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IN COBELL V. NORTON

TESTIMONY
BEFORE THE COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON THE "STATUS OF THE INDIAN TRUST FUND LAWSUIT, COBELL V. NORTON"

FEBRUARY 16, 2005

I. INTRODUCTION

Good morning, Chairman Pombo, Ranking Member Rahall and Members of the Committee. My name is Keith Harper, I am a member of the Cherokee Nation of Oklahoma, a senior staff attorney for the Native American Rights Fund, a non-profit law firm, and counsel for the plaintiff class in Cobell v. Norton, Civ. No. 96-1285 (RCL).

First and foremost, on behalf of Elouise Cobell and all our clients – 500,000 individual current Indian trust beneficiaries of the Individual Indian Trust ("Trust") (and all past beneficiaries), who are the owners of all the assets managed, administered and controlled by the government, we want to thank you for your sincere interests and efforts to explore a prompt and fair resolution of the Cobell litigation. Further, we are gratified that you have asked us to provide oral testimony on this critical issue facing Indian Country and it is our deepest hope that we can continue to work with you and your dedicated staff to ensurre a just and fair resolution of this matter.

Before we discuss the subject of the oversight hearing – namely an update on the Cobell case – I wanted to make the Cobell plaintiffs' position on one critical issue unmistakably clear: There is nothing Elouise Cobell, the other named plaintiffs and plaintiffs' counsel want more than an immediate and fair resolution of the Cobell case. It is a matter of record that the government has mismanaged this trust for over a century. Cobell v. Norton has shed light on the gross mismanagement of this Trust and has raised this serious problem from the deepest and most secluded shadows of government bureaucracies to the light of day, where everyone can see the extraordinary injustice and abuse. A century of mismanagement is far, far too long. A century with no accounting of trust assets is unconscionable and unprecedented. A century of harm to hundreds of thousands of this nations poorest citizens in inexcusable. And the harm done to the plaintiff class everyday is unquantifiable and our clients suffer without abatement. This is often a matter of life and death. A resolution is long past due. We will work with whomever is capable of achieving a fair resolution. Moreover, we want to emphasize that this is not a new position. From inception, plaintiffs have sought expeditious resolution of this case. We continue to do so. We have been and presently continue to be willing to participate in any process that is reasonably calculated to lead to resolution of this case in an expeditious and fair manner – whether that be working with Congress for acceptable legislation, mediation, arbitration or continuing litigation. Simply put, plaintiffs have no interest in prolonging these proceedings.

While we are steadfast in our commitment to a prompt resolution of this case, we have an unconditional ethical obligation to ensure that any settlement is fair. We will, of course, vigorously resist "settlement" that allows pennies on the dollar to the beneficiary class and that fail to address meaningful on-going and profound mismanagement of their trust assets. It is our obligation as counsel to the class to work towards immediate settlement, while at the same time forcefully resisting any resolution that would further harm the beneficiary-class.

This hearing, as I understand it, is to update this Committee on developments in the Cobell case and to resume discussions on how best to achieve resolution and finality. Accordingly, I will provide this Committee an overview of developments in two separate components of this matter: litigation and mediation. In addition, I will discuss our views as to how to determine the most appropriate ways to find an acceptable settlement of the Cobell case.

II. LITIGATION UPDATE

The Cobell case was filed on June 30, 1996. It is brought on behalf of all past and present individual Indian trust beneficiaries. The Courts have rendered over eighty published decisions since the inception of this case. Because of the sheer volume of the record, plaintiffs present update necessarily will be truncated and discuss only the most critical decisions on the merits of the case essential to give a satisfactory overview of the litigation.

Plaintiffs seek a full accounting of our trust assets for the entire period that such assets have been held in trust – since 1887. After all, trustees, without exception, have a duty to provide accurate and complete statement of accounts to each beneficiary at regular intervals and a complete and accurate accounting upon demand. Yet, the United States has never provided an accounting to individual Indian trust beneficiaries. It has never provided beneficiaries accurate and complete statement of accounts. In addition, plaintiffs seek that the account balances of the Trust be corrected, restated and distributed to the correct beneficiary in the correct amount. Finally, plaintiffs seek reform of the trust management and accounting system, such reform will ensure that trust duties are discharged prudently and the government's liability does not continue to increase exponentially.

