"Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?"

Testimony

Presented by

A. David Lester for Darrell Martin, Chairman

Board of Directors

Council of Energy Resource Tribes

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Thank you, Chairman Pombo and Members of the House Resources Committee, for giving the Council of Energy Resources Tribes the opportunity to testify today. The issue before the Committee is whether Tribes and the Congress can formulate a process to resolve the federal court case of Cobell v. Norton that involves accounting for hundreds of thousands of Individual Indian Money (IIM) account.

We understand the Committee's objective today is to see whether there might be a way to avoid continued expensive, time-consuming and often acrimonious litigation in a manner that is fair and equitable to the plaintiffs in the case. CERT Tribes would of course like to participate in developing an alternative process but does not have a formal position on what such a process would be like or how it might be structured. What we offer today are simple insights and suggestions that might be a starting point for achieving such a process. CERT Tribes have some experience and wisdom that would be useful if there is a will to move forward with a settlement process.

Let me begin by telling the Committee a bit about CERT. It is an organization comprised of 52 Tribes, each of which has significant energy resources. The Tribes use CERT to come together to discuss common problems and to share solutions to problems that impact the development of tribal renewable and non-renewable energy resources. Our Mission is to support the development of viable, diversified self-governed Tribal economies through the prudent protection, management and development and use of Tribal energy resources according to each Tribe's own values and priorities. The energy Tribes that direct and govern CERT have not given CERT portfolio to engage in issues involving individual Indian allotted trust lands.

Tribes with significant energy resources normally have Tribal Trust Accounts held by the Bureau of Indian Affairs into which funds earned from leases of land and minerals are deposited. This is not unlike the system using to make deposits into the accounts of individual Indians on whose lands there are grazing leases, timber leases, mineral leases and the like. The BIA collects the money from the lessee and deposits the funds in the IIM accounts and into Tribal Trust Accounts.

Unlike most individual Indians, tribal governments have some ability to track the money that is deposited into tribal accounts and to monitor lease activity on tribal lands. CERT is an active participant in the Intertribal Trust Funds Monitoring Association ("ITMA") that consults with the BIA about tribal trust funds issues. There is substantial cross membership between CERT and ITMA due to the significant cash flow through the Tribal Trust Accounts from energy mineral leases. But ITMA does not, however, have any oversight or responsibility for individual Indian trust funds. It is unclear whether expansion of its mission to

include IIM accounts would be a conflict of interest. According to the Judge in the IIM lawsuit, the Department of Interior's accounting system for individual accounts is in shambles. The situation appears to have reached ridiculous proportions. The same accounting systems that have allowed for individual Indian monies accounts to be mismanaged is the same system that is used to account for Tribal accounts.

The Tribes with energy minerals resource leases along with Tribes with substantial timber and agricultural resource lands formed ITMA because they discovered serious problems in the management of the leases and of the income produced from the leases as well as problems in properly managing the Trust accounts themselves. There are many remaining issues between the Department of Interior and the Tribes over these issues but Tribal organizations under the direction of their governing bodies have consistently avoided intervening in the issues relating to IIM accounts.

We think a brief history on how we got here probably would probably be helpful to Committee members, particularly to those who are new to Indian country issues. Only when we know where we have been can we begin to see how to get where we want to go.

Historically there have been five major eras defining federal Indian policy; some contributed heavily to the current trust failure. The "Treaty-making era" began in colonial times and ended with a statute announcing the end of treaties with tribes in 1871. In the treaty era, promises made by the United States after adoption of the Constitution in 1780 were paid in accordance with the terms of the treaties. Most treaties, as we know, were broken. There was a significant effort to resolve Tribes' treaty accounting and land claims under the Indian Claims Commission Act of 1946. The Indian Claims Commission, established by the Act, expired in the early 1978 and residual claims were shifted to the Court of Claims for resolution. The deadline for filing a claim was August 13, 1951. These cases resolved tribal claims, not individual Indian claims because treaty promises generally went to the Tribes, not to Indian individuals directly.

The "Allotment Era" or the "Assimilation period" began in 1887 with enactment of the General Allotment Act, commonly known as the Dawes Act, when Congress initiated the policy of allotting tribal lands to individual Indian members, generally in quarter sections of 160 acres and sometimes more. The intent, based on the Jeffersonian vision of America as a nation of gentlemen landowners, was to make farmers of Indians and to break the communal ties that bound individual Indians to their Tribal cultures and values that perpetuated the existence of Tribes as separate political communities. The intent of the Indian reformers of that day was to free the Indian from the slavery of tribalism as they had freed the African Americans from slavery itself. Though history shows that the Dawes Act was well intended by its authors who believed it would benefit Indian country, those good intentions ended in disaster. Under the Act, the United States held the individual land in trust for 25 years after allotment. When that period elapsed, the land was subject to taxation by state. Most of the land lost by individual Indians after the expiration of the 25 years was for tax foreclosures. Nearly 100 million acres of Indian land passed from Indian ownership as a result.

