INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds

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TESTIMONY
of the
INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
Before the
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The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following federally recognized tribes: Central Council of Tlingit & Haida Indian Tribes, Kenaitze Indian Tribe, Metlakatla Indian Tribe, Hopi Nation, Tohono O'odham Nation, Salt River Pima-Maricopa Indian Tribe, Hoopa Valley Tribe, Yurok Tribe, Soboba Band of Luiseno Indians, Southern Ute Tribe, Nez Perce Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa Indians, Grand Portage Tribe, Leech Lake Band of Ojibwe, Red Lake Band of Chippewa Indians, Blackfeet Tribe, Chippewa Cree Tribe of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe, Fort Belknap Tribes, Fort Peck Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Walker River Paiute Tribal Council, Jicarilla Apache Tribe, Mescalero Apache Tribe, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Sandia, Three Affiliated Tribes of Fort Berthold, Turtle Mountain Band of Chippewa, Absentee Shawnee Tribe, Alabama Quassarte, Cherokee Nation, Kaw Nation, Kiowa Tribe of Oklahoma, Muscogee Creek Nation, Osage Tribe, Quapaw Tribe, Thlopthlocco Tribal Town, Confederated Tribes of Umatilla, Confederated Tribes of Warm Springs, Cheyenne River Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, Chehalis Tribe, Confederated Tribes of Colville, Forest County Potawatomi Tribe, Oneida Tribe of Wisconsin, Eastern Shoshone Tribe, and the Northern Arapaho Tribe.

ITMA is very grateful for this Committee's invitation to share our thoughts today on the status of Indian trust reform within the Department of the Interior. We believe we have addressed those issues on which the Committee specifically requested our views. This is our third opportunity to share our views at the Committee's invitation, and we still await the first opportunity from Secretary Norton to do so. In fairness to her, we never received that invitation from her predecessor, either, during his eight years in office.

ITMA emphatically suggests that the following issues must be addressed and considered in improving Indian trust reform:

- Consultation with tribal governments and Indian individuals
- Continuous, diligent oversight by Congress
- Determination of the trust duties to be discharged
- Develop policies and procedures to execute acknowledged trust duties
- Develop internal controls to detect failures to follow policies and procedures
- Develop an enforcement system to preserve integrity
- Develop an appropriate system of rewards and sanctions
- Disclose known losses and thefts
- Role of lawyers and budget officials identified
- Deal in good faith
- Avoid self-dealing or double standard

· Reconciliation or Settlement

Consultation is not a gratuitous nicety

This Committee has heard much about the Secretary's lack of consultation in developing her restructuring plan. ITMA wants to emphasize that consultation is essential to the Department's own stated goals of wanting to improve the delivery of trust services. This Committee asks our views. The Senate oversight committee asks our views, the appropriations committees in both houses have consulted with us over the years, the General Accounting Office has consulted with us over the years in the preparation of reports for the Congress, and the press has requested our views in reporting trust fund matters to the public. The Department of Interior alone, charged with the principal duties of Indian trust administration, has almost never consulted us, except to solicit our endorsement of a decision already taken behind closed doors within the Department.

Had Secretary Norton consulted us, she would have been told that her plan for restructuring would face enormous opposition if she unveiled it as a surprise. Such an announcement would violate a written agreement entered into by Mr. McCaleb's predecessor on the issue of consultation. The Secretary recently attended one, and dispatched her team to other tribal "consultations" throughout Indian Country to convey her plan for reorganization. Secretary Norton and her team heard first-hand from the Indian leadership that Indian Country totally opposed her plan and lack of consultation.

Her first personally signed report to the *Cobell* court, delivered on January 16 of this year, gives us our first indication that the present Administration just might, after all, bring that breath of fresh air to Indian trust reform we have so long hoped for and awaited. We are pleased with the report previously given us by her Director of the Office of Historical Accounting that he has agreed to adopt the approach we suggested six years ago by beginning with the judgment accounts. ITMA can be helpful to that office in suggesting ways in which the remainder of the IIM accounts can be similarly stratified for examination in manageable portions. In her report the court, the Secretary announced, among other things, her intention to adopt a few of our other long-standing recommendations to her Department.

