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INDIAN TRUST FUNDS

JOINT HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

AND THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON INDIAN TRUST MANAGEMENT PRACTICES IN THE DEPARTMENT OF THE INTERIOR

MARCH 3, 1999
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INDIAN TRUST MANAGEMENT PRACTICES IN THE DEPARTMENT OF THE INTERIOR

WEDNESDAY, MARCH 3, 1999

U.S. SENATE, COMMITTEE ON INDIAN AFFAIRS, MEETING JOINTLY WITH THE COMMITTEE ON ENERGY AND NATURAL RESOURCES,

Washington, DC.

The committees met, pursuant to other business, at 9:40 p.m. in room 106, Senate Dirksen Building, Hon. Ben Nighthorse Campbell (chairman of the Committee on Indian Affairs) presiding.

Present: Senators Campbell, McCain, Burns, Murkowski, Gorton, Domenici, Thomas, Craig, Inouye, Akaka, Johnson, Bingaman, Dorgan, and Conrad.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. We'll now turn to the joint Committee on Indian Affairs and the Committee on Energy and Natural Resources hearing on Indian trust fund management practices, and those witnesses, if you'd like to take the seats, we'll be introducing you in just 1 moment. That will include Secretary of the Interior Bruce Babbitt, accompanied by Assistant Secretary for Indian Affairs Kevin Gover, and others.

For those unfamiliar with the trust funds issue, I'd like to be clear that the money in these accounts, or the money that was supposed to be in the accounts, is Indian money that has been entrusted to the United States. It's not Federal money.

There are billions of dollars at stake—some say maybe upwards of $2.4 billion—in tribal funds that are unaccounted for. While the point of this hearing is to get a handle on the efforts to reform trust management, it is important for people to understand how the problems started.

I would direct your attention to the photographs around the hearing room. There are about six or eight of them. We picked these out of a series of about 35 or 36 pictures. They came from a 1993 report on the Bureau of Indian Affairs' recordkeeping procedures and were taken at a number of different BIA offices. These photographs show trust fund documents mixed with all kinds of other documents kept by the field offices, with no organization, no attention paid to the conditions. These are essentially bank records. They're water damaged, kept in trash bags, disintegrating

boxes, next to paint cans, mop buckets, street signs, mice droppings on them, and so on.

Now, I want to say from the outset I don't blame the Secretary or Assistant Secretary. They inherited part of this problem. A good deal of this was done or in the process of accumulating long before either came on board, but, as Harry Truman once said, "Around here the buck stops here." So, although I would hope that conditions have improved since these photographs were taken in 1993, some may have got worse.

Incredibly, last year the Interior Department claimed it could not comply with a court order to produce some of these documents because they were covered with mouse droppings and there was concern about Honta-virus infestation. Coming from the southwest, I understand the danger of that, but I have to say if we can fly to the moon as a government we ought to be able to get rid of some mice in these records.

Last session, the Committee on Indian Affairs held two hearings on trust fund legislation. We are continuing our oversight responsibilities today.

After last year's hearings, I was confident that many of the much-needed trust management systems recommended by the special trustee were being implemented and believe that the first priority is to fix the underlying systems that continued to cause the problems—land fractionation, probate backlogs, and outdated accounting and computer systems.

We are going to try to focus on how to improve the systems, but clearly we also want to know if there were wrongdoers in the process.

This committee is not a court. We are not here to relitigate issues that are properly before the court. It is not a personnel board, and we are not here to discuss the personal qualities of the former special trustee.

We are two committees, with oversight responsibility over Indian trust funds and, more specifically, over the 1994 American Indian Management Reform Act.

It is our goal to determine whether the act is being followed in both letter and spirit and whether the recent actions of the Secretary and the special trustee help or, in fact, hinder our collective efforts to resolve what everyone agrees can be called the Indian trust fund's mess.

Since 1993, there have been 10 congressional hearings on trust fund management and reform, and I'm not sure if it has increased the accountability or, in fact, just been spinning our wheels. There seems to be an institutional rot that doesn't go away in the Bureau. And I'm not trying to find fault, but there is clearly massive mismanagement within the agency. I don't know what improvements have to be made. Hopefully, we will get some suggestions today. But if we need to do it, certainly we will do our part as Congressional elected officials to propose whatever legislation is needed to make it better.

With that, I look forward to hearing from the four witnesses.

Senator Murkowski is chairman of the Energy Committee. Do you have any opening statement?

STATEMENT OF HON. FRANK H. MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you very much.

I am pleased to join with you, Senator Campbell, as you chair the Committee on Indian Affairs in the U.S. Senate. I think the opportunity to have this joint hearing where we both have oversight in this area of activity is appropriate and certainly timely.

Let me welcome the Secretary. Yesterday, I had the pleasure of spending about 4½ hours with him. It started out with the Secretary being delayed because of a fire in the Reagan Building, and when he got up the temperature continued to be relatively high throughout the balance of the hearing and the day, but I think we've had an opportunity to get the fire out, so I'm pleased to see him and start again in our effort to meet our mutual obligation in this difficult situation.

Let me just make a few comments relative to the recognition that this has been a long-term, difficult problem, and clearly the administration has an obligation to work with Congress to get the program on a sound footing.

My concern, Mr. Secretary, is whether this really belongs within the Government or whether there should be an effort realistically to contract outside the Government for these services. Trust departments throughout the United States are responsible, they're bonded, they're experienced for collecting, managing, dispersing billions and billions of dollars for those in the benefit of those who put their trust in them.

As Senator Campbell has said, we can pick apart what's wrong with this situation, but I think we have to depend on professionals.

Arthur Andersen has shown that Indian Trust Fund systems are inadequate and non-existent. Well, that's a pretty good overview, professionally, at least, from people who are paid to be objective.

I think it is important to reflect on the Congress' action in 1994 in passing the Indian Trust Fund Management Reform Act. I understand, Mr. Secretary, that was over your objection. I think it would be appropriate that we hear your objection to that because, after all, that's kind of a pivotal point on what we're working under, and the fact that you objected to it and Congress passed it, maybe that's part of the problem with the impasse. I don't know.

But, in any event, the act was designed to provide Indian Trust Fund beneficiaries with the same projections and protections enjoyed by other trust fund beneficiaries throughout the country.

My understanding of the act is that in 1994, it set up an independent special trustee, free from the politics and the inter-departmental fights which are a reality in our system. It provided for new accountability, management procedures to fix the system that was broken then and replace it with a state-of-the-art trust system.

I'd like to hear this morning what happened to that. Now, maybe Congress has not been responsive, and, if not, we need to know it.

Congress' goals remain the same today as in 1994—to guarantee American Indian and Alaska Native beneficiaries that their funds are being managed like any other beneficiary would be. It's not clear that the Department's administration of the law has been consistent Congress' original intent, so I'd like to hear whether

there has been compliance with the law or whether there has been reinterpretation of the law. I don't know.

But the ongoing problems with the Department and the Indian Trust program will not be solved, I believe, if the Department, rather than an independent trustee, runs the new system.

Obviously, we have got a U.S. district court judge that is not very happy with the performance of the Department of Interior, as evidenced by the contempt order.

The special trustee, Mr. Homan, was so unhappy with the secretarial order that he resigned. That doesn't give us a lot of confidence.

So I would hope today that we'll hear of some progress in implementing the 1994 law, rather than subversion of the law if, in fact, that exists.

I would hope to hear today what, if any, progress there has been made in implementation, as well.

So, Mr. Secretary, I guess I'm troubled with the status that we're in. I do support your effort to get a handle on it. I don't know, though, whether this is the best way to address this—with the Department of the Interior basically accepting the responsibility for the detailed recordkeeping that's associated with this significant responsibility. I know what I'd be inclined to do if I were in your position—I'd look for the best professional private sector contracting capability and just see, indeed, whether this headache can be put in a perspective where it is workable, because I don't envy you and your obligation in trying to unscramble this, but what I'm concerned about is, in a couple of years, when you are gone, this mess will simply be passed on to the next Secretary of the Interior.

Thanks very much.

The CHAIRMAN. Thank you. I notice we have a terrific amount of interest among our colleagues this morning, so I would ask our colleagues if they could try to limit the duration of their opening statement.

What I'm going to do is just go back and forth, because I don't know who entered first, but Senator McCain has a very, very tight schedule, so, with Senator Inouye's permission, I'd ask Senator McCain for his statement.

Senator MCCAIN. Mr. Chairman, thank you. I'd like my complete statement to be made a part of the record.

The CHAIRMAN. Without objection, so ordered.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

Senator MCCAIN. I would just like to say that I have been involved in this issue since 1984, Mr. Chairman, when I was on the House Interior Committee. I worked very closely with Senator Inouye for years. On this issue there have been more than 10 hearings, 20 GAO reports. I was heavily involved with the appointment of Mr. Homan as the special trustee.

After all of this, there's still $2.4 billion in unreconciled tribal trust accounts that can't be accounted for.

Mr. Chairman, that is criminal. It is unfortunate. It is tragic that this country cannot do better in exercising its trust responsibilities to Native Americans.

I'm not seeking scapegoats here, but, in all due respect to my colleague from Alaska, this issue was carefully examined by the Indian Affairs Committee in hearing after hearing. We passed legislation in a bipartisan fashion that was sponsored by then chairman Senator Inouye. We know this issue. We know what's wrong. We knew what needed to be done to fix it, and it hasn't happened.

Mr. Chairman, those are exactly the facts.

Now, I don't know how long we are going to continue down this road. I don't know how difficult it is going to be. And I don't underestimate its difficulties. But legislation that we passed in 1994 was a result of studies and recommendations that were made, and if we can't maintain our involvement and the Department of the Interior to maintain its proper authority, then again we will have abrogated our responsibilities to the Native Americans, and I think they have every reason to be very deeply disturbed and upset about this absolute, total, fraudulent misuse of their funds which, by right, belong to them, and we have failed in our trustee responsibilities.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator McCain.

[Prepared statement of Senator McCain appears in appendix.]

The CHAIRMAN. Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Thank you very much, Mr. Chairman.

I join in welcoming Secretary Babbitt, Assistant Secretary Gover, and Assistant Secretary Berry.

Mr. Secretary, we are well aware, as noted by the two Chairs, that the problems associated with the management of tribal trust funds did not begin during your tenure as Secretary, nor is it likely that all of the challenges which we presently face will be resolved in the next 21 months. These problems have been building and have been compounded over many years, and I want to commend you for the personal commitment you have made to addressing these far-ranging management and record-keeping problems.

If there is fault to be attributed, much of it can be and should be shared by the Congress, for we must acknowledge that it is only within the last 5 or so years that we in the Congress have even begun to provide sufficient resources to support the efforts that must be undertaken.

Yes, Mr. Secretary; we have enacted legislation, but we have never supported you with the resources to implement them.

Recently, as noted by previous speakers, we were provided with a draft copy of an assessment that the committee requested from the General Accounting Office [GAO]. I must say that the findings are not happy ones, and I'm certain that the Department will be responding to these findings and recommendations made by GAO.

Our hearing this morning provides us with an opportunity to explore how we can best support your efforts and to explore what additional resources may be necessary to assure a continuum of sustained effort in the years ahead.

Our Government, the entire U.S. Government, has a fiduciary duty, a trust responsibility to the first citizens of this Nation. There can be no debate that in this area, as sadly is true in other

areas, as well, this Government has failed miserably in the fulfillment of our trust responsibilities, but our past record need not inform the future, and I believe we are committed to rectifying the egregious errors of yesterday.

The Native people of this Nation, the first Americans, deserve no less, and we must assure, on their behalf, that they receive no less.

Mr. Secretary, it is our legal duty and our trust responsibility, so let us work and look toward the future. I thank you very much.

Mr. Secretary, I will have to be leaving here because this is one of those bad days. We have four meetings at the same time, and I find that I must be at the Appropriations Committee to make certain that your accounts are fully resourced.

Thank you.

The CHAIRMAN. Senator Burns.

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. Mr. Chairman, I'll just submit my written statement.

This is a problem, I guess, that has bothered all of us for a long time, those of us who represent States that have large holdings of Indian country. And I look upon this, as Senator Inouye had pointed up, as the funds to directly manage this trust fund. You know, most trust funds are managed from the assets of the trust fund. Why that wasn't set up in this case I'll never know.

I can remember the 1994 act, and I can remember the controversy that surrounded that debate, and we—I guess we had a false sense of security that that act would address the situation and would make it whole.

What I find disturbing is a complete lack of dedication to managing a trust fund of this size. I don't think the Department's own budget is big as just the moneys that cannot be accounted for.

We look at it, and just—I was in two schools, one in Brockton, MT, and one up at Box Elder, and we have to scrape and fight just to build schools in Indian country, and to do that, and yet the resources that's in their trust is so mismanaged by folks who have no level of dedication or the importance of their work, and I find that very disturbing, and we will not get to the bottom of this until we find some dedication to that job.

So I thank the chairman for holding these hearings. I intend to become very active in this situation. When I look on my reservations and the resources they need in order just to survive, and we play around like this is nothing to it—and a judge was exactly right in this contempt order, and it is just sad that it is coming a little late in the game.

So I wish you a lot of luck on this investigation, and I appreciate your attention to this matter.

[Prepared statement of Senator Burns appears in appendix.]

The CHAIRMAN. Senator Bingaman.

STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

Senator BINGAMAN. Thank you very much.

Mr. Secretary, thank you for coming back to the Senate again the second day here.

I want to commend you and Secretary Gover for the commitment you have made to get this problem solved. I do think there's a lot of blame to go around for all the past mistakes of our Government on this issue, and certainly the Congress shares in those, as clearly does the administration and previous administrations.

I do think that the main value that can come out of this hearing is to focus on what is now being done, what resources you need to carry through your plans, and what we need to do to help, not just with resources. You mentioned two bills yesterday that you thought would be of assistance, one dealing with fractionated interest, and to resolve disputed tribal balances, another one in that area. As I understand it, those bills were introduced in the 105th Congress, died in committee. If we are to take action on those in the 106th Congress, I would be anxious to know your thoughts as to whether we should go with the bills as introduced in the previous Congress or if you are going to send us a new version, and, if so, how you recommend we proceed.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Thomas, did you have a statement?

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS. Just very briefly, Mr. Chairman.

Welcome again, Mr. Secretary. I, too, have been with this for a while. I was on the House committee that worked on this in 1990.

I guess the thing that distresses me the most is we keep talking about all the reasons why we haven't done it, and, Mr. Gover, you are quoted as stating,

> Warnings of an accounting disaster have been sounded as early as the 1930's, but successive administrations have ignored the problem. Until recently, Congress has failed to appropriate the funds.

You know, that's great talk, but the point is we've got to get at it and do something.

Mr. Secretary, you indicated that your Mr. Homan resigned in protest what he thought by efforts by the Secretary to obstruct, and so on, which may or may not be true, but we find just all these excuses, when the fact is, regardless of what has been done in the past, we have a challenge to do something now, and that's really what is before us, so I look forward to working with you.

[Prepared statement of Senator Thomas appears in appendix.]

The CHAIRMAN. Senator Akaka, did you have a statement?

STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Thank you very much, Mr. Chairman.

I want to welcome back Secretary Babbitt and Assistant Secretary Berry, also Assistant Secretary Gover and Trustee Thompson.

The tribal trust funds issue represents one of the most challenging problems, if not the most challenging problem you face as Secretary of the Interior. I've heard it mentioned as being a logistical

nightmare and very difficult for you, as was mentioned. This is almost—you can call it historical.

This problem has its roots in legislation enacted 112 years ago by Congress, legislation which certainly qualifies as Pandora's Box for the many evils it has spawned.

As I see it, Mr. Secretary, you are making the best of a bad situation. The problems with tribal trust funds did not begin during your tenure—we know that—although I give you credit for taking meaningful steps to correct them.

I understand that this issue is your top priority and the fiscal year 2000 budget contains over $100 million to address the problem. Given the state of the trust fund management that you inherited, I doubt that any Secretary of the Interior could have avoided a contempt citation for failing to produce trust fund documents.

Native Hawaiians recently, as I mentioned to you, witnessed the aggressive efforts of your Department to correct a 60-year-old injustice against Hawaiians. Assistant Secretary Berry was a tireless champion for our cause. Your efforts to restore the full value to the Hawaiian Homelands Trust stands out as an example of your commitment to fairness and equity.

I tell you I have faith in your ability to apply these principles to the accounting of tribal trust funds.

I thank you very much for being here and I'm looking forward to your testimony, and I also want to say happy birthday to the Department. I understand the Department of the Interior is 150 years old.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Craig, did you have any comments?

STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

Senator CRAIG. Mr. Chairman, first of all let me thank you for being willing to take on a difficult task. I just hope that this committee will stay with it until a solution is rendered.

To all of you, I can't point fingers and I won't, but I will tell you there's a lot of folks around the country that manage a lot of multi-billion-dollar trust funds with not one dime out of place.

