TESTIMONY OF ELOUISE C. COBELL, LEAD PLAINTIFF IN *COBELL V. NORTON*

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

JULY 26, 2005

INTRODUCTION

Good morning, Chairman McCain, Vice-Chairman Dorgan and Members of the Committee. Thank you for inviting me here today to provide testimony to the Committee on the possible legislative resolution of our nine-year old lawsuit. I also want to thank you and your staff for all of your years of hard work on this issue. We know that you all share our desire to do justice. Although we have our strong disagreements with this initial proposal as an appropriate vehicle to resolve the case in a fair manner we are all united in our end goal of achieving an equitable resolution to this century-old stain on this great nation's honor.

We thank you for the opportunity to present our views on this initial proposal and look forward to continuing discussions with you and your staff to deriving a sound legislative approach to achieving our shared goals.

As you know from my earlier appearances, I am here today on behalf of myself and the more than 500,000 other individual Indian trust beneficiaries represented in the lawsuit we filed nearly nine years ago in the Federal District Court of the District of Columbia, *Cobell v. Norton*, Civ. No. 96-1285 (RCL).

Let me reiterate what I have said in prior testimony, there is nothing I would like more than a quick and just resolution to this lawsuit. We are in the tenth year of this litigation. Because of obstruction and delay by government counsel – for which they have been repeatedly sanctioned – justice has been delayed for individual trust beneficiaries. Delay and obstruction is not in our interest. Understand though that trust beneficiaries I have spoken with have – to a person – told me that they want a fair resolution, even if it takes a little longer. They do not want to be sacrificed on the altar of political expediency as they have so many times before.

BACKGROUND

Since 1887, members of the class have been subjected to injustice after injustice. Report after report for generation after generation have cited the rampant mismanagement and malfeasant administration of the Individual Indian Trust. As you know a congressional report from 1915 spoke about this scandal in terms of "fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension."[1] A 1989 Investigative Report of this Committee also found similar fraud and corruption. In 1992, the Misplaced Trust Report from the House Committee on Government Operations made similar findings of malfeasance. The Court of Appeals described the disastrous historic and continuing management of individual Indian property as "malfeasance" – not misfeasance or nonfeasance, but malfeasance – and held further in 2001 that the continuing delay was "unconscionable." *Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001). Most recently, the Federal District Court Judge Royce C. Lamberth -- a former Justice Department senior official, appointed to the bench by President Ronald Reagan – who has presided over this case for nearly a decade -- appropriately described the utter failure to reform by the Interior Department and continuing abuse of the Indian beneficiaries in this way in a recent opinion:

"For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions

[1] "Business & Accounting Methods, Indian Bureau," Report of the Joint Commission of the

engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people." [July 12, 2005 slip op. at 1-2.]

"The entire record in this case tells the dreary story of Interior's degenerate tenure as Trustee-Delegate for the Indian trust – a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy – the end of which is no where in sight." [July 12, 2005 slip op. at 10-11.]

I could not have said it better. This property was taken from Indians to be held in trust in 1887 because the U.S. government thought it could do a better job of managing it than Indians themselves. By setting up the trust, the government promised to abide by common trust laws – like investing the property profitably and providing an accounting to the beneficiaries. As you and many others have recognized, the government has made a criminal mess of the situation, and it has only gotten worse over the years. It has failed even the most simple of trustee duties. It is shocking to say, but the government cannot even say how much money is in each beneficiary's account.

Imagine the outrage if suddenly a major U.S. financial institution were to announce that it had no idea how much money was in each depositor's account. Imagine the headlines. Imagine the congressional hearings, the class action lawsuits that would be filed as a result. Heads would surely roll on Wall Street.

Yet that's exactly what has happened here. In the nine years that our lawsuit has been proceeding, we've won on virtually every single substantive point. Both Judge Lamberth and the

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Congress of the United States, 63rd Cong. 3d Sess., at 2 (1915) (emphasis added).