None of this suggests that she is in a position to implement such sweeping changes as outlined sketchily in her November 14, 2001 memo introducing the reorganization and creation of a new agency to carry out trust reform successfully. She was just as confident in her ill-fated, if short-lived announcement that she intended to proceed with a "statistical sampling" of the IIM accounts. We believe she could have avoided one of her present contempt charges, had she simply chosen to confer with us, rather than taking the "statistical sampling" decision behind closed doors, which is the same way she her reorganization plan appears to have been conceived.

Successive Administrations going back to 1986 have announced bold, sweeping proposals to reform Indian trust administration. None of these proposals rose to the level that could meaningfully be called a plan. Whether the proposal was to contract trust fund administration to Security Pacific Bank, or with Mellon Bank, or to the Bureau of Reclamation, or to transfer it to a whole new agency as Secretary Norton now proposes, the result was the same and was totally predictable. Indian country rose up in outrage not merely because they were not "consulted," but because they had no idea what would happen to our money or service delivery, and no one could tell us. Career employees whose principal contribution in retrospect turns out to have been to buy time reaped scores of thousands of dollars in meritorious bonuses. The failures and the losses and the national embarrassment continued. After a decade and a half, this pattern should be clear.

Progress of "Consultation" on Secretary Norton's plan for reorganization

It is too early in the "consultation" process on the Secretary's proposal to make any informed observations about the results. It is not too early, however, to make some comments on the process itself, or to offer some observations about improving the process. In very significant measure, this particular consultation process has been badly undermined from the beginning by both the Administration and the Congress. Tribes and their organizations both have been admonished by congressional staff either to come up with persuasive alternative proposals or to persuade the Secretary to abandon hers. Otherwise, her plan will almost certainly be approved when she presents it again, this advice has continued. If that advice reflects the true situation, then the present consultation process is very probably not much more than a charade.

ITMA believes the consultation process should focus on the objectives to be achieved in the various areas of trust administration such as leasing, rights-of-way, extractive operations, investment, etc. These collaborative deliberations should begin with the legal duties required of the government as trustee, and the capabilities and resources needed to perform those duties. Only when there has been some consensus achieved on the nature and scope of those duties does it make sense to focus on the systems and structures best suited to accomplish their performance. Unless the Department is genuinely willing to put its opening assumptions on the table, consultation in this matter will, indeed, be simply a gratuitous nicety, to be endured by the Department as part of the cost of proceeding with a predetermined course of action.

In her first personally signed report to the court, the Secretary and her contractor indicate what we hope is a commitment to return to first principles and analyze the objectives to be achieved before turning again to the systems best suited to achieving them. We note, for instance, that in revising trust regulations, the previous Administration acknowledged the need for an accounts receivable system, but would not acknowledge any responsibility for collecting receivables until the much vaunted TAAMS system was operational. Now that system has been put on hold. Whether or not that disclaimer is effective is another matter, but the example is instructive here.

We have heartily applauded the Secretary's apparent repudiation of that systems-driven approach to performance of trust duties, but we point out that the very same mistake can be made with respect to organizational structure as with respect to systems. Her predecessor's systems-driven approach has now left Indian trust beneficiaries stuck with a regulatory regime that explicitly disclaims any responsibility on the Department of the Interior to collect their receivables. This Secretary appears to have repudiated that systems-driven approach. Instead, she has apparently elected to proceed with an organizational structure-driven approach, instead. If that is the case, we predict a similar result. In both instances, the choice made represents a decision to proceed publicly amid much fanfare with activities that require a lot of motion, transfer and expenditure of funds, and generally mesmerizing movement. This flurry of activity in the name of reform is well known to the Department as a tried and proven formula to forestall embarrassing questions from oversight Committees and eat up the calendar allotted to any Administration in large chunks.

