Testimony of
Neal McCaleb, Assistant Secretary for Indian Affairs
before the Senate Committee on Indian Affairs
on S. 2212, the proposed Indian Trust Asset and Trust Fund
Management and Reform Act of 2002.

July 30, 2002

Mr. Chairman and Members of the Committee, I am here today to provide to the Committee the Administration's position on S. 2212, the proposed " Indian Trust Asset and Trust Fund Management and Reform Act of 2002" sponsored by Senators McCain, Johnson, and Daschle.

The Administration is strongly opposed to the enactment of S. 2212, and recommends instead that the recommendations of the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform be enacted, where there has been agreement. While well intentioned, S. 2212 does not reflect the consensus of the Tribal Task Force.

In the remarks Senator McCain made when the bill was introduced, he stated that Congress should give careful consideration to the recommendations of the Task Force. The Department learned a valuable lesson last year when it proposed the formation of a new Bureau of Indian Trust Asset Management prior to consulting with the tribes. This proposal was soundly rejected by tribal leaders. They were particularly concerned that the Department and the tribes had not sat down together to discuss the concept before it was proposed.

Similarly, S. 2212 was introduced in the Congress without any discussions or review by the

Department of the Interior or the broader tribal community. The provisions of S. 2212 are at odds with the work of the Task Force. Enactment of these provisions after the Department and tribal leaders have met at multi-day meetings in seven different locations over the past seven months would seriously undermine the consultation process and the work of the Task Force.

The Administration is strongly opposed to creating another Deputy Secretary position within the Department of the Interior. No other Department within the Executive Branch has more than one Deputy, or a Deputy with a particular mission other than the overall responsibility of the Secretary. We have reached agreement within the Task Force to recommend the creation of an Under Secretary for Indian Affairs who would be appointed by the President and confirmed by the Senate, the creation of a new Office of Self-Governance and Self-Determination that reports directly to the Under Secretary, and the creation of a Director for Trust Accountability.

The Under Secretary would have direct line authority over all aspects of Indian affairs within the Department. This would include the coordination of trust reform efforts across the relevant agencies and programs within the Department to ensure these functions are performed in a manner that is consistent with our trust responsibility. This reorganization will require narrowly tailored legislation. We would be happy to provide to the Committee draft legislative language that embodies the duties agreed upon by the Department and the Tribal Leaders on the Task Force.

We also object to the creation of an Office of Trust Implementation and Oversight. This is not the model we have developed in our consultation with the tribes through the Task Force. Also,

we do not believe that the proposed 10-year Indian Trust Fund and Trust Asset Management and Monitoring Plans authorized by the bill will meet their goal of assisting tribes in moving towards self-governance and self-determination.

In addition, we have concerns with the list of duties of the Office of Trust Reform Implementation and Oversight enumerated in Section 2(b), which adds a new Section 307 to the American Indian Trust Fund Management Reform Act of 1994. Many of the duties in section 307(e)(3), as currently drafted, are overbroad and imprecise, and serve only to further confuse the issue of what obligations the trustee has. For example, section 307(e)(3)(H) imposes the duty to "ensure. . . the greatest return on those funds and assets." The proposed language arguably does not permit the government to analyze the claimed liquidity needs or to consider the compound interest needs of any particular individual or tribal owner of trust funds before it invests such funds. Additionally, the proposed language appears intended to extend the government's responsibility regarding trust asset management beyond that established by Supreme Court precedent, with the potential to affect ongoing litigation over the scope of the government's fiduciary duties.

We also have concerns regarding the obligation to manage the funds in accordance with all applicable tribal laws. This requirement carries the possibility of altering the trust duties of the Secretary in differing ways depending on which tribe's plan was involved, which could make the Department's administration of its "inconsistent responsibilities" practically very difficult and subject to litigation risk.

For these reasons, we recommend that the Committee put S. 2212 aside, and consider instead legislation that reflects the recommendations of the Task Force. Those recommendations include creation of the Under Secretary position mentioned above, creation of a new Office of Self-Governance and Self-Determination that reports directly to the Under Secretary, and creation of a Director for Trust Accountability. The Task Force has also agreed on the concept of creating an independent commission that would provide oversight on the management of trust funds and other issues. Our work on that proposal is not yet complete. We are hopeful that we will finalize the commission proposal in August. We look forward to working with the Committee on these provisions during the next few weeks.

This concludes my statement. I would be happy to answer any questions the Committee might have at this time.