

STATEMENT OF
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BEFORE THE HOUSE COMMITTEE ON RESOURCES
FOR THE OVERSIGHT HEARING ON THE STATUS OF THE INDIAN TRUST FUND LAWSUIT

February 16, 2005

Mr. Chairman and members of the Committee, my name is James Cason and I am the Associate Deputy Secretary of the Department of the Interior. Thank you for the opportunity to testify today on the status of the Indian Trust Fund lawsuit, Cobell v. Norton. As you are well aware, this is a longstanding case that originated in 1996 as Cobell v. Babbitt. The Department appreciates the Committee's interest in this case and your desire to help the parties reach a solution.

Congress designated the Department of the Interior as the trustee for one of the most complex and diverse governmental land trust ever established. The Department manages approximately 56 million acres of land held in trust. Over ten million acres belong to individual Indians and nearly 46 million acres are held in trust for Indian Tribes. On these lands, Interior manages over 100,000 leases for individual Indians and Tribes. Leasing, use permits, land sale revenues, and interest all of which total approximately \$205 million per year are collected for 245,000 open individual Indian money (IIM) accounts. About \$414 million per year is collected in 1,400 tribal accounts for 300 Tribes. In addition, the Indian trust fund manages approximately \$3.0 billion in tribal funds and \$400 million in individual Indian funds. Because the Cobell case only involves IIM accounts, most of my testimony will focus on the issues related to the management of those accounts.

Although much of what I have prepared to say today has been previously heard by your Committee, I believe it is vital for you to understand the background and facts in order to craft a pathway that will actually make progress for Indian Country. Mr. Chairman, you and your Committee stand at a crossroads in history. We need to work together to resolve this issue promptly and in a meaningful way, so that among other things we can avoid time-consuming and expensive litigation that ultimately is not in the best interest of the parties.

Background

In 1887, Congress passed the General Allotment Act, which resulted in the allotment of some tribal lands to individual members of tribes, mostly 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, after which the Indian owner would own the land in fee. However, Congress in 1934, through the Indian Reorganization Act, reaffirmed its commitment to tribal governments, halted the further allotment of tribal property, and required that the allotted lands be held in trust indefinitely by the United States for the benefit of the individual owners.

Interests in these allotted lands started to "fractionate" as interests divided among the heirs of the original allottees, expanding exponentially with each new generation. One of the most challenging aspects of trust management is the management of the very small ownership interests, which result in many very small IIM accounts and land ownership interests. There are now over 1.65 million fractional interests of 2% or less involving more than 32,522 tracts of individually owned trust and restricted lands. The Department provides a range of trust services – title records, lease management, accounting, probate – to the growing number of land owners. We have single pieces of property with ownership interests that are less than .000002 of the whole interest. The Department is required to account for each owner's interest, regardless of size. Even though these interests today might generate less than one cent in revenue each year, each is managed, without the assessment of any management fees, and the revenues generated are treated with the same diligence that applies to all IIM accounts. In contrast, in a commercial setting, these small interests and accounts would have been eliminated because of the assessment of routine management fees against the account. Management costs of the IIM accounts, as well as tribal trust accounts, are covered through the general appropriations process and borne by the taxpayers as a whole, rather than by the accountholders.

Formation of the American Indian Trust Fund Management Reform Act of 1994

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 weaknesses in the Bureau of Indian Affairs (BIA) management of Indian trust funds. It pointed out that the General Accounting Office's audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 found fault with management of the system. The report notes Arthur Andersen 1988 and 1989 financial audits stated that "some of these weaknesses are as pervasive and fundamental as to render the accounting systems unreliable."

Arthur Andersen stated 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 1992 Government Operations Committee report describes the Committee's reaction: "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. 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 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.

On April 22, 1993, the late Congressman Synar introduced H.R. 1846. On May 7, 1993, Senator Inouye introduced an identical version, S. 925. It was in these bills that Congress first included a statutory responsibility to account for Indian trust funds. Section 501 was entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds." Senator Inouye's bill included an effective date provision that stated:

" This section shall take effect October 1, 1993, but shall only apply with respect to earnings and losses occurring on or after October 1, 1993, on funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian."

The Senate Committee on Indian Affairs held a hearing on S. 925 on June 22, 1993. Eloise Cobell in her capacity as Chairman of the Intertribal Monitoring Association, testified in strong support of the bill. The only amendment Ms. Cobell recommended in her oral statement, as well as her written statement, was to allow Tribes to transfer money back into a BIA-managed trust fund at any time if they so wanted. Ms. Cobell mentioned "[W]e have amendments, and we are willing to work with the committee on these particular amendments. I am not going to devote any more of my time in my oral presentation to the provisions of the bill because we feel it is an excellent bill."

The Navajo Nation and the Red Lake Band of Chippewa Indians were the only tribes to submit testimony. They supported the bill, and did not object to the prospective application of the accounting section in their testimony.

