Testimony of Elouise C. Cobell,

Class Representative - Cobell v. Norton

House Committee on Resources

United States House of Representatives

July 9, 2003

Good afternoon, Chairman Pombo, Mr. Rahall, Members of the Committee - thank you for inviting me here today to address the Committee on the critical issue of Indian trust funds. I would like to begin by taking this opportunity to personally thank you Mr. Chairman - for your outspoken opposition to Section 137 of the House Interior Appropriations bill - which is also being called the "Mandatory Account Adjustment Directive" or MAAD.

As you are aware, MAAD is a most repressive measure designed to eviscerate the rights of Indian beneficiaries and steal from us the victories we have achieved through seven years of litigation. MAAD is touted by its proponents as a sound, reasonable and fair process for "settling" the on-going Indian trust fund case, Cobell v. Norton. But in reality, it is neither sound, nor reasonable, nor fair. Rather, MAAD is a draconian provision that would involuntary extinguish the claims of trust beneficiaries and eliminate their right to seek redress from the courts for the uncontested century of mismanagement of our trust funds. Put simply, MAAD is bad federal Indian policy. I will discuss its implications and the misinformation that supports it in greater detail in a moment. MAAD is a blatant violation of the Separation of Powers doctrine which seeks to change the judicial rules in midstream by a massive legislative intrusion in to a court case that has been going on for seven years.

I am pleased to come here today to provide testimony on the vitally important and timely question posed by this hearing: "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit." The Cobell plaintiffs believe that the answer to that question is self-evident: Of course, such a process can be developed. Moreover, I want to be make our position on one matter unmistakably clear: We are now - as we have been since the commencement of this litigation - prepared to engage in a fair settlement process and resolve these longstanding trust mismanagement issues. The key word is of course, is "fair." On behalf of over 500,000 plaintiffs of the Cobell class, I am here to offer our support for a fair process to settle the Cobell case and offer some suggestions to aid this Committee in its deliberations on this issue.

In order to better understand how to develop a process, I think its important to start with an overview on why we are where we are. Why, after a century, is the Interior Department still - by its own admissions - mismanaging our assets and monies? Why has Federal District Court Judge Royce C. Lamberth held two successive Secretaries of Interior - Babbitt and Norton - in contempt of Court? Why are some in Congress seeking resolution of Cobell by doing injustice to beneficiaries?

Cobell Overview

Mr. Chairman, when I last appeared before the Committee on February 6, 2002, I described the compelling nature of the lawsuit. The Individual Indian Money (IIM) trust is supposed to be the mechanism by which revenues from Indian-owned lands throughout the Western states are collected and distributed to approximately 500,000 current individual Indian trust beneficiaries. This trust is a vital lifeline for Native Americans, many of whom are among the poorest people in this country. Where I live, in Glacier County, Montana, the home of the Blackfeet Nation and one of the 25 poorest counties in the United States, I can tell you that many Indian people depend on these payments for the bare necessities of life.

As you know, these trust funds are not a handout or an entitlement program. It is imperative to keep in mind that this is our money - our property - revenues generated from leasing and sales of our land and resources,

including oil and gas, grazing, farming, logging and mineral extraction on our lands. The IIM Trust was devised by the United States government, imposed on Indian people more than a century ago, without our consent. As trustee, the United States and each branch of the federal government has the highest legal duty and fiduciary responsibility to properly manage the IIM trust. Unfortunately - as you and many of the members of this Committee are well aware, Mr. Chairman - there is no one that disputes that this has been and remains, a severely broken trust.

That is the reason I brought this suit seven years ago. We tried working with the government for over a decade to resolve the mismanagement of the IIM Trust. Even after the Misplaced Trust Report was unanimously issued in 1992 under the leadership of Congressmen Mike Synar (D) and Bill Clinger (R), nothing changed. But the report led to the passage by Congress of the Trust Reform Act of 1994. After enactment, however, still no progress was realized. Administration after administration, both parties simply ignored us and continued to lose hundreds of millions of dollars of our money each year. As a last resort and with reluctant resignation and deep frustration, I asked my attorneys to bring the Cobell case.