Court of Appeals have agreed with us that the government has done a despicable job – that it has completely failed us – the individual Indians. Understand the extent that we have prevailed. The government argued that they had no duty to account for our money prior to 1994. The District Court and Court of Appeals agreed with us that they did have such a duty and that they would have to account for "all funds." The Courts held that the duty to account "pre-existed" the 1994 Trust Fund Reform Act. The Courts have also held that the government is in breach of its trust duties. They have held that interest and imputed yields are owed the beneficiary class. The Courts have rejected the government's position that the Courts have limited remedial powers and that this suit is controlled by the limitations – such as deferential review – of the Administrative Procedures Act. The government's position that the statute of limitations limits the accounting back to 1984 has been repudiated as well. The government has challenged the court's jurisdiction; they lost that one too. Time after time on major issue after major issue, the Courts have made clear that the law and the facts are on our side. These have been hard won victories, nine years of brutal litigation that has taken its toll on those of us involved. But we will not sell out individual Indian beneficiaries – we have worked too hard to get where we are.

One would have thought that our government's response to the wholesale repudiation of its case time and again would have resulted in reforms, acquiescence to the rule of law and obedience to Court orders. Sadly, it hasn't. Instead, government officials have continued what the Court of Appeals has termed their "record of agency recalcitrance and resistance to the fulfillment of its legal duties" and "intransigent" conduct. *Cobell v. Norton*, 391 F.3d 251, 255, 257 (D.C. Cir. 2004).

Further, not satisfied with flouting orders, government officials have attempted to vilify the Court itself. They – along with certain allies in Congress – have tried to paint the District

Judge as a rogue. What is the evidence? There is none. No court filing nor even the whispered slander has identified any fact that Judge Lamberth got wrong. The Court has – similar to the Court of Appeals – simply called a spade a spade and cited the government's routine and continuing utter disregard for the law.

To be sure, this case continues to be about mismanagement, breach of trust and the victimized Indian beneficiaries – abused by a century of dishonorable dealings. But this case has become something else as well – it has become about the Judiciary attempting to bring an intransigent executive branch into compliance with its crystal clear fiduciary duties and the things that certain Executive Branch officials will do to keep business as usual.

Because of the government's legendary, obstructionist tactics in this case, it has taken nine years to get to this point, and who knows really how long it will take to get to a judgment. Again, don't take my word for it; listen to the words of the judge:

"Despite the breadth and clarity of the record, Interior continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue. This is yet another factor forestalling the final resolution of the issues in this case and delaying the relief Indians so desperately need." [July 12, 2005 slip op. at 10-11.]

Because of the government's position in this litigation, we can be assured that we will be litigating for years before we see victory. We are quite willing to do so if necessary, but we would like to find a way to bring the case to a just resolution sooner if possible. We are simply losing too many elders who have waited a lifetime for this debacle to be corrected. Every time one of them dies, my heart breaks. They should see this fixed in their lifetime.

That is why we were so pleased to respond to your call to develop Settlement Principles for a resolution of the lawsuit. Heeding your call was an Indian Country united like I have never

seen it. Past differences and petty arguments were put aside, and we came together around a set of Principles that we unveiled five weeks ago. I urge you all to revisit those Principles, and I would ask that a copy be made a part of the record.

PLAINTIFFS' VIEWS ON SENATE BILL 1439

Mr. Chairman, I – like most Indian people – have always viewed you and Vice-Chairman Dorgan as supporters of Indian Country in general and of the goals of the *Cobell* case in particular. Indeed, when you stated during a Committee Hearing in 1995 that if any other group of Americans had been victimized like individual Indians had by this government abuse, there would be people in jail. I knew then that you got it – you had some idea what individual Indians felt like.

At the outset, we should point out that there are some aspects of the proposed legislation that are positive. First, this hearing itself is a constructive step forward that provides us with a forum to address this important matter and thereby help educate Congress and the American People.

In addition, the inclusion of a provision that calls for the settlement amount to come from the Claims Judgment Fund is in everybody's interest. It assures that the Interior Department's budget will not be scored with the cost of the correction of the accounts settlement and hence will not diminish funds for vital Indian programs. The victims should not be punished in order to resolve the problem.

S. 1439 recognizes that the settlement amount ranges in the billions of the dollars. That is a positive aspect.

Another beneficial provision is to assure that settlement distributions received by beneficiaries – being a partial return of their own money – shall not be used to disqualify them from receiving any benefit to which they are otherwise entitled nor shall be turned into taxable income.