There are no excuses. There should be no excuses. This team before us—you—have been on watch for 6½ years. There should be no excuses coming from you.

Why can't we be smart enough to hire the right people to do the job?

I won't point fingers now, but I'll tell you by the end of the year, if we haven't got this solved and a full accounting done as to why we can't manage billions of dollars effectively and responsibly, then we ought to turn it over to somebody who can, and maybe it isn't the Government.

Thank you.

The CHAIRMAN. Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, all of us know that we have a full-scale emergency on many of our Indian reservations dealing

with housing, health care, and education, and that comes from a lack of resources. Part of that responsibility is ours. We're not doing what we should for schools and housing and health care on reservations. It is our responsibility here in Congress, our shortfall.

I mentioned last week the death of Sarah Swift Hawk, who died, frozen to death in her home, and I described that home. We've got lots of problems.

But compounding that tragedy is trust fund mismanagement and circumstances where trust funds exist, available, or should be available to people who have enormous needs, some of whom live in desperate poverty, some of the poorest citizens of our country, and then we discover that the management of the trust funds is in very, very serious shape.

I know this dates back to the 1820's, and I don't—I have not been able to study it sufficiently to determine exactly where the intersection exists where all of the problems develop, but I would say to Secretary Babbitt I think this must be the highest priority and we must fix this and do it soon.

To have these trust funds mismanaged, to have lack of accountability at a time when we have full-scale emergencies in housing, health care, and education on our reservations is just untenable.

Neither do I wish to point fingers. I would say to the Secretary, You run a very large bureaucracy. I know how difficult that can be sometimes, and I just hope that, from these hearings, you'll have a couple of resolves: No. 1, by Congress, the resolve to provide the resources necessary—all the resources necessary—to address this issue; and, No. 2, a resolve by the Department that, having gotten the resources, these matters will be resolved on an emergency basis.

Mr. Chairman, Thank you.

The CHAIRMAN. Thank you. Did I get through everybody? Senator Johnson, did I recognize you?

Senator JOHNSON. Just very briefly, Mr. Chairman. I'll submit a full statement.

The CHAIRMAN. Without objection, so ordered.

STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Senator JOHNSON. I want to welcome the Secretary and thank the chairman for holding the hearing.

Of all the extraordinary circumstances we find in Indian Country, at least in South Dakota, the problems are almost overwhelming sometimes, from schools to health care to jobs to the knotty jurisdictional issues that we have to face, but I don't think there's any problem more complex, more difficult, and more shocking than the circumstances we have surrounding trust fund management.

As my friend from North Dakota has commented, all of the other problems are compounded by the difficulties we have here, and I, too, would be the first to acknowledge that these problems have gone on literally for generations, and Administrations of both political parties have been inadequate in their response, and the level of direction and the resources provided by Congresses over decades has not been all that needs to be put in place.

But I share the sentiment that this is one of the most urgent problems we have and that there are so many other problems that flow from, or at least the solutions flow from an inability to come to terms with this issue.

I applaud the Secretary for doing his best to tackle this issue, but I do look forward to testimony today relative to where are we now, what additional resources do we need, and how can we get on with this in a constructive fashion? Understanding that there is no short-term solution, we've got to at least feel that we are moving constructively in the right direction with some sense of urgency, and I think that is all that we can ask at this point, but we do need to feel that we are at least at that point.

And so I yield back, Mr. Chairman, and will submit a fuller statement for the record.

[Prepared statement of Senator Johnson appears in appendix.]

The CHAIRMAN. Okay. With that, Mr. Secretary, you have repeatedly said that the trust funds resolution is what you want your legacy to be regarding Indians. Let's hope it is a good legacy.

Proceed.

STATEMENT OF BRUCE BABBITT, SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY KEVIN GOVER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS; JOHN BERRY, ASSISTANT SECRETARY, POLICY, MANAGEMENT AND BUDGET; AND THOMAS M. THOMPSON, ACTING SPECIAL TRUSTEE FOR AMERICAN INDIANS

Secretary BABBITT. Mr. Chairman, thank you. It is a pleasure to return for the second day in a row for some time before this committee and Senator Murkowski.

Seriously, I am greatly encouraged by the tenor of the opening statements on both sides of the aisle. I appreciate very much the message that is being sent by everyone from Senator Craig over to Senator Johnson, because I read the message as: We cannot fail, we must be accountable, and we ought to work together.

I appreciate that and I intend to reciprocate in kind, and the remarks that I have to say, I hope you will appreciate that I am willing to accept responsibility for what has happened in the past and, more importantly, eager to talk about where we go from here.

Now, Mr. Chairman, I would like, if I might, to take a reasonable amount of time in my testimony to go through this in a fair amount of detail, because I think in doing that I can answer some of Senator Murkowski's questions and perhaps also answer Senator Bingaman's questions and some from the others about what it is we need to do from here on out. Senator Thomas has made that point, as well.

I'm not here to do any finger-pointing. In that spirit, let me just start out by discussing briefly the contempt citation.

The contempt citation applies to Secretary Rubin, to Mr. Gover, and myself. Now, it relates to a relatively narrow but important issue, and that is the backward-looking issue, the historical issue of attempting to get all this material which is spread all over the west, accumulating over the last 150 years, and get it into shape in front of the judge so that he can conduct the litigation.

Now, the basis for the judge's decision is a matter of public record, and let me just say we apologize to the court for the Government's failures in this litigation. We intend to do all that we can to be fully responsive to the court's orders.

And I would add that at the end of the trial the Government recommended the appointment of a special master just as a way of dealing with the discovery issues that have proven to be so difficult, and last week the judge appointed Alan Balaran to serve as special master to oversee the discovery process, administer the production of documents ordered by the court in its orders of November 1996, and May 1998.

The special master will be responsible to report on the adequacy of the steps that are being taken by the Government to come into compliance, to make recommendations with respect to discovery, and so forth.

I think this is a good move. I think it is going to help and, of course, we intend to comply fully with the orders of the court.

There are, I think, three issues that I would like to go through with you today, and think of them in somewhat separate ways.

The first one is the forward-looking issue. What are we doing to get these systems running according to modern standards from here into the future. After I discuss that, I would then like to turn and look backward at two separate issues. One is the historic issues with respect to tribal accounts. I want to separate that, because I have some legislative proposals there. The other one then is the issue which is the subject of the litigation and the discovery process, which is the historic issues relating to the individual Indian accounts.

Now, let me, if I may, outline what is occurring right now within the Department on trust funds reform looking forward, because I think we have accomplished a great deal here and I would like to just lay that out.

You all understand—and I think it has been pointed out—that the trust services that we provide to these allottees and their heirs date back to the General Allotment Act of 1887. That act was a widely-acknowledged failure, and its legacy reaches out to the present day. It has complicated land ownership patterns and made our relationships with tribal governments very complex.

It is a 112-year-old act. It divided Indian lands into 40-, 80-, and 160-acre parcels, allotments for Indian tribal members and family.

Now, when the law was enacted, these individual parcels were intended to remain in trust for a period of no more than 25 years, but that's not the way it has worked out, because they're still in trust ownership, jointly owned by hundreds and in many cases thousands of individual Indians, each with an undivided interest.

For example, in some of the parcels, after five generations there are now owners—and I want you to listen to this—who hold a 77/1-millionth [seventy-seven one millionth] interest in a 40-acre parcel. That means that the income derived from the use of these lands for grazing, mineral, and other leases has to be divided to the 45th decimal place.

Now, I've asked my staff to pass out a chart which will show you graphically what it is we are dealing with and how these issues have come out to, again, 77-one-hundred-millionth interest.

Now, I have another chart which I'd like to go through with you briefly—I'm going to ask Mr. Berry to hold this, and hopefully we have a pointer here—because yesterday I learned a quite significant fact. I learned for the first time Assistant Secretary of the Interior for Indian Affairs, Kevin Gover, is both now a well-known defendant in this litigation, but he has now disclosed to me that he is also a plaintiff in the same litigation.

Now, I thought about referring Mr. Gover's apparent conflict to the ethics officer in Interior Department, and I may yet do that, but I would like to share my dilemma with you, and you can comment as you please.

Last year, Mr. Gover received an allotment share from the Pawnee Agency as the result of a probate process involving the descendants of his great-grandfather, who received an allotment. Now, Mr. Gover informs me that since last year he has been receiving a statement every quarter, four times a year, informing him as follows—by law, he gets it four times a year—that five generations later, the value of his share is 36 cents, and, by law, he gets four quarterly statements which tell him that last year, the first year of his surprise inheritance, he received 7 cents.

Now, the fact is that, of these 300,000 accounts, I think approximately 60 percent of them require this kind of accounting for less than $25 in value.

I provide this background so that we can appreciate the complexity of this problem that we are trying so desperately to get a hold of. It's not simply an issue of money management. The bank trust function is the smallest piece of this, and that's what I think is important to feel with Senator Murkowski's question. The real problem here is the part the bank trust systems don't deal with, and that is the underlying assets out there across the country that derive from these allotments and the land record systems administered by the BIA, the appraisal process, the probate process, and the forwarding of those minuscule amount of income to the bank trust system, if you will.

Well, it's an enormously complex process, and the BIA has, in effect, been the equivalent of a county recorder's office maintaining a land record and title system, a land manager collecting proceeds and negotiating leases, and streaming all of this money back.

Now, back in the Bush administration, proposals were made—and I believe with the acquiescence of this committee—to turn the process over to the private sector. The Mellon Bank was given a contract for about 1 year, and they threw up their hands and that was the end of that. A second contract went out to the Security Pacific Bank. They threw up their hands, and that was the end.

The Indian community did not support the process. In fact, it had relatively little to offer, because all it would do was do the accounting for the money. The Security Pacific Bank can't step back into the land record and revenue-producing and natural resource issues.

So that's the reason that we are here today.

So what are we doing about it? Well, let me just restate very briefly. This problem began on March 3, 1849. That's 150 years ago. That's when the Department was established. And, without being rhetorical about it, I would note that 47 of my predecessors

have done virtually nothing, and I believe that's because they had the sense to say, "I don't want to scratch up this snake, because I'm going to get snake bitten," and they just walked right past it.

Now, what have we been doing? Well, on the trust management side we're making significant progress. We're acquiring and installing commercial trust and investment accounting systems for tribal trust funds. We've improved internal controls. We have yearly audits of financial operations. We now have daily reconciliation of all trust-related cash. And we have the use of contracted third-party services for the kinds of things the private sector can do—safekeeping of investment securities, a variety of other issues.

In the last year, the Department has cleaned up 200,000 of these individual account files. That's two-thirds of the total.

Now, when I say, cleaned up, what I'm talking about is the trust cash management system. By the end of 1999, we will have completed the installation of a commercial bank trust fund accounting system for every single account. We've awarded a contract to replace the BIA's trust management system in bank style. Basically, there's going to be an outside contractor running what is known as the TAMS in a related system that we can talk about. Obviously, we expect to bring that to fruition.

Now, the Department has been increasing the budgetary investment in this trust reform as it moves along, and in the fiscal year 2000 budget we're seeking $100 million, and we believe we can document the need for that. And, of course, it's a large sum. I believe it is a realistic figure, and I believe that we have a plan which will use that money to get a handle, as I believe we are already doing, with the contemporary, current money management systems.

Now, the real problem, in my judgment, is how we settle up the past, what it is we do about this 150 years.

Now, on the tribal account side, we have made a good deal of progress. I really believe that we are within striking distance. We've worked hard at it. We've had guidance from the Congress. We have invested $21 million in appropriated funds, 5 years of effort. We're dealing here with accounting issues that surround about 1,500 accounts held by 338 tribal entities with assets in excess of $2.5 billion.

Now, I would like to say to the press, with all due respect, you have badly misreported this story, and I would say, with all respect to the fourth estate, that $2.4 billion has not been stolen, it is not the subject of fraud. It is in the bank, and you may go out and personally count it. The $2.4 billion has yet to be reconciled with a complete historic trail of exactly documented where it came from through the grazing, mineral royalty, oil leasing process. It is not missing. We have not tracked it back.

Now, that 2.4 billion is 14 percent of the tribal transactions. The rest of them have all been reconciled. That's about $15 billion—that's 86 percent. They're all reconciled. There is no suggestion in this process that there are any significant sums of money that have been absconded with. It's simply not there.

Now, having said that, what we need to do is to proceed to closure. We've had accounting firms doing these reconciliations. We've spent a lot of money on the 2.4 billion in unreconciled accounts. We need to settle this one, and I think we are within striking distance.

The Department has drafted and sent to the Congress legislation which would deal with this tribal problem of the unreconciled accounts by enabling us and giving us a clear authority to do as follows:

We would, through an accounting firm, do a statistical reconstruction of these remaining 14 percent, and out of that submit a settlement offer to each individual tribe, and the tribe would be free to accept or reject the offer. Bear in mind, this isn't new money. This is the $2.5-billion that is sitting in the bank.

If a tribe felt that there were a problem and that the statistical sampling process did not produce a fair result, the legislation would set up a mediation process in which, frankly, we would attempt, through a mediator, to reach an acceptable solution, which would take into account the costs of litigation and continuing all this process. In effect, we would say we'd like to indulge a presumption that on any reasonable basis we will settle in favor of the tribe.

So I think we are really within reach of that one with your help with legislation.

No. 3, most difficult, the subject of the litigation is the individual Indian accounts which is now the subject of a class action lawsuit.

The document production has been—I've already discussed. It is incredibly complex. It is underlain by the fractionated interests that I spoke of.

Just to retrace that briefly, the problem is this: Of all the documents and the historical roots that go out from this, what we have is what is known as a jacket file. It is part of the trust accounting process. It has the recipient's name and a bunch of numbers in it. We can produce those. But the problem is tracking it out of the non-bank piece of this system, back through what is the equivalent of the county recorder's office, and the managers of the oil leases and the grazing leases and merging that up with the probate records that are now seriously behind.

We have an Office of Probate in the Department of the Interior, and you can see what's working with their workload. It is a geometrical increase in each decade.

The transaction listings for the IIM accounts became available some time ago, and I think that, with a combination of things I've told you about, we're moving within striking distance. That's the 200,000, approximately—probably about 300,000 accounts where we have managed to come, I believe, very close to the bank accounting system. But we're still nowhere near, on these individual accounts, getting back into the roots of the generation of the income, and that, I believe, is ultimately going to be the subject of the class action litigation by 300,000 plaintiffs, including the 200,000 whose bank trusts we have reconciled. They're all going to ask, understandably, for a complete historic documentation of their accounts.

The judge is ultimately going to make the decision on this. There's no question that—and I think a question will be, Are we going to do an individual search for every one of those that—the accounting firms say a minimum of $300 million? That estimate is 5 years old. It may be closer to $1 billion.

I personally don't think that's the appropriate way to go, because there is no evidence of theft or fraud. I believe and I believe that the lawyers will ultimately to the court recommend some kind of statistic-based reconciliation with a final result of that type.

We are not prepared to offer a draft litigation on this one, and it is now the subject of litigation, and I think the best that we can do is simply to slog through it, to get out there and produce the records, work with the special master, work with the court, do what we can.

Now, that leads me to the issue of the special trustee. It was my judgment, as this matter flared up, that we had an operational problem of a serious magnitude in terms of the supervision of this historic search into the deep, dark past, and that there were, indeed, some conflicts between the Office of Special Trustee, the Bureau of Indian Affairs, its 12 area offices, and 100-some sub-offices. And, after looking at that carefully, it was my decision that we needed to tighten up our efforts in this area reflected in the judge's unhappiness. That's what led to the order which I put out on January 6.

It's a very simple order. What is says is we've got to have day-to-day management of OST field operations.

I did two things. First, I directed that a new position, a principal deputy/trustee, be created with direct authority over the field operation so that we can get moving on this and be accountable. That person is sitting with me on my far right today. His name is Tommy Thompson. He was hired by Mr. Homan. He has a long and distinguished career in Government and in management of a variety of complex operations. I made him principal deputy, and I said, "We are going to get these records moving. It is your responsibility."

He is now acting special trustee until such time as we consult with the White House about a successor to Mr. Homan.

We have dealt with the records management issue at the Albuquerque level by hiring a new records manager. We decided that there we needed a professional records manager. We have been very fortunate to obtain an individual who has spent his career as a records manager at the State Department. He organized two Presidential libraries, he has run a division of the National Archives, and I believe is exactly the person whom Mr. Thompson can put to the test.

I believe I have covered everything. If you have questions about the authority for the reorganization, I'd be happy to answer them, but let me just say that, you know, the general statutes provide the Secretary authority to run the Department and to organize and reorganize, and the special trustee remains in charge of all of these people. That's clear from the legislation, and I support that.

Last, let me return to what it is that I think we can do together and where I need the help of Congress.