We brought the case to achieve certain simple goals relevant here. First and foremost, this lawsuit is about establishing an effective IIM trust management system. The only way to accomplish this reachable goal is through sound planning and competent management, two ingredients that have been missing for far too long. The Interior Department has tried to blame Congress, saying that you have not devoted sufficient funds to reform. But resources have been available - indeed, close to $1 billion - has been appropriated for trust reform with little to no success. Resources are not the main problem.

Second, this lawsuit seeks an equitable accounting for the Individual Indian Trust beneficiaries. At least $500 million dollars a year in trust revenues is generated from individual Indian owned lands. Where is this money? The United States as Trustee, as the Court of Appeals has held must account for all "deposits, accruals and withdrawals" to and from the IIM Trust. That is the government's fundamental fiduciary obligation. The problem is a massive and unquantifiable amount of documents and data have been lost or destroyed. As a result, defendants cannot discharge their duty to account. The Congress, GAO, Interior's own Inspector General, Interior's contractors, including Price Waterhouse and Arthur Andersen, have all concluded that a full accounting is impossible. Still, the defendants will not admit that fundamental fact. So Interior says that an historical accounting requires Congress to appropriate hundreds of millions, possibly billions, of dollars to do an accounting that will not discharge their duties. It is our position that any money spent on that type of an accounting is a waste, because it will not lead to a result satisfactory to the courts, Congress of individual Indian trust beneficiaries.

So why spend the money? The Department of the Interior says because the Court has required them to do an accounting - but that is only because Interior refuses to admit that such an accounting is impossible. If Interior did so, then Interior officials fear an alternative approach would be used for the Court to formulate an equitable decree to correct the account balances in lieu of the accounting and finally do justice for individual beneficiaries. But this would end the delays and legal wrangling and require the government to finally address 100 years of abuse and malfeasance in the near term, something they do not want to do.

Since defendants will not admit what all objective observers have already concluded, we must establish by judicial findings that there are not sufficient documents or reliable data for defendants to discharge their trust responsibility to account. Yesterday, I attended closing argument for a 44 day long trial before the District Court - a trial where one of the central issues before the Court is whether defendants' can ever complete a fair and full accounting given the unreliability of their data and destruction of documents. Plaintiffs will ask the Court to hold that they cannot and an alternative mechanism, consistent with principles of trust law, should be used to determine accurate account balances.

The parties expect a decision within the next few months. That decision will set forth the appropriate parameters to proceed on the remainder of the case including how to reach corrected account balances. Those same parameters will also provide a helpful basis for launching settlement discussions.

Timing and Settlement
A central stated justification for Section 137, the appropriators' MAAD proposal is the mistaken notion that there is no end in sight to the Cobell v. Norton lawsuit. That is simply not true. In point of fact, as mentioned, we have just concluded a trial that will decide many of the remaining disputed issues. The Court could hold its final trial - the equitable accounting trial - as early as this fall. The truth is that it is precisely because the Court is approaching a judgment sooner rather than later that Interior is now desperate for Congress to enact MAAD.

It is important to note that this case has been in litigation over seven years. It is a matter of record that time and time again the case has been unconscionably delayed as a result of government litigation misconduct. Put another way, this case has taken as long as it has because of the obstructionist behavior of the government counsel and officials for which they have been held in contempt of Court - twice.

We, the IIM beneficiaries, on the other hand have pursued expedited resolution of this case. We have vigorously contested each and every government-sponsored delay tactic. That is the record of this case. We want resolution because each and every day trust beneficiaries are dying without receiving justice.

Some have disputed this notion and have suggested that plaintiffs want this case to last forever because class counsel is getting rich. One politician said my lawyers were making millions of dollars. That is patently untrue. In fact, Mr. Chairman, I have not paid my lawyers a dime for over four years. They are not getting rich; in fact, each day that passes is a day that they are not getting paid. The fact is, my lawyers have worked day and night at great personal sacrifice without compensation. Hardly, a sound approach to getting rich.

We want resolution more than anyone, especially for the plaintiffs' class who have, for the last century, not seen a working trust system or justice. So, I would welcome an opportunity to reach a fair settlement of the Cobell case and we welcome the involvement of this Committee and the Senate Committee on Indian Affairs in determining a sound process.