However, to be honest, I was deeply disappointed when I read Senate Bill 1439. It falls so short of being a good starting point to resolving the *Cobell* case in an equitable manner. This bill, in present form, is drastically in favor of the government-malfeasors' position. What is more, it is not faithful to two important sources that offer considerable guidance to any legislative resolution effort – the 50 Principles for Settlement and the numerous decisions rendered by the courts in *Cobell* itself.

At the request of this Committee, Indian Country came together in an unprecedented effort to develop appropriate principles to resolving *Cobell* and addressing trust reform. We worked hard and had great success in creating 50 Principles that we strongly believe constitute a roadmap to resolution. Never did we think that every principle would be included in your bill. But S.1439 fails to incorporate the vast majority of the Principles. The bill is not in accord with important judicial rulings made over the nine years of *Cobell* litigation. An equitable settlement must honor and reflect the judicial decisions from the many hard fought victories won in the District Court and United States Court of Appeals.

I do not say these words lightly. Nor am I unmindful that we cannot achieve the goal of resolving this case equitably without you, the Vice-Chairman and this Committee's support.

I say these things because I have an obligation – a fiduciary obligation – to represent the many other individual Indians out there who rely of me. Like Mary Johnson, a Navajo grandmother who relies almost exclusively on the few dollars from her allotment she receives to

support herself and her family. She receives pennies of what a non-Indian is paid for the gas from her land. Or Mary Fish, a seventy-year old Creek woman, who cannot replace the windows in her small home because she lacks the fund yet there are five oil wells that have been pumping constantly for decades on her land. There are so many more – across every reservation, grandmothers and grandfathers, parents and children all suffering the same indignities of their forbears. And why? Because, in the end, people in Washington have always cared more about their own parochial interest than the Indian beneficiaries. The powerful have always assured that the gravy train for corporations – oil companies, gas companies, timber companies – doesn't stop. Too many have been willing the cut the expedient deal, despite the negative affect of beneficiaries.

I won't do that. I've promised too many that I will not rest till justice is achieved. We have been in this for nine years and I want an end, but I am prepared to fight for as long as it takes to achieve fairness – to make this right. A century of "fraud, corruption and institutional incompetence" is enough. In short, Indian trust beneficiaries, which I represent, deserve nothing less than complete assurance that I will come here and represent them in the best way I know how.

Despite my disappointment with the bill as presently drafted, I pledge to continue to work with this Committee in this legislative process to resolve the *Cobell* case and put in place reforms of the individual Indian trust. I am confident that if we work together, we can achieve our these common objectives.

It is with this positive and future looking mindset that I offer what I hope you will see as constructive criticism of S.1439. Because we have only had a few days to review the bill, my comments here are not in any way comprehensive. There are many specific parts of the S.1439

that I believe need to be addressed. I merely highlight some of the areas of deepest concern and some of the places I believe the bill offers a sound approach. It is my hope that the Committee will see fit to have another hearing sometime when we and other stakeholders have had an opportunity to more thoroughly review the bill and offer additional commentary to aid the continuing legislative process.

A. The Fox In Charge of the Henhouse

One of the most disturbing aspects of S.1439 is the placing of the Secretary of Treasury – a defendant in the *Cobell* lawsuit and one of the parties principally responsible for the historic and continuing victimization of Indian trust beneficiaries -- as the person to in charge of the settlement funds. While it is certainly true that the Treasury Department is better than the Interior Department as far as failed trustee-delegates, frankly, that is not saying much. The Treasury Department has been Interior's partner in crime for far too long. They have been found in breach of trust. They have failed to reform. Is it really reasonable given the history of this case to ask trust beneficiaries to accept their victimizer as the entity to provide for a fair distribution now? Of course not.

To make matters worse, the Department of Treasury has had a record of bad faith in the *Cobell* litigation. In February 1999, after a three week trial, the Secretary of Treasury along with the Secretary of Interior was held in contempt of Court for flouting Court orders (that they had consented to) to produce certain documents. *See Cobell v. Babbitt*, 37 F.Supp.2d 6 (D.D.C. Feb 22, 1999). Adding insult to injury, the plaintiffs and the district court learned months afterwards than during the contempt trial itself, Treasury Department employees in violation of court orders

and in contradiction of representations made to the Court, destroyed 162 boxes of disbursement related documents – including untold numbers of IIM account related information. Treasury Department lawyers waited over three months to report the destruction to the Court. *See, e.g., Cobell v. Babbitt*, 91 F.Supp.2d 1, 60 (D.D.C. Dec 21, 1999) (determining that the destruction of the 162 boxes and the government's failure to report the incident "misconduct").