Plaintiffs have prevailed on the merits throughout this litigation. For the first five years, the government argued, among other things, that it did not have a duty to provide a full accounting of trust assets in conformity with generally applicable trust law. The government's position was repudiated by the district court on December 21, 1999. The Court held that the government is in breach of the trust duties it owes the plaintiff class and must render a complete and accurate accounting of "all funds." Defendants' attempt to limit the accounting to some "subset" of assets was expressly rejected by the district court. The government appealed this decision arguing that they could decide the nature and scope of the duty to account owed to individual Indian beneficiaries and that, in any event, the duty only required an accounting of funds in the trust as of 1994, when Congress enacted the American Indian Trust Fund Reform Act of 1994, 25 U.S.C. §§ 162(a) & 4001 et seq. On February 23, 2001, the Court of Appeals rejected these arguments and affirmed in all material respects the district court's order. The Court of Appeals explained that the normal deference shown to administrative agencies did not apply because this case involved a trust. The Court further held that the duty of the United States to account was not created in 1994. Rather the duty "inheres in the trust relationship itself" and therefore "preexisted" and was not dependent on the enactment of the1994 Trust Fund Reform Act. Thus, the accounting must be of all funds "irrespective of when they were deposited ." Finally, the Court held that because of the "magnitude of government malfeasance and potential prejudice to the plaintiffs' class," the district court had commensurately greater latitude to order appropriate relief for the identified breaches of trust and to ensure that the government was brought into compliance with its fiduciary duties. The United States did not appeal further this decision. Accordingly, the February 21, 2001 decision is a final decision.

Despite the clarity of the district court and appellate court's rulings, defendants have continued to resist providing plaintiffs the complete and adequate accounting to which the each beneficiary is entitled. Defendants have refused to take affirmative steps to bring themselves into compliance with their trust duties. Indeed, at every turn defendants have obstructed the proceedings and attempted to escape their plain legal obligations. It is because of this resistance and refusal to discharge their legal obligations that this case now approaches the end of its ninth year in the Courts.

Two recent Court of Appeals decisions further define the nature and scope of this case, and clarify the critical role of the Court in ordering appropriate remedies for the plaintiff class. In both instances, the government appealed injunctions entered by the district court. The first appeal, decided December 3, 2004, addressed the astonishing internet security deficiencies of the Interior Department computer systems that house and give access to critical information of the Trust. The second was decided on December 10, 2004 and addressed a "structural injunction" that the district court had entered intended to compel the defendants to provide a historical accounting and commence true trust reform. In the appeals, the government had sought outright dismissal of the Cobell case. Defendants argued, among other things, that trust reform was not part of this case at all, and that the case had "lost its moorings."

While in both cases the appellate court vacated the trial court's injunctions, it did so on narrow, largely procedural, grounds. More importantly, the appellate court categorically rejected the government's argument that the Court improperly exercised jurisdiction over all aspects of the case. In addition, the Court rejected the government's contentions that the highly deferential review standards of administrative law controls this case and that the district court could not grant appropriate relief for identified mismanagement and malfeasance.

Plaintiffs believe that these two decisions, taken together, provide a solid legal foundation to attain the relief we seek in this case and provide important guidance for the Congress as well. Certain principles emerge from these decisions that are important considerations in analyzing the current posture of this litigation and the potential ways to resolve the case. They will be discussed individually below.

1. This Is a Trust Case and is Not Controlled by Administrative Law

One of the government's central arguments in these appeals was that the district court erred by applying trust law standards in a case that the government believed was controlled by the highly deferential review standards of the Administrative Procedures Act. In its December 3rd decision, the Court vacated the injunction on the narrow procedural ground that the Court should have instituted another evidentiary hearing prior to issuing the injunction. But on the wider question of whether the decisional law for the Cobell case was trust law or administrative law

the appeals court, quoting its 2001 decision, held: "Contrary to the Secretary's view, '[w]hile the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms,' and the narrower judicial powers appropriate under the APA do not apply." The Court further explained:

The district court, then, retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties. Id. at 1099, 1109. The Secretary's suggestion that the appropriate role for the district court was confined to retaining jurisdiction and ordering periodic progress reports, as in In re United Mine Workers of America International Union, 190 F.3d 545, 556 (D.C. Cir.1999), ignores these salient considerations.