The Director of Planning and Reporting of the General Accounting Office also testified. He was asked if he agreed with the Arthur Andersen estimates I mentioned above. He stated the following:

" In my statement I talked about how there are a lot of these accounts that maybe you don't want to audit, that maybe what you want to do is come to some agreement with the individual account holder as to what the amount would be, and make a settlement on it. We had a report issued last year that suggested that, primarily because there are an awful lot of these accounts that have very small amounts in terms of the transactions that flow in and out of them. Just to give you some gross figures, 95 percent of the transactions are under \$500. One of our reports said there that about 80 percent of the transactions are under \$50. So in cases where you have the small ones, maybe there's a way in which we can reach agreement with the account holders and the Department of the Interior on how much we will settle for on these accounts rather than trying to go back through many many years, reconstructing land records and trying to find all of the supporting material. It may not be worth it." [page 29 of S. Hrg 103-225]

On July 26, 1994, Congressman Richardson introduced H.R. 4833 which ultimately became the American Indian Trust Fund Management Reform Act of 1994. The House report on H.R. 4833 notes that H.R. 1846 was the predecessor bill to H. R. 4833. There was one legislative hearing held on H.R. 4833 by this Committee on August 11, 1994. There is no printed record of that hearing. There was no Senate hearing.

H.R. 1846 and H.R. 4833 were similar in many places. H.R. 4833 did not however include the effective date provision explicitly making the accounting requirement prospective only. While the report notes in a number of places why changes were made to the H.R. 1846 provisions, it is silent with respect to this omission.

It may surprise Members of this Committee to note that there is no mention of the costs associated with either complying with the Act, or completing the accounting in the Committee's report. Moreover, no analysis from the Congressional Budget Office was included in the Committee's report. The Department sent a letter on H.R. 1846 and an amended S. 925 that was placed in the Committee report on H.R. 4833. Its only mention of cost is the following sentence: "We wish to note that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs." Given the lack of cost analysis contained in the legislative history, one could assume that Congress in enacting the 1994 Reform Act had no idea it may have required a multi-million or multi-billion dollar accounting.

Cobell Litigation

In 1996, five IIM beneficiaries filed the Cobell v. Norton class action lawsuit alleging that the government had breached its fiduciary duty in managing the IIM accounts. In 1999, a Federal district court held, in a decision affirmed on appeal in 2001, that the government had breached its fiduciary obligations to plaintiffs. In the litigation, the plaintiffs have sought an accounting, rather than monetary damages, but their argument is that they are owed any money that the government collected but cannot prove was properly distributed to individual Indians since 1887, some of which the government cannot do because of the unavailability of trust records. Under the plaintiff's theory, they are owed as much as the total amount collected since 1887 (which is estimated to be \$13 billion), plus interest. They calculate the amount to be over \$176 billion.

In September 2003, the district court ordered Interior to conduct a transaction-by-transaction accounting, back to 1887, of all of the IIM accounts that it manages or has ever managed and required that Interior substantially complete this accounting by the end of FY 2006. Interior estimates that complying with the court's order would cost between \$9 billion and \$12 billion, and even then it would not be able to meet the court's requirements or its aggressive timeline. The government appealed this order.

P.L. 108-108, enacted on November 10, 2003, provided that nothing in any statute or principle of common law should be construed or applied to require Interior to commence or continue historical accounting activities with respect to the IIM trust until Congress amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of Interior with respect to the Individual Indian Money Trust; or December 31, 2004, whichever came first.

Court of Appeals Ruling

On December 10, 2004, the Court of Appeals addressed the district court's September 25, 2003 order. The ruling addressed the two main categories of the district court's decree: "Historical Accounting" and "Fixing the System." The Court found that Historical Accounting was governed by P.L. 108-108 and thus vacated the district court's order with respect to that portion of the case. In so finding:

? The Court pointed out that Congress passed PL 108-108 "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required."

? The Court stated "The committee "reject[ed] the notion that in passing the American Indian Trust Management Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has been ordered by the Court. Such an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources."

The Court rejected the plaintiffs' argument that PL 108-108 amounted to a legislative stay of a final judicial judgment and thus violated the separation of powers doctrine. The Court found a critical distinction between statutes that reverse final judgments for money damages and statutes that alter substantive obligations of parties subject to ongoing duties under an injunction.

Plaintiffs also argued PL 108-108 violated the due process and takings clauses of the Fifth Amendment. The Court rejected this argument, noting that plaintiffs did not explicitly identify the property right being taken other than to reference the right to interest earned on trust accounts. The Court also pointed out that "Congress may provide a simpler scheme than the district court's, while nonetheless assuring that each individual receives his due or more."

While the second part of the Court's decision focuses on "Fixing the System," elements of it are important to decisions relating to historical accounting. The Court confirmed an earlier district court observation that the establishment of a trust relationship does not mean that plaintiffs can automatically "invoke all the rights that a common law trust entails." The Court reasserted that the government's duties must be "rooted in and outlined by the relevant statutes and treaties . . ."

The Court also focused on the government's argument that normally private trust expenses are met out of the trust itself, pointing out "[T]hus plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures."