We've talked about the budget issues. We have discussed the need for a framework piece of legislation to settle the tribal accounts, where I believe we are really within striking distance of having it under control.

Last, we need the IIM legislation to deal with Kevin Gover's 7 cents.

Now, I've got to tell you this one isn't anybody's fault. This Congress in the 1980's tried twice to deal with this. They first passed what I would call escheat legislation. The Supreme Court, a couple years later, declared it unconstitutional. My predecessors went back to work. They drafted another law. It was passed and signed. It went to the Supreme Court and it was held unconstitutional.

Now, scrutinizing these decisions for guidance and using the best lawyers we've got, we have put together a third draft designed to whittle this thing down and stop this proliferation.

We would be happy to work with you for any suggestions you have on that, because we cannot walk away from it. We absolutely must get that under control.

With that, let me end where I started, Mr. Chairman. I very much appreciate the tenor of the opening statements. I will do everything in my power to respond in kind.

Thank you.

The CHAIRMAN. Thank you.

[Prepared statement of Secretary Babbitt appears in appendix.]

The CHAIRMAN. Since we have so many Senators, I'm going to ask staff to operate these lights and give us about a 5-minute timeframe so we can rotate among the Senators that have some questions, and we can start with me.

I was interested in your comments that the money is there and it is in the bank, and I'm sure it is, but I tell you, I have a little bit of money in the bank, but when I want a new car, if I can't access to the money you might as well not have it. If you can't get it out, you can't use it, there's no use even having it. I think there are many Indian people that find themselves in that same position.

I think I would be interested in knowing what it costs to administer the 7 cents that Under Secretary Gover got. I'm sure it is not cost-effective. So I know that we've got a real problem, but let me ask you a few specific questions.

As I look at the 1994 act that created the Office of Special Trustee, I can't find anything in there that gives you the authority to restructure it and give the new responsibility for future reforms to basically your chief of staff, the assistant secretary, and the principal deputy, this gentleman on the end. If you think that is consistent with the act, then you tell me what part of that gave you legislative authority to do it, number one.

And, number two, since you have done that, doesn't that diminish the role of the special trustee, that basically that's what the legislation was all about?

Secretary BABBITT. Senator, it does not in the least diminish the role of the special trustee, and we will move very promptly to, through the White House, send a nominee for your consideration. In the meantime, the acting special trustee is Mr. Thompson.

Now, my authority to do that is under section 2 of the reorganization plan, number three of 1950, 5 USC appendix, which gives the authority under the Secretary to organize offices under his administration.

The CHAIRMAN. How do you envision the new nominee working with your special principal deputy when that name goes through?

Secretary BABBITT. I expect him to work in a very smooth and constructive——

The CHAIRMAN. So you intend to leave that in place even after the new nominee is in place?

Secretary BABBITT. Normally, what I do when I reorganize is leave the organization in place.

What this has really done is almost everyone in the constellation of agencies in the Interior Department has, in the office of the director—whether it is Fish and Wildlife or the National Park Service or whatever—a principal deputy whose job is operations, who makes the trains run on time. And I think that is an appropriate organization for the special trustee.

The CHAIRMAN. Okay. You mentioned the potential cost of $300 million I thought I heard you say that may be required to fix this whole problem with the records. In fiscal year 2000 the administration has requested $100 million for the trust reforms. I think there are many Members of Congress that want to fix this, but they are also worried if that money is going to be wasted or not, particularly when they see pictures like this. But that $100 million apparently is not going to be the last trip to the well.

Secretary BABBITT. Senator, I think that's right. The $100 million for next year is aimed in several directions. First, we want to get the trust management systems up and operating. Now, we are going to have a test run in Billings, MT, this summer. One thing that I laid our relatively early on is we're not going to make this mistake of having a giant plan and then put it up all at once. Big plans have a way of producing melancholy results, so we said we're going to have a test bed run. It will be up in Billings this summer, and we are ready to implement the whole, if you will, bank accounting system. We've got excellent contractors for the TAMS and the other pieces. We've got state-of-the-art assistance. And I'm confident that it is going to go.

Now, someone mentioned the GAO report. The GAO report, which is just out today, takes issue with the way we are doing this. They would like us to step back for a couple of years and sort of scratch our heads about a—it's really basically this report is written by people who come out of the computer mainframe era of the 1960's. They say,

> Step back. Don't use anything off the shelf. Make this into a moon shot full of experts who will ponder for 2 years and create something from scratch.

I take exception to this report. I think it is a backward-looking report. I obviously don't question the integrity and the competence of the people who wrote it. I do not accept this report after a great deal of work. And I would suggest that, if this turns into an issue, that it would be appropriate for this committee to hire an absolutely independent technical consultant to mediate this dispute, because I'm absolutely confident we are on the right track.

The CHAIRMAN. I have some additional questions, particularly related to this recent contract you awarded to this firm to supposedly cleanup the documents. My time is running out. I think I will wait until my next round and go ahead and ask Senator Murkowski if he has any questions.

Senator MURKOWSKI. Well, Mr. Secretary, I have been on this committee for 18 years, and I am hearing pretty much the same thing—a reassurance to the committee that, given enough time,

given enough money, given enough new people, this process is going to be taken care of.

I'm not convinced. Two things bother me. One is you've got 3 years left, and I'm not sure——

Secretary BABBITT. Senator, I thought you would celebrate that fact.

Senator MURKOWSKI. Well, I might celebrate it, but I'm not, because we've got an obligation here to get a handle on a certain set of circumstances, and you and I both know it.

You know, I would like to have a check on you in 1 year, and I'm going to suggest to the chairman of the Committee on Indian Affairs that we come back and review your progress, because, you know, as I listen to the reality that we've got 300,000 accounts with less than $25, or I listen to Assistant Secretary Gover's situation where he gets 36 cents quarterly——

Secretary BABBITT. Seven cents a year, Senator.

Senator MURKOWSKI. Okay. Whatever it is. My reaction to that is, for heaven's sakes, Mr. Secretary, close those accounts out. Close them out for service charge. That's what they do with your checking account at the bank. If that doesn't work, then, for heaven's sakes, have the tribes buy those back in the name of the tribe.

I'm sitting here looking at your problem for 5 minutes and saying, If you don't have the authority, for heaven's sakes, ask the committee for the authority and get rid of these 300,000 accounts.

I mean, this is a simple approach. There may be something wrong with it, and if there is, for heaven's sakes, tell us. We shouldn't have to tell you how to dismiss 300,000 accounts.

But I'm concerned about the $2.4 billion. And, while you say—and I'm satisfied that the money is there somewhere—my Tlingit and Haida people that have got $15 million can't get an accountability of what your performance has been with that $15 million. They don't know what the return on it is. They don't know where it is invested. And there is simply no excuse for that.

Now, you talk about moving kind of into the area of consulting with some experts, but you haven't addressed my question: Where did you contract it out? What have you got? How many employees do you have involved in this, have you had involved in it?

The chairman has mentioned that some of them don't have any incentive out there. They don't know how. There's no excuse for that. The private sector would fire the 20 people in line for a mess like that, and you're giving the assurance that it's going to be all right.

Let me ask you a specific question, Mr. Secretary.

The Trust Fund Reform Act, which is the law of the land, requires each program manager participating in trust management each year to submit his budget request to the special trustee, who is, to quote the law,

To certify in writing as to the adequacy of such request to discharge effectively and efficiently the Secretary's trust responsibility.

The question is, does your fiscal year 2000 budget request include these certifications?

Secretary BABBITT. Senator, I'd like to respond in writing. I assume that it does, but I don't know that for a fact, and I would be happy to respond in writing.

Senator MURKOWSKI. And, second, can you supply copies of the written certifications, if, indeed, they exist, so that we can ensure that your budget request complies with the Trust Fund Reform Act?

Secretary BABBITT. Senator, I would be happy to do that. That's a reasonable request.

Senator MURKOWSKI. But you don't know at this time whether you're in compliance or not?

Secretary BABBITT. I do not.

Senator MURKOWSKI. Well, I think it is important, and I think you'd agree——

Secretary BABBITT. I do.

Senator MURKOWSKI [continuing]. That your obligation is to comply within the law.

Now, speaking of the law, you are under contempt, in a sense, which I'm sure you're a little sensitive to.

Secretary BABBITT. Well, it is—look, it's not the first time that I have, you know, been in some—shall we say some rough water around——

Senator MURKOWSKI. What is the penalty for contempt? Is it whatever the judge decides?

Secretary BABBITT. Pardon me?

Senator MURKOWSKI. What is the penalty for contempt?

Secretary BABBITT. Well, the Justice Department apparently is not here today, but let me see if I——

Senator MURKOWSKI. Well, you're a lawyer and I'm not. I assume it's what the judge decides.

Secretary BABBITT. That's my point. It is—I'm not a lawyer.

I believe, first of all, this is civil contempt.

Senator MURKOWSKI. Right.

Secretary BABBITT. So far.

Senator MURKOWSKI. Right.

Secretary BABBITT. And I believe that what the courts normally do in civil contempt is give attorneys fees to the plaintiffs, and I believe that's what is at stake here so far.

Senator let me, if I may, just say a word——

Senator MURKOWSKI. Sure.

Secretary BABBITT [continuing]. About this issue of where this ball of wax belongs.

Senator MURKOWSKI. As you do, I also sense the fact that there was evidently some reluctance for you to appear, and I'm glad you appeared before the committee. But if there wasn't reluctance then, we need some clarification from your people.

Secretary BABBITT. No; I'm happy——

Senator MURKOWSKI. Because I don't want to go down that rabbit trail too far.

Secretary BABBITT. If you want to have a hearing, I'll be here.

Senator MURKOWSKI. Good. Go ahead. Talk about contempt.

Secretary BABBITT. I'm still alive and breathing after 2 days of quality time, and I'd be happy to do it anytime.

Now let me say this, there are three models that this committee has wrestled with about how we deal with this. The first one was in the 1980's, and I talked about Mellon Bank and Security Pacific. The reason that failed I hope I have explained. They can do the bank stuff, but they can't take over 200 BIA offices and land records systems and title companies and the probate and all of that. We're stuck with it.

Second is the special trustee in the plan, the statutory plan that he was required to produce, which he submitted to you in 1997, contained his proposal to set up a brand new governmental entity outside of the Interior Department, and that met with a predictable response from this committee, and it is one that I share, and that is, anybody who proposes setting up a new Government agency to deal with a problem should be met with some skepticism.

Now, I'm willing to look at any organizational model that anybody wants to propose. I will tell you that this is no fun, and I've——

Senator MURKOWSKI. Just contract it out. The Government doesn't build a ship, they contract the shipyard and put out the specifications. It's done.

My time is up, and my questions haven't been answered exactly, but you've made an effort.

Secretary BABBITT. I hope you're saying I've improved on yesterday. Is that right?

Senator MURKOWSKI. Well, perhaps. So have I maybe.

Secretary BABBITT. You have.

Senator MURKOWSKI. Mr. Thompson and Gover, do you have an answer to the question that I posed to the secretary?

Mr. GOVER. Which question, Senator?

Senator MURKOWSKI. Well, it was a question on certification. Does your fiscal budget request include the certifications, and can you supply us with copies of the written certificate? I would think you gentlemen have probably been a little closer to that than the Secretary.

Mr. THOMPSON. The 2000 budget submitted to the committee for $100 million does not have a certificate of the special trustee. However——

Senator MURKOWSKI. So it is not in compliance, technically, with the law?

Mr. THOMPSON. Not in compliance, technically, with the law.

Senator MURKOWSKI. Thank you, Mr. Chairman.

The CHAIRMAN. Okay. Out of deference to the chairman of the full Energy Committee through which I've got two bills pending, I let him go a little bit longer than this 5 minutes.

Senator Bingaman.

Senator BINGAMAN. Thank you very much.

This bill that was introduced in the last Congress by Congressman Young, H.R. 2743, that tries to deal with the individual provisions or individual accounts, as I understand it, has got this provision in here which I think gives you the authority to do what Senator Murkowski was urging you to do, and that is the Secretary is authorized to acquire, with the consent of its owner, and at fair market value, any fractional interest in trust or restricted lands, and then it says,

The Secretary shall hold in trust for the tribe that has jurisdiction over the fractional interest the title of all interest acquired under this section.

It would seem to me that one thing which clearly needs to be done is to try to make sense out of the current records. The other, which I think cannot or should not wait for all the recordkeeping to be sorted out is this business of extinguishing or acquiring all of these small accounts, like the one that Kevin Gover has got there that you had the chart on.

Am I right that if we will pass that provision of the law and give you that authority, you would then be able to assign someone to go out to the Pawnees or the Navajo or whichever tribe and dramatically reduce the number of people who are affected?

Secretary BABBITT. Senator, I think that legislation would be a great help.

The original legislation had escheat provisions, which said once you get down below a certain level you do what a bank could do, which is just close the account and mail the check.

The Supreme Court, in varying ways, didn't let that get by, but there is, in my judgment, no question: the legislation which allows us to go out and offer in a consensual transaction what is 36 cents to Mr. Gover would be a big help.

It is costing us, the taxpayers, $35 a year to sent Mr. Gover his seven cents, and legislation would certainly help.

I assume that the Assistant Secretary will be the first in line to receive his windfall.

The CHAIRMAN. From my understanding, the tribes have opposed that bill; is that correct, the bill you're suggesting?

Mr. GOVER. Mr. Chairman, I don't believe the tribes have particularly opposed that bill. We haven't had a hearing on the fractionated interest bill. On the tribal trust fund settlement there was tribal opposition last year, and that's why we've been working with the tribes to try to find common ground and present it to the committee.

Senator BINGAMAN. Well, on this fractionated interest issue, it does seem to me that, Mr. Chairman, maybe we could try to take this legislation that was introduced in the last Congress, see if there are any changes that are needed that would accommodate any concerns you've got, and go ahead and introduce it here in the Senate and pass it, because I do think that getting some of these fractionated interests or fractional interests purchased or in some way extinguished makes an awful lot of sense, and until that gets started the problem will just continue to worsen, it seems to me, in terms of the number of individuals who have some claim—seven cents a year or whatever—to something in this system.

There is an argument being made, as I understand it, by the Navajo Tribe, their attorneys, that they believe that there is an underpayment of 40 to 60 percent in these accounts that are owed to them, I guess to their tribe. They're not talking about the fractional interest there. They're talking about the tribal lands, and they think that the Government has underpaid them by 40 to 60 percent. Is that an argument you're familiar with? Do you have any comment on that?

Secretary BABBITT. Senator, I'm generally familiar, and I'd ask any of my co-testifiers here to join in.

I think that, Senator, it is an issue that has to be looked at. It's not about fraud or misappropriation, I don't believe. What it is appropriate is whether or not the lessors of the mineral rights and the grazing rights were timely in making full payments under the contracts that were administered historically and still are by the BIA.

I think we need to take that seriously and see what we can find out.

Senator BINGAMAN. So the claim is not that the money was put in the wrong account or that the Government has lost the money or something; the claim is that the Government did not properly manage these trust lands to get the maximum benefit.

Secretary BABBITT. I think that's the most serious of those issues. Yes. Right.

Senator BINGAMAN. And all this talk about farming out various pieces of this, none of them that I am aware of here, as I am understanding the discussion, contemplate the Department of Interior farming out the responsibility for managing the trust lands. I mean, that would remain with Department of the Interior. The only question is, Are you going to farm out responsibility for keeping some of the records and keeping the funds that are obtained from the management of the trust lands; is that right?

Secretary BABBITT. Senator, I think that's exactly right. That's what the tribes are saying to us, and it is the reason that they opposed Mr. Homan's reorganization proposal that was up here in 1997. The tribes were unanimous in their reaction to that.

Senator BINGAMAN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Burns, did you have questions?

Senator BURNS. No; I'm sorry. I had to go to another meeting and I didn't hear his testimony.

The CHAIRMAN. Thank you. Senator Thomas.

Senator THOMAS. Thank you.

Mr. SECRETARY——

Secretary Babbitt. Senator Burns, I will provide you ample opportunity when I arrive at your office door on our annual visit.

Senator BURNS. You've got to show up. That's two-thirds of life, Mr. Secretary, is just showing up.

Secretary BABBITT. I can quote Conrad Burns and Woody Allen on that. That's exactly right.

The CHAIRMAN. Senator Thomas, before you start, I'd like to submit, if there is no objection, a statement from Senator Domenici for the record.

[Prepared statement of Senator Domenici appears in appendix.]

Senator THOMAS. You indicated, Mr. Secretary, that the money is in the bank, the $2.5 billion. What bank?

Secretary BABBITT. Senator, I believe it is all in the Treasury. When I said money in the bank, you mean the 2.5? It's in the Treasury.

Senator THOMAS. I see. It's IOUs?

Secretary BABBITT. Well, I don't know why exactly. I've not talked with Mr. Rubin about his reaction to the——

Senator THOMAS. Well, is it drawing interest?

