

**U.S. House of Representatives  
Committee on Resources**

**Oversight Hearing on Indian Trust Fund Accounts, the Department of Interior's Restructuring  
Proposal and the Impacts of the Court Order Closing Access to the Department's Computer System**

**Testimony of Tex G. Hall  
President, National Congress of American Indians**

**February 6, 2002**

Mr. Chairman, members of the Committee, Tribal leaders and members of the public: thank you for the opportunity to provide testimony to you today on issues that Indian Tribes and Nations believe are of critical importance throughout Indian country. My name is Tex Hall, and I am providing testimony on behalf of the National Congress of American Indians, the oldest and largest organization representing Indian Tribes and individual Indians, founded in 1944 and representing more than 200 Tribes. I am also the Chairman of the Mandan, Hidatsa and Arikara Nation (the Three Affiliated Tribes), a Nation with an area of approximately 1500 square miles located along the Missouri River in northwest North Dakota.

**Summary**

1. Tribes throughout the United States are unanimously opposed to the creation of a separate Bureau of Indian Trust Assets Management (BITAM) within the Department of Interior and have strongly urged the Department to withdraw the proposal for creation of BITAM made to the court in the case of *Cobell v. Norton* now pending in U.S. District Court for the District of Columbia. Tribes believe that the proposal of DOI as filed with the Court goes far beyond what was necessary to comply with previous Court orders and that it contradicts the Indian Self Determination Act, including the provisions of that Act for self-governance, and that it violates Congressional intent in passing the American Indian Trust Fund Management Reform Act of 1994. Tribes further have requested that Congress take such steps as are necessary to prevent the BITAM from being created.
2. Tribes are in the process, through a 36 member Task Force selected by the Tribes, of developing alternative mechanisms for ensuring effective reform of trust asset management that will carry out the mandates of the American Indian Trust Fund Management Reform Act of 1994 without the need for a separate Bureau within the Department.
3. Tribes welcome the support DOI has expressed for the Task Force process, provided that any alternative mechanism for trust asset management that is developed by the Task Force and implemented by the Department must receive the full support of all affected Tribes.
4. Tribes recognize that in order to ensure that necessary trust asset management reforms are carried out by the Department, legislation may need to be enacted by Congress that among other things, may provide for the establishment of trust standards and provide for a permanent oversight mechanism to ensure compliance by the Department with those standards.
5. Tribes urge the Congress to appropriate adequate funds to address the issues of trust management and accounting in Indian Country. We believe that funding for tribal land repurchase programs should be seriously considered by Congress as a cost effective solution that will decrease the problems and costs

related to fractionation of land title.

6. Tribes remain highly concerned about the slow progress by the Department in installing necessary security systems on the networked computers the DOI uses for accounting for the assets of Tribal members contained in Individual Indian Money (IIM) accounts. We understand that some checks have begun to be processed, but a great deal of work remains to be done while individual tribal members are suffering because income from their assets upon which they depend for everyday needs has not been paid to them since early December.

7. Tribes request that Congress pass a modest one-year extension of the statute of limitations that arguably can be used to defeat Tribal claims against the United States stemming from trust asset mismanagement that arise because of the issuance in early 1996 to Tribes of the admittedly inadequate Arthur Andersen reconciliation reports required by the American Indian Trust Fund Management Reform Act of 1994.

### Background

This Nation's Indian Tribes have a special and unique relationship with the United States. The relationship is one rooted in the history and rooted in the sovereign nature of the federally recognized Indian Tribes, which all possess inherent sovereignty over their own affairs and are recognized as separate, sovereign governments by the United States through treaties and various other forms of Federal recognition. How this relationship is to be recognized and handled has been formally recognized by the President of the United States in Executive Order 13175, outlining how the executive departments of the United States government should interact with the Tribes on the basis of a "government-to-government" relationship.

Because of the great sacrifice that the Indian tribes have made to the United States of much of their homelands, by conquest, taking, or by ceding those lands through treaties and otherwise to the United States, the United States has become a trustee of much of the lands and assets that have been set aside for the tribes. See, e.g., Memorandum Opinion, *Cobell v. Babbitt*, Civil No. 96-1285, District Court for the District of Columbia, December 21, 1999 and the affirmance of that opinion by the Court of Appeals for the District of Columbia, February 23, 2000 for a more complete outline of the origin of the trust responsibility of the United States.