In short, the Court's decision invites a discussion within both the Executive Branch and the Congress as to what is an appropriate historical accounting.

Status

The litigation in this case continues. It has had a profound effect on every part of the Department. To date, many career employees have had the specter of contempt hanging over them. Within the last few weeks we have been informed that the plaintiffs' lawyers want to depose representatives of the Bureau of Land Management, the Fish and Wildlife Service, the National Park Service, the Bureau of Reclamation, and even the Department's Inspector General. To give you a sense of the case, as of February 10, 2005, the plaintiffs are seeking to depose the following departmental employees or former employees:

- Ethel Abeita, Director, Office of the Special Trustee for American Indians
- Anson Baker, Director, North West Regional Appraisal Office, Department of the Interior
- Brian Burns, CIO, Bureau of Indian Affairs
- Norma Campbell, Retired Director, Office of Planning and Performance Management, Department of the Interior

- James Cason, Associate Deputy Secretary, Department of the Interior
- Francis Cherry, Deputy Director, Bureau of Land Management
- Katheryn Clement, past Deputy Director, United States Geological Survey
- Robert Doyle, Deputy Director, United States Geological Survey
- Galvan Wendall, Records Management Specialist, Department of the Interior
- Jeffrey Jarrett, Director, Office of Surface Mining
- Mary Kendall-Adler, Deputy Inspector General, Department of the Interior
- Thomas Kerstetter, Service Center Specialist, Office of the Special Trustee for American Indians
- Regina Lawrence, Office of Chief Information Officer, Department of the Interior
- Thao Le, Chief Technical Officer, Bureau of Indian Affairs
- Mark Limbaugh, Deputy Commissioner, Bureau of Reclamation
- Donnie McClure, Records Management Officer, Office of Historical Trust Accounting
- John Messano, Director of the Office of Information Operations, Bureau of Indian Affairs
- Pat Moloney, Chief of the Systems Division, Bureau of Indian Affairs
- Donald Murphy, Deputy Director, National Park Service
- William Ragsdale, Director of the Office of Trust Review, Department of the Interior
- Hord Tipton, CIO, Department of the Interior
- Timothy Vigotsky, Retired Director of the National Business Center, Department of the Interior
- Steven Williams, Director, Fish and Wildlife Service

Historical Accounting

Interior conducted a reconciliation for the five named Cobell plaintiffs and their predecessors, reviewing documents which dated back to 1914, and found that 86 percent of the transactions and 93 percent of funds moving through the accounts were properly documented. The review, which cost \$20 million to conduct, did not reveal any collected transactions not included in the selected accounts (with the exception of one transaction posted to the wrong Indian account holder). Moreover, Interior conducted a reconciliation of tribal trust funds based on a statistical sample with certain agreed upon accounting principles and found that 89 percent of total receipts and disbursements for 1972 to 1992 were reconciled with far less than a one percent error rate. At that time, Interior did not have sufficient documentation to reconcile the remaining 11 percent.

As of December 31, 2004, the Office of Historical Trust Accounting (OHTA) had reconciled more than 36,700 judgment accounts with balances totaling more than \$53 million and reconciled 7,360 per capita accounts with balances of over \$21.7 million. As of today, the OHTA has mailed over 11,000 historical statements of judgment accounts to individual Indian account holders and former account holders. By the end of 2005, OHTA will reconcile a total of 34,000 judgment accounts and 9,200 per capita accounts.

Through December 31, 2004, OHTA also resolved residual balances in nearly 8,200 special deposit accounts, identifying the proper ownership of more than \$38 million belonging to individual Indians, Tribes, and private entities. By the end of 2005, OHTA expects to resolve the proper ownership of approximately \$51 million (cumulative) in residual special deposit account balances.

The OHTA also has begun using a contractor-developed accounting reconciliation tool to reconcile land-based IIM transactions. In 2004 OHTA reconciled more than 4,700 land based IIM transactions and by the end of 2005, OHTA will reconcile an additional 7,000. In preparation for completion of historical statements of account for land-based IIM accounts, OHTA will verify and fill any gaps in historical transaction data for approximately half of the BIA regions.

The Administration proposed funding the historic accounting at \$130 million and \$109 million in FY 04 and FY 05 respectively. Despite our request of \$109 million for FY 2005, only \$58 million was appropriated and this includes funding for tribal trust fund accounting as well. The FY 06 budget request for historical accounting is \$135 million, an increase of \$77.8 million over the 2005 enacted level. This amount will provide \$95 million for IIM accounting, an increase of \$50 million above what the Department anticipates it will spend in 2005, and \$40 million for tribal accounting, an increase of \$27.8 million above what the Department anticipates it will spend in 2005.

It is also not clear what will occur in the district court now that the provisions of P.L. 108-108 have expired. The Department has been involved in mediation, but no agreed-upon resolution has yet emerged.

Conclusion

I want to thank the Committee for holding this hearing. We have a historic opportunity to resolve these issues which are fundamental to our responsibilities to our beneficiaries and to the American taxpayer. This concludes my statement. I would be happy to answer any questions the Committee may have.