Interior Secretary Norton's Plans for Restructuring Trust Administration

ITMA strongly opposes Secretary Norton's plan to restructure Indian trust administration within her Department. ITMA's opposition does not stem from pique over not having been consulted. Rather, our opposition stems from the fact that this announcement fits the very pattern described above. This is her first sweeping proposal for reform, and it, too, was conceived behind closed doors, and no one in the Department has been able to tell us just what it means for either our money or our other trust assets. We do know that

her choice to head up what she calls her office of "trust transition" was the architect of failed sweeping proposals for Indian trust fund reform in the 1980's, when meritorious cash bonuses were paid to career employees but no improvement resulted.

This proposal contains within it the same seeds of likely failure that attended the software acquisition called TAAMS. So far as anyone in the Department has been able to tell us, little thought has been given to the ability to state the objectives to be achieved, beyond the catchall term of improvement. The Secretary's team has not been able to tell us just what functions, positions, resources, facilities, or other capabilities she proposes to transfer. Her team has not shared with us any of the planning, if any, that went into this proposal, or what it portends for the remaining agency and its capabilities. She has not been able to tell us why she thinks current employees could perform their duties better if they were located in a new agency. We respectfully suggest that she and her team have not given sufficient attention to the necessary first step of determining just what those duties are.

Further, we note that her proposal contains within it the explicit assumption that determining the nature and scope of those duties is solely within her purview. ITMA categorically rejects that assumption. We are aware that the Congress is reluctant to "tie the hands" of the Executive Branch officials who are charged with discharging those duties, and that deference to agency "expertise" is a long-standing tradition. In the present situation, our reluctant duty is to advise this Committee that the weight of recent history counsels against honoring either of those traditions without carefully examining the underlying assumptions.

Finally, we note that in this instance, Secretary Norton and her team have candidly conceded that this proposal was driven in large measure to avoid interference in her administration of the trust by the federal court in ***Cobell***. We find that explanation totally inadequate for the purpose claimed, fraught with far too many uncertainties, and more likely than not to be counterproductive even for her stated purposes. As we have noted, her proposal offers no explanation why a realty clerk having difficulties performing his duties would be better disposed or equipped to perform those duties under a new agency than under the present one. If the person is the problem, it is a personnel problem and not an organizational one. If the person is not receiving adequate supervision, it is a management problem and not an organizational one. If, as we suspect, the problem is that insufficient attention has been given to determining the nature and scope of the duties themselves, placing the person's position in a different box or the person in a different agency will contribute absolutely nothing to improving the situation. If that person is left in the same location, but transferred administratively to a new agency the Department will have created an entirely new administrative and budgetary regime that contributes absolutely nothing to achieving the original objective, which remains the delivery of realty services. The ***Cobell*** court's Special Monitor's reports abound with such examples of bureaucratic shuffling that have exacerbated, rather than alleviated, problems in Indian trust administration. A wholesale restructuring of the Department without a responsibly developed plan for what is to be achieved would be somewhat like catching air in a net. Prodigious amounts of energy can be expended. The movement can be mesmerizing. But in the end, nothing will have been changed.

ITMA respectfully urges this Committee not to ignore the lessons of recent history in carrying out is own oversight responsibilities to evaluate Secretary Norton's restructuring proposal.

Impacts of Court Order to Shut Down Internet Access for Trust Activities

More than 40,000 individual Indians went through the winter month of December and the holidays without

access to their own money as a result of the court-ordered shut down of automated systems connected to the internet. Some 43,000 individuals did not receive checks that would otherwise have been written during that period. ITMA hopes that the lesson in unintended consequences from this episode is not lost on either the court or the Department, or the Congress for that matter, in considering the Secretary's reorganization plan.

Inquiry must be made into other unforeseen consequences of this shut down period. We presume, for instance, that the government will pay interest to those individuals whose money it held rather than paid out during the period of the shutdown. How will the interest be calculated, or from where will it be paid? Was the money that was held rather than paid out invested as part of the entire IIM investment pool? If it was invested as part of the pool, will others in the pool, such as minors and judgment account holders, be credited with a portion of the interest so earned? The effect on individual Indians who went without their only source of income during the winter months and the holiday seasons should not be lost on anyone.