Much of the land held by the Tribe as a collective owner that was not allotted to members was declared surplus Indian land and was opened up for homesteading by non-Indian settlers. The remaining lands are still in tribal ownership. In addition, the United States deeded alternating sections of land throughout some reservations in the West to railroads. Thus came into being the term "checkerboard" reservation. Most of the jurisdictional disputes we see today between Tribes and states trace directly to the allotment policy and to the railroad deeds.

In 1934, 47 years after the Dawes Act, the Allotment Era ended when Congress passed the Indian Reorganization Act ("IRA"). The IRA ushered in the "Reorganization Period" and, among other things, ended the policy of allowing Indian land to be taxed after the 25-year period. The intention of the new trust policy of the United States was to keep in Indian ownership those Indian lands that had not yet been lost and to restore lost tribal lands to Tribes. The Congress was prompted to enact the IRA when it became aware that over 90 million acres of Indian land had gone out of Indian ownership because of the policies of the Allotment Era. It was a social and economic disaster to Indian country.

In the 1953, some not so very well intentioned Members of Congress caused the enactment of H.Con.Res.108, the infamous "termination resolution." Under that resolution, the "Termination Era" began during which over 20 Tribes were terminated by the United States and the Tribes' land and resources were sold, mostly to non-Indians. Congress has now restored all of these terminated Tribes to federal recognition but of course very little of their former lands have been restored. The Menominee and Klamath Tribes, both with vast timber holdings, were very big losers during the Termination Era. Hundreds of thousands of acres of land were lost to the Tribes.

In 1975, the Congress passed the Indian Self-Determination and Education Assistance Act (P.L. 93-638), an Act that had been espoused by former President Nixon and endorsed by every President since. This was the beginning of the modern era of federal Indian policy, the “Self-Determination Era”, the federal policy of Self-determination and the recognition of Tribal rights to self-governance has is supported by every Indian Tribe in the United States and is the policy upon which Tribal economic and social development success of recent years is built. For these reasons we hope that this policy remains the hallmark of federal policy.

Under self-determination, tribal governments manage and operate programs that had previously been the responsibility of the United States. Tribes operate housing, education, health, roads, welfare, justice and other programs under contract with the BIA, IHS and other agencies under the 638 contracting process. The management skills and the technology transferred to the Tribes have empowered Tribes to engage in competitive economic activities using Tribal human and natural resources to advance more diversified Tribal economies.

At the beginning of the Allotment Era in the late 1887, the United States assumed for itself the responsibility for “managing” both individual and tribal land. Under leasing laws and other statutes, the BIA would sign leases for logging, for grazing, for farming, for oil and gas development and for other uses permissible by law. The funds from the lessees were to be placed in appropriate accounts for use either by the landowners or by the Tribe. It may well be that the management of trust accounts was marred from the beginning in part because non-Indians believed the Tribes would cease to exist as organized communities and that the Indian allottees would, in fact, be assimilated within a generation or two. That being the case, the actual collection of monies and accounting for them it appears was something of an afterthought. The United States is now completely unable to account for the monies received for these individuals (and maybe even the Tribes) and whether the monies due the Indian landowner from private parties were even placed in the accounts. This may be due in part to the way Indian land devolved through probate to fractionated interests of miniscule amounts, and in part because the United States just did not set a high priority on tracking interests in land or income from land. The Allotment Policy was reversed but its authorizing statutes were not repealed or amended to make clear the on-going Trust obligations were of the highest priority.

Individuals Indians were concerned for years about the funds in their accounts (or funds not in their accounts, as the case may be) and could find no relief. This forced Ms. Eloise Cobell and other plaintiffs to bring suit to secure an accounting of the funds from the United States. The genesis of the problem is clear and the reason for the lawsuit is completely justifiable. However, the question now is whether we leave the federal courts to unravel the issues and demand a true accounting or whether Congress can step in to create an atmosphere for settlement. At the outset, we need say that section 137 of the House Interior Appropriations bill for fiscal year 2004 is not the answer.

Section 137 is relatively simple. It applies to any claim against the United States arising out of any obligation of the United States or any person of instrumentality thereof “relating to the conduct of an accounting, or the balance of, and individual Indian money account arising prior to December 31, 2000.”

Subsection (b) then provides that the Secretary of Interior shall formulate, and within four years complete, a “statistical sampling evaluation” of all covered IIM accounts “in a manner that the Secretary deems feasible and appropriate given the availability of records, data, and other historic information, and shall estimate, so as to achieve a ninety-eight percent confidence level, the rate of past accounting error ….” As the language indicates, the Secretary has nearly unfettered discretion in determining the manner in which such sampling is conducted, and is only required to “estimate” the rate of past accounting error.