In short, the appellate court resolved in plaintiffs' favor that because this was an Indian case and a trust case, the court had far broader authority than in ordinary cases to remedy identified mismanagement and government breaches of trust.

The December 10th decision of the Court of Appeals also noted "the availability of the common law of trusts" but stated that trust law could not "fully neutralize the limits placed by the APA." As a result, the Court refused to vacate the injunction in its entirety, but only those aspects that, in the Court of Appeals' words, constituted an order "to obey the law in managing

the trusts."
In sum, the Court of Appeals had narrow disagreements with the district court's decisions regarding process, rather than broad disagreements over the district court's authority. The appellate decisions recognized that the APA's "narrow judicial powers" were not applicable and indeed, the trial court possessed "substantial latitude" to order appropriate relief to remedy identified breaches. Further, the Court of Appeals upheld Judge Lamberth's broad authority to grant relief for the beneficiary class when specific breaches and management deficiencies are found and "ordering specific relief for those breaches." Moreover, the district court was empowered to rachet-up its remedial effort if there was further delay: "Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate."
1. There Exist Important Limits on Congressional Power to Interfere in This Litigation

Mr. Chairman, as you are well aware, in the late fall of 2003, the Congress enacted the Interior Appropriations Act, P.L. 108-108. That law included a provision, commonly called the "Midnight Rider" that you and many members of this Committee opposed. The Midnight Rider was so dubbed because it was not a provision vetted through the authorizing committee of jurisdiction, this Committee, rather it was hastily snuck in to a conference committee report directly prior to enactment by the Appropriations Committee. The Midnight Rider is a prime example of why legislating on an appropriations bill is folly. While one of the stated purposes of the Rider by its sponsors was to provide a "time out" so the appellate court could review the trial court's decision requiring a historical accounting be performed, the actual effect was to negate the appellate court's ability to review the historical accounting part of the structural injunction decision altogether. Specifically, the December 10th appellate decision held that the Midnight Rider temporarily "removes the legal basis for the historical accounting elements of the injunction." By Congress' doing so, the appellate court could not review the trial court's historical accounting duty until after the Rider expired on December 31, 2004.
Rather than expedite resolution of this case, the Midnight Rider caused serious and irreparable delays. It is not an overstatement to suggest that the Midnight Rider delayed this case and relief for the plaintiff class for no less than three years. There are a couple of important lessons that can be gleaned from this experience with the Midnight Rider. First, when Congress acts it must do so carefully. Hastily drawn riders without proper review through appropriate committees and hearings can have unintended consequences that dramatically impact the lives of people – here, 500,000 individual Indians. Second, while the Court of Appeals clarified that the Midnight Rider was constitutional, that was so only because of the temporary nature of the rider. Had the Rider completely eliminated the duty to account, it would have violated the Fifth Amendment Takings clause. Third, and perhaps most importantly, the appellate court acknowledged that Congress had some authority to address the accounting issue through legislation, but that it was obligated to "assur[e] that each individual [beneficiary] receives his due or more." Put another way, any legislative alteration of the accounting duty that does not provide each beneficiary "his due or more" would necessarily be a taking of that individuals' property and, hence, constitutionally infirm.
2. The Government Owes Beneficiaries Interest and Imputed Yields

In upholding the Midnight Rider, the Court of Appeals held that the provision did not constitute an impermissible taking because any delay would necessarily be compensable by the payment of interests or imputed yields. Specifically, the court held: "As trust income beneficiaries are typically entitled to income from trust assets for the entire period of their entitlement to income, and for imputed yields for any period of delay in paying over income or principal, see G.G. Bogert & G.T. Bogert, Law of Trusts and Trustees § 814, pp. 321_25 (rev.2d ed. 1981) ...."
The December 10th holding settles a longstanding dispute between then parties. Any money demonstrated not to have been properly credited to a beneficiary would require a correction of accounts for both "interest" and "imputed yields." As a result a resolution of this litigation must be developed with consideration that this critical issue has now been resolved with finality.
4. Where Do We Go From Here?