Simply put, the Treasury Department has a record of cover-up, malfeasance, breach of trust, lack of candor with the Courts, spoliation of evidence and contempt of Court. The suggestion that any settlement fund be handled by such an entity is wholly unacceptable to the beneficiary class.

I routinely go out to Indian Country to speak with members of the beneficiary class. Virtually every time, I am asked whether we will agree to have the government – meaning the Executive Branch handle the monies when we prevail. Always, I promise, we will never agree to that to cheers from the allottees I speak with. I can say with confidence that an Executive Branch entity will not be acceptable to the beneficiary class.

Equally infirm is the appointed Special Master who answers to the Administration. Bear in mind that Indian Country has considerable experience with this Administration appointing individuals that are to serve a salutary function on behalf of the Indian Trust. Take by way of example the experience with the 1994 Indian Trust Fund Reform Act.

Mr. Chairman, I along with many other Indians sought for nearly a decade legislation to remediate the government's failure as trustee for our assets. We worked with you, other members of both Houses and, of course, the late great Representative Mike Synar and his distinguished colleague Bill Clinger. Finally, in October of 1994, the Trust Reform Act was enacted. One of the core aspects of the law was to put in place the Office of the Special Trustee.

Indian Country representatives wanted the Special Trustee to be independent. But the Interior Department vigorously objected to that. So the Act was watered down and the Special Trustee reported to the Secretary of Interior. That was the first problem – inadequate independence. One of the principal rationales for supporting the establishment of the OST was to get people involved in the management that had the competence to do the task. Also, it was to keep people who did not know what they were doing – like Ross Swimmer who was disastrous as Assistant Secretary for Indian Affairs for beneficiaries – as far away from our money as possible.

Then to my utter dismay, in 2003, Secretary Norton fired then Special Trustee Thomas Slonaker and the Administration replaced him with none other than Ross Swimmer. Imagine all our hard work just to have our trust, our assets, and trust reform put in the hands of a person universally recognized by Indian Country as hostile to Indian interest and a failed trustee-delegate. That, of course, is not the only example. After all, Jim Cason as we speak is acting as Assistant Secretary for Indian Affairs.

It is with these considerations in mind that we analyze whether it makes sense to work hard for nearly a decade to get a settlement and then have the settlement put under the control of a person appointed by an Administration that has put Mr. Swimmer in charge of trust reform. Under what rationale would that make sense to us? I struggle to comprehend why anyone would think we should accept that.

Worse than who the Bill empowers – namely Treasury Department and the Special Master appointed by Administration – is who the Bill disempowers – the Court. Over the century of mismanagement, one entity has stood up for trust beneficiaries – the Court. Even detractors from our lawsuit – Steven Griles, Jim Cason, Kevin Gover, Bruce Babbitt and many others – have admitted under oath that this lawsuit has been the impetus for any improvements that have

been made. Under this legislation, the only ameliorative entity – the Court – would be eliminated from the picture entirely.

That makes no sense for a number of reasons. Courts have the greatest institutional competence to make distributions in a fair manner. They are often called upon to do just that. Courts are armed with Rule 23 and related case law that provides sound guidance in resolving difficult distribution issues. Courts are best at providing an opportunity to be heard and other due process protections to the beneficiary class and after weighing the evidence presented to it through well-settled rules of procedure and evidence. More importantly, unlike the "political branches" (i.e. the Executive Branch and Congress), Courts make juridical and not political determinations. A court sitting in equity – like the *Cobell* court – is charged with considering the evidence and acting equitably in fashioning appropriate remedies. That is precisely the type of institution that should be figuring out how to divide the funds among the beneficiary class. It is the most competent to do so.

Moreover, the Court in *Cobell* has nine years of experience of living with the facts of this case. The knowledge developed through that process is invaluable and irreplaceable. No Special Master – even a well meaning one – can possibly do as well as a judge intimately familiar with every facet of the case as the *Cobell* Court is.