This issue raises other questions that the Secretary's proposal to separate "trust" and "non-trust" functions seems to ignore, including the connection between the BIA's trust services and its other service delivery responsibilities. Tribes never considered the extent to which trust service delivery has come to depend on the internet. The recent shutdown has caused us to wonder how many initial lease payments were received, along with the administrative fees the BIA now charges. That situation would raise the question of whether the government was paying into its own account, but not into Indians' accounts, monies charged for the use of Indian land. We do not know whose responsibility it is in the current situation to ensure that all the payments that were withheld are paid, and paid in full, including interest. All the monies withheld, together with accrued interest, should be paid immediately, and should not take months to work through the backlog.

IIM Security

ITMA shares the concern of the *Cobell* plaintiffs, the court, and the Department for security of information relating to IIM accounts. We point out in passing that during the period of the *Cobell* litigation, the Pentagon, the FBI, and the Central Intelligence Agency have been hacked into, and none of them was shut down as a result. Nevertheless, there is probably no area of Indian trust administration that has generated more consensus among all the interested parties than that, "The security of individual Indian trust data is inadequate," in the words of the current Associate Deputy Secretary.

This issue has received detailed attention from the Special Master appointed by the court in the *Cobell* litigation and his contractors, as well as from the Department and its contractors. No doubt, the court-ordered shut down did much to focus the Department's attention on this matter, and this focus does appear to have resulted in a candid self-appraisal of its shortcomings in this arena.

The Department has now acknowledged, for instance, that it simply does not have in place either the comprehensive plan for establishing and continuously improving data integrity systems, or the staff required to develop one, as required by the Government Information Security Reform Act, and OMB Circular A-130. Both supervisory and technical support positions such as those for a Chief Information Officer and Information Technology Specialists for security assistance and oversight remain vacant. In the absence of an overall plan, the Department's efforts in this area continue to be driven by its immediate needs, court orders, and contractor-identified priorities.

ITMA does note in the area of IIM data security where the Department itself is in trouble and the Secretary on trial for contempt of court, the Department has adopted an approach long recommended by ITMA for the

overall trust reform effort. Because the Department is in trouble for noncompliance in performing its duties, it has not charged ahead with either a huge systems procurement or a wholesale reorganization of the boxes on organizational charts. Rather, the Department has undertaken an inventory of its duties as they are found in statutes, regulations, OMB-Circulars, court orders, treaties, and directives from Congressional appropriations Committees. In the absence of qualified staff dedicated to this effort, the Department will charge one of its contractors to develop guidance in designing business models and systems specifications to perform those duties. This is precisely the approach ITMA has long insisted the Department adopt to achieve trust reform, and not just data integrity in systems designed to perform historic functions more efficiently. If the Secretary would exercise similar care in designing trust service delivery that she is giving to staying out of jail, prospects for meaningful trust reform would be significantly improved.

Suggestions for Improving Indian Trust Reform

Continuous, Diligent Oversight by Congress. ITMA believes that true reform of the administration of the Indian trust must begin with the proposition that the Secretary alone cannot be permitted to determine the scope of her own duties. Recent history demonstrates conclusively that those tasks that appear easy to perform will be given prominent attention, and those that will eat up large portions of any Secretary's term in office will be held forth as progress to shield against continued oversight by the Congress. We recognize the natural inclination of the Congress not to appear to be interfering with pending court proceedings, or to "tie her hands" in carrying out her responsibilities. For the reasons that follow, however, ITMA respectfully suggests that this traditional deference has been misplaced in this context and that continued oversight by the Congress is necessary for effective reform of Indian trust administration.

As we have noted, in the absence of effective oversight, the Department will determine the scope of its own duties and this alone violates the first principle of the law of agency. Secondly, without the kind of oversight represented by this hearing, the Secretary would already have committed some $300 million to the expensive, highly visible, and time-consuming task of reorganizing the trust functions of her Department without having shown any evidence that it would result in improvement.