The trust responsibility of the United States to the Indian tribes within its borders is carried out on the basis of the statutory mandates of Congress, often guided by opinions of the courts of the United States. In 1994, Congress explicitly recognized these fundamental trust obligations, and also recognized the government's failure to adequately carry out its trust responsibility to Indian tribes by passage of the "American Indian Trust Fund Management Reform Act of 1994", P.L. 103-412 (the "Act"). That Act stated in Title I, Section 101 that the Department of Interior needed to act to carry out its responsibilities for discharging its trust responsibilities in an affirmative fashion, and described the functions the Secretary must carry out as follows:

"(d) The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

- (1) Providing adequate systems for accounting for and reporting trust fund balances.
- (2) Providing adequate controls over receipts and disbursements.
- (3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures

for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands."

The Act further created an Office of Special Trustee (OST) whose job it was to develop a plan for the establishment or reform of all necessary systems for Indian trust fund management, and to ensure that these reforms were in fact carried out by the Secretary of the Department of Interior (DOI, or the "Department") who in general has been given by Congress the responsibility to manage assets held in trust by the United States for the benefit of Indian tribes and individuals. The Congress, since 1994, has held many hearings regarding the progress made by the OST and by DOI, and has appropriated considerable sums to ensure that the necessary reforms have been carried out.

Nevertheless, at least in the case of individual Indians, efforts were seen to be inadequate and against the backdrop of the American Indian Trust Fund Management Reform Act of 1994, litigation was filed in 1996 in the U.S. District Court for the District of Columbia by a group of individuals representing the class of all those persons who have rights to Individual Indian Money (IIM) accounts. Their complaint against the Department of Interior sought, among other things, an accounting of their assets and affirmative relief against the Department to ensure the Department's compliance with the Act. This case is known now as *Cobell v. Norton*, Civil No. 96-1285, still pending in the U.S. District Court for the District of Columbia.

The Court in *Cobell* has issued a series of rulings and orders, and has appointed a special Court Monitor who is required to report back to the court the progress the Department has made in carrying out its trust reform responsibilities, particularly in relation to the IIM accounts which is the focus of the *Cobell* plaintiffs' complaint. In recent months, the Court Monitor has issued several reports highly critical of the failure of the Department to complete the required reform efforts and has cited the Department for issuing to the Court false and misleading reports about its progress in making necessary reforms to the trust management systems.

Because of these reports, the plaintiffs in *Cobell* have argued to the court that the performance of the Department in carrying out the orders of the Court, which incorporate the requirements of the American Indian Trust Fund Reform Act, and which have identified specific breaches of the trust responsibility, is grossly inadequate and that a receiver should be appointed to oversee trust reform efforts concerning the IIM accounts that are the subject of the litigation. The plaintiffs have also sought to have the Secretary of Interior and several other officials, and their attorneys, to be held in contempt of court for making false statements to the court about the progress of trust management reform, among other things.

On November 14, 2001, attorneys from the Department of Justice (DOJ) filed on behalf of DOI a response to the Order of the District Court for the District of Columbia in the *Cobell* case to show cause why the Secretary of Interior and others should not be held in contempt of court for failing to comply with the Court's previous Orders. The Court had particularly wanted to know why the Secretary had failed to comply

with the Court's order of December 21, 1999 which required, among other things, that the Department carry out its High Level Implementation Plan (HLIP) as the Department had previously promised to the Court it would do in its filings with the Court, and which also identified four specific breaches of the trust responsibility that should be corrected by DOI with the assistance of the Office of Special Trustee and the Department of the Treasury, which handles distribution of earnings from trust assets to the individual Tribal member beneficiaries.

The response outlined a planned division of the functions of the Bureau of Indian Affairs (BIA), with a new Bureau to be created called "Bureau of Indian Trust Assets Management" (BITAM) to be headed by a new, as yet unnamed, Assistant Secretary of the Interior. The new Bureau would be in charge of the all trust asset management functions of DOI now handled by the BIA and would eventually handle those trust functions of the Office of Trust Funds Management (OTFM), as well, including management of Tribal trust assets, despite the fact that Federally recognized Indian tribes are not parties to the *Cobell* litigation and the fact that the Court does not have the subject of Tribal trust assets before it. Exactly what constitutes "trust management functions" was not defined in the response presented to the Court and to the Tribes.

The DOI response as filed on November 14, 2001 with the *Cobell* court has vast implications for the provision of all trust services to Tribes and their members. **Yet, this response was filed without any notice to the affected Indian tribes, as required by EO 13175.** Instead, DOI indicated shortly after filing its response with the *Cobell* court that it was beginning to conduct "consultations" with the affected Indian tribes to get their reaction to the reorganization.