Secretary BABBITT. Sure.

Senator THOMAS. Because it is in Government securities?

Secretary BABBITT. Yes.

Senator THOMAS. So it is IOUs, like Social Security?

Secretary BABBITT. Yes.

Senator THOMAS. Great investment.

It indicates in one of the materials I have here that the Government pumps one-half billion dollars a year into the 300,000 trust funds [sic]. Is that so?

Secretary BABBITT. I think that's high. Tommy or John?

Mr. THOMPSON. Senator, the tribal accounts, themselves, churn about $800 million a year. That's in addition to the 2.5 that is kind of a static balance for them. The IIM accounts, where the balance is about $500 million at any one point, churn about $300 million a year in the form of income from their holdings or assets.

Secretary BABBITT. Yes; The 500 is the average level of the IIM accounts.

Senator THOMAS. There's income each year coming into these accounts?

Mr. THOMPSON. Yes, Sir.

Senator THOMAS. That then goes into the Treasury to be lost on IOUs and so on?

Secretary BABBITT. Well, a lot of that—Kevin Gover got his 7 cents.

Senator THOMAS. How much flows through in 1 year?

Mr. THOMPSON. As I mentioned, if you look at just the IIM accounts, about $300 million flows through in 1 year's time from various sources.

Senator THOMAS. You say you can't account for the accounts. How in the world can you distribute funds?

Mr. THOMPSON. We can account for the IM accounts as we bring them on this new system.

Senator THOMAS. I thought that was the problem, that you couldn't account for it as to whose it was.

Mr. THOMPSON. Our problem is two-fold. We don't know if the balance in Kevin Gover's account of 7 cents is correct.

Senator THOMAS. But you go ahead and issue him the money anyway?

Mr. THOMPSON. The income, yes, Sir.

Secretary BABBITT. Senator, there is no question about the ownership of the money in virtually every instance. It is in the Treasury. Again, the issue is whether or not we can reconcile the books and say to Kevin Gover,

> Your 7 cents we can tell you is your exact entitlement in a system in which the probate records are correct, the interests have been probated, and the land records system has documented the collection of every oil royalty that is due under the contract to the Pawnee Nation and its allottees.

Senator THOMAS. Well, it's puzzling, because apparently the judge has, in his contempt materials, said that the Department has failed to provide required materials and had a campaign of stonewalling and strained interpretations.

Now you say, on the one hand, that you know where the accounts are, you can come out with 7 cents for Gover, but you can't produce for the court the information. That's puzzling to me.

Secretary BABBITT. Senator, what the judge is referring to, I believe, is something that we, in fact, have been unable to provide to

his satisfaction, and I certainly appreciate his dissatisfaction. It's the documentation that goes out to an oil lease which was signed—well, taking Kevin's great-grandfather, there may not be any record five generations later of the original documents that created this entitlement, or they may be in one of those boxes.

Senator THOMAS. How do you then determine his 7 cents?

Secretary BABBITT. Because the oil companies have sent in a royalty which is in the name of his great-grandfather and——

Senator THOMAS. So you're distributing just the yearly revenue?

Secretary BABBITT. Yes; that's right.

Senator THOMAS. Not the total?

Secretary BABBITT. That's right.

Mr. BERRY. And, Senator, that's reconciled daily and audited annually. So the Treasury is reconciling that——

Senator THOMAS. That's almost as much a puzzle as a while back the administration saying that the Census didn't count all the Indians when they're all enrolled in tribes. I don't understand that. That's an aside.

Secretary BABBITT. That's above my pay grade, Sir.

Senator THOMAS. Mine, too.

But, finally, I had some other very interesting question I was going to ask, and I forgot what it was.

Oh, the Supreme Court has already ruled, haven't they, that anything that is above about 1/32 interest is a taking? They've done that twice already.

Secretary BABBITT. That's correct.

Senator THOMAS. So how are you going to get by—how are you going to change that as long as the Supreme Court says it is a taking if you removed that?

Secretary BABBITT. It's a taking if you escheat it and do not pay value. That's my understanding of the decision.

Now, the legislation—the third attempt is going to say it was—in some form of legislation it was reverting back to the tribe. The theory was that these minuscule little interests did not merit a sort of individual transaction that could all go back to the tribe. The Supreme Court, I think quite understandably, said,

Well, that's all fine and good, but tribe's interest is not identical to the individuals, and therefore it is a taking.

Now, what our legislation says—and we don't have authority to do this. We'd like authority. We'll go out to Mr. Gover, call him to my office, and say, "Here's 36 cents. Sign if you choose to do so."

Mr. GOVER. Senator, we're actually running a pilot this year to acquire $5 million worth of such interest in order to begin to compress the number of accounts, so we are experimenting with it this year with the consent of the Congress, and we've made a request for next year to expand the program to buy even more of those interests.

Senator THOMAS. Thank you.

The CHAIRMAN. Senator Craig.

Senator CRAIG. Thank you very much, Mr. Chairman.

Mr. Thompson, you responded to Senator Murkowski's question in relation to where you were with the budget by saying that the 2000 budget was not in compliance with the Trust Fund Reform Act.

Mr. THOMPSON. Sir, I started to amend that by simply saying that the Office of Special Trustee prepared the Department's entire budget for this effort. We are intensely aware of what has been requested and who has requested it. What we did not do was take the step to certify that budget forward to the Congress.

Senator CRAIG. So, in other words, you have an illegal action before us. You are out of compliance.

Mr. THOMPSON. The 2000 budget?

Senator CRAIG. Why should we give you $100 million?

Mr. THOMPSON. If we want to work together to fix this problem, we'd like to work on the systems to replace those and do data cleanup. We can do certifications for you next year.

There are elements of the act that we are not in compliance with even today with the systems we have.

Senator CRAIG. Okay. Well, obviously, we're going to have to spend some time with that, because we want you to fix it.

Mr. Secretary, as a freshman legislator in 1982, over in the House Interior Committee, I remember a discussion about this issue and consequent discussions with other Secretaries and with Department officials.

Now, I am probably one who will celebrate your departure because I believe you have been wrong-headed on a lot of things. I'm not yet sure you are on this. And I'm willing to give you the benefit of the doubt. I have a very fundamental question to you. Are you being bold enough to set in place actions that will carry through to your predecessor so we can get some continuum here to get this D-A-M mess cleaned up?

Secretary BABBITT. Senator, I believe that if we can converge with these committees, the court litigation, and the reorganization of this office and the legislative proposals that I'll be able to answer that yes. You're going to be the judge. I'll do my best.

Senator CRAIG. Well, continuation is important so that we can resolve this no matter who is at the helm of the Department of the Interior. You know, I've been around long enough and you have to watch a tremendous level of sophistication grow amongst tribes and Native Americans. I'm not quite sure why they're tolerating this any more or even would want to tolerate it any more. I can't see why they don't want their own banks and their own banking systems instead of letting the Federal Government do it for them, and they ought to be rushing to us to change the law to give them that kind of independence and power.

In that discussion I had in 1982, somebody—I remember it very well—handed me a slip. We were talking about Indian housing, and they said,

> Why don't you ask a question of the then assistant secretary, BIA, why they don't create their own housing agency and loan their own money out to themselves because they have these huge accounts down in Albuquerque. They're loaning money out to other banks at interest rates——

And you do. In fact, I know banks in Idaho that quote the money market on a daily basis, and there are the figures coming out of those accounts.

I am very frustrated why we don't have independence here, but we have this system that's 120-plus years old, I believe you used the figure, and it is a mess, by everybody's interpretation. It has

never been modernized. It is no criticism of Mr. Gover or his predecessors. Not at all. But we've got a mess on our hands, and now the question is, Can it be accounted for?

I'm not saying that it has been misused or the money has been absconded with by somebody. We're going to judge, we're going to watch, and we're going to work with you. I hope you are bold enough to get out there or at least to set in motion something that's bold enough to take the tribes of this country where they want to get.

I would be amazed that they would still want their Federal Government to be the central banking system for them that handles their accounts.

Secretary BABBITT. Senator, the individuals, under existing law, cannot automatically withdraw——

Senator CRAIG. I appreciate that, Mr. Secretary. That's why I'm saying are you being bold enough.

Secretary BABBITT. Yes.

Senator CRAIG. And I know that's risky politics.

Secretary BABBITT. Yes; well, the tribes can withdraw their funds at any time and manage them, themselves. Only three tribes have done that.

Senator CRAIG. Why?

Secretary BABBITT. Well, I would respectfully suggest that I could come back and answer that in a long and careful——

Senator CRAIG. All right.

Who are these three tribes?

Secretary BABBITT. I don't know, but we'll get you the facts.

Senator CRAIG. But what you are saying for the record is that there are three tribes out there who are independent of this system?

Secretary BABBITT. That's correct.

Senator CRAIG. They've taken their assets and left the system?

Secretary BABBITT. That's correct.

Senator CRAIG. Okay.

Secretary BABBITT. I'd like to know who they are. From a personal standpoint, I'd like to track them and see how successful they've been in being independent of this system and being able to account for their own assets. I think it would be valuable for us to understand that.

Thank you.

The CHAIRMAN. I think your question about who those three tribes are and what kind of success they've had would be of interest to this whole committee, in fact.

Senator CRAIG. I think it would be.

The CHAIRMAN. Yes.

Let me just ask—it's my turn again here—just speaking of this physical mess that's in these pictures, have you made any personal visits to any of these places where these pictures were taken, like the Albuquerque area office?

Secretary BABBITT. Senator, the answer is yes.

The CHAIRMAN. Has it physically been cleaned up?

Secretary BABBITT. I do not have the answer to that. I believe that—I'd be happy to respond in writing.

The CHAIRMAN. Do you have the answer, Secretary Gover?

Mr. GOVER. I don't, Mr. Chairman. If you'll tell us, though, where these locations are, we will find out.

The CHAIRMAN. These photographs. I think they were all taken in Albuquerque, if I'm not mistaken, but we can provide that for you. But I'd like to know if it has been cleaned up in the light of the comment the Secretary made a few weeks ago that apparently some couldn't be cleaned up because of Hanta virus and infestation of rodents or something.

Secretary BABBITT. Senator, we hired Arthur Andersen, and they designed a decontamination process where a guy in a moon suit goes in, retrieves these things one box at a time, and puts them into a decontamination.

The CHAIRMAN. What the heck happened to house cats and mouse traps and something? We're going to pay millions of bucks for somebody in a space suit to move the boxes?

Well, I didn't mean to make light of it, because I know some people that have actually died of Hanta virus, so I know it is bad, but I just can't believe that mice are what is holding up our cleanup process.

Let me ask you a little bit about the——

Secretary BABBITT. Senator, if I may interject in response to Senator Craig's question, the three who have removed funds are the Navajo, the Mescalero, and the Potawotami. The Mescalero one is a partial withdrawal, but the Navajos and the Potawotami are out of the system.

The CHAIRMAN. Do you have any information on the success of their self-management programs?

Secretary BABBITT. I think the tribes would be the appropriate place.

Senator CRAIG. At least the Mescalaros and the Navajos, their successes somewhat speak for themselves. I don't know about the other tribe.

We ought to pursue that, Mr. Chairman.

The CHAIRMAN. Yes; let's do.

Mr. BERRY. Senator, if I could, on the records management, we did put in place a protocol on the hanta virus. The protocol is working. The records are now clean. They are going to be available for us in the next couple of weeks, and our records folks on the grounds are going to be able to deal with them.

We did have to be extremely careful. The hanta virus has a 50-percent mortality rate, and so it was something we had to be very careful with for our employees and the trustee's employees.

The CHAIRMAN. Yes.

I'm interested in the contract that was awarded, basically, as I understand it, as going with a private management firm, that is going to manage the records, help clean them up. Was it a Texas firm? Is that correct? I'd like to know more about that firm.

Mr. BERRY. Artesia Data Systems is the firm that will be—is the contractor.

The CHAIRMAN. Artesia Data?

Mr. BERRY. Data Systems.

The CHAIRMAN. Data Systems.

Mr. GOVER. Mr. Chairman, that's not for the records cleanup. Artesia is designing the software that will operate the TAMS system.

The CHAIRMAN. Have they——

Mr. BERRY. So they are not doing the records cleanup.

The CHAIRMAN. Okay. And did the Bureau or the Secretary authorize that contract?

Secretary BABBITT. That contract, probably in this case, comes from the special trustee.

The CHAIRMAN. Came from the special trustee. Was it done by competitive bid?

Mr. THOMPSON. Yes, Sir; it was.

The CHAIRMAN. And had they done previous work for either the Bureau or the trustee?

Mr. THOMPSON. They have not. They are a firm from Dallas, Texas, who have a pretty good history in performing trust asset management, principally in the oil and gas area for the private side. They were technically the most competent firm that approached us.

The CHAIRMAN. Are the principals or the owners of that—have they had any interaction with the Bureau? Have any of them been former employees with the Bureau or have any relative with the Bureau or that kind of thing?

Mr. THOMPSON. I'm not aware of the employee profile, but I know that the president of the firm has taken a personal interest and is the direct project manager.

The CHAIRMAN. All right. I might mention, too, Senator Murkowski mentioned something about a report. As I understand it from staff, there is a GAO report now being done on this systems management cleanup, and it will be available shortly; is that correct?

Secretary BABBITT. Senator, is this separate from the one which is on its way out now? This is the draft, and I believe it is——

The CHAIRMAN. It's not public yet, but it is being——

Secretary BABBITT. I believe it is out.

The CHAIRMAN. Okay.

Secretary BABBITT. I think it merits our——

The CHAIRMAN. I have no further questions.

Senator Murkowski, did you have any additional questions for the Secretary?

Senator MURKOWSKI. Yes; I'll try to be brief.

You still haven't really answered why you're not interested in contracting out totally, and if you don't have the authority, why you don't ask for it. You seem to want to keep this within the BIA and the Department of the Interior, and that escapes me, Mr. Secretary, particularly when in your 2000 budget request you haven't included the certification so you're out of compliance with the law and you have to provide us with the certifications which—do they exist? Do you know, gentlemen?

Mr. THOMPSON. They do not exist today.

Senator MURKOWSKI. So they don't exist. You know, you've got a real problem on your hands that you're not aware of. You depend on other people to do this, and I can understand that, but, you know, you're not going to be able to, obviously, legitimately request the $100 million if you're not in compliance with the law. So you're

going to have to get the certification and I don't know what you have to do to get that done. Is there a big problem associated with that, gentlemen?

Mr. THOMPSON. There is not a big problem.

Senator MURKOWSKI. Why isn't it done, then?

Secretary BABBITT. Senator, it will be done.

Senator MURKOWSKI. But why wasn't it done?

Secretary BABBITT. Mr. Homan will be testifying this afternoon. He may be able to shed some light on it.

Senator MURKOWSKI. Okay. Again, contracting out seems a reasonable alternative. If you need authority, we'll change the law for you. I'm sure that the consideration and merits to do that are there.

I would like to ask you to provide us with the Tlingit and Haida $15 million account certification and reconciliation so I can—because my people have come to me and said, "Hey, we can't get this now."

Maybe one of the problems has been the other tribal organizations have not been able to get an accounting to leave, but clearly I think it is evident to both you and I, Mr. Secretary, that the tribes would be better off contracting with a commercial trust department, putting their funds in there and letting them manage it.

Why the Federal Government wants to get in this, again, I don't know, but I'm concerned—you know, we've had 10 hearings on trust fund reform issues. I understand until today you've not testified at them. You've had your people, which I can understand. But I also don't think either you have held one single meeting with tribal leaders to discuss trust fund reform legislation. That's the information I have. If I am inaccurate, that's fine. But I want to remind you that you've indicated that this area of your responsibility is that you want to square this matter, and your long-stated claim that trust reform is your highest priority in Indian Country, and the fact that you're here today I think suggests that you mean business, but you've been a little slow in getting there.

Also, I'm concerned about the expertise within your department because Mr. Homan—I don't know what the difference is between you and he, but obviously there is a change and there's a little unhappiness on Mr. Homan's behalf, but he was at least experienced in managing the Riggs Trust Department's activities, and I'm curious to know the experience level of Ms. Shields and Mr. Berry. And I don't mean to put anything derogatory there, but do they have the same level of experience? This is a big operation, $2.4 billion. What is their expertise in comparison to Mr. Homan's?

Secretary BABBITT. Senator, the acting special trustee is Mr. Thompson.

Senator MURKOWSKI. Yes.

Secretary BABBITT. He is acting. We will, through the White House, submit a nominee for your consideration. We'd be happy to do that in consultation——

The CHAIRMAN. You have not submitted that nominee yet?

Secretary BABBITT. We have not. Obviously, we will be eager to consult with you prior to the point that a formal nomination is sent over.

Senator MURKOWSKI. Well, can you explain to us, you know, why you've changed? Obviously, you're dissatisfied with performance, I assume, or personalities, or do you want to get into that directly with Mr. Homan, or would you like to be heard from?