Determination of the Duties to be Discharged. Although the Secretary cannot be permitted to determine unilaterally the scope of her duties, no one disputes that existing duties as set forth in treaties, statutes, and case law have not been adequately carried out in the past. Nor has any significant effort been made even to identify those duties, except in the area of automated data security where the exercise appears to be motivated by the threat of a contempt citation. Notwithstanding that this underlying failure to perform legal duties is itself the basis for the entire trust reform effort, no one to date outside the Office of Trust Funds Management has attempted to set forth with clarity just what those duties are. ITMA believes that any improvements resulting from reorganization or successful automation of current practices would be a result of sheer happenstance if those initiatives are not driven by a comprehensive understanding of the duties to be performed. Every one of the hundreds of millions of dollars paid in settlements and judgments over the past fifteen years has been paid because of a failure to perform existing duties required by law. In presently pending litigation, the Executive Branch continues to deny the existence of those duties. Almost every conceivable avenue has been explored, except to identify them, acknowledge them, and then to design policies, procedures, and systems to discharge them honorably.

Any serious attempt to determine the duties to be performed in carrying out the nation's trust duties to

Indian tribes and individuals will encounter early the Self-Governance Act of 1994 (P.L. 103-413). Under that law, some tribes have chosen to undertake many of those duties themselves. ITMA is hopeful this Secretary will find those tribes' experiences to be useful and instructive, and will not view the self-governance policy embedded in our nation's laws as simply a frustrating obstacle to her "global" approach to trust reform.

Develop Policies and Procedures to Execute Acknowledged Trust Duties. Once the duties to be discharged are determined and articulated, then the Department should develop policies and procedures designed to facilitate and promote the discharge of those duties. Such matters as segregation of duties, development of written policies and desk operating procedures, and defining job qualifications, etc., can meaningfully be addressed only when the underlying duties to be performed have been identified and articulated. BIA data cleanup provides a good example of a massive undertaking that preceded, rather than followed, a clear definition of the duties to be performed and development of policies and procedures developed to improve the performance of those duties. ITMA applauds Secretary Norton's decision to put this initiative on hold until this kind of analysis can be conducted. This is precisely the approach the Secretary seems to have chosen when the matter at issue is her liberty. As a trustee, she should accept no lesser standard when the matter in issue is our property for which she holds a solemn and legal trust obligation.

Develop Internal Controls to Detect Failures to Follow Policies and Procedures. No human enterprise is immune from failures and attempts to defraud it. Indian trust administration is no exception. It is not the duty of the Secretary to achieve perfection. It is her duty to recognize this reality and to design internal controls to detect these occasional mistakes or failures and to correct them. There will be human mistakes; there will be errors in the best of systems; and there will be the occasional criminal attempt. Once appropriate policies and procedures are in place, a system of internal controls should be designed to permit managers to exercise quality control, maintain system integrity, and correct those deficiencies noted. This concept is not foreign to the Department. For many years, voucher examiners reviewed travel and other reimbursement claims submitted by the highest level officials of the Bureau of Indian Affairs to protect the government from overpaying for mileage or per diem rates. On the other hand, throughout this period, oil and timber companies were permitted to take billions of dollars of resources from Indian lands, and no employee was assigned to review the self-generated reports of their operations. Similarly, no one was assigned the duty of monitoring transactions in trust accounts, as the Special Master in the *Cobell* case has so dramatically demonstrated in recent months.

Develop an Enforcement System to Preserve Integrity. The present system of enforcing policies, procedures, and internal controls focuses on easily accomplished "successes." The backgrounds and character of lower level employees are thoroughly screened. Some with bad credit records are relieve of their duties. In the meantime, thefts from trust funds are concealed. New hires are brought in at the highest levels and given operational authority over trust reform activities with neither the civil service review given to voucher examiners or the advice and consent of the Senate. When defalcations or thefts are discovered, no publication invites other account holders similarly situated to review their accounts. No auditor is asked to pay particular attention to transactions from that location. Confirmation letters are not directed to others who were equally vulnerable to the same pilferage. The current system of enforcement, insofar as there can be said to be one, is not designed to enforce compliance, but to avoid liability.