In the DOJ filing, the reorganization was not presented as a proposal. It was presented as something that the Department would be implementing as soon as possible. DOI indicated that it already had appointed someone to head a "Trust Transition Office", namely Ross Swimmer, a former Assistant Secretary for Indian Affairs who served in the Reagan Administration. In other materials filed with Congress, DOI indicated that it would have to reprogram as much as \$200 million for FY 2002 in order to effectuate the transfer of the trust asset management functions to the new BITAM. It did not indicate that it needed any additional funds in order to carry out the reorganization.

As the reason for its reorganization effort and the creation of the BITAM, the noticed filed by with the court by DOI cited a recent report from a consultant firm, EDS, that DOI had hired to analyze its progress on implementing the HLIP. However, nothing in the EDS report had indicated that forming a new BITAM was necessary, and nothing in the Court's previous orders had indicated that forming a new agency was necessary.

### **Position of NCAI Concerning the Reorganization**

At its Annual Meeting on November 25-30, 2001, in Spokane, Washington, NCAI passed unanimously the attached Resolution, No. SPO-01-006, which opposed the reorganization plan proposed by the Secretary on several fundamental grounds: 1) That the Secretary of Interior has made the reorganization plan without adequate consultation with the affected Indian tribes, in

violation of EO 13175; and 2) That the reorganization raised many questions that troubled Tribal leaders, including whether it was authorized by law; whether it was in compliance with Court orders, whether the proposal would do anything to help manage trust assets better, the effect it would have on tribes who contract or compact for trust functions, and whether it would end up reducing the services provided by the BIA to Tribes.

Beginning on December 13, 2001, in Albuquerque, New Mexico, the Secretary of Interior began a series of meetings with Tribal leaders from throughout the United States. Her meetings, called "consultations" in the Notice published in the Federal Register were to be conducted according to a published schedule and were to allow Tribal leaders to comment on the reorganization plan, but these meetings were only to be held in selected regions of the United States, and did not include meetings in all of the BIA Regions affected by the reorganization. To date, there have been meetings, which the Assistant Secretary for Indian Affairs, Neal McCaleb, has publicly called "scoping" meetings, a term Tribal leaders believe is more consistent with EO 13175, in Albuquerque, NM(12-13-01); Oklahoma City, OK (1-3-02);Rapid City, SD (1-10-02); San Diego, CA (1-17-02); Anchorage, AK, (1-23-02), and Washington, D.C. (2-1-02).

At every meeting to date, Tribal leaders have been unanimous in their opposition to the BITAM and the Department's plan as presented to the Court. Tribal leaders protested the lack of consultation, the effect the proposal would have on provision of trust services of the BIA, the illegality of the proposal, the failure of the plan to request more funds for its implementation, the failure of the Department to provide for security in its computer programs and its slow response in fixing the problem, the possible affect the changes would have on tribes that compacted or contracted for trust services, the failure of the plan to provide for historical accounting of trust assets as required by the American Indian Trust Fund Management Reform Act, the weakening of the BIA as a result of taking trust asset management from it, the waste of time represented by such a far-reaching reorganization without establishing substantive mechanisms for reform of trust asset management, the failure of the plan to address real conflicts of interest among agencies providing some of the trust asset management and accounting functions, and the fact that the plan went far beyond what is required of the Department by the *Cobell* litigation, among other things.

In Albuquerque, the Tribal leaders developed a position paper outlining the basic principles that should govern any trust asset management reform effort. These principles have guided tribes as they have testified at the various "scoping" meetings that have been held so far. The principles include: 1) opposition to BITAM for the reasons stated above; 2) requiring the Department to engage in true consultation on a government-to-government basis pursuant to EO 13175; 3) ensuring that there are adequate resources to carry out trust reform; 4) establishing a mechanism for determining historical account balances; 5) doing no harm to established self-determination and self-governance programs for management of trust assets; 6) providing Tribes the flexibility to assist the Department to manage trust resources consistent and develop different systems consistent with each Tribe's unique resources and circumstances in such areas as grazing, timber, oil and gas, commercial real estate, agriculture, fisheries and hunting and fishing; 7) recognition of the need for trust assets to be managed in a way that protects and allows the continuance of each tribe's unique culture on a long term basis, consistent with Tribal control of the use and development of their lands, including recognizing a strong role for enforcement or leases by the Department.