Mr. Chairman, it is important to bear in mind that this litigation has gone on now for nearly nine years and a resolution is something we should all strive to achieve. But these nine years have not passed without substantial progress. Many of the most critical issues in this case have been resolved and in plaintiffs' favor. There is a duty to account for all funds irrespective of when deposited back to 1887. Statute of limitations does not limit our claim. The government, as trustee, has been found to have breached its fiduciary duties. The Court can order remedies for specific breaches of trust identified through evidentiary proceedings. This is a trust case and therefore the "judicial powers appropriate under the APA do not apply." We note too that more still would have been decided but for the unfortunate intervention of Congress in the form of the Midnight Rider.
This progress sets a critical foundation for plaintiffs' continuing attempt to achieve equitable relief through the judicial process. Based on the decisional law in this case, we are presently pursuing two litigation avenues of which this Committee should be cognizant.
Mr. Chairman, as you are well aware, a central dispute between the parties is what is a fair amount for the aggregate restatement of accounts. We note on this point, that defendants contractors have estimated their liability at up to $40 billion. Plaintiffs believe that the number is well north of that figure. The government's public position, however, is that they owe very little. They base this claim almost exclusively on the so-called "Ernst & Young Report."
The government has long asserted that the Ernst & Young Report is a full accounting of the trust funds belonging to four of the five named plaintiffs and their predecessors in interest. Further, they allege, that because few errors were found by their so-called "accounting," there should be a presumption that – despite the well-documented record of mismanagement

and malfeasance – most funds reached the correct beneficiary. For years now, despite overwhelming evidence in the record showing the spectacular deficiencies of the Ernst & Young Report, the government has insisted it is an accounting. For example, Associate Deputy Secretary James Cason testified, under oath, that the "E & Y Report" is an accounting:
As part of the Cobell litigation, Interior collected over 165,000 documents for the historical accounting of IIM trust fund activity through December 31, 2000 for four of the named plaintiffs and 24 of their agreed-upon predecessors. Of these documents, about 21,000 documents were used to support the transactional histories, which dated back as far as 1914, and which included a total of about 13,000 transactions. The accounting contractor, Ernst and Young, found 86 percent of the transactions and 93 percent of the funds moving through the accounts were supported by the documentation located. The cost of this accounting was over $20 million. Furthermore, under questioning from former Representative Brad Carson, Mr. Cason unequivocally confirmed the government's view that the "Ernst & Young Report" is an accounting:
MR. CARSON: ... You said you did accountings for the five named plaintiffs in the Cobell litigation?

MR. CASON: Yes.
The Secretary herself has similarly claimed the "Ernst & Young Report" is an accounting in trial before the district court:
Q. Ms. Norton, I've asked you this question twice and I would like to see if I can get a clear answer to the question. Is it your understanding that the Ernst & Young report discharges the duty to provide an accounting to the five named plaintiffs and their predecessors in interest?

A. My understanding is that is a huge amount of documentation of their accounts and I'm not aware of any way in which it is less than what would be considered meeting the appropriate standards. So I would have to answer that in saying yes, that would satisfy the level of scrutiny, and, you know, there may still be a reporting back to them has not formally been done.