Develop an Appropriate System of Rewards and Sanctions. As noted earlier, during much of the last

fifteen years, scores of thousands of dollars have been paid to career employees of the Department for assisting one Administration after another to create the illusion of active reform efforts, while underlying problems were not addressed at all. Justice Department lawyers have received publicized rewards for the meritorious representation of the government in trust funds litigation, only to be removed ignominiously from the case months later. The government itself has been sanctioned or rebuked in trust litigation arising from California to New Mexico to South Dakota to Washington, D.C., and the attorneys responsible continue the same pattern of practice. In the *Cobell* case alone, the government has paid more than $600,000 in sanctions, three Presidentially appointed officials have been held in contempt of court, and another is presently on trial. In none of these instances has there been an effective incentive to alter the behavior of career employees of the Interior or Justice Departments. On the other hand, the government faces serious accusations of retiring, firing, or retaliating against employees who have disclosed failures, challenged unauthorized access, and told the truth when questioned under oath.

A system of rewards and sanctions should be designed that will effectively discourage cover-ups, falsifying records, giving false testimony, dissembling, and otherwise providing materially misleading writings or utterances. Such a system should reward those who discover problems and bring them to light. It should reward those who discover and disclose losses, waste, or thefts from the trust corpus. It should reward those who come forward with solutions. It should reward those who tell the truth. It should reward those who place problems squarely on the table for deliberation and resolution.

Under the current system, losses from nearly a generation are tallied neatly with accrued interest owed, but not made whole. ITMA respectfully suggests Congress has a responsibility here as well. The Department requested $12,668,000 for fiscal year 1996 to make good some known losses to IIM accounts, and ITMA believes the Congress declined to provide it. No Committee of Congress has so much as made an inquiry about it in the intervening years. After the *Cobell* case was filed, the Department has never again even intimated that there may have been losses to the IIM portfolio. Institutional memory is entrusted to career employees at management and attorney levels who reap rewards for covering up and dissembling. The entire nation and its financial press in recent weeks have raised a huge public outcry about the lack of transparency, the apparent dissimulation, the rewards to management while account holders suffered losses, and the failure of analysts to discern underlying problems associated with the collapse of Enron. All those very same issues attend the current system of Indian trust administration.

Disclose Known Losses and Thefts. Other than possibly the appearance of self-dealing, no issue arising from the travesty of the Enron collapse has received more attention than the lack of transparency in its financial statements. ITMA firmly believes that disclosure of known losses, waste, fraud, and theft is an essential underpinning of any trust operation. When such events are discovered in a commercial trust operation, the legitimate expectation of beneficiaries is that some honorable individual will step forward, disclose the event, and offer to make restitution. This attitude is conspicuously and defiantly absent in the government's administration of the Indian trust estate. ITMA has discovered evidence of the theft of more than $7.75 million in a single episode in 1984. No Secretary of the Interior and no Assistant Secretary of Indian Affairs has ever disclosed that theft to account holders. When ITMA brought its awareness of the matter to the Department in the mid-1990's, the Department calculated the amount required to make good the unrecovered money plus accrued interest and requested appropriations to do so. Congress declined to provide the money, and the matter has not been heard of again. ITMA believes the Department does maintain a running tally of the amount presently due, but only against the day when the matter may be

brought to light again. It is virtually impossible to repose trust in a system that knows, but fails to disclose and make whole, losses it has allowed to occur. ITMA believes in the adage that sunlight remains the best disinfectant known to the operation of government in a free society.

Role of Lawyers and Budget Officials. ITMA believes the failure to disclose known losses is often the result of the role of government lawyers and budget who see their role not as officers of the court, or as protectors of the integrity of government, but as defenders of the public fisc. Even those officers appointed by the President to run the Executive Branch of government are often hamstrung in their efforts by the advice of career employees who effectively direct trust operations from their unseen positions in the service of successive Administrations. ITMA believes this cloak must be removed, and the role of these officers subjected to the same scrutiny we give to those in front offices. Even a cursory review of the government's record in trust litigation over the past twenty years will convince any reviewer of the importance of this issue. But no one in a position of authority in Interior, Justice, or Congress is even aware of this record.