In fact Mr. Chairman, as you know, by letter dated April 8, 2003, Senators Campbell and Inouye expressed their "strongly held belief that the parties to this case should pursue a mediated resolution rather than the current course of continued litigation" (copy attached). The Senators encouraged the parties "to engage the services of an enhanced mediation team that will bring to bear trust, accounting, and legal expertise to develop alternative models that will resolve the Cobell case fairly and honorably for all parties."

By letter dated May 23, 2003 John Echohawk on behalf of the plaintiffs' class responded affirmatively to the Senators' proposal. I have included a copy of this letter with my testimony. A recitation of some of Mr. Echohawk's response is quoted below and demonstrates our commitment to resolving this case:

First and foremost, on behalf of the 500,000 individual Indian trust beneficiaries we express our gratitude for your sincere interest in the Cobell litigation and your willingness and desire to see that it is resolved fairly and expeditiously. Be assured that the Cobell plaintiffs are now, and always have been, willing to engage in frank and honest discussions for a fair resolution of this case. However the executive branch - with the exception of Treasury - has been steadfast in its unwillingness to negotiate such a resolution. Without your direct and active participation in the settlement process, we have no hope that the Administration will discuss these matters in good faith.

On five previous occasions, we have engaged the executive branch in fruitless settlement discussions. Each time, government officials broke promises they had made to the Cobell plaintiffs and rejected settlement of matters that the negotiators had resolved. And, they have never made a good faith offer to resolve the accounting matter.

[P]laintiffs are skeptical that Interior and Justice are prepared to resolve the Cobell case in good faith and in a fair manner. Nevertheless, with your involvement, we hope that it is possible. As a firm commitment to resolve this case as soon as possible, we hereby pledge to you that we are now - and we have always been - open to a resolution that ensures our clients are treated fairly and justly. For this reason, we welcome your efforts to begin a resolution process before the close of this year.

Letter from Echohawk to Senators Campbell and Inouye, dated May 23, 2003.

I understand that Interior has not responded in writing to the Senators. Mr. Chairman, the Individual Indian trust beneficiaries stand ready to participate in a fair settlement process with this Committee, in conjunction with the Senate Committee on Indian Affairs. Given past history, plaintiffs are not optimistic that a resolution can be reached, but we are willing to try. It is not clear to us how to ensure that the Interior Department will take settlement seriously. Our hope is that with the involvement of the authorizing committees there will be sufficient pressure brought to bear to ensure a good faith negotiation and perhaps a successful resolution to the Cobell case.

The MAAD Proposal

The MAAD proposal obviously is not a sound proposal and will not achieve the justice this case demands. After a century of mismanagement, MAAD is a bald-faced attempt at taking the property of individual Indian beneficiaries by eliminating their judicially established rights. After a century of mismanagement of their property, MAAD adds insult to injury and we are glad so many members of this committee have rejected it as unfair and unsound.

The MAAD proposal is based not on truth and fact and the record of this case. Instead, it is based on myths and falsehoods. We will discuss these in turn.

In the House Appropriations Report which attempts to justify MAAD, there is a wild assertion that it is intended to benefit individual account holders. The U.S. Court of Appeals has already held that the beneficiaries have the right to have all items held in trust accounted for by the Department of the Interior. The U.S. District Court has rejected and discredited statistical sampling as a methodology for the accounting of the IIM Trust embraced by MAAD. So how does it help beneficiaries by allowing the government to get away with a lesser standard rejected by the Courts?

Equally important, the individual Indian trust beneficiaries have also clearly rejected the very statistical sampling approach MAAD would purport to impose on them. In 2000, the Department of the Interior published a Federal Register notice requesting comments from the beneficiaries whether they wanted a full "transaction-by-transaction" reconciliation or a "statistical sampling." Within the notice, the Department clearly pushed for the statistical sampling approach by stating, among other things, that it would be quicker for beneficiaries to get paid. To their dismay, officials at the Department were forced to report back that "an overwhelming majority . . . wanted to see a transaction-by-transaction reconciliation in spite of discouraging language contained in the Federal Register Notice stating that such a solution was not very likely . . .." (1) Account beneficiaries presented with the choice rejected the MAAD approach. Make no mistake about it - the truth is that MAAD severely diminishes rights of individual Indian trust beneficiaries to enforce their rights through the courts and forces statistical sampling down their throats.