And what possible justification is there to eliminate the Court's role? Because the Executive Branch doesn't like this Court? The Administration has no legitimate interest in dictating how the settlement funds are distributed. None. If there is a settlement, their liability for the agreed-to period for the accounting claim would cease. Who gets what after that is an issue for the beneficiary class and the court to determine. Nobody wants the involvement of the malfeasor in that process; they have done quite enough damage in their century of

mismanagement.

At bottom, this is an issue of trust. We cannot trust the people who have abused us for a century. We can trust the courts and the judicial process. The answer is crystal clear in the asking of the question.

B. The Settlement Amount

We recognize that S.1439 places the settlement amount appropriately in the billions of dollars. That, of course, is only sensible since the government's own internal risk assessment by their contractors set the liability as between $10 to $40 billion.[2] But we are disappointed that S.1439 did not get specific with respect to a number for resolution.

In the 50 Principles, the workgroup put forward what is a completely justifiable and reasonable aggregate settlement amount: $27.487 billion. Given the facts as we know them and the record of this case, this figure is not only supportable but is more than fair to the government that given what has been taken from trust beneficiaries. This amount is not reparationsdamages, nor welfare; it is quite simply a return of a portion of the money that was and is being taken from them.

The amount was derived by reviewing our model for each year of total proceeds from Indian allotted lands. In large measure, the government's model of these proceeds is not far off from plaintiffs' in aggregate amount generated from these lands. For each year, plaintiffs calculate a percentage of the monies that were, for settlement purposes, properly collected,

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[2]SRA International Inc. "Risk Assessment" at 5-1 (2002).

invested and disbursed to the appropriate beneficiary. These disbursement percentage rates are made highly favorable to the government. So, for example, we have presumed -- for purposes of this calculation – that the government can account for upwards of 80% of all transactions, even though we have uncontraverted evidence that they are unlikely to be able to establish over 99% of the disbursements with sufficient evidence because of their mass document destruction. Using this percentage, we have calculated how much of the yearly aggregate proceeds defendants failed to distribute properly. To this number we add interest for each yearly calculation. We add this number together and then subtract again a "litigation delay" – a percentage based calculation for the cost of continuing litigation. The result of this calculation is the: $27.487 billion.

The number is further justified with the following uncontraverted facts that are part of the settled record:

1) The government's potential liability well exceeds $100 billion. (This is the $13.5 billion they have admittedly collected plus interest since the courts have already concluded that interest and "imputed yields" are owed).

2) The government concedes that it will have to spend upwards of $14 billion just do perform the accounting required by law – that is how much it will cost merely to figure out how many tens of billion more they owe Indian landowners.

3) Even if they were to spend that amount of money, because they have destroyed so many documents, the accounting will never be adequate. The government concedes have called doing an accounting "futile" and "impracticable."

4) An internal government report – prepared by the government's experts – concludes that the government's liability is between $10-40 billion.

5) The government says it owes Indian Trust beneficiaries only a paltry sum, but the government has no credibility and no facts to back up its wishful claim. In fact, in 2005, plaintiffs asked the Court to have a trial on the adequacy of their so-called "accounting process." Not surprisingly, the government opposed plaintiffs' call for a trial, not wanting to put their wild assertions to the test in a judicial proceeding. That is because their so-called "accounting" is nothing more than a sham. It is even less of an accounting process than the "tribal trust reconciliation" which the GAO reported was no where close to the type of review required by law.

The Principle's settlement amount is fair and reasonable. The government's statements to the contrary are baseless. Report after report from 1915 to 1926 ton1934 all the way to reports in 60s, 70s, 80s, 90s and throughout this century have pointed out the lack of internal controls, lack of document retention, failure to properly invest, use of trust funds as "slush funds," documented "fraud," no information technology security leaving the trust assets free to manipulation and theft, inadequate systems etc., etc. The GAO, Arthur Andersen, the Inspector General, the Courts, OMB, Price Waterhouse and many other entities – both private and public – have repeatedly made such findings. Yet, despite all this body of information, the Administration would like everyone to take it on faith that it has properly collected, invested and distributed over 99.99% of the trust funds. What is their basis for this claim? A so-called "accounting" that they refuse to allow be subjected to judicial scrutiny. This is hardly a position that deserves any credit, particularly in light of a group of government officials that have been sanctioned time and again for failing to tell the truth to the Court.