Deal in Good Faith. ITMA believes that neither trust reform nor consultation will be successful unless both sides consent to deal with the other openly and in good faith. ITMA notes the wildly varying explanations provided by the Interior Department to explain the genesis of Secretary Norton's reorganization proposal as an example of our concern that we are not being dealt with in good faith. Department officials have explained to us that her reorganization proposal was developed largely out of a concerted desire to avoid court intervention in her administration of the trust, and to avoid receivership. We understand from conferences with Congressional staff that she has made much the same explanation privately to Congress. ITMA notes that her explanation to the court suggests an entirely different rationale and history of the development of this proposal. Consultation on this or any other matter will be utterly meaningless unless the real reasons for her positions are put forth straightforwardly for discussion. In this matter, ITMA notes that the Secretary's recent report to the court explains tribal opposition to her reorganization proposal as centered on the consultation process itself. If she really believes that, and that there are not substantive issues that need to be addressed, and that her assumptions as well as ours are not on the table for discussion, then the consultation process is merely a procedural hurdle, and not a meaningful forum.

Avoid Self-Dealing or Double Standard. ITMA believes that meaningful collaboration in trust reform will require the Department to give as much attention to honorable trust administration as to protecting the government from liability for past mistakes or keeping the Secretary out of jail. No one expects the government to operate flawlessly. We accept that everyone wants to improve the future performance of the government in trust administration. But failures of the past that are known or discoverable should be faced squarely and dealt with honorably. Of course, those that are known should be disclosed. None of this is happening, however. The government to date, including Secretary Norton's team, has admonished us to let bygones be bygones, and to focus on the future. ITMA notes that this government has operated vigorously at the highest level and exerted pressure on dozens of governments around the world in recent years to face honorably obligations owed as a result of the Holocaust. ITMA notes that our government has paid some one billion dollars in recent years in settlement of past failures in Indian trust administration. ITMA further notes that a recent $20+ million effort to "reconcile" tribal trust accounts resulted in a major accounting firm's disclaimer of either opening or closing balances in its reports. ITMA remains convinced that the government must agree to deal honorably with past failures, even as it focuses

its efforts on future reforms, if real reform is to have any meaning. Any other approach means that even future obligations may be ignored with impunity.

ITMA also notes that when Secretary Norton created the Office of Historical Accounting in her office, she provided the officer in charge with 60 days merely to develop a timetable for developing a plan of operations. She further afforded him 120 days merely to determine what he thought he could do "immediately." In light of that schedule - 60 days merely to develop a timetable for developing a plan - her recent abbreviated schedule for nation-wide tribal "consultation" on a vastly more ambitious undertaking is both an outrage and an insult. ITMA fears that this careful and deliberative approach where she is faced with contempt proceedings, compared to her cavalier treatment of tribes' opportunity to proceed deliberately, reflects a mentality of self-dealing and a double standard that is totally unacceptable.

Likewise, where she is also facing contempt proceedings in the matter of IIM data security, she is proceeding by carefully inventorying and articulating her duties, tracing them to treaties, statutes, case law, regulations, OMB directives, and Congressional reports. In the much larger matter of overall trust reform, however, she proposed to make a $300 million overhaul. By at least one of her accounts, her proposal to uproot all trust functions was made within two days of receiving a list of options, a list that did not even contain the prospect of beginning with an analysis of the duties to be performed.

ITMA believes that the Secretary must agree to approach trust reform by giving Indian beneficiaries the same level of consideration she is giving to her far more personal concerns.

Reconciliation or Settlement. The Department will never be in compliance with the 1994 Indian Trust Funds Management Reform Act until it can report accurate account balances. In addition, it will never be able to report accurate account balances until it deals with the issue of historic balances. If the Arthur Andersen reports of the mid-1990's demonstrate the impossibility of a global, transaction-by-transaction reconciliation of tribal accounts, then other methods must be found to achieve "accurate balances." This is neither the impossibility nor the meaningless one-quarter billion-dollar exercise it has been presented to be. It is an exercise that will require cooperation. It will require a willingness to accept responsibility for past failures, a determination to deal in good faith, and to avoid self-dealing. ITMA has suggested approaches to this matter that have been successful in litigation and negotiation for years. The Executive Branch has so far been unwilling to participate in any substantive discussions that would require it to admit the very systemic failures that it presently acknowledges in open court. Career attorneys in the Department of Justice have been able to give effective "direction" to Presidential appointees in Interior to avoid even discussions on settlement proposals. ITMA continues to recommend discussions designed to achieve negotiated or stated balances where actual reconciliation is not possible. In those instances where a full reconciliation is possible, there is no excuse for not proceeding.