Secretary BABBITT. Senator, other things being equal, I'm not a historian. I'd rather talk about what we're going to do from here.

Let me just say this. In the wake of the litigation, it was clear to me that the records management and production system was not working, and I took the steps to make sure that it does work. And it was my feeling, and it remains my feeling that the way to do that was to have a principal deputy in charge of running the trains. That's the pattern in all of the other agencies within my jurisdiction, and it was clear to me that would be a useful move.

I made that and I believe it was the correct thing to do.

Senator MURKOWSKI. My last question is: Why were you opposed to the passage of the Indian Trust Fund Management Reform Act?

Secretary BABBITT. I supported the legislation. I opposed——

Senator MURKOWSKI. I understand it was over your objection.

Secretary BABBITT. Well, I was opposed to the creation of a special trustee because I felt then and I felt now if there are problems the way to take care of them is to manage them, not to split authorities. That remains my view.

I'm willing to come up here and take it as much as you want to dish out, but when you start creating separate organizations or independent people, there is, in my judgment, very little in the history of the Government or in the private sector to suggest that that's a good thing to do. That's why I opposed it.

Senator MURKOWSKI. I understand, but here's a question of whether you want Congress to micro-manage your area or you want to do it yourself, and I think the only reason Congress moved on this in 1994 was it was out of control, and it is still out of control.

Secretary BABBITT. I understand we've got to wrestle out those differences, and that's a reason that when the act was passed I moved to implement it to the best of my ability.

Senator MURKOWSKI. Yes; but you're not in compliance with the act today and it is not in compliance with your budget, and it seems to me that you've got a problem in the inner workings of the Department that are going to be very, very difficult to change.

If you think you can do it still on your watch, more power to you, but I'm from Missouri on this one and I think you need professional assistance, and the fact that you don't have anybody named yet to permanently come in suggests that anybody with a reputation in this area is going to be very reluctant to walk into it and lay their reputation on the line, as opposed to contracting with the private sector and having it done, cleaned up.

But maybe it has got something to do with the bureaucracy that has been allowed to build up over the years within the Department of Interior.

Enough said. Thank you.

Oh, one other thing, for the record I have a response to the Glacier Bay fishing that I promised you yesterday. I said I would have it, and the Petersburg fishermen, and we can see who is the most convincing in their written presentation.

Secretary BABBITT. Senator, with all due respect, I am increasingly eager for this hearing to wind down.

Senator MURKOWSKI. I bet you are.

The CHAIRMAN. We'll have a few more minutes with you, Mr. Secretary.

Senator Burns, further questions?

Senator BURNS. I guess we've done something right. They say there is a test case being run in Billings to start rolling over the accounts in the new system that they are proposing. Billings may end up being a model for the rest of the Nation in that office up there. So that's good news there.

Just get it through my thick head here. There are some things I don't quite understand. You know, we look at the budget and we do things and I realize that when you change bank accounts and you change banks you can't transfer overdrafts, and I realize that's hard to do. But for the life of me I cannot see how we take these funds from the tribes—that has been generated by land or gas and oil or coal or whatever—and we just put them into an account, and then they just fall into the black hole of this abyss, this bottomless abyss, and we lose it, and we lose the accounting of it. I cannot fathom that, because I will tell you, if you're out of compliance and you are coming up here and you're asking for more money just to cleanup—not only physically clean up some of the problems you've got around, but also this accounting systems—I'm going to look upon that as sort of throwing good money after bad.

Of course, we do that in Government everyday, of course, and we don't got a lot of it. You know, thanks to Mr. Babbitt and all these people that have wild, weird ideas about certain things, Montana's income per capita has gone from about 20th in the Nation until we're 51st now. That lays it at some of the thinking that we have here in this town.

Secretary BABBITT. How are you 51st?

Senator BURNS. We haven't made it to 50th yet. I think it is a tie. It is a dead heat.

But it looks like if those accounts are making interest or are collecting money based on the assets of those accounts, why wouldn't it—is it against the law that you can't use some of that money generated by those accounts in order to manage the account?

Secretary BABBITT. Yes, Sir; that's correct.

Senator BURNS. By law you cannot use that interest?

Secretary BABBITT. That's correct.

Senator BURNS. By law?

Secretary BABBITT. That's correct.

Senator BURNS. Okay. That answers one question. In other words, you get free banking, and yet you come back to the taxpayer, who is paying that interest in the first place, just to clean up the mess. Is that correct? It's not very well put, but I'm not a very smart person.

Secretary BABBITT. Senator, I agree with your last observation.

Senator BURNS. Which one? That I am not a very smart person? [Laughter.]

Secretary BABBITT. Senator, your next-to-the-last observation.

Senator BURNS. It just seems to me that some way—if there is a way that we can—people would take a little more interest in the

system to make sure that it runs right if they are investing in the management of that fund. It just seems to me that maybe we ought to take a look at that. If they want to keep it with the Government and not go into the private sector with a large trust account, that makes sense to me. But I can't see how you issue checks and make deposits and there's no records.

I can't do that. No other American can do that. No other American. And so I'm really baffled by this and I'm going to get a lot more—I'm going to get a hell of a lot smarter about this whole thing before it is all over, because it is just like I said—we've got some things in Montana on the people that live in my State that I have an obligation to, and I feel like I've got an obligation to protect their money, and I'm going to get very active in this.

We want to build some schools. We've got water systems to build. We've got things to do on our reservations that we—and through this mismanagement, my gosh, we could have had golden streets up there at Crow Agency and Poplar and a lot of places, you know. And I feel obligated to do that, so I'm going to get very, very—I'm going to be an expert on this before it is all over, because I just feel that obligation. I've just got to do it.

But if you need to change the law, then let's change the law, but at least let's approach this like adults and good business people that we should be in order to correct it. I don't think this is going to be the last hearing on this or the last inquiry that you're going to have, Mr. Secretary, because we're getting kind of tired out there in the west. We have to be like old Yellowstone bears. We come out of hibernation and we stand alongside the road and hoping one of these Grey-Poupon-and-White-Wieners will come out and pitch us a hamburger every now and again because we can't use our resources and we can't do a lot of things because of some mandates that come out of the 17 square miles of environment. And one day we're going to overcome that thing.

Secretary BABBITT. When?

Senator BURNS. Well, I don't know. We'll just keep——

Secretary BABBITT. Time runs on, you know. You're getting gray.

Senator BURNS. I'm not getting gray. You're the one that is getting gray.

The CHAIRMAN. With that bit of colloquial wisdom, time has expired.

Senator BURNS. Thank you. I'm going to lunch now. I've never missed a meal and I don't plan to miss one. [Laughter.]

Secretary BABBITT. I'm in solid agreement with you on that.

The CHAIRMAN. Just a few minutes more, Mr. Secretary.

Senator Craig, did you have any further questions?

Senator CRAIG. A couple of brief ones.

First of all, Mr. Chairman, I hope you will continue to pursue this and work with the Secretary and his people. I'd like to look at the legislation. Let's move this stuff and give you the authority, if that's what you need to respond to this.

I hope, Mr. Secretary, that you look at this as a continuum so that, whomever is there, this thing transitions and at least we can begin a process to resolve it.

It is a bad legacy.

Let me ask this question, though. Of the receipts or the revenue flow that comes in, is any of that revenue flow gaming revenue?

Secretary BABBITT. No; I don't believe so.

Senator CRAIG. Why isn't it?

Secretary BABBITT. Because the tribes are free to set up enterprises in their discretion which are outside of the trust mantle which, without exception, covers the allotments.

Senator CRAIG. So we're talking about the resource and the revenue from the resource that's inside the trust mantle exclusively?

Secretary BABBITT. Someone once told me that there was one gaming enterprise that somehow was tied up in this, but, with the smallest possible exceptions, Senator, the answer to your question is that's correct, the casino revenues are not under the trust mantle.

Senator CRAIG. Well, many tribes have gaming revenues today and it was my understanding that most of those, if not all of them, were outside this.

My point is that tribes are learning to handle large sums of money in very sophisticated ways and develop mechanisms to manage that money in sophisticated ways to account for it, to have accountability with their people. They have professional auditing teams that come in to do this kind of auditing independent of the tribes, and I guess that's my frustration in pursuing this—that we want to pursue a 120-year-old legacy that may be worth reviewing today as it relates—as it looks to how we work with the tribes to get away from this.

I'm not sure that, as much work as you or I might do in it, that 20 years from now or 10 years from now we'll find anybody as intently interested in doing it. And my guess is, if we look at that continuum of time over the last 100-plus years, we know the ebb and flow of this Congress and of assistant secretaries and of secretaries as it relates to the intensity of interest as to how these resources get handled. And that's not a criticism. I think that's a reasonable observation.

For whatever reason, that's what happens. I guess that's my frustration, looking at this.

Well, we'll work with you—I'm certainly willing to do so—to see if we can resolve this.

Thank you.

The CHAIRMAN. Mr. Secretary, we appreciate you attending.

Let me just ask you one final question. Did you consult either with the tribes or the Inter-Tribal Monitoring Association before issuing your executive order to create this principal deputy?

Secretary BABBITT. Senator, like you, I have a huge network going back 30 years across the west, dating from my representation of a number of tribes, and I talk through the grapevine very regularly. I did not meet with the Advisory Council.

The CHAIRMAN. Did you meet with any of them to get their opinion?

Secretary BABBITT. No.

The CHAIRMAN. Why not?

Secretary BABBITT. Well, the chairman of that committee is a plaintiff in this lawsuit.

The CHAIRMAN. I see.

Secretary BABBITT. I think that is a constraint.

The CHAIRMAN. I understand. Well, I thought I probably in parting should pass on this bit of wisdom that you might not totally appreciate, but we are going to probably reconvene another hearing on this. We may or may not ask you to come back, but we'll be certainly looking at any legislative changes that we need to do to help you in your effort, but also we may be looking at something to countermand that executive order that has been suggested by several members of this committee, by the way. And I might also tell you there's a couple of committee members who have suggested that they may object to your budget if you are not in compliance with the law by the time that comes up.

I don't want to spoil your whole morning, but I thought I ought to pass that on to you for your own information.

Secretary BABBITT. Senator, I look forward to an early return to meet with this committee.

The CHAIRMAN. Thank you very much. Other panelists, thank you for appearing today.

With that, we have three other people that we will be taking testimony from, and I would ask all three of them to come to the table and we'll hear from all three before we ask questions. That will be: Ed Thomas, a member of the Advisory Board of the Special Trustee; Chief Charles Tillman, chief of the Osage Nation, also the Inter-Tribal Monitoring Association; and Mr. Paul Homan, the former special trustee for American Indians of Homan Associates of Washington.

We'll start in that order, so, Mr. Thomas, if you would proceed. And because we took so much time with the Secretary, we're going to have a little bit of a time problem, so I would ask you to turn in your full written testimony but try to keep your comments down within about a 5-minute timeframe or so.

We'll start with Mr. Thomas first.

STATEMENT OF EDWARD K. THOMAS, BOARD MEMBER, ADVISORY BOARD ON TRUST FUND REFORM, JUNEAU, AK

Mr. THOMAS. Thank you, Mr. Chairman.

My name is Ed Thomas. I'm president of the Tlingit and Haida Central Council, and I'm also a member of the Advisory Board for the Office of Special Trustee.

I want to thank the chairman for holding these hearings. As you are well aware—and I heard the comments made by the various members of the committee—you recognize that this single issue most definitely defines the fiduciary role that the Federal Government plays in——

The CHAIRMAN. Mr. Thomas, could you withhold for a moment. In the back of the room, if you folks that are speaking could go out in the hall and speak—go ahead, Mr. Thomas.

Mr. THOMAS. It is the one single issue that most definitely defines the fiduciary role that the Federal Government plays in managing the trust resources of Indian tribes and Indian individuals.

I won't be asking for equal time that the Secretary got, even though I think the tribal message——

The CHAIRMAN. You're not in trouble like he is.

Mr. THOMAS [continuing]. Needs to take just as much time, because the issues are very long-lasting. Not only that, I think that when people get up and testify they summarize and somehow shortchange the real problems that are out there.

Now, I became interested in this particular issue when I was a member of the Department of the Interior BIA Reorganization Task Force, and we heard a report from ITMA, and I was appalled at how many people had trouble getting information on their tribal trust accounts, or the individual trust accounts. So, subsequently, we met with the BIA Administration and I became even more appalled that there was so much resistance by the administration in trying to work with the tribe and the individual tribal account holders in trying to fix the problem.

My tribe then joined ITMA and their efforts to secure funding so that we can get these accounts audited.

You might recall that this was at a time when Congress was taking some aggressive actions in dealing with the problems that were happening in the savings and loan industry across the country.

So we felt fairly secure and we felt very confidant that if we were only able to identify the problem we'd get some assistance from Congress in trying to fix this very long-lasting problem. But, as it turned out, the Arthur Andersen audit was not able to be completed because there were so many missing records. I think that is still the case today.

Now, throughout this entire process you heard from the Secretary that he was not in favor of formulating the Office of the Special Trustee, and, as a matter of fact, objected to the Trust Fund Reform Act of 1994.

That, in itself, tells you the magnitude of the problem. If we do not have him in the corner fixing the problem, then he becomes an obstacle, and that has been the case since day one.

Now, way back in those days it was suggested that we needed to move the entire trust resource management out of the Department of Interior into some other agencies, and I joined in that commitment.

Now, the Secretary said unanimously tribes opposed that. Well, I didn't oppose it because I am of the opinion that tribal relationships are government-to-government and not necessarily just government to the single agency called the BIA.

Nonetheless, I think that it has been proven to be true that the Secretary has gone to great lengths of short circuiting the efforts of the Office of the Special Trustee in carrying out its functions.

Now, I realize that nobody wants to blame the current Administration for all the problems of the past, and I'm not here to do that. But I think we need to talk about what has happened since 1990 when this particular problem was put into legislation and a number of actions that took place.

Immediately after the act was passed, there were a number of nominees for the Office of Special Trustee. It took until 1996 to get a special trustee appointed.

Now, the Secretary reported to you that this next year he is going to be asking for $100 million, and I applaud that, even though there's not the justification for the budget as part of the certification process. I realize that the initial plan called for ap-

proximately $250 million just to get to the basic management structure that is needed to manage these funds. The first year we needed approximately $75 million, and the Secretary requested $13 million. Even after he got the $13 million, he objected to the way in which those funds were going to be expended.

Now, the Secretary also threatened the tribes that if we were to put the money into this project, that it would have to come from other BIA programs. Therefore, there was a substantial resistance from tribes to include more funds for the OST because there is a shortage of funds at many other levels within the BIA structure.

We, on the other hand, have been advocating for quite some time that we needed to make sure that these requests were made by themselves.

Now, I think that one final thing that I want to talk about, the stripping of the duties and responsibilities of the special trustee, was simply wrong. Now, he justified it by saying there was mismanagement or under management of the field staff. Well, the special trustee had some responsibilities, but did not have the authority to manage all field staff who had responsibility of certain records and certain things of that nature. I just don't buy that.

Now, I need also state that we would never have gotten as far as we have had we not had the kind of character that Paul Homan had in battling the BIA. There is no doubt in my mind about that. I think that it goes without saying that we fought every step of the way against this administration and Secretary Babbitt on trying to get this program implemented as required by the act, and that hasn't happened.

So, Mr. Chairman, in all due respect to the Secretary, I must strongly disagree that those things which he is using to justify his actions are really not true.

Now, it was pointed out that there are many small accounts, one where it is generating 7 cents to the Assistant Secretary of Indian Affairs. That may be true, but there are a lot of accounts out there where we don't know if they should be generating 7 cents or $7,000, and that is the heart of the problem right there is that we need to make sure that if we're going to be transferring money, closing accounts, that, indeed, they are reconciled and that the people are not being shortchanged because of the poor management within the current system.

With that, Mr. Chairman, I want to thank you for your time and your attention. I do have my written comments for you.

The CHAIRMAN. Without objection, your complete written testimony will be in the record.

Mr. THOMAS. I will be happy to answer any questions. I did leave some out of my verbal, just in the interest of time.

The CHAIRMAN. Thank you. We do have several questions for you, so we'll get back to you and you can elaborate on those.

[Prepared statement of Mr. Thomas appears in appendix.]

The CHAIRMAN. With that we will go ahead to Chief Tillman.

STATEMENT OF HON. CHARLES TILLMAN, CHIEF, OSAGE NATION, ON BEHALF OF THE INTER-TRIBAL MONITORING ASSOCIATION, ALBUQUERQUE, NM, ACCOMPANIED BY DANIEL S. PRESS, ATTORNEY AT LAW, VAN NESS FELDMAN, WASHINGTON, DC

Mr. TILLMAN. Mr. Chairman and members of the committee, I'm Chief Tillman of the Osage Nation of Oklahoma and I serve on the board of directors for the Inter-Tribal Monitoring Association on Indian trust funds.