It is vital that a fair amount be selected for the amount of the settlement funds at an early stage. The number Indian Country has agreed to through the Principles is fair and we hope that upon consideration of the evidence that number is utilized by the Committee.

C. Failure to Adequately Address Trust Reform

Another fundamental area of concern is the inadequacy in addressing reform of the Individual Indian Trust. During my testimony before this Committee in March of this year, I stated what our experience demonstrates conclusively is the bare minimum necessary for even giving trust reform a fighting chance:

This record makes plain certain inescapable facts. Specifically, accountability and meaningful trust reform will come only when the government is forced to change. It will not do so voluntarily. If a century of failed reform is not long enough to demonstrate this fact, certainly the experience of the last two-decades of more promises and more rhetoric – but no reform – should be. I, along with many others from Indian Country, attempted to work with Interior defendants for over a decade prior to bringing this lawsuit. We heard many promises and many commitments made to Congress in hearing after hearing, but never reform, never a meaningful movement towards bringing the government into compliance with its trust duties.

The sole source of the limited progress has been this lawsuit – the constant prod requiring the Interior Department to at least look like it's interested in managing our property better. But even with the litigation, the government has fought us every step of the way. One of the Court's recent orders referenced defendants' obstructionist tactics throughout this case and the resulting delay and harm to the beneficiary-class:

> As this case approaches its ninth year, it is this Court's hope that the defendants' next appeal will be truly expedited, and will lead to the resolution of these legal issues. Elderly class members' hopes of receiving an accounting in their lifetimes are diminishing year by year by year as **the government fights – and re-fights – every legal battle**. For example, the defendants continue to contend today that this is a simple record-review Administrative Procedures Act case – a proposition that has been squarely rejected by this Court on more than one occasion, as well as by three different Court of Appeals panels in *Cobell VI, Cobell XII,* and *Cobell XIII*.
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> **In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics**.[3]

It is these insidious litigation tactics by the government that have led to numerous contempt proceedings[4] and our calls in 2001 for a receivership. Let me be clear on this point, the record amply supports the conclusion that the Interior Department does not have the political will or the institutional competence to reform itself. A receiver – temporarily appointed during the pendency of reform –

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[3] *Cobell v. Norton*, __ F. Supp. 2d __, 2005 WL 419293 at *7 (D.D.C. February 23, 2005) (emphasis added).

[4] While plaintiffs would prefer not to have to resort to contempt, we have been left with no alternative in light of the government's persistent violation of court orders and other serious misconduct. In addition, we note, that we have offered to drop all contempt charges if the government would agree to stop its obstructionist behavior and consent to a prompt accounting trial date. To date, the government has not accepted this offer.

with the requisite competence and charged with, and singularly focused on, instituting reforms that permit the safe and sound management and administration the Individual Indian Trust is, in my view, the sole way to **ensure** reform will occur.

But I also understand that the government is highly resistant to the receivership approach and has called it a "non-starter." So while plaintiffs will continue to pursue this relief, among others, through judicial proceedings, I understand that this is not likely an acceptable avenue to attain the requisite political support for settlement legislation. It is with this baseline understanding that we propose certain other alternative ways that may lead to successful trust reform. These alternatives will not ensure success like a receiver would. But a proposal that contains at least these measures **may** be sufficient for reliable and meaningful reform.

Often, Interior Department officials come to Congress and discuss the Individual Indian Trust as if it is not fixable. They complain of the enormity of the problem and they speak of the challenges involved. We hear excuse after excuse as to why they have not brought themselves into compliance with the most rudimentary and basic fiduciary duties.

What belies their contention that reform is impossible or near impossible is that there are millions of trusts managed in the private sector all over this Nation that do not have these problems and do not suffer from malfeasant management. To be sure, this system has not evolved into a gold standard for mismanagement overnight, it is the result of a century of fraud, corruption and institutional incompetence that has enriched many, but left the Indian owners poor. Contrary to the pleas of government officials, however, the cure need not be decades away.

To achieve real and meaningful reform requires certain fundamental changes must be made immediately. If one compares the mismanaged Individual Indian Trust with any other trust in the United States, certain observations are easily discernable. There are baseline elements that the Individual Indian Trust lacks which are elements of all other trusts. Moreover, the lack of these elements perfectly explains why the Individual Indian Trust is so profoundly mismanaged and wholly lacks accountability.

