STATEMENT OF
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DEPARTMENT OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON S. 1770, THE INDIAN MONEY ACCOUNT CLAIM SATISFACTION ACT OF 2003

OCTOBER 29, 2003

Mr. Chairman and Vice-Chairman Inouye, the Department of the Interior appreciates the opportunity to appear before the Committee today to give the views of the Administration on S.1770, the Indian Money Account Claim Satisfaction Act of 2003. The Administration appreciates that you have turned the attention of this Committee to the pressing historical accounting issue facing Indian Country and the Department of the Interior.

Mr. Chairman, when you introduced S. 1770 eight days ago, you stated, "I am introducing a bill that will end this lawsuit in a way to provide justice to IIM accountholders and restore some sense of normalcy to the Department of the Interior." You also stated that money of the magnitude required to complete an accounting similar to the one ordered by the judge in the case of *Cobell v Norton*, "is better spent on reconstituting the Indian land base and building a forward looking state-of-the-art trust management system and providing more dollars to Indian Health Care." Finally, you recognized that both the *Cobell* case and the challenges we face because of fractionation are legacies of Congressional efforts to "break up the tribal landmass and teach Indians to be 'civilized'."

Mr. Chairman, we appreciate the insight and sincerity of your comments. However, S. 1770 creates an additional accounting and resolution process. It does not relieve the United States in any way of the accounting work that must be done to comply with the recent orders relating to *Cobell v. Norton*. S. 1770 does not modify, nor clarify, the accounting Interior must complete to comply with its statutory obligations or any common law duties related to an accounting. Finally, S. 1770 does not establish how long the Task Force should take to actually complete an accounting. Given the task and resources which must be devoted to meeting the judge's order, the Administration can not support an additional accounting mandate and resolution process. We

are, however, encouraged by the introduction of any legislation related to this subject matter, and we would like to work with you and the Vice-Chairman, as well as other Members of Congress to find a rapid, meaningful resolution to both our duties to complete an accounting, and to develop a solution to address fractionation.

On July 25, 2002, I appeared before this Committee to discuss an historical accounting plan. I have not forgotten your words, Mr. Chairman, when you stated "there are a lot of Indian people out there that are going to die before (the historical accounting project is complete), waiting for that money, if they have to wait 10 years." On October 29, 2003, many of the individuals are still waiting for money and, if we proceed as we have been, they should expect to wait a long time.

Despite comments to the contrary, *Cobell v. Norton* is not a case about money. The plaintiffs in the lawsuit have not requested any money damages. The plaintiffs in the case, and the class they represent, have demanded an accounting. Despite some individuals' and decision-makers' preferences to give money directly to individual Indians, instead of providing that money to accountants, we are obligated, and have been ordered, to do an accounting by the court.

In 1994, Congress passed the American Indian Trust Reform Act. That Act requires the Secretary to "account" for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Nine years later, after seven years of litigation, the court in the *Cobell* case has ruled that the statute requires a process that will likely cost billions of dollars over the next three years. Obviously, to successfully accomplish this task, the Congress will need to provide the necessary funds. The FY 2004 Interior Appropriations bill currently provides $45 million for accounting, $85 million less than the Administration requested before the ruling.

BACKGROUND

This Committee is keenly aware of the challenges fractionated ownership. As trustee, the United States, acting principally through the Department of the Interior (DOI), keeps the ownership records for the lands, approves leases of the lands for a wide variety of purposes, and collects and distributes the revenues generated from the lands. The revenues are managed in Individual Indian Money (IIM) accounts. DOI charges nothing for its trustee services.

There were 279,310 IIM accounts as of December 31, 2000. The vast majority of these accounts contain revenues derived from leasing allotted lands. Other accounts contain revenues from court judgments or business enterprises, which are distributed to individual members on a per capita basis. These funds are initially deposited into Special Deposit accounts, and are then distributed to individual accounts.

These IIM accounts had balances of $416.2 million, as of December 31, 2000. The amount of IIM funds that have passed through the trust since 1887 is approximately $13 billion. From 1985 to 2000, $3.3 billion passed through the trust. The vast majority of the money moved through relatively few accounts; DOI is required to maintain thousands of accounts with less than $100 in annual throughput. Throughput is the total amount of money that goes into, and then out of, an account on an annual basis. The annual cost of maintaining an account is, on average, approximately $150.

SEPTEMBER 25, 2003 COURT ORDER

On January 6, 2003, as ordered by the court in the *Cobell* litigation, DOI filed *The Historical Accounting Plan for Individual Indian Money Accounts (DOI's Accounting Plan).* DOI's Accounting Plan provided for an historical accounting for about 260,000 IIM accounts, over a five-year period, at a cost of approximately $335 million. The Plan called for an each eligible IIM account holder to be provided an Historical Statement of Account that listed the transactions in his or her account.

The accuracy of the transactions was to be verified by reviewing support documentation on a transaction-by-transaction basis for all transactions over $5,000 and by statistically sampling for transactions under $5,000. The sampling methodology design would be designed to provide a 99 percent confidence level of any error rate. The President's FY 2004 budget includes, within the request for the Office of the Special Trustee, $130 million to significantly expand efforts to complete this accounting plan by FY 2007.

On September 25, 2003, Judge Lamberth of the District Court issued a structural injunction specifying of what the accounting must consist and when it must be done. The court decided that the accounting must provide a complete history of all financial transactions and all land ownership transactions in the trust since 1887. To understand the significance of the court order, it is useful to compare it to the historical accounting plan that DOI prepared, but which, in large part, the court rejected.