This association, as you know, Senator, consists of about 39 federally-recognized tribes. I am here on behalf of them to present their testimony and some of the things that they would like to present to this Senate, but also as the chief of the Osage, which we have a 3.2-billion-barrel asset down there in oil and gas, I can tell you a horror story that would probably curl your hair.

But, before I do that, I think that what I need to do here first—and not to take a lot of your time—is about the serious problems that the Department has undermined the Trust Fund Act. We know that. I've come here to ask you and this committee to help us, the tribes out there out west, to help us solve these problems. Somebody has got to bird-dog these people and stand over them and make them do what's right. That's all we're asking here—to do what is right.

I think what needs to be done—there are some points here I'd like to make—is that maybe some of the things that should be in legislation to help you out a little bit in the matter of records is that I believe that the legislation could contain, No. 1, the transfer of the Office of Special Trustee to one of the Federal bank regulatory agencies, for which it oversees the trust reform effort at Interior, examine the Interior Department's management of trust, and be empowered to impose penalties for violations, just as those agencies do to every bank and trust department in the private sector.

I also believe that the Office of Special Trustee would operate a special program to assist tribes that wish to assume administration of the trust asset functions pursuant to the Self-Determination Act and Self-Government Acts.

No. 2, it will take months, at best, to get amended legislation enacted and implemented, but during this period we cannot afford to let the present unqualified officials oversee this trust reform, particularly with the President's request for 90 million for reform efforts in fiscal year 2000.

No. 3, the ITMA therefore requests that the committees write to the Judge in the *Corvel* v. *Babbitt* case and ask that he appoint a special master to oversee the trust fund reform until the Congress can adopt new legislation.

Senator I really sincerely believe, in my belief, it is very unfortunate that Secretary Babbitt has been misinformed, ill-advised, misguided by his staff in these matters. There are questions you asked today that he could not answer. He didn't know. The Assistant Secretary couldn't answer. He didn't know.

So somewhere we have got to stop the bleeding, and let me tell you why. Arthur Andersen came to the Osage. In the 20-year period from 1972-92, that was the best accounting period for the

Osage. We have a large asset down there—oil and gas, 1.5 million acres of it. We had over 17,000 oil wells we pump.

In that accounting period it was unauditable. They could not audit the books. Six years of that, they couldn't even find the records. Two years, they tried to reconcile that account with some of the accounts and found that there was an $800,000-some-discrepancy, and they haven't paid us yet. And this has been going on since 1992, and where this money is, I don't know. But I tell you what, this is a large amount of money.

We have met with Assistant Secretary Gover, the ITMA, in trying to work out these problems, and they want to shove it underneath the carpet. They call it "rough justice." Let's figure out something and settle. Let's figure out something and maybe you'll be satisfied and we'll just sweep it under the rug and then you all go home. We've been done that way for years.

I want to tell you something. You know, back in the early going, when my grandfather and grandmother was living—and you probably remember some of those days with the older Indian tribes—that's all we had was the BIA, and they said, "Trust me. You trust me," and we did trust them, and look where we are at. Look where we are at.

So I come to this Government, the United States, to correct this problem called the BIA. It needs to be done. It needs to be done for the children across this country, as well as the old folks. That's why I come here.

I come 1,400 miles to say this, Senator. I come from Oklahoma. There's over 400,000 Indians in that State. It is the most populated Indian State in the country. That's what I'm here for.

Someone has got to take a handle on this.

That's all I've got to say, and I want to thank you for letting me testify today, and I guess we'll be glad to answer any questions that you have.

Thank you very much, Sir.

The CHAIRMAN. Thank you for that very eloquent statement, Chief.

[Prepared statement of Mr. Tillman appears in appendix.]

The CHAIRMAN. Mr. Homan, please?

STATEMENT OF PAUL HOMAN, HOMAN AND ASSOCIATES, WASHINGTON, DC

Mr. HOMAN. Thank you, Mr. Chairman.

I will be extremely brief, but I would like my full statement to be submitted for the record.

The CHAIRMAN. Without objection, it will be included.

Mr. HOMAN. On September 19, 1995, I was appointed special trustee for American Indians and served in that capacity until January 7, 1999, when I resigned rather than accept the reorganization of the Office of the Special Trustee set forth in the Secretary's order 3208 dated January 5.

For all practical purposes, in my view, the order deprived the special trustee, the Office of the Special Trustee, and the Advisory Board of the independence and the authority which was intended by the Reform Act. This was the principal reason for my resignation. In short, I felt I was deprived of the authority and the finan-

cial and managerial resources to carryout the duties and responsibilities of the special trustee and OST, itself.

The secretarial order and other Department of the Interior actions since 1994 relative to trust management reform demonstrate over and over again how easy it is to under-fund, under-staff, delay, and otherwise frustrate the reforms required by the Reform Act in favor of higher departmental priorities.

The result has been to place the Indian trust management reform efforts in jeopardy, in my view.

The Reform Act was flawed in one important respect in that it failed to provide the special trustee, the Office of the Special Trustee, and its Advisory Board with the independence and the authority to carry out the purpose of the act.

The record of the last 3 years shows a dramatic difference between the very successful Reform Act results achieved by OST directly through the Office of Trust Fund Management, which was under my direct control, with both IIM cleanup and the implementation of the trust fund accounting systems substantially and successfully implemented.

All of the oral testimony progress that the Secretary noted in terms of audits, reconciliations, the 200,000 accounts that had been cleaned up to date, and the installation of the trust fund asset accounting system was accomplished by my direct authority over the OTFM, not the BIA and not the other Department institutions.

Contrast that with the BIA's record in the last 3 years and also that of the Department's recordkeeping efforts, which have yet to begin in terms of document cleanup. What the cleanup has shown so far, out of the 200,000 accounts cleaned up but not mentioned by the Secretary is that over 100,000 of those accounts have a missing mandatory document, which means that the current recordkeeping systems incorporated by the Department are very deficient and are no better than what we found in 1992 and what is illustrated so dramatically in the hearing room.

The Secretarial order purports to deal with the recordkeeping issue, but to my knowledge there is still no records retention policy, which I have advocated for 3 years, which meets the commonlaw standards, a condition precedent for any adequate trust records management system, and was recently confirmed by the courts. Nor is there a records management system to retain trust documents, keep records, and furnish information sufficient to provide an accounting to the beneficiaries or to meet the accounting accuracy and reporting requirements of the Reform Act of 1994, which is another condition of that act.

In recent weeks, the Department has been criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the BIA were held in civil contempt of a U.S. district court's document production orders.

The court noted,

> The court will appoint a special master to oversee discovery, document production, and related matters, and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves.

When the Department of the Interior can no longer be trusted—and I share this view—to keep and produce trust records which are

conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities.

The Department's history and the recent record of this administration have shown that, so long as the organization and management of the trust management activities remains status quo, and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral standards and trust and exacting fiduciary standards the United States has undertaken and assumed, yet the status quo continues.

I share the court's view, as I indicated earlier, that the Department of the Interior can no longer be trusted to keep and produce trust records. More important, it is the view not only of the people on my right that have long shared this view, but by many, many Indian trust beneficiaries, themselves, and is the basis for the IIM lawsuit which the court is now considering.

Therefore, I believe it is time for Congress to consider alternatives to the Department's future management of the Government Indian trust management activity. Specifically, I recommend that Congress consider establishing an independent agency outside the Department of the Interior to manage these important trust responsibilities.

Thank you very much, Mr. Chairman. I would be glad to answer any questions you or other Senators will have.

The CHAIRMAN. Thank you for appearing.

[Prepared statement of Mr. Homan appears in appendix.]

The CHAIRMAN. Let me ask all of you, were you at all aware that the Secretary's executive order was coming down? Did he consult with any of you before he issued that order? I don't think he did with you, Mr. Homan. He took you by surprise?

Mr. HOMAN. No; he did not consult. We didn't even hear about it until after it was done.

Mr. THOMAS. No; he did not, Senator.

The CHAIRMAN. He did indicate he did not consult with any tribes. Has he consulted with any of you about the new nominee that he said will be sent to the White House?

Mr. HOMAN. No; he did not, Senator.

Mr. THOMAS. No; I didn't know he had one.

Mr. TILLMAN. No.

The CHAIRMAN. We didn't, either. All right. Mr. Thomas, in your opinion, did the Advisory Board receive adequate opportunity to consult and coordinate with Mr. Homan during his tenure as a special trustee?

Mr. THOMAS. I think that, for our role, yes, we had adequate opportunity. Now, that's not to say that we had adequate resources to carry out the interests of those of us on the Board to get the job done.

The CHAIRMAN. Mr. Homan suggested that we transfer the Office of Special Trustee completely out of the Interior Department. What is your feeling of that? And yours, too, Chief Tillman. Both of you?

Mr. THOMAS. You want me to go first?

The CHAIRMAN. Yes.

Mr. THOMAS. Okay. I think that it has a lot of merit to it because of what you have seen so far as far as not only the resistance but also the holding back of resources necessary to carry out the responsibilities.

The CHAIRMAN. Chief.

Mr. TILLMAN. Let me say this about the Office of Special Trustee. I believe that what we did in the past with Mr. Homan, he had the confidence of the Indian people across this country. Now that's a big asset right there, to have the Indian people behind you and supporting you, and that's what happened.

But, you know, when you get back in here, when you dismantle all that, it dismantled a lot of Indian tribes in thinking,

What in the world is happening to us now? What is the Government going to do to us now?

With that, I sat down, as chief of the Osage, and say, we had a good thing going with Mr. Homan. We had his trust. We trusted him. He trusted us. He came and visited us on our reservations. We felt comfortable with that. We've had a lot of comfort from him for what he told us. And then all of the sudden he's gone.

The CHAIRMAN. Mr. Homan's testimony indicated that there were several reforms that were already underway. Were you optimistic that those were beneficial and fruitful in moving forward in a timely manner?

Mr. TILLMAN. Yes; I was. We were very satisfied.

The CHAIRMAN. Were you, Mr. Thomas?

Mr. THOMAS. Yes; let me qualify that once again.

I think, for the resources that we had, I say yes. But, as far as having the resources that were in the original plan, as well as splitting the responsibility of records management back to the BIA, then I felt that we were behind on the BIA portion of records management.

The CHAIRMAN. Chief, you proposed contracting management of the trust funds to tribally-owned banks. How many tribally-owned banks are there? And would they have the capabilities of processing or managing $3 billion?

Mr. TILLMAN. I'm not saying—Senator, my testimony there needs to be corrected. The tribes should have the option, if they want to have, to do that. I don't think they are commanded to do that. I really don't.

The CHAIRMAN. Do you think they'd have the capability to——

Mr. TILLMAN. I'm not in agreement with that. No.

The CHAIRMAN. This gentleman with you—will you identify yourself for the record, if you have a comment?

Mr. TILLMAN. This is Dan Press. He's the attorney.

Mr. PRESS. My name is Dan Press. I'm an attorney with the law firm of Van Ness Feldman, and I'm counsel to the ITMA.

There are presently nine banks that are owned by tribes. There is another one that a group of tribes are now trying to start to form that will be a larger bank. We've talked to bank experts, and

they've concluded that those banks and the new bank would have the capability to handle the management of the——

The CHAIRMAN. To handle $3 billion of trust money?

Mr. PRESS. Yes; I had that same question, and we put it to a number of experts in this area, and they felt that it would not be a problem.

The CHAIRMAN. Thank you.

Mr. Homan, let me refer to these pictures over here. Had you visited any of those places to see the physical mess that had accumulated in any of those area agency offices?

Mr. HOMAN. My office took those pictures, and I did not personally visit any that looked quite like that, but I have been on over 22 reservations. I have observed the recordkeeping practices directly for myself.

The CHAIRMAN. During your tenure, had you——

Mr. HOMAN. I found them at least as bad as that in some of those places.

The CHAIRMAN. During your tenure, had you made any substantial improvements since those pictures were taken?

Mr. HOMAN. Yes.

The CHAIRMAN. Just a physical cleanup?

Mr. HOMAN. The only cleanup effort directly under my control was the IIM jacket files, which consists of about 300,000 individual files for American Indians.

My office in 1996 started that process, even though they were under-funded by the Secretary's office. We finally received funding last year, and those were the statistics that the Secretary cited.

To date, out of the 300,000 files, we have already cleanedup 200,000 of them, or two-thirds. We had gotten nearly all of the records by the time I —

The CHAIRMAN. Did your testimony indicate that 100,000 files may be missing?

Mr. HOMAN. Yes; that's something the Secretary did not indicate. But, of those we found so far, there are over 100,000 accounts that have one or more documents missing, such as a name, address, some vital statistic. We find that germane to our ownership statistics and the ability to distribute money to those accounts.

So there are exceptions there that have built up over a number of years that need to be reconciled, so the testimony that they are truly cleanedup is false. We need to further reconcile those accounts to make sure that we get those vital statistics.

Among those are some 40,000 accounts—whereabouts unknown—where we do not know the address of the beneficiary. These people are being denied approximately $50 million worth of money that sit in those accounts, draw interest, but which they obviously can't use and don't know about.

The CHAIRMAN. My time is up. I'll come back to you in just a moment.

Senator Murkowski.

Senator MURKOWSKI. Mr. Homan, you previously were associated with the Riggs Bank in what capacity?

Mr. HOMAN. I was the president and CEO of the Riggs Bank, which included the trust company you alluded to earlier, $5 billion——

Senator MURKOWSKI. It's $5 billion managing trust, so obviously the ability to manage a $2.4 billion trust was within your scope of experience and expertise?

Mr. HOMAN. Yes.

Senator MURKOWSKI. And then why didn't you manage it?

Mr. HOMAN. The format——

Senator MURKOWSKI. And tell us why you left the Department recently.

Mr. HOMAN. The format gave me only oversight responsibility over two-thirds of the trust management activities. I had direct responsibility for Indian trust funds management, which is the deposit, investment, and disbursement function.

Since 1992, we have reconciled each of the dollars coming in there to the satisfaction of our auditors, and we are the only part of the Department's trust management activities that has such an audit.

But the other two aspects—Indian asset management, that is resource management, the leases that occur on grazing rights, royalty payments, and the like—are under the management of the BIA. Those leases have not had an accounting of what the GAO calls a "universe." We don't know how many of them there are. We don't know whether the dollars coming into my operation in Albuquerque—as I said, I can account for the dollars that come in. I don't know whether they should be $2 or $10. I don't know whether Mr. Gover's 37 cents should be $100. And it is right, and I would agree, in terms of being an efficient private sector manager, that you should not handle these small accounts.

But the Indians make a very good point: how do you know they're small? How do you know if you can't know the beginning balance whether——

Senator MURKOWSKI. Well, you're investing the collected funds? In other words, you're responsible for the collected funds, but the distribution is the BIA's, and if they don't know, nobody knows.

Mr. HOMAN. The Government is also in charge of the ownership records. So when I disburse money out of our account, I don't know whether it is getting to the right person. Probate is behind in some of the Bureau's offices as long as 4 years, which means that some of these beneficiaries are not getting paid if a death occurs.

Senator MURKOWSKI. Why did you choose to leave?

Mr. HOMAN. I chose to leave principally because the Secretary reorganized the four major elements of my office, put in charge people that I didn't believe had the ability to carry out those responsibilities, and otherwise undermined my authority to act independently.

Senator MURKOWSKI. Do you have any prediction as to whether the Secretary's reorganization is going to work?

Mr. HOMAN. I would suspect it is in regression.

Senator MURKOWSKI. In other words, it is not going to work?

Mr. HOMAN. No.

Senator MURKOWSKI. And that's your professional opinion——

Mr. HOMAN. That is my——

Senator MURKOWSKI [continuing]. Based on your expertise as—how long were you in the trust business?

Mr. HOMAN. I've had a banking career of over 30 years, 20 years at trust supervision.

Senator MURKOWSKI. So it is your 30-year experience, looking at the way he proposes to manage, that it's not going to work.

Mr. HOMAN. I don't think so.

Senator MURKOWSKI. And the rationale behind that is, what, inexperienced people, or lack of——

Mr. HOMAN. They are operating with an inexperienced management. Management in these things is the singular issue. And, through no fault of their own, they've become obsolete over the last 30 years. There is not a single person, to my knowledge, in Department trust management activities that has never been trained as a trust officer. They're social and welfare people——

Senator MURKOWSKI. Having spent 25 years in the banking business and managing the trust department, I know what you're talking about. That's a quasi-independent arm of a financial institution. It is managed by the bank, in a sense, but it is almost independent in its structure, its examinations by special trust examiners, and, believe me, you either adhere to the principles or the examiners write you up and it goes to the board of directors and so forth. That oversight is clearly lacking in the BIA structure.

You indicated a recommendation of an independent management. How far would you take that?

