** – As discussed above, the “High-Level Implementation Plan” (HLIP), developed by the Department in 1998, has received considerable criticism. We are now working to create a plan to guide future Departmental activities that will provide an integrated, goal-focused approach to managing trust assets. This new plan will reflect a beneficiary approach to trust management and service delivery. Objectives will include maintaining comprehensive, up-to-date and accurate land and natural resource ownership records, and developing a robust accounting system to manage financial accounts and transactions. An integral aspect of the plan will be the development of a workforce plan, and associated activities, to attract and maintain a qualified, effective workforce.

**Creating a New Office of Historical Accounting** -- To better coordinate all activities relating to historical accounting, on July 10, 2001, the Secretary created the Office of Historical Trust Accounting (OHTA) within the Bureau of Indian Affairs. OHTA's assignment was further guided by Congressional instructions given in the Conference Report on the Department's fiscal year 2001 appropriations bill which stated the following:

“...the managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results. This plan must be provided to the House and Senate Committees on Appropriations prior to commencing a full sampling project. Finally, the determination of the use of funds for sampling or any other approach for reconciling a historical IIM accounting must be done within the limits of funds made available by the Congress for such purposes.”

The Department will deliver a Comprehensive Plan to Congress to outline the full range of historical accounting activities and to provide a foundation for Congress to evaluate the Department's funding requests. OHTA has already released its *“Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts”* and *“Report Identifying Preliminary Work for the Historical Accounting.”*

We have requested a \$9 million increase in our FY 2003 Budget for this historical accounting, but as discussed earlier, when a full reconciliation of all accounts is undertaken considerably more money would be required. In responding to the court's requirement that we do a complete historical accounting of each account by conducting a full audit, transaction by transaction, we will face challenges that will pose great difficulty and will be very expensive. Without such an accounting, the plaintiffs in the ongoing litigation will continue to assert, as they have in the press, that they are owed

\$60 billion to \$100 billion. A comprehensive historical accounting is likely to cost hundreds of millions of dollars, and still may not be viewed as entirely satisfactory because of gaps in existing records.

**Proposing a Departmental Reorganization of Trust Management** -- Reformation of the Department's trust responsibilities was, of course, mandated by Congress in the 1994 Trust Reform Act. In its 1999 opinion, the District Court in *Cobell* declared that the Department had breached certain duties found in the Act. The Department has heard from many sources -- e.g., the Special Trustee, EDS, the Court Monitor, and through budget reviews -- that one of the fundamental barriers to trust reform is the disorganized scattering of trust functions throughout the Department. In August 2001, during our formulation of the FY 2003 budget, various proposals and issues were identified concerning the trust asset management roles of the BIA, the Office of Special Trustee for American Indians (OST), and other Departmental entities carrying out trust functions.

An internal working group developed a number of organizational options ranging from maintaining the status quo to privatizing functions to realigning all trust and associated personnel into a separate organization under a new Assistant Secretary within the Department. While this internal review was underway, Electronic Data Systems (EDS) was undertaking an independent, expert evaluation. On November 12, 2001, EDS presented its report "DOI Trust Reform Interim Report and Roadmap for TAAMS and

BIA Data Cleanup: Highlights and Concerns” in which it called for a “single, accountable, trust reform executive sponsor.”

The Secretary decided to propose the formation of an organizational unit called the Bureau of Indian Trust Asset Management (BITAM). This option envisioned the consolidation of most trust reform and trust asset management functions located throughout the Department into a new bureau that would report to a new Assistant Secretary. The new Assistant Secretary would have authority and responsibility for trust reform efforts and for continuing Indian trust asset management. The proposal was reviewed by EDS and received a supportive endorsement. This option was proposed because it would consolidate trust asset management, establish a clearly focused organization, provide additional senior management attention to this high priority program and retain the program within the Department to facilitate coordination with the Native American community. Under this proposal, BIA would focus on its other core functions and programs such as providing tribal services, helping tribes with economic development, and education. The Department is carrying out consultation on this option, as will be discussed below.

On November 20, 2001, the Secretary issued an order to establish the Office of Indian Trust Transition (OITT) within the Office of the Secretary and shortly thereafter appointed Ross Swimmer to be the Director of the OITT. The OITT is currently charged with developing the strategic plan to replace the HLIP, and organizing the Department's efforts to implement that strategic plan.

**Fulfilling our Obligations to Consult with Tribes --** We are currently consulting with Tribes to involve them in the process of attempting to reorganize the Department's trust asset management responsibilities. To date, Tribes have expressed their dissatisfaction with the consultation process and with Interior's reorganization proposal.

The Department has held a series of consultation meetings. The first was in Albuquerque, New Mexico on December 13, 2001. Eight additional consultation meetings in different locations have been held. The meetings have been very well attended.