Since the government has claimed that the "Ernst & Young Report" is an accounting, plaintiffs filed a motion on December 30, 2004 seeking a trial that would determine whether that accounting is adequate. Plaintiffs would like to test the validity of the government's claim that this is an "accounting," or as we have alleged, comes nowhere close to discharging their fiduciary duty to account. Trials are the ordinary manner to address such factual disputes.
But tellingly, defendants have opposed our motion. They now argue in their opposition to our motion that the "Ernst & Young Report" is not an accounting at all, but merely an "expert report." Interior officials do not want the Court or anyone to make specific findings as to whether the "Ernst & Young Report" is an adequate accounting. The reason is self-evident. If there are judicial findings after the weighing of specific evidence that the "Ernst & Young Report" is not an accounting, the government would lose its main basis for claiming they owe little. The motion is fully briefed and plaintiffs await a decision by the district court.
The Ernst & Young trial would be helpful for another reason. The Report cost $23 million dollars for four beneficiaries. Thus, to do an Ernst & Young type "accounting" for the entire class would, by per capita calculation, cost hundreds of billions of dollars – an amount that is plainly ridiculous and excessive. Once plaintiffs establish that the Ernst & Young Report is not an adequate accounting – despite the excessive costs – the conclusion will be clear: An accounting is impossible. Therefore, as we have long stated, alternative methods consistent with trust law should be utilized to correct and restate account balances.
In addition, Mr. Chairman, plaintiffs have recently filed a request for a status conference to discuss with the Court how to proceed to an evidentiary hearing regarding IT security. Independent evaluations of the present IT systems of the Department of Interior continue to show that they are woefully inadequate to protect individual Indian trust data. Plaintiffs believe that addressing these issues requires immediate attention. The Court of Appeals has made clear that Judge Lamberth cannot act to protect this data through an appropriate injunction without an evidentiary hearing. Plaintiffs have asked the Court to expedite that process to ensure this critical data is protected. This request too has been fully briefed and awaits a deicsion by the district court.
A final word on litigation. As plaintiffs' counsel we fully comprehend that litigation can be a slow and tedious process. But it also has great value in settling rights with certainty. In this case it is a sluggish march towards righting longstanding wrongs. This government has long been aware of the habitual and extraordinary nature of the mismanagement of Indian trust assets, as well as the devastating impact such malfeasance has on Indian people throughout this Nation. Yet, they did nothing about it except pay lip service. Elouise Cobell and many others pled with them to reform. But they only made promises that they then routinely broke. This was the painful reality for trust beneficiaries, until now – until the Cobell case. This case is primarily responsible for this festering problem to be addressed after a 117 years of abusive treatment by our trustee. Although frustratingly slow at times, let us not forget the great value of this case and let us not seek to stop it until the underlying mismanagement – so long standing and so long neglected – has been cured.

III. UPDATE ON MEDIATION
Mr Chairman, as you know, over the last year or so, with the urging of you, Mr. Rahall and the leadership of the Senate Indian Affairs Committee, the parties in the Cobell suit have participated in a mediation process. From the beginning, plaintiffs were thoroughly dedicated to seeking alternative resolution, but expressed concern as to whether such another such process would be successful. Lead plaintiff Elouise Cobell testified at a hearing before this Committee entitled "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?" stated without reservation: "The Cobell plaintiffs believe that the answer to this question is self-evident: Of course, such a process can be developed."
However, she further stated:

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. * * * 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 (more than anyone) because each and every day trust beneficiaries are dying without receiving justice.

After over a year in this mediation process, I can affirm that plaintiffs feel very much the same as we did when Ms. Cobell made that statement. We appreciate the great effort made by the leadership of this Committee and that of your dedicated staff over the last year. We are poised to mediate a resolution. But the fact is we cannot settle with ourselves. The government when they come to the table must do so with reasonable proposals or at a minimum address the settlement proposals we have sent them. That has not happened. Nor did it happen in the seven previous occasions when plaintiffs have participated in a settlement process.

To further elucidate this point, I would like to discuss briefly some of our experiences over the last year. We cannot discuss all aspects of mediation in this public forum, because we are constrained by certain confidentiality requirements. But we can say the following.

Initially, we note that plaintiffs have made substantive proposals in a good faith effort to resolve each of the three principal issues presented in this litigation: 1) IT security; 2) historical accounting, and 3) institutional trust reform – the Government has not responded or initiated any meaningful discussion of these issues. Plaintiffs' proposals, and the Government's continuing failure to address these issues, are addressed in Sections 1-3 below.

1. IT Security

Remedying the serious deficiencies in the security of Interior's computer systems housing or accessing Individual Indian Trust Data is a matter of critical importance to Trust management, as the Court of Appeals has recently recognized. Defendants acknowledged the magnitude of this problem three years ago, when they urged the District Court to enter an order providing that Interior "immediately" take steps to achieve compliance with the governing federal standard for computer security (OMB Circular A-130, Appendix III).

Defendants have fallen far short of achieving this objective. In February 2004, Interior informed the District Court that only 4 of the 62 computer systems housing Trust Data – less than seven percent – had been certified and accredited as meeting the OMB standard.