In all other trusts, there are, among other things: (1) clarity of **trust duties** and standards; (2) clarity regarding the complete **enforceability** in courts of equity of trust duties and clarity regarding the availability of **meaningful remedies** against a trustee breaching its responsibilities; and (3) **independent** oversight with substantial enforcement authority to ensure that beneficiary rights are protected. The Individual Indian Trust, by contrast, does not have these elements.

> These commonplace elements in other trusts ensure accountability and make it impossible for trust to deteriorate to the extent the Individual Indian Trust has. Their absence ensures no accountability and permits the trustee to abuse the beneficiary with impunity. What possible incentive is there for a trustee to manage trust assets safely and soundly and for the best interests of the beneficiary, if it is nearly impossible to hold them accountable when they mismanage?
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> Reform must, at a minimum, bring the Individual Indian Trust in line with all other trust by addressing these three missing elements. Duties must be stated expressly in statute. Congress must clarify that Indian beneficiaries, like all non-Indian trust beneficiaries, can bring an action to enforce **all** trust duties in courts of equity. And Congress must provide for effective oversight.

Testimony of Elouise P. Cobell, Lead Plaintiff in Cobell v. Norton, The Senate Committee On Indian Affairs, Oversight Hearing on Trust Reform, March 9, 2005, at 6-9

I am deeply disappointed that in this present draft of the bill, our views on the necessary ingredients for adequate reform were wholly ignored. There is no codification of trust standards. There is no oversight body. And there is no cause of action. The three missing elements that distinguish this broken trust from the thousands of trusts for non-Indians throughout this great Nation are still missing.

D. Other Miscellaneous Provisions

The problems identified above are not the only ones. Among the other problems that need to be addressed are the following:

1. The definition of "claimant" is also problematic since Section 102(2) would limit those eligible to receive any distribution to the beneficiaries and their heirs alive as of the date the 1994 Reform Act was enacted. This excludes a substantial percentage of the *Cobell* class, which the court certified on February 4, 1997 as consisting of all past and present

Individual Indian Trust beneficiaries dating back to the Dawes Act of 1887 imposing the trust. Equally disturbing, this narrow definition of the class seems to buy into the government's view that there is no duty to account except as derivative from the 1994 Act – a position that was completely repudiated by the Court of Appeals in February 2001. *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

2. The bill also directs that to determine the "formula" for determining a portion of the distribution amount to be received by each claimant, the Secretary takes into account only those funds that have passed through the IIM account since 1980. This would work a gross injustice. In light of the holding in Cobell VI that "all" funds means exactly what it says and that an accounting dating back to 1887 is required, the cutback on our clients' rights is a direct affront to this key victory won in the Court of Appeals four and one-half years ago. To make matters worse, the bill would extinguish the rights of beneficiaries – even if they did not receive anything from the settlement.

3. There is no definition of what information should be relied upon to determine facts upon which distribution decisions are made. It is well established that government records lack integrity. Yet, it seems that they are to be relied upon. This is unreasonable and could work serious injustices to various individuals.

4. The findings clauses of the bill completely fail to set a proper foundation for a resolution of this case. There is no mention of mismanagement, fraud

> and the corruption that has pervaded the management of our assets. There is no mention of the found breaches of trust. There is no mention of the government's litigation delay tactics and obstructionist conduct. There is no mention of the Court findings of unconscionable delays. There is no mention of the pain and suffering endured by generation of Indians because of this governmental abuse. Instead, there seems to be more of a blame on the litigation and a focus on ending it – the only thing that has achieved any positive change whatsoever.

CONCLUSION

Mr. Chairman, let me conclude by reiterating the plaintiffs commitment to resolving this case. Our misgivings about this current draft bill are not intended as a rejection of the process of achieving resolution. 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 look forward to continuing our work together to finally and conclusively put an end to the criminal administration of our trust property. We have a chance right now to stop this **"**fraud, corruption, and institutional incompetence" that has pervaded the system for a century. We will not rest until that is completed and we pledge to work with you to get that done. With help from this Committee, we can make sure that the abuse present since 1887 is not still present in 2007.