The Department and the Tribes have formed a Joint Task Force to review the numerous proposals for trust reform that have been submitted in response to the BITAM proposal forwarded by the Department. In addition to reviewing all proposals, the Task Force is assisting the Department in its review of current practices.

The Task Force had an initial meeting in Shepherdstown, West Virginia, on February 1-3, 2002. The Task Force began its review of proposals at this meeting and also formed three subgroups, each of which are tasked with addressing specific issues. The subgroups have been tasked with developing a protocol for the conduct of the Task Force, developing a scope of work for a contractor who is consulting on Trust Reform, and in depth review of proposals submitted to the Task Force.

The Task Force is scheduled to meet again on March 7-10, 2002, in Phoenix, Arizona. While an agenda has not been agreed upon yet by the Task Force members, we expect the Task Force to continue its review of proposals, adopt a protocol, and set a schedule for future meetings.

It is our hope that ultimately the Task Force will provide advice and recommendations for Trust Reform to the Secretary that will significantly improve the management of Indian trust assets.

**Reconnecting Departmental Computers to the Internet** -- On December 5, 2001, as part of the ongoing *Cobell v. Norton* proceedings, the Court ordered the Department to disconnect from the Internet all of the computer systems that house or provide access to Indian trust data. The order came at the request of plaintiffs and was based on a report the Special Master for the Court had prepared on the security weaknesses of information technology security involving individual Indian trust data. The Department is committed to complying strictly with the orders of the Court. Computer systems were completely shut down where the Department was not able to verify complete, immediate termination of access to individual Indian trust data.

On December 17, 2001, the Court entered a consent order proposed by the Department, over the objections of the plaintiffs. It establishes a process that allows the Department to resume operations of some computer systems after providing the

Special Master assurances that problems he identified have been addressed and that security meets a certain standard. The December 17 consent order is the only mechanism under which the Department may utilize some systems or reconnect them to the Internet. The Department prioritized its requests under the Consent Order to seek first the Special Master's concurrence to operate the information technology systems required to make payments to individual Indians.

To date, we have received concurrence to permit Internet service to the United States Geological Survey, the Office of Surface Mining, Reclamation and Enforcement, the National Park Service and the Bureau of Land Management, along with a few isolated computers located at the National Interagency Fire Center and the Department of the Interior Law Enforcement Watch Office. We will continue to work with the Special Master to expedite the resumption of the many public service programs which depend upon reconnection to the Internet.

The Department has taken initial steps to prepare a long-term strategic plan to improve the security of individual Indian trust data. The Department intends to bring relevant individual Indian trust information technology systems into compliance with the applicable standards outlined in OMB Circular A-130.

We expect that the core of the dedicated network can be installed during fiscal year 2002, with the anticipated phase-in and shift of data from other systems expected to

take approximately three years. The overall cost estimate could be \$65 -70 million. The final estimate will be determined as we develop a capital asset plan.

### **Areas Where Interior Needs Help From Congress**

These actions are only the beginning of a long, intensive effort that will be required of the Administration, Congress, and the Courts. Significant work needs to be done.

**FY 2003 Budget** -- The President released his fiscal year 2003 budget this week and it includes the Secretary's recommendation for \$83.6 million in spending increases for trust management and accounting. Increased spending for improved trust management is one of the major initiatives of the Department's proposed FY 2003 budget.

**Trust Management Expectations** -- As mentioned above, the courts expect the Department to deliver trust services based on a very high standard. Congress must recognize that meeting these expectations will require significantly more funding and resources. The courts first look to Congress for its expression of intent as to how the trust program should be managed. Congress must make clear what it envisions the responsibility of the Secretary to be, and provide the resources necessary to carry out those responsibilities, while recognizing the other financial responsibilities and mandates of the Bureau of Indian Affairs and the Department as a whole.

**Land Fractionation** -- The last Congress enacted the Indian Land Consolidation Act Amendments of 2000 in order to prevent further fractionation of trust allotments made to Indians and to consolidate fractional interests and ownership of those interests into usable parcels. As we begin to implement ILCA, we may find that additional incentives are needed to expedite the consolidation of these interests.

### **Conclusion**

In conclusion:

- Indian trust asset management responsibility is a very high priority for the Department.
- The Department needs to establish an organizational structure that facilitates trust reform and trust asset management.
- The Department needs to establish an ongoing effective consultation mechanism with tribes.
- The Department must improve the computer support and security to ensure the integrity of Indian trust data.

- The Department is being challenged by litigation which requires significant changes in how the trust is managed.
- It appears that substantial resources will be required to meet the growing expectations of the tribes, the courts, and Congress.
- The tribes, Interior, and the Congress have to reconcile the competing principles associated with trust responsibility and self-determination.

This concludes the Department's testimony, Mr. Chairman. Thank you again for inviting us to testify today. We would be happy to answer any questions the Committee may have.