In the pre-mediation protocol which the parties negotiated on February 20, 2004 – with critical assistance from staff of this Committee – it was agreed that the ongoing IT security problem would be the first issue mediated. After the mediation got underway in April of last year, however, defendants refused for more than three months to authorize the funds needed for the mediators to retain technical consultants to help them evaluate this issue. As a result, an agreement allowing for the mediators' retention of an IT consulting firm (Red Cliff) to assist them was not reached until July 20, 2004.

In September 2004, Red Cliff submitted a "seven phase" proposal for the assessment of Interior's computer systems. At a meeting called by the mediators on September 22, 2004, we were informed that while defendants had agreed to allow Red Cliff to proceed with Phases 1 and 2 (involving the consultants' review of OMB Circular A-130 and other relevant security requirements), Interior was unwilling at that time to commit to any of the remaining phases of the Red Cliff proposal (including the actual testing and other assessment of Interior's systems). We were further informed that Interior's decision whether to go forward with Phases 3-7 of the Red Cliff proposal would hereafter be made on a piecemeal, "one phase at a time," basis.

Of even greater concern, we understand that six months into this process, defendants have made no commitment to address whatever deficiencies Red Cliffs' review of their insecure systems may reveal. Nor has any proposal been made to us regarding how Interior intends to protect irreplaceable Trust Data from further corruption or loss until such time as its computer systems are finally secure.

In our view, it is in the shared interest of the parties to resolve this "first-up" mediation issue amicably. If mediation of this issue is ultimately unsuccessful plaintiffs will have a duty to report that development to the District Court. Until that time, plaintiffs will continue to look to this process for resolution of the IT security issue.

2. Historical Accounting

As indicated in the mediators' report, the Government has not responded to the proposal plaintiffs made seven months ago to resolve this issue. Nor have they presented us with any form of counter-offer.

At the mediators' request, we presented plaintiffs' specific proposal to resolve the historical accounting issue in this litigation during a joint mediation session on July 20, 2004. Representatives of Interior, Treasury and the Justice Department attended that meeting, and we provided them with a detailed explanation of the factors considered in formulating plaintiffs' proposal, addressed their questions and invited defendants' response.

When several weeks then passed without further communication from the other side, we authorized the mediators to share a July 16, 2004 letter we had given them outlining plaintiffs' proposal and the reasons supporting the proposed settlement amount.

During our most September 23, 2004 meeting with the mediators, we were told that while they had no firm proposal from the Government to convey, they believed upwards of $10-15 billion could be made available to settle the historical accounting issue presented by our case along with two other issues of purported concern to the Government – land consolidation and the prospective release of all claims of Trust management. We responded by saying (as we had on a number of prior occasions) that while we were willing to listen to the Government's proposals regarding such unrelated issues, we represented the class of 500,000 Trust beneficiaries with respect to the historical accounting and IIM trust reform issues only. We explained that we were therefore not in a position to bind our clients with respect to issues that we had not been certified to resolve on their behalf, and that we would be violating our ethical duties if we urged plaintiffs to accept less than

the fair and just monetary resolution of the historical accounting issue in exchange for defendants' promise to pay a "premium" to resolve other issues outside the scope of the Cobell litigation.

That remains our position. Eighteen months ago, Congress directed the parties to make a good faith effort to resolve the issues presented in this case, and we believe that is enough of a challenge without burdening this process with such unrelated matters. Certainly we can accept no solution which would unfairly impinge upon our clients' rights to the prompt restatement of IIM trust balances that we believe to be warranted due to Trustee-Delegates' continuing breaches of fiduciary duty.

3. Institutional Trust Reform

No progress has been made on this front, despite the fact that –

• A decade ago, Congress enacted reform legislation requiring fundamental changes in Trust management – changes the defendants have yet to accomplish.

• Five years ago, the District Court ruled following the Phase One trial that defendants were in breach of their trust duties and remanded the case to the Trustee-Delegates to allow them to rectify such problems – a decision the Court of Appeals unanimously affirmed on February 23, 2001.

• This past week the district court reaffirmed that the accounting claim is a "live" claim in this case and with it comes a requirement that defendants reform the "the processes by which records and other documentation of transactions involving trust assets and the actions of the trustee-delegate are created, stored, preserved and so forth."