Mr. HOMAN. I believe that, as long as it is under the Department of the Interior, the institutional culture there is such that this will never get adequately addressed.

Senator MURKOWSKI. I totally agree with you. I think the Federal Government and the Department of the Interior and the BIA is totally incapable internally of meeting their obligation, so why not acknowledge it and, for heaven's sakes, get it out there and contract and—excuse me, Mr. Tillman, you indicated that the word was "trust me."

Mr. TILLMAN. Right.

Senator MURKOWSKI. Now, clearly, the Indian Gaming Boards aren't putting their funds into the trust accounts under the BIA; they're putting those moneys out where they see they can generate a greater return, and have accountability for their funds.

Now, you represent 400,000 Indians in Oklahoma?

Male Voice. We have that many in Oklahoma.

Senator MURKOWSKI. I've got 100,000 in my state of Alaska.

Mr. Thomas, Tlingit and Haida—you remember the Tlingit and Haida—you've got $15 million or thereabouts. Why don't you pull it out and take it some place else where you can get accounting?

Mr. THOMAS. Yes; there are several reasons.

Senator MURKOWSKI. Just give us one or two.

Mr. THOMAS. We did take some out and put it under private management, and it is doing fine.

The main problem is accountability. Do you take out five million? Do you know it is $5 million.

Senator MURKOWSKI. Okay. So you don't know. You're afraid to take it out because you don't know whether you're talking it all out or whether you've got more coming?

Mr. THOMAS. Right.

Senator MURKOWSKI. It's a sad state for the Secretary of the Interior to run a Department and a BIA organization that can't, and so you keep it there because you're fearful that if you take it out there might be more coming. On the other hand, you might be better off taking it out. Three of them evidently have; is that correct?

Mr. THOMAS. Yes; they know of three tribes.

The other part of it, which is equally as important, is that when funds are under the management of the Federal Government as part of the trust fund management thing, they are somewhat protected from litigation that may happen tat the tribal level. Whether it is through a political and whatever else, but our tribe has felt very strongly that we need to have part of our funds in a secure place that would not be subjugated to individual.

Senator MURKOWSKI. Do you think the BIA is a secure place for funds?

Mr. THOMAS. Well, that's why we're here. I think that we can——

Senator MURKOWSKI. Well, I don't know. From what I've heard at this hearing, I wouldn't want to give them 10 cents.

Mr. THOMAS. Back to my original comments about the——

Senator MURKOWSKI. Might get 7 cents back.

Mr. THOMAS. I think, with the dealings of the savings and loan issues, I think our faith was rejuvenated by this courageous effort that Congress went through in replenishing all those accounts, and we are hoping that, in the eventuality, we will get a full replenishing of our accounts. then we can move forward again.

Senator MURKOWSKI. Well, I wouldn't wait too long for a full replenishing of accounts. How long have you been waiting now?

Mr. THOMAS. Well, I've only been involved in this since 1990, but my account has been in there since 1965.

Senator MURKOWSKI. I've had letters from the Tlingit and Haida saying, you know, we can't get an accounting of our money from the BIA for the last 18 years that I've been in the U.S. Senate.

Mr. THOMAS. Since——

Senator MURKOWSKI. I don't know. Maybe your patience is greater than mine, but I'd get the message somewhere along the line that you'd better do better than that. Pull it out and——

Mr. THOMAS. Since 1990, all of those dollars that were in the account at that time have had proper trails on it. We have had our auditors look at it, also. So we are on top of those dollars that are in the Federal Government from that point forward. What we need to do is reconstruct things backwards.

Senator MURKOWSKI. Well, that's the problem. Mr. Homan indicated that, you know, he didn't have the responsibility in that area. He addressed this issue on the investment asset management, but it's when it comes back. And there's no reason on earth, from what we've heard today, to suggest that the BIA physically is capable of that. I don't care how much money you throw at it.

Chief.

Mr. TILLMAN. Senator, what really bothers me is that there's $90 million that the Government is going to turn back over to the same entity that created the problem.

Senator MURKOWSKI. I totally agree with you.

Mr. TILLMAN. And so here we are. And now what do you do if you let the fox back in the hen house again and they're going to take care of us? Well, it's not going to happen.

Senator MURKOWSKI. Let me tell you, this is a responsibility that the chairman of the Committee on Indian Affairs certainly has in the sense of jurisdiction, and, to a degree, we do on the Committee on Energy and Natural Resources.

But you're going to see this go one way or the other. You're going to see the Secretary take the $90 or $100 million and comply with the law by certification and time will march.

Mr. TILLMAN. Right.

Senator MURKOWSKI. Or you can make a recommendation that we take this out of the Secretary's hands, mandate that he comply with the private sector, and see if we can do any better.

Now, maybe the private sector would take one look at the mess and won't want any part of it. Is that possible, Mr. Homan?

Mr. HOMAN. I think there could be a way for the private sector trustees. I think that the two instances that the Secretary mentioned—the Mellon Bank and Security Pacific Banks—were not given the appropriate representations and warranties by the Government to enable them to take on the trust responsibility, one being that they had to certify to a balance. They didn't want to undertake the litigation liability in case a beneficiary subsequently came back. The Government was unwilling to give those types of indemnifications. If they were, I think it would be a good solution to hire outside contractors to both clean up this mess and also to administer it in the future under some general oversight by the Federal Government.

Senator MURKOWSKI. Well, my time is up. I want to compliment our witnesses today. I think your statement, Chief Tillman, on "Trust me" rings with me. We've not kept our trust, and I don't think this organization is capable of it. And if it isn't, then let's change it.

Mr. TILLMAN. That's why I'm here, Sir.

Senator MURKOWSKI. Mr. Thomas, you've been involved in trying to rectify this situation, and I notice you're getting some gray hairs, too. And I'm putting the Tlingit and Haidas on notice that I don't know what to do about them, but if I were them I'd pull the money out.

Mr. Homan, I appreciate your commitment and contribution and professionalism, and I think we're just making full circle if we think that the BIA can address and rectify this problem, and so, Mr. Chairman, I'm going in opposition to the Secretary's request to take the money in-house to try and address the problem. If he wants to take the money and contract with professionals who are out there who will risk their reputation and put it on the line to clean up this mess, then I'm all for it.

Thanks for holding this hearing. It has been beneficial and good for my digestive juices.

The CHAIRMAN. Chief Tillman, your comment about, "Trust me," I was reminded that we've had 380 or so treaties signed by the U.S. Government, and every darned one of them has been broken, so that will tell you something about how much you can trust your Government to deal with Indian tribes.

And, Mr. Homan, your credentials were well-known to the committee, and, if I'm not mistaken, the Riggs Bank was one where many of our former Presidents, including Lincoln, put their money, and that was good enough for me. I want to tell you that.

But, clearly, there is a need for either an additional hearings or some legislative adjustment to the 1994 act. It is obvious, from your testimony and the Secretary's testimony, that things are not working the way we meant them to. And, of course, that's the effect. We put something in place by legislation, and very often, by the time they get going over their rule and regulation writing, it flies in the face of the intent of the original act.

We're probably going to go back and deal with that, as we learn a little bit more about it. And I'll be working with Chairman Murkowski. Obviously, much of the authority will also come from that committee, as well as the Indian Affairs Committee.

But I do want to thank you for appearing. This record, for any additional testimony, will stay open another 15 days, so if there are additional things that you or anybody in the audience would like to submit, we will put that in the record and review that.

Mr. Thomas.

Mr. THOMAS. I want to make a pitch for the money. I realize that we are in a difficult period of time, but I hope we don't throw the baby out with the bath water. It is very clear to me, serving on the board, that those dollars are direly needed to fix existing problems, and we really need to bear down and get the job done, and I would like to see us change what the Secretary did, but we really need to get the job done.

The CHAIRMAN. Every member of the committee understands that. When we're told that there are possibly 100,000 records missing, frankly, I don't know if we can ever clear it up through legislation. Probably not. I mean, I just don't know how to even approach a lot of those missing records, but we'll do our best.

Yes, Chief.

Mr. TILLMAN. I'd just like to make a final comment. Indian tribes, when the Secretary does things that he doesn't consult the Indian tribes or anything——

The CHAIRMAN. That came out very clearly. I asked him that specifically and he said he did not consult the tribes.

Mr. TILLMAN. And I think we need to have the tribes involved, Senator. I really do.

I'd like to say one thing to Paul Homan—that was a job well done, Paul, what you did for the Indians across this country. It needs to be put in the record.

The CHAIRMAN. Well, don't give up on us yet.

Thank you for appearing.

With that, this hearing is adjourned.

[Whereupon, at 12:15 p.m., the committees were adjourned, to reconvene at the call of their respective Chairs.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Thank you Mr. Chairman for the opportunity to address the committee today. To anyone who was in attendance at yesterday's Interior Budget Committee hearing, I apologize for sounding like a broken record. However, today's topic is one more instance of the Department of the Interior's contempt for people whose resources they are supposed to manage.

The Denver Post, on February 25, had a good comparison that clarifies the amazing actions of the Fund managers. Suppose your local bank took all of their deposits and mixed them with every other bank customer then told you it hadn't kept track of what money came out of which account. Then imagine that this money was then used to bail out another bank, without ever telling any of its customers that their money had been spent. Picture a bank that didn't keep track of whether checks had cleared, then refused to let customers see their account records, so they could try to sort it out themselves.

Would you willingly hold your deposits in such a bank? The easy and quick answer is no. Yet, the Tribal Members who are part of the trust have no choice in allowing the Government to manage their "bank" account.

District Judge Royce Lamberth recently found Secretary Babbit and Secretary Robert Rubin in contempt of court for failing to provide materials for the class action suit by Native Americans. This contempt was not for a one time occurrence; it was for 2 years of inaction and delay. It's important to note that the lawsuit did not seek dam, ages, it only sought an accounting. The tribal members only wanted to know what had happened to their Trust funds.

In an average budget submittal for the Office of the Special Trustee, we usually appropriate $40 million directly for management of the trust. I believe that the committee is owed a proper explanation of the expenditures of these funds. They obviously have not been spent responsibly or wisely, since you haven't found billions of dollars. The fiscal year 2000 budget including the proposed fiscal year 1999 supplemental authorization total $56 million in additional dollars for trust management. How will these additional funds be used? It's estimated that 10 percent of the documents at the Bureau of Indian Affairs are of unknown origin. This means that the boxes and files are unlabeled, no one knows their contents, and they aren't filed in an organized manner. How can we be assured that additional money will reverse the pattern built up over the last, 175 years.

It is hard to view this year's request with an unjaded perspective given the history of the Department of the Interior with Congress.

We need to set our priorities and get our house in order. Before we can authorize spending additional moneys, we need to ensure that the basic problems will be addressed. I look forward to hearing in detail how we will improve the management of the Indian Trust Fund so we can restore confidence to our depositors that the United States will honor its commitments.

Thank you again .Mr. Chairman, I appreciate the opportunity to start a much needed dialog with the witnesses.

PREPARED STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

This record keeping nightmare has been going on for decades. Today we are here to try and assure ourselves and Indian tribes across America that there is some hope for bringing the trust management system into the 20th century before the 21st century begins.

Commercial banks know how to operate trust departments. The U.S. Department of the Interior [DOI] is in the learning process. The technology is available. It is now a matter of cleaning up every record since 1972 that is available to DOI, and generating reports to the Indian owners of the status of their assets that are held in trust by DOI.

In addition to playing catch-up, we must also ensure tribal governments and members that the $800 million annually that flows through this system is being properly tracked and reported to the Indian owners.

These funds are generated from natural resources like timber, gas, and oil that are sold to private companies on behalf of tribal owners. There are some 300,000 individual trust accounts and about 1,700 accounts for 338 tribal entities.

Progress has been made. Among the tribal accounts, $17.7 billion in transactions have yielded $15.3 billion [86 percent] of reconciled accounts. $2.4 billion remains unreconciled , but under scrutiny.

In the Individual Indian Money [IIM] Accounts, there are about $500 million in assets for 300,000 individuals. Thousands of these are minuscule amounts [under $1] as a result of generations of fractionated ownership of small pieces of Indian land. I applaud the Administration's desire, and I support their efforts to find ways to consolidate these lands.

The class action lawsuit [*Cobell* v. *Babbitt, et al*] on the IIM. Accounts is the court action that has led to the citing of Secretaries Babbitt and Rubin for contempt of court. The court is unable to move forward without documentation.

This whole issue is about documentation and the lack thereof.

Secretary Babbitt tells us that he has cleaned up over 200,000 IIM account files, two-thirds of the total. By the end of this year, he hopes to have completed the installation of a commercial bank trust fund accounting system for all IIM and tribal accounts.

Next year's budget seeks $100 million, with an increase of $50.5 million over enacted 1999 levels for the Office of Special Trustee. $10 million would be transferred internally in the BIA to address the fractionated lands problem. $65.3 million is dedicated to improving computer, accounting, and other trust management systems.

In 1 month or so, this Committee on Indian Affairs, will have the benefit of a GAO study on progress made to modernize the BIA's trust management system.

In the interim, I will continue to support efforts to get this problem behind us. I look forward to the day when we can offer timely, accurate, and honest reporting to Indians who deserve to know the status of the accounts their trustee keeps on their behalf.

PREPARED STATEMENT OF HON. BOB GRAHAM, U.S. SENATOR FROM FLORIDA

Secretary Babbitt, I commend your commitment to the improved management of Indian trust funds and am pleased with the development of a comprehensive High Level Implementation Plan. This 13 component plan, including the installation of a new trust find's accounting system, improved records management, and employee skills training, will certainly help to better serve the 300 tribal entities and 300,000 Individual Indian Moneys trust fund account holders that depend on the Department of the Interior's trusteeship.

The Department of the Interior has a responsibility to serve as a faithful trustee and defender of the interests of American Indians. I urge you to continue to examine the deficiencies in the current system, and reflect on whether the planned efforts to recover and improve this trust relationship will be adequate.

PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

I thank Chairman Campbell for his swift action in scheduling this hearing today, and Chairman Murkowski for dedicating his committee time for this important issue. Congressional oversight is clearly needed to cause resolution to this decades-old debacle of Indian trust funds mismanagement by the Federal Government. Late last month, another sorry chapter was added to this long story when three of our

highest officials—two of which appear before us today—were held in civil contempt for their failures to comply with statutory requirements and court orders.

My involvement on the issue of Indian trust funds management stems back as far as my entire Hill career—from previous work with Mo Udall on the House Resources committee in 1984 to my oversight responsibility as chairman of this committee in 1995 to institute a Special Trustee to bring reform to the management of Indian trust funds by the Department.

The undeniable fact in this matter is the $2.4 billion in unreconciled tribal trust accounts which STILL cannot be accounted for, despite congressional and court requirements. $2.4 billion of unaccounted tribal money—which the United States, as the fiduciary trustee, is entirely responsible for receiving, holding, or paying out to Indian tribes or individual Indian holders. These fiduciary standards are of the highest responsibility and trust.

More than ten hearings have been held on this issue in both the House and the Senate. Approximately twenty GAO reports have examined various aspects of trust fund accounting and management. Despite $21 million spent over 5 years on the BIA reconciliation project, 14 percent remains unreconciled. All this signals a systematic mismanagement problem within the Bureau of Indian Affairs and unacceptable and lax oversight by the Interior Department.

Five years ago Congress called for an end to this gross negligence on behalf of the Indian beneficiaries by enacting the American Indian Trust Fund Management Reform Act. This law required an overhaul of the Department's management and appointment of a Special Trustee to oversee the Department's complex responsibility toward resolution of trust funds. Yet, we are here today—5 years later—because the Interior Department refuses or is unable for some reason to comply with the LAW.

Further, the appointed Special Trustee—Paul Homan—resigned in January of this year, after a Secretarial Order issued by Secretary Babbitt reorganized the Office of Special Trustee in ways that Mr. Homan believed usurped his authority as Special Trustee and further hindered his ability to do his job.

The resignation of Mr. Homan and the recent contempt order underscore what many of us in the Congress have feared for some time—the Interior Department has persistently failed to own up to its mistakes and fulfill its basis responsibilities to Native Americans whose money is in the hands of the United States. I'm certain that my colleagues shared my hope that Mr. Homan's expertise held some prospect for resolution of these long-standing problems.

Unfortunately, recent events lead us to the same conclusions we have reached many times over—tribal trust accounts cannot be fully reconciled or audited due to shoddy recordkeeping. Even more troubling is a very questionable commitment to properly follow through on Indian trust fund management policies and procedures. We should seriously examine whether the Interior Department should maintain its authority over Indian trust funds management.

Through Congress and the Courts, the tribes sought decisive and effective action by the Interior Department and Secretary Babbitt.

It is evident, as noted by the Court, that:

"Justice has not been done to these Indian beneficiaries."