### **Development of a Tribal Task Force on Trust Reform**

During the initial "scoping" meeting in Albuquerque on December 13, 2001, and continuing at each of the scoping meetings thereafter, Tribal leaders have developed a Tribal Leader's Trust Asset Management Reform Task Force, composed of 2 representatives and one alternate from each of the 12 BIA Regions in the United States. Each of the Regions have now submitted names to the Task Force, and at the invitation of the Department of Interior, the Task Force has held its first formal meeting over the weekend of February 1-4, 2002 at DOI's National Conservation Training Center in Shepherdstown, West Virginia. The Task Force is committed to developing in a deliberative manner an alternative approach to the BITAM developed by DOI and has requested that the Department accept the plan developed by the Task Force instead of the

BITAM. The Secretary of Interior has stated that the Department is interested in considering the proposal developed by the Task Force. The Task Force has elected from its members two co-chairs, including myself, Tex G. Hall, and Susan Masten, Chairperson of the Yurok Tribe in California. The Task Force also has developed a draft protocol of its operations

Already the Task Force has under consideration nine separate proposals for trust asset management reform as outlined by various Indian Tribes and organizations. As more proposals are received, further refinements will be made. Among the common themes of these proposals are: 1) keeping all trust management functions within the Bureau of Affairs; 2) creating an independent commission to develop trust asset management standards and ensure compliance with those standards; 3) providing for all necessary trust asset management functions within the BIA; 4) ensuring complete and full consultation on a government-to-government basis on issues affecting Tribes and their members; and 5) recognition and protection of Tribal sovereignty and the ability of Tribes to manage their affairs and their resources. The Task Force has now appointed a subcommittee to review the various proposals and I am confident that the Task Force will develop a final proposal that meets the trust management needs of all Tribes, while at the same time satisfying the requirements of the *Cobell* court and other court decisions regarding the responsibility of the United States for trust asset management for Indian tribes and their members; the American Indian Trust Fund Management Reform Act of 1994, and the various trust asset management obligations imposed on the United States by Treaties and statutes as illuminated by the common law principles of trust management.

Task Force members are aware of the need to communicate effectively their work product to all Federally recognized Indian Tribes, and to have their meetings open to all Tribes and their advisors so that the maximum input and ideas from Tribes may be received. They also certainly expect that Task Force meetings will be held in the various Regions of the United States to make their deliberations as accessible as possible. They expect that their work will be long and difficult, and that all Tribes will have to work hard to build consensus among them for a final proposal to be acceptable to the Department of Interior, to the Courts, to Congress, and finally, and most importantly, to all of their members.

The Task Force members are well aware of the great responsibility thrust upon them. They have spoken candidly to Secretary Norton at the meeting in Shepherdstown, West Virginia this past weekend about their desire to see a Department of Interior that consults on a government-to-government basis, that takes their concerns seriously, that fully funds trust asset management reform, that will implement meaningful trust reform, withdraw the BITAM plan, that will honor the Treaties and that will respect their sovereignty.

### **Congressional Assistance**

There are a number of steps Congress can take to assist the Department of Interior and the various Indian Tribes in this Nation achieve real trust asset management reform.

**1. Congress should ensure that no funds are reprogrammed during FY 2002 for the BITAM proposal and that for FY 2003, all funds aimed at trust asset management reform remain within the Bureau of Indian Affairs and the Office of the Special Trustee.**

This is critical because DOI has already notified Congress of its intent to reprogram funds to implement the BITAM plan. Tribes are unanimously opposed to the BITAM proposal and know it will not work because it so radically changes the way services are provided to Tribes. There is no reason to spend money on a planned reorganization that does not serve the interests of the affected Indian Tribes.

Congress should also make it clear to the DOI that it would prefer that their BITAM proposal be withdrawn and that a new alternative acceptable to Tribes be developed. DOI has committed to making the Task Force process work, but that must include an adequate commitment to ensure the opportunity for participation in the process by all Tribes, through regular communication, a sufficient number of meetings and sufficient resources devoted to this effort for it to meet all of the Task Force objectives.

**2. Congress should be prepared to assist Tribes to develop meaningful legislation that will likely, among other things, establish enforceable trust asset management standards that allow the needs of all Tribes to be met consistent with each Tribe's unique resources; that will establish a mechanism for oversight of compliance with the standards; and that will provide a structure for trust asset management that balances the needs of Tribes to be involved with trust asset management with the overall trust asset management responsibilities of the United States.**

Tribes, including the Tribes represented on the Tribal Leaders Trust Reform Task Force, are working hard to develop a proposal, or perhaps proposals, that will provide a superior alternative to the BITAM plan already advanced by the Department. Exactly what is to be contained in that proposal is not yet clear, but almost certainly the proposal will have a legislative component to it to ensure that the Department will enact meaningful trust asset management reform. The elements of such legislation may include the establishment of trust asset management standards and an independent commission or other mechanism to ensure compliance with those standards. This legislation must also respect the individual and unique needs of each Tribe, consistent with the ability of Tribes and their members to manage their own assets and affairs through such things as self-governance compacts and self-determination contracts. Finally, the legislation must recognize the need for meaningful government-to-government consultation as the legislation is implemented by the Department.