Two weeks into the mediation process, we were informed that Interior would never agree to the appointment of a receiver to assume responsibility for rehabilitating the Individual Indian Trust until long-standing breaches of Trust duty had been rectified. We therefore conveyed a proposal (via the mediators) on July 20, 2004 that Interior's co-Trustee Delegate, Treasury, assume responsibility for certain additional functions related to the financial management of the Trust. In making this proposal we believed the transfer of such functions to Treasury would go a long way towards responsibly resolving the serious problem with IT security (by transferring Trust Data to Treasury's more secure IT systems) and also other key areas of Trust management.

We since have been informed by the mediators that plaintiffs' proposal in this regard is "unacceptable." No explanation has been provided to us for defendants' rejection. Moreover, as with the historical accounting issue, no counter-proposal has been made.

Furthermore, when the mediators met with us on September 23, 2004 to discuss settlement "concepts," the only solution to the critical reform issue they presented for our consideration after months of deliberation was the creation of a "blue ribbon" commission to further study the trust reform issue and report to Congress on what needed to be done.

Of course, the creation of yet another panel, without more, to again re-confirm the existence of unresolved Trust management issues is wholly inadequate when plaintiffs are being asked in exchange to dismiss their trust reform claims and forego remedies achieved in the course of this protracted litigation. Fundamental changes in trust management clearly must be made to discharge the Trustee's declared fiduciary duties. Alternatively, in the event meaningful reform remains nothing more than a hollow promise, a fixed amount, equivalent to "liquidated damages" should be paid annually to our clients until such time as Interior's IT systems are finally secure and the Individual Indian Trust is finally being administered prudently.

In short, the history of this mediation raises certain salient considerations that should be noted. Plaintiffs have been more than willing to show our cards. We have identified time and again specific ways to address all the elements of this case. We stand at the ready to explore alternative avenues for resolution, but we can not do this alone. The government must respond to proposals and explain why they are not satisfactory. That type of dialogue may lead to exploring new possibilities. It is not reasonable to simply dismiss proposals without giving any reason why they are objectionable.

We believe if both parties are compelled to come to the table and act reasonably than this case can be mediated to resolution. The leadership of this committee and your staff have considerable ability to play a vital role in this respect and we urge you to do so. You are peculiarly positioned to bring your authority to bear on the parties and compel reasonableness. We understand that this is a resource drain on already taxed resources of this committee. But plaintiffs believe we have an extraordinary opportunity to resolve this case with your continuing aid.

IV. ELEMENTS OF A SOUND RESOLUTION

We understand that this Committee is prepared to look at ways to settle the Cobell case. Plaintiffs are not prepared at this juncture to present specific proposals. But we did want to share with you a few items that we believe are important elements of a sound resolution of this matter.

1. The Proposal Must Be Fair

Any proposal must ensure that the rights of beneficiaries are not sacrificed on the altar of expediency. Section 137 of the House Interior Appropriations bill for FY 2004 failed because it gave authority to one party – the defendants – to decide the case unilaterally with only minimal judicial review. Such gerrymandering of the judicial system is plainly unacceptable, as well as unconstitutional.

Another consideration of fairness is the obligations of the United States as already determined by the Courts. Here, as defendants readily admit they owe a legal obligation to the plaintiff class which will cost multi-billions of dollars to fulfill. If

a settlement proposal relieves the defendants of this legal obligation to perform an accounting, the saved resources should be considered in the settlement amount.

There are other considerations of fairness. In a class action, the beneficiaries are protected by due process, rules of procedure and defined rules of ethics. There must be assurance that these protections exist in any alternative process. Moreover, if the consent of beneficiaries is necessary, any legitimate and constitutionally permissible process must ensure that the consent was knowing and voluntary.

Fairness and the protection of beneficiary rights must form the basis of any sound proposal. After all, these are the victims of a century of government mismanagement and should not be victimized again through an unfair resolution process.

2. The Claims Judgment Fund Should be Used for Any Resolution

This case should not be settled by utilizing funds that would otherwise be used to benefit American Indians and tribal communities. That would add insult to injury. Victims of the government's mismanagement should not be victimized again by stripping them of desperately needed and limited resources to pay for a settlement of this case. Accordingly, we believe it important to access the Claims Judgment Fund, 31 U.S.C.1301 et seq. to pay all the costs of any settlement of this matter.