	Interior's Plan	**Structural Injunction**
Estimated Cost	$335 Million	$6-13 Billion[1]
Time to Complete	5 years	3 years for most accounting[2]
Verification Approach	Verify all transactions over $5000.00 by review of supporting documents. Verification by statistical sampling of transactions under $5000.00	Verify all transactions review of supporting documents
Trust Asset Accounting	Describe trust assets owned by each IIM account holder as of December 31, 2000	Describe all trust assets ever owned by current IIM account holders or their predecessors in interest from 1887 to the present

[1] Estimate is very preliminary.
[2] Even though the order gives until September 30, 2007, to complete the Special Deposit accounts, it requires all accountings for individual Indians to be completed by September 30, 2006.

Deceased IIM Account Holders	No accounting for beneficiaries who died prior to October 31, 1994; probate considered final	Full accounting for all IIM accounts since 1887
Closed IIM Accounts	No accounting for IIM accounts closed prior to October 31, 1994	Full accounting for all IIM accounts since 1887
Direct Pay (rents and royalties paid directly to Indians and never held in trust)	No accounting	Full accounting for all direct payments since 1887
Time Frame	Accountings back to 1938 or inception of IIM account, whichever is later	Accountings back to 1887

The structural injunction requires the review and documentation of approximately 61 million financial transactions and supporting land ownership records. DOI currently holds approximately 500-600 million Indian trust records, and the injunction appears to necessitate the indexing and electronic imaging of the vast majority of these records. In addition, the court is requiring DOI to obtain additional records from third parties, which may include state and county record offices, energy companies, timber companies, other former and current lessees, tribes, and individual Indians. The court seems to anticipate that DOI will need to subpoena documents from thousands of private sources and then evaluate the documents' relevance to the historical accounting.

The court has ordered that the bulk of the accounting be completed in three years. In addition to the historical accounting, the Court ordered DOI to fully implement a plan for trust reform by May 31, 2005. This accelerates the Department's schedule by several years, and will have significant budget implications in both FY 2004 and 2005. The extent of those additional costs

is not yet known, because the plan is not yet complete; the court has ordered it to be completed by March 2004.

S. 1770

The subject of today's hearing is S. 1770, a bill intended to establish a voluntary alternative claims resolution process to reach a settlement of the *Cobell* litigation. Mr. Chairman, the statement you made when you introduced S. 1770 aptly points out that the *Cobell* case guarantees us more litigation, and hundreds of millions and maybe billions spent without a resolution. As you stated, this case is truly just the beginning. Unfortunately, S. 1770, as currently drafted, does not address the requirements contained in the 1994 Act, or the judge's order.

As structured, S. 1770 sets up a Task Force that will spend a year looking at the historical accounting plans that both the plaintiffs and the Government submitted to the *Cobell* court in January 2003. It appears that, during this period, the Government will still be subject to the responsibilities and timetable set forth in the court's order.

After a year, the Task Force is to develop one or more "appropriate" methodologies to conduct an accounting, and use that methodology in conducting an accounting of individual Indian money accounts. The bill does not establish a deadline by which this must be completed. Once again, during this period, the Department is subject to the court's order. Finally, when the additional accounting is completed, any individual can choose to reject its results and remain a plaintiff in the *Cobell* case. Thus, notwithstanding its intent, the bill provides little incentive to pursue out-of-court alternatives.

Under this bill as currently structured, the Department must still proceed with the accounting ordered by the court. As the preceding table points out, the court order will still require Interior to account for the funds in all IIM accounts since 1887, including direct payments never passed through IIM accounts, and for all assets ever owned by current IIM account holders or their predecessors in interest from 1887 to the present.

The term "accounting" is subject to interpretation. The definition of the term "accounting" in S.1770 should be reconciled with the Congressional intent of the 1994 Trust Reform Act by making it clear what Congress meant in 1994. Applying the term only to the Indian Money Account Claim Satisfaction Act, as S. 1770 does, further confuses the issue rather than clarifying it.

We also believe that if there were to be a task force, there must be some review of the methodology the Task Force develops. It is unclear who, if anyone decides whether the methodology chosen is, in fact, "appropriate." Plaintiffs are claiming over $176 billion is owed. There will be great pressure on the Task Force to adopt a methodology that supports the expectations the named plaintiffs and their attorneys have created in Indian country. Nothing in the bill prevents the Task Force from irresponsibly adopting some methodology that opens the government up to a substantial liability, not based on facts. While we all are striving for a solution that is fair and equitable to the individuals caught in this ongoing litigation, we must act in a manner that is responsible to all the taxpayers. Congress must use caution when it unconditionally opens the taxpayer's wallet, as it does in this bill.

In addition, we believe that a constitutional problem may exist with having a Task Force solely chosen by the legislative branch reach conclusions that require the Secretary to make direct expenditures from the Federal Treasury.

Despite these concerns, the Administration sincerely appreciates your bipartisan effort to address the historical accounting issue in a meaningful way. We would like to work with you and other Members of your Committee to ensure the bill accomplishes the goal of resolving this longstanding issue.

Conclusion

On July 10, 2003, the House Appropriations Committee submitted its report on H.R. 2691, Interior's FY 2004 Appropriations bill. It included a section, section 137, which clarified the

parameters of the historical accounting of IIM accounts, and included a voluntary buyout provision. Eloise Cobell sent a letter to class members urging them to oppose this effort, and assuring them that billions of dollars would soon be available to the plaintiffs as a result of the judge's then impending decision in the trial that began in May 2003.

The judge has now ruled. He did not adopt the plaintiffs' approach to historical accounting. I believe Congress can fashion a legislative settlement of this matter that balances the goals of fairness and equity with fiscal responsibility. However, based on the expectations in Indian Country, there is little hope of satisfying all parties completely. We would like to work closely with you in this endeavor, and once again thank you for holding this hearing today.

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