Furthermore, MAAD's proponents also say it is intended to limit protracted litigation. What is clear, however, is that MAAD, by its own terms will delay resolution and spawn further litigation. MAAD provides for an initial one year delay for Interior to develop a process and seek to force settlements of claims. Then it allows for an additional four years for Interior to implement the process. At the end of that process, Interior will deal with the inefficient process of individualized IIM claims for the many people who will undoubtedly challenge the unfair "adjustments" to their IIM accounts.

In addition, MAAD is most likely unconstitutional as it denies Indian beneficiaries fundamental due process rights and would constitute an unconstitutional taking of their 5th Amendment-protected property. It also contravenes the separation of powers doctrine as Congress is attempting to dictate the outcome in a judicial proceeding. I will assure you that if Section 137 passes, we will challenge it at every juncture. In short, MAAD, rather than limit litigation, will actually lead to additional protracted litigation, thus increasing the costs to the United States and delaying justice to the individual Indian trust beneficiaries.

Another persistent myth is that MAAD somehow offers a "voluntary" settlement process. But MAAD is about as voluntary as holding a gun to someone's head and telling them to sign away their rights. MAAD allows - at the Secretary's discretion - for a "settlement" process prior to the Department's implementation of statistical sampling. If the individual Indian trust beneficiaries do not "agree" to settle, then the Secretary can unilaterally determine the appropriate "adjustment" to their accounts based on judicially-rejected "statistical sampling" and force them to accept Interior's findings. If the individual Indian trust beneficiaries want to challenge the findings, MAAD materially limits judicial review to a determination if Interior acted "arbitrary and capricious." All such appeals must be filed with the U.S. Court of Appeals for the D.C. Circuit within 60 days. Hardly a fair and voluntary settlement process.

Equally important to bear in mind, MAAD eliminates the generally applicable federal court protections for members of a plaintiff-class. When a defendant in a class action lawsuit seeks to "side settle" claims with individual members of a class, they are required to have the court review and authorize the communication. This judicial check is to ensure that the individual members are making their decision based on good information and not based on the "spin" of the defendant. The danger of not having this protection is that a person might "consent" to settlement based on false or misleading information. MAAD eliminates critically important due process protections for individual Indians and give the Secretary unbridled discretion to coerce settlements and ultimately force unfair "adjustments" on 500,000 Indian beneficiaries.

In addition, as is clear from the Interior Subcommittee's report on FY 2004 Appropriations, a major driving force of the MAAD proposal is the insupportable notion that the accounts of the IIM Trust are "substantially accurate." This notion is based on the absurdly inaccurate, Ernst & Young Report. In sworn testimony, the Department of the Interior's lead expert at trial, Dr. Lasater, admitted that the Ernst & Young report is "not an accounting" - after Interior spent over $22 million. Just last week, another expert, testified at trial that the Ernst & Young Report was "riddled with errors." More telling still, the report itself states that it "assumes" all information is accurate and Ernst & Young did not independently verify a shred of evidence and refused to sign or certify it. The truth is that the Report is so riddled with errors, unreliable and insupportable that it is in fact a sham and cannot serve as the basis of any sound decision-making.

Conclusion
I would like to close today, by thanking the many members of this Committee who stood by Indian beneficiaries and supported Mr. Rahall's Amendment last term that stripped another hostile-anti-Indian rider from the Interior Appropriations bill. The Rahall Amendment prevailed with bipartisan support by a final vote of - 281 to 144 - and was a historic victory for Indian Country and justice. We are glad to hear the support of both you Mr. Chairman and Mr. Rahall and so many others on this Committee to ensure that MAAD will never become law.

The disaster of the IIM trust has stood as a blight on this great nation for too long. This "national disgrace" in the words of Senator John McCain, has for too long been allowed to exist. It has outlived many heroes - including Mike Synar and Mildred Cleghorn.

And so I welcome this Committee's intention to be involved in fair resolution of this case. The plaintiffs are committed, as we have been from the beginning to achieving justice for all individual Indian beneficiaries - we look forward to working with you on that most commendable goal.

Thank you.

1. Memorandum of Kevin Gover, Assistant Secretary Indian Affairs to Lisa Guide, Acting Assistant Secretary PMB, et al., December 21, 2000 at 4 (attached).