**3. Congress should be willing to pass legislation extending any potential statute of limitations that would affect the filing of lawsuits against the United States by the Tribes for trust asset mismanagement.**

The issue of a statute of limitations defense that could be raised by the United States in any lawsuit brought by Tribes against the U.S. for trust asset mismanagement arises because of the requirements of the American Indian Trust Fund Management Reform Act of 1994 that reconciliation reports be completed by the Department of the Interior. The Department contracted with Arthur Andersen, one the big five accounting firms, to prepare the overall report and the reports for each tribe with trust funds under management of the Office of Trust Funds Management (OTFM), for the years 1972-1992. Arthur Andersen concluded that the Department lacked the necessary records and systems for a complete review and accounting of Tribal trust accounts, a fact generally acknowledged by the Department.

However, the reports were issued to Tribes beginning early in 1996, and the Department made offers of reconciliation to Tribes based on those reports. Tribes universally rejected the vast majority of these offers as being inadequate because of the inadequacy of the accounting by Arthur Anderson. To the extent the reconciliation reports provide a basis for a lawsuit being commenced by any particular tribe against the United States, the receipt of such reports by any particular tribe may start the statute of limitations on tort related lawsuits against the United States to run for that tribe. The statute of limitations can, and should be extended for at least one year for several reasons:

1) The Arthur Andersen reconciliation reports are woefully inadequate, cover a limited period of time, and do not form a good basis for indicating the extent of mismanagement of Tribal trust assets by the

Department;

2) Extending the statute of limitations may well induce settlement discussions between Tribes and the United States for past mismanagement of Tribal trust assets, and may well spur discussion in Congress for settlement options;

3) The number of possible lawsuits that may be filed by Tribes is quite large and the burden on the courts and the Department of Justice will become larger than necessary.

The proposed legislation for which we would request consideration is similar to S. 1857, now pending in the United States Senate.

### **The Computer Shut-Down Problem**

Just after DOI announced its BITAM plan by filing it with the *Cobell* court on November 14, 2001, the Court Monitor in the *Cobell* case issued a scathing report concerning computer systems security issues. The report indicated that DOI's computer systems could be breached, or "hacked", and that records of trust asset management, including the financial records of IIM account holders, could be altered by "hackers" relatively easily.

The Court issued an order that required the Department to fix the security problem on its computers before using the system again. The Court subsequently allowed the Department, on application to the Court Monitor, to use its computer systems for the purpose of issuing checks to IIM account holders representing the proceeds of their trust assets as managed by the BIA, but that process has not yet occurred and there is still no firm date when IIM account holders will receive their checks.

This situation is totally unacceptable to the Tribes and their members. While we are aware and appreciate that DOI officials are working very hard to fix this problem which was many years in the making, we also know that prior to the special effort of the Court Monitor to "hack" the system, checks had been sent out using the computer accounting system for IIM accounts for a number of years without significant incident. We are still hopeful of getting the checks issued very soon. We urge Congress to devote such resources as are necessary to make sure the problem is completely fixed and to ensure that the IIM account holders receive the funds they are owed, including interest, as soon as humanly possible. The Department and the Court Monitor must work together to find an acceptable and immediate solution to this problem.

### **Summary**

NCAI fully supports the implementation of meaningful trust asset management reform. In rejecting the BITAM approach NCAI and its members Tribes, and indeed, Tribes nationally, are not rejecting the effort needed to make trust reform to happen. NCAI's leaders look forward to working with the Department of Interior to develop a true alternative to the BITAM proposal that meets the needs of all Tribes, is acceptable to all Tribes, and which will truly bring about the many needed changes to the Department of Interior for trust asset management reform.

We also pledge to Congress to ensure that in every way possible for us, Tribes and their leaders will be made aware of the trust asset management reform process as it goes forward. The only way a proposal for trust reform can be implemented is for it to receive broad support from Indian country.



We also urge the Congress to assist us as we develop our alternative proposal the BITAM approach, especially as we more fully develop any legislation that will be needed to fully implement the proposal. We believe that this year very well could be the year that true trust reform is put into place and this issue can begin to be brought to closure. Finally, we would ask Congress to pass legislation that will extend the statute of limitations for Tribal lawsuits that allege mismanagement of trust assets by the United States. Masehgedataz (Thank you).

####