3. The Proposal Must Expedite Rather than Delay Resolution

To have an prompt resolution of this case, the structure of the resolution must ensure that the Cobell claims are resolved as a whole. Piecemeal resolution will not be expeditious and will make it difficult for beneficiaries to make fully informed and knowledgeable decisions regarding their rights. It is important to note that if the government believed that it could make fair offers to beneficiaries to buy out their claims, they could approach the Court with a proposal without any additional legislation. Such proposals would be analyzed to determine that they do not make any false or misleading assertions. The need for such due process protections are self-evident. The only thing legislation could possibly do is diminish these protections, which we believe is ill-advised.

Furthermore, Congress must recognize that its actions can lead to delay rather than expedition of resolution. As mentioned earlier, the Midnight Rider is a principle example of this. It did not advance this case at all, but rather undermined the ability of the Courts to determine issues central to this litigation.

4. The Proposal Should Not Be a Forum to Re-litigate Settled Issues

Any resolution should strive not to reconsider issues already resolved through the litigation. Over the last eight and one-half years, the District Court and Court of Appeals have decided numerous issues and defined the nature and scope of the obligations owed to beneficiaries. An appropriate approach is to use the Court's decisions to govern which methodologies are appropriate and consistent with law and the rights of beneficiaries as judicially established and confirmed.

5. The Proposal Must Be Consistent with Trust Law

Any resolution should be grounded in the basic and elementary principles of trust law including, without limitation, that all inferences are against the trustee and for the beneficiary. For example, if the trustee does not have documentation, then trust law says that one presumes whatever is best for the beneficiary (e.g. if the trustee has inadequate records to support a disbursement, then it is presumed the disbursement was not received by the beneficiary and should be credited to the account). We believe it appropriate that settlement proposals must have this principle at their core or, by definition, they will undermine the well-settled rights of beneficiary class.

6. The Proposal Must Be Constitutional

It should go without saying that any proposal to resolve this case must past constitutional muster. With on-going litigation, particularly where the Court's have already made final unappealable decisions about the rights of a party, as here, any resolution that does not achieve full participation by the parties and informed consent to the settlement process is fraught with material constitutional infirmities. The interests that Individual Indian Trust beneficiaries have in their trust assets is protected by the Fifth Amendment Due Process and Takings Clauses. Indeed, not only the actual "interest" in the asset but also any cognizable claim (i.e. the accounting) is a 5th Amendment protected property interest. In short, any legislatively imposed resolution which alters the claim in order to limit the United States' liability for the breaches of trust would necessarily violate the Constitution.

V. CONCLUSION

Mr. Chairman, let me conclude by reiterating the plaintiffs commitment to resolving this case. We have vigorously pursued litigation because we want resolution. We do not care if achieving fairness and stopping abuse of individual Indian beneficiaries comes through litigation, mediation or a settlement act, or arbitration for that matter. The means are unimportant. What is important is that we do so quickly and fairly.

I will leave you with the following passage from a report commissioned and prepared for Congress some years ago:

In the first place the machinery of government has not been adapted to the purpose of administering a trust.

On the other side, behind the sham protection which operated largely as a blind to publicity, have been at all times great wealth in the form of Indian funds to be subverted; valuable lands, mines, oil fields, and other natural resources to be despoiled or appropriated to the use of the trader; and large profits to be made by those dealing with trustees who were animated by motives of gain. This has been the situation in which the Indian Service has been for more than a century – the Indian during all this time having his rights and properties to greater or less extend neglected; the guardian, the Government, in many instances, passive to conditions which have contributed to his undoing.

And still, due to the increasing value of his remaining estate, there is left an inducement to fraud, corruption, and

institutional incompetence almost beyond the possibility of comprehension.

As you can see from the citation, this is a report from 1915. They knew back then of the “fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension.” I can show you similar findings in reports from the 1920s, 30s, 40s 50s, all the way up to present. When and how will this nightmare administration of our trust property end? We have a chance right now to stop this “fraud, corruption, and institutional incompetence.” With help from this Committee, we can make sure that the abuse present in 1915 is not still present in 2015.