Once the statistical evaluation is complete, the Secretary must certify the sampling and publish such certification in the Federal Register. Within 180 days following such certification, the Secretary must adjust all IIM accounts covered by the certification, provided that the Secretary may not adjust an account downward.

Judicial review by an IIM account holder is extremely limited. As set forth in subsection (f), judicial review is limited to filing an Administrative Procedure Act style action with the U.S. Court of Appeals for the District of Columbia. Any such petition must be filed within 60 days of the date the Secretary adjusts the respective account. Such review would accordingly be limited to the “arbitrary and capricious” standard of review and would therefore be limited to the administrative record. Also, nothing in subsection (f) or in Section 137 requires the Secretary to personally notify the respective account holders that their account has been adjusted. Without such notification and given the short 60-day window, it is foreseeable that most account

holders would not have an adequate opportunity to challenge the Secretary's adjustments to their IIM accounts. This judicial review provision is exclusive and applies retroactively to "any litigation filed before, on, or after the date of enactment of this section," and would necessarily include the plaintiff class members in the Cobell litigation.

Subsection (g) of Section 137 provides that the balance of any account as determined under Section 137 "shall conclusively constitute the new balance of the account … and shall not be subject to any further adjustments …." Section 137 also allows the Secretary, in her discretion, to voluntary settle any claims directly with IIM account holders. Account holders who settle are not entitled to any further adjustment to their account balances.

Because Section 137 retroactively affects pending causes of action and potentially affects the amount of damages recoverable under such actions, it may well violate the constitution, specifically the Due Process and Takings Clauses of the Fifth Amendment to the U.S. Constitution. If held to be constitutional, Section 137 would eliminate the Cobell case and any other cases related to the mismanagement of IIM accounts to the extent those accounts existed prior to December 31, 2000. It essentially gives the Secretary nearly unlimited discretion to resolve any IIM accounts discrepancies without meaningful judicial review.

The foregoing analysis moves us to say what a true settlement would definitely not look like. It would not look like Section 137. In fact, Section 137 looks remarkably like Justice Department's dream resolution of the Cobell case.

In focusing on what a settlement process would look like, common sense and fairness dictates that there needs to be complete agreement on the part of the plaintiffs to participate in such a process. And the option of returning to the litigation if the process fails must be absolute. As for how such a process might look, one possibility is that Congress could take a nugget from history on how it has resolved similar issues involving non-Indian account holders along the lines of what was done in the Thrift Savings resolution. In that case the US even protected account holders who had balances above the government's insured levels to maintain the integrity of the banking system and the trust and confidence of the American citizens affected by the crisis. Those two standards, establishment of a system that has internal integrity and that is accountable to a regulatory authority and the re-establishment of trust and confidence of the Indian account holders, should be included in the fundamental principles that guide the resolution of the trust funds crisis as well.

If in the agreed upon process for resolution of the crisis the Indian account holders are willing to consider the idea of a statistical error rate that would adjust accounts upward but not downward, that error rate could be determined but not at the cost to the plaintiffs that is envisioned in Section 137.

Congress could also establish an accounting organization to do the historical accounting work and then certify unpaid or underpaid IIM accounts to Treasury for payment. There are probably dozens of ways for Congress to wrap its arms around the IIM accounting (and damages) claims. But one thing is certain. Any method or process will cost money. Justice to Indian account holders should not be subjected to a bureaucratic cost benefit analysis. If that had been applied to the freeing of the slaves or to the processes of American self- governance itself they would have failed the test. But a fair process agreed to by the stakeholders to resolve the accounting, we believe it will save millions over the long haul in legal costs and in damage claims.

Indian money was collected by the government acting as Trustee for the Indian landowner but did not create a system by which the money could be properly accounted and a system that has not been accountable to any external review to assure its integrity. This is the reason the problem developed early in the history of allotted Indian lands. The unaccountable accounting system persisted because no one could imagine that a federal agency acting as trustee would ever create such a mess in the first place and Indian people placed a great deal of trust in the integrity of the Department of Interior and its Bureau of Indian Affairs to do the right thing. Is there any other group of American citizens or a single citizen any where whose monies had been mismanaged by an agency of the federal government who would think Section 137 would be a fair process to achieve settlement? We think not.

Fair resolution of the Trust Funds scandal cannot revolve around the cost benefit analysis. What price is Congress willing to pay to restore National honor and regain the trust and confidence of the hundreds of thousands of Indian account holders who trusted in the integrity of their federal trustee? The Founding Fathers pledged "their lives and their sacred honor" in establishing the American Republic of which Indian

Tribes and individual Indian landowners are now a part. The Department of Interior has not only breached its Trust obligations to Indians it has cast a shadow on the “sacred trust” that was bequeathed to all Americans, our trust in the fairness and in the integrity of our own government. That is what is at issue!

Witness:

A. David Lester, Executive Director

Council of Energy Resource Tribes

695 South Colorado Boulevard, Suite 10

Denver, CO 80246

303-282-7576

303-282-7584 Telefax