Substantive Legislation Needed. Last month, at least three lawsuits were filed against the government, in large part to protect the tribes against possible claims that the Arthur Andersen reports provided nearly six years ago sufficed to end the Congress' tolling of the statute of limitations. Even though those reports explicitly disclaimed the accuracy of either opening or closing balances, Justice Department lawyers have indicated they will interpose those reports in any claim against the government as evidence of both any accounting that might be ordered, and as evidence of account balances. The Congress should act to eliminate the possibility of either of those uses over the objection of any tribe. A tribe that knowingly chooses to accept the report for its own accounts, of course, should be free to do so. Congress should also affirmatively address the statute of

limitations issue by making it clear that no tribe is barred from bringing suit until Congress has expressed its agreement that an adequate accounting has been provided. Such a provision would likely forestall, rather than prompt, lawsuits such as those filed last month as protective measures.

No matter what organizational structure is ultimately adopted, or what systems acquired or developed, there are a number of areas where substantive legislation is needed. The present method of investing IIM monies in a pool has returned hundreds of millions of dollars in increased earnings over the past generation, and saved tens of millions in administrative costs. This method does not have affirmative authorization in law. The method of computing interest for individuals is unnecessarily complex and, in fact, has to be contracted out even by the trust accounting systems contractor. Both these matter should be addressed in legislation. ITMA respectfully suggests that Congress consider authorizing a par value fund structure for this pool.

The Congress should act to repeal the blanket authority presently available to the Secretary unilaterally to impose administrative fees on Indian trust assets to recover the costs of administering the trust. This provision has never until January of last year been incorporated into regulations, making it a duty of BIA officials now to make two collections for every lease of Indian lands, one for the government and one for the Indian landowner. When the Indian payment system was shut down in December, presumably the government was paying itself, but not Indians for any leases issued during that period. There is neither rhyme nor reason disclosed for the "formula" now contained in regulations for computing the government's fee for processing leases, assignments, extensions, modifications, renewals, etc. ITMA believes the Congress provides resources for the discharge of trust duties and is largely not even aware that the Department is supplementing its appropriations with these fees. ITMA also thinks it is an outrage that a Department that is in so much trouble for its inability to collect for Indians should take it upon itself to double the number of transactions to be processed solely for the purpose of augmenting its Congressional appropriations. Put more bluntly, ITMA fears that the Department has dusted off this antiquated statute and wielded it in retaliation for the embarrassments and slights it feels it has suffered in trust reform.

Restore Honor and Decency. There is a moral element in trust administration. "Not honor alone, but the punctilio of an honor the most sensitive, is the standard of behavior for a trustee," Justice Cardozo wrote. President Bush campaigned the length and breadth of the nation on a platform to restore honor and decency to the highest levels of government. ITMA continues to hope the moral tone he has set for the country will filter into the administration of the Indian trust estate. We believe that control of this effort must be wrested from the career employees who have directed it, and taken firmly in hand by those officers appointed by the President under the watchful oversight of Congress and the beneficiaries themselves. Those officers must set the tone for honor and decency in administering the trust.

ITMA takes no pleasure whatsoever in our government's embarrassment. In numbers out of all proportion to our own, our men and women continue to fight for this country whenever it sends our forces upon foreign shores. We do no particular honor to their service when we rebuke the government they serve in the face of foreign shot and shell. It is our government, too. It does not belong to those who occupy its seats of power. We desperately want to be able to believe our government as much as we believe in it. We stand ready to provide whatever assistance we can offer the Department or this Committee in this important enterprise.

On behalf of all the 53 tribal members of the Intertribal Monitoring Association on Indian Trust Funds who hold individual accounts, we express our profound gratitude to this Committee for its dedication to providing oversight to Indian trust reform. Thank you for affording us this voice in the operation of our government.

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