Mr. Chairman, the trust obligations our Nation owes to Native Americans are of the highest order, yet we have honored them mainly in the breach. By action and by performance, the Federal Government has failed miserably.

If resolution to this long-standing problem is truly a priority for the Interior Department, we need to end this injustice.

Thank you, Mr. Chairmen.

PREPARED STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Mr Chairman, let me begin by expressing my appreciation for the opportunity to participate in today's hearing. The present and future challenges the Department of the Interior, Bureau of Indian Affairs and the Office of Special Trustee face are a high priority for South Dakota's Indian tribes, and I look forward to continued work with the Committees on efforts to improve the quality of services provided by the Department, and to protect the interests of tribes in my State of South Dakota and across the country.

The issue of Trust Fund mismanagement is one of the most urgent problems we are faced with in Indian country. Of all the extraordinary circumstances we find in Indian country, at least in South Dakota, I do not think there is any more complex, more difficult and more shocking then the circumstances we have surrounding trust fund mismanagement. This problem has persisted literally for generations, and continues today. Administrations of both political parties have been inadequate in their

response, and the level of direction and the resources provided by Congresses over past decades has not been used to their best ability.

The Federal Government, by law, is to be the trustee of Native American people. When the Trust Fund Management Act of 1994 was passed, I was hopeful that this accounting situation would be remedied. Unfortunately, this has not been the case. In 1996, I was appointed by Chairman Young to the Congressional Task Force on Indian Trust Fund Management, to review and study the management and reconciliation of funds administered by the Department of the Interior's Office of Trust Fund Management. Those meetings were productive, yet 3 years and many millions of dollars later, this problem still persists.

My concern remains, where are we now, and what resources does the Department need to ensure that this problem is eliminated in the shortest amount of time? Far too much time and resources have been exhausted attempting to remedy this deplorable situation, which affects far too many of South Dakota's poorest people. This is one of the most urgent problems we face in Indian country, and there are so many more problems that flow from, or the solutions flow from the inability to come to terms with this issue. Congress has been to this table at least 10 times in the past few years. I do not want to revisit this issue 10 more.

Mr. Secretary, I commend your intent to remedy this situation, however, as much as I would like to see this come to a conclusion, I am not yet convinced this daunting task will be completed before you leave office. before you leave office. Interest remains is pursuing actions to afford you the resources necessary to complete this job once and for all. I look forward to receiving testimony on this important issue and will continue to closely monitor your progress. I would also like to ask both Chairman Campbell and Chairman Murkowski to revisit this issue in the near future, in order to gain assurance that steps are being taken to right this terrible wrong against the Native people of this country.

PREPARED STATEMENT OF SENATOR CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Mr. Chairman, as a member of both the Indian Affairs and Energy Committees I have more than a passing interest in the subject of today's hearing. As the ranking Republican of the House Subcommittee on Native American Affairs, I worked long and hard with my House colleagues conducting a series of hearings looking into the Indian trust fiasco and crafting legislation to deal with the problem which culminated in the Reform Act of 1994.

I realize that the breadth and complexity of this problem means that there's no quick fix. But we cannot continue to ignore the problem, to drag our heels, to blame others for the failure to act or to follow through. We need to take this bull by the horns and get on with solving the problem.

I heard Secretary Babbitt say yesterday at an unrelated hearing that Interior's not really to blame for the problem, or for disregarding Judge Lamberth's order, and that this administration has done more than any previous administration to straighten out the problem. Well Mr. Chairman, in my opinion this administration has only addressed the issue because we in Congress, in effect, required them to. And the fact that a Federal judge has cited the Secretary for contempt leads me to the obvious conclusion that this administration isn't addressing the issue well.

I look forward to hearing the testimony this morning, and to working closely with you, Mr. Chairman, on this issue in the future.

STATEMENT OF

BRUCE BABBITT
SECRETARY OF THE INTERIOR,

Accompanied by

KEVIN GOVER
ASSISTANT SECRETARY - INDIAN AFFAIRS,

JOHN BERRY
ASSISTANT SECRETARY - POLICY, MANAGEMENT AND BUDGET,

THOMAS M. THOMPSON
ACTING SPECIAL TRUSTEE FOR AMERICAN INDIANS,

U.S. DEPARTMENT OF THE INTERIOR,

Before the

SENATE COMMITTEE ON INDIAN AFFAIRS AND
THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

March 3, 1999

The purpose of today's hearing is to discuss my recent actions taken to reorganize and strengthen the Office of Special Trustee. I welcome the opportunity to explain why these actions were necessary. Before I do, however, let me briefly address the matter of the contempt citation.

Contempt Citation

Mr. Chairman, as you know, last week Federal District Court Judge Lamberth found Secretary of the Treasury Rubin, Assistant Secretary Gover and me in contempt for failing to comply in a full and timely manner with certain discovery orders. These matters and the claims of approximately 300,000 IIM account holders remain before Judge Lamberth. The basis for his decision is a matter of public record. We have apologized to the court for the government's failures in this litigation and intend to do all that we can to be fully responsive to the Court's orders. I do want to indicate that at the end of trial the government recommended the appointment of a Special Master, as a way of addressing many of the discovery issues that have proven to be difficult.

Last week Judge Lamberth appointed Alan L. Balaran to serve as Special Master. The Special Master will oversee the discovery process and administer the production of documents ordered by the court in its November, 1996 and May, 1998 document production orders. Additionally, the Special Master will report on the adequacy of the steps being taken by the Government to

come into compliance, and file monthly reports about the Government's progress He also will recommend resolution to the court of any discovery dispute that arises which cannot be resolved by the parties. We think this process will be helpful, will assure that documents are produced, and ensure that the court is fully apprised of any difficulties that arise. We intend to cooperate fully with the Special Master and the plaintiffs in this effort.

Trust Funds Reforms

Before turning to the specifics about the reorganization and the actions we are taking on a number of fronts, let me briefly outline what is occurring within the Department on the broader front of trust funds reform.

Our responsibilities for and the trust services we provide to individual Indian allottees and their heirs date back more than 100 years to the passage of the General Allotment Act of 1887, a widely acknowledged failure whose legacy continues to this present day -- complicated land ownership patterns and complex relationships with tribal governments. This 112 year old act divided Indian lands into 40, 80, and 160 acre parcels for individual tribal members and families. When the law was enacted, these individual parcels were slated to remain in trust for a period of no more than 25 years Yet, these parcels continue to remain in trust today, now jointly owned in common by hundreds, and in many cases, thousands of individual Indians, each with an undivided interest in the whole parcel. For example, some of the parcels, after five generations, now have owners who hold a seventy seven one hundred millionths interest in the parcel. The income derived from the use of these lands through grazing, mineral, and other leases has to be divided to the forty-fifth decimal place.

I provide this background for contextual purpose, so that you have an understanding of the complexity of the problem we all, this Administration, this Congress, and now the courts, are trying desperately to solve. This is not a simple question of money management. Rather it is a problem rooted in historical land ownership and land management patterns and in the management of income derived from these lands for hundreds of thousands of beneficiaries.

Fixing the Future

What are we doing about it? Over many decades, the Bureau of Indian Affairs (BIA) record keeping and trust management systems simply have become inadequate. Congress, the GAO, OMB, the Department, and Indian account owners have all agreed that reform is needed. However, this is the first administration in 100 years to have attempted a serious correction of that deplorable situation.

Improvement of the Department's trust fund management responsibilities is happening at an increasing pace beginning with acquiring and installing commercial trust and investment accounting systems for tribal trust funds, significantly better internal controls through yearly audits of financial operations, daily reconciliations of all trust related cash, and use of third party

services for safekeeping of nongovernment investment securities. We are continuing to move aggressively to make needed improvements.

In a little over a year, the Department has cleaned up over 200,000 IIM (Individual Indian Money) account files, two-thirds of the total. By the end of 1999, we will have completed the installation of a commercial bank trust fund accounting system for all IIM and tribal accounts. The Department has awarded a contract to replace BIA's key trust management system with modern commercial systems for lease management, fiduciary accounts receivable, land records and trust administration. Supporting these efforts is work on records management, training, policies and procedures, and additional internal controls.

Trust fund systems will be modernized and centralized so that the trust data the Department uses is accurate and current. More importantly, the systems and information will be available to tribal managers and Indian trust fund owners all across the United States

The Department has been increasing the budgetary investment in trust reform. The FY 2000 budget seeks more than $100 million for the Office of the Special Trustee to continue improvements. All told, the Department will devote more than $150 million to trust reform. No Administration in history has asked Congress to invest these vast sums for trust assets and trust funds management. I am asking for your partnership in this effort.

Settling the Past

This effort to fix these long neglected systems does not absolve us from settling the past. We have worked hard on this front too. With the direct guidance from the Congress and the investment of $ 21 million in appropriated funds and 5 years of effort (1991 - 1995) the Federal Government attempted to resolve accounting issues surrounding the 1,500 accounts held by 338 tribal entities with combined assets in excess of $2.5 billion.

The Tribal Reconciliation Project was undertaken by Arthur Andersen LLP, under the supervision of the Department. The basic reconciliation procedures of the project encompassed the reconstruction of $17.7 billion in non-investment transactions, of which $15 3 billion -- about 86 percent -- were reconciled. For the reconciled transactions, approximately $1.87 million in transactions were in error -- an error rate of one-tenth of one percent. The remaining 14 percent of the transactions ($2.4 billion) were deemed to be "unreconciled," meaning that the Department could not locate all source documents required under the project procedures to verify the accuracy of the general ledger entry for the transactions within the time frame allotted to the reconciliation process. The Department, with the assistance of another accounting firm, subsequently has been able to reconcile another $.5 billion in transactions, leaving approximately $1 9 billion in "unreconciled" transactions. Because this is a complicated matter, the news media erroneously reported that $2.4 billion had been "lost". In reality, the $2.4 billion had been recorded in the accounts, but the source documents to provide the origin of the transactions could not be located during the time frame of the project.

We need to come to closure and settle the past with regard to tribal accounts. I met with Chairman Campbell and he agreed to take on this issue legislatively, the only way in which it could be finally and fairly resolved. On July 22, 1998, Assistant Secretary Gover testified before a joint session of the Senate Committee on Indian Affairs and the House Committee on Resources on HR 3782, a bill to compensate certain Indian tribes for known errors in their tribal trust fund account uncovered by the reconciliation projects, and to establish an informal dispute resolution process to settle other disputes regarding tribal trust fund accounts. Regrettably, neither body acted on the legislation in the last Congress.

During that same tribal reconciliation effort, Arthur Andersen provided an estimate that it would cost between $108 million to $281 million to conduct a similar reconciliation of the 300,000 individual Indian accounts. The Congress and the GAO did not recommend following such a course of action due to the high costs involved and the likelihood of little resolution at the end of the day.

IIM Litigation

In June of 1996, the Cobell litigation (Cobell v. Babbitt) began. This class action lawsuit stems from the government's alleged mismanagement of the Individual Indian Money trust accounting system. As mentioned earlier, the United States acts as trustee of money accounts on behalf of individual Indian beneficiaries with interests in land allotted to them. These land allotments held in trust by the Government, like tribal lands, earn income by the lease of their grazing, farming, timber and mineral rights. The income from these leases provides the majority of money flowing through these accounts. In the course of this IIM litigation, the U.S. District Court, as part of the discovery process ordered the production of records for the five-named plaintiffs and their predecessors in interest, including Eloise Cobell, who originated the lawsuit.

Document production for the five named plaintiffs has proven difficult. The locating of these documents is a complex and laborious task. Because of fractionated interests hundreds of owners in one parcel is common. Only one set of documents, the IIM jacket file, is filed by the name of the account holder. Land-related documents are kept where the land is located; i.e at 12 BIA Area and 92 Agency Locations. Information is filed by tract number or by lease number and not owner name. To locate related documents various reports must be generated including chain of title and ownership interest and encumbrances reports. Older documents are located at Federal Records Centers and the Archives.

Locating financial transactional documents has been even more complicated because day-to-day transactional documents are filed by date and type of document Also, account analysis must be undertaken so that all documents related to the account transactions can be located. The existence of fractionated interests means that hundreds of people may own a small portion of one lease, and receive the related payment, which makes analyzing the account even more complicated. Fractionated interests also mean that lease income may be deposited into a holding

account, or Special Deposit Account, while a determination is being made as to who are beneficial owners. This creates additional documents.

Automated transaction listings for IIM accounts became available in approximately 1985; however, prior to that time, a combination of accounting machines and manual systems were used to record transactions, which creates additional complexity to researching older IIM accounts.

OST Reorganization

When my senior staff learned that U S. Federal District Court Judge Lamberth was contemplating a contempt citation for our failure to produce the ordered records, I determined that it was time to address some longstanding issues.

As part of this examination, it became clear that the Office of Special Trustee (OST) had, for whatever reasons, encountered a series of obstacles and roadblocks that it has been unable to overcome in producing documents for the court in a timely and effective manner.

As I reviewed this situation, I became convinced that more direct oversight of the OST's field operations, particularly the records management function and litigation, was needed in the Office of the Special Trustee if we were ultimately going to succeed in these tasks. A number of operational problems came to the surface including: lack of day-to-day oversight of field operations; the lack of a coherent, affirmative plan from the Washington office to meet litigation demands; a failure to develop an adequate records management plan in compliance with Departmental and Congressional Committee directives; and an unusually high number of complaints of friction in resolving records issues between the OST field organization and other entities both inside and outside of the Department.

I believed it was imperative to strengthen day-to-day management of the OST field organizations, and I put two changes into effect to accomplish this. First, I directed that a new position of Principal Deputy Special Trustee be created with direct line authority over the OST's field organizations so that there could be direct accountability and oversight exercised by the OST's Washington Office. The Special Trustee's Deputy for Operations, a seasoned career manager previously selected by Mr Homan, lacked line authority over the OST field operations. The organizational alignment of placing a principal deputy to manage day-to-day operations is an approach that is used in nearly every other bureau and office in the Department. Second, to improve the OST's responsiveness in meeting critical records deadlines and to improve the coordination of records management across the organizations that must share this information, we obtained the services of an expert records manager from the Department of State who has had an outstanding, exemplary career in the field of records management and placed him in charge of the entire records organization and the litigation support function. A records management and records retention function as complex as ours requires the expertise and experience of a manager who has made records his career.

Neither of these actions diminished or usurped the Special Trustee's authority. Section 3(b) of my Secretarial Order explicitly provides that the Deputy for Operations (now designated as the Principal Deputy) continues to report directly to the Special Trustee. I informed the Special Trustee on January 6 that he would retain all of his responsibilities and authorities enumerated in the Trust Funds Reform Act. The changes that I ordered do not conflict with the statutory responsibilities of the Special Trustee and his direct reporting relationship to me.

On January 7, the Special Trustee unexpectedly provided me with a one sentence resignation letter and he left immediately. We will work with the White House to identify highly qualified candidates for the President's consideration who meet the requirements of the Special Trustee position as set forth in the Reform Act. After a nomination is made, this body can consider and hopefully confirm the President's nominee for this critical position

In the meantime, the Principal Deputy, Thomas M Thompson, will run the Office of Special Trustee until the position is filled permanently. Mr. Thompson has had an exemplary career as a manager in this Department before being selected by Mr. Homan as his Deputy for Operations. He has been closely involved in trust issues over the years, and was the principal architect for the High Level Implementation Plan that is guiding our trust reforms.

Authority for the Reorganization

Committee staff has inquired about my authority to reorganize OST by Secretarial Order and how it comports with the intent of the 1994 American Indian Trust Fund Reform Act. Every Secretary of the Interior has had broad authority under Section 2 of the Reorganization Plan No. 3 of 1950 (5 U S.C. Appendix) to organize the bureaus and offices which report to him This authority has been used regularly and routinely over nearly half a century by Secretaries of the Interior under both Democratic and Republican Administrations There is no conflict in the use of this authority with the authority and responsibilities enumerated in the 1994 Reform Act. The 1994 Act provides the Special Trustee with broad policy oversight of the reform effort and stipulates that the Special Trustee report to the Secretary of the Interior.

The operational activities that are the focus of the January 5, 1999 Secretarial Order were originally assigned to the Special Trustee by me in 1996 under my general management authority. The secretarial Order does not alter the assignment of those responsibilities to the Office of the Special Trustee. Rather, it merely provides day-to-day oversight of these operational entities, within the Special Trustee's office.

Other Changes

The Bureau of Indian Affairs is strengthening its responsiveness to the court orders and the appointment of the Special Master by forming a special team to intensify the effort in BIA to locate and produce as many records as possible.

Likewise, the Justice Department has notified the court of a complete restructuring of the litigation team in the case, with four new senior counsel overseeing the case on a day-to-day basis and additional staff added to improve its performance

Congressional Assistance is Needed

Congress needs to be more deeply involved on a number of fronts. First, to enact the reforms set forth in the High Level Implementation Plan, the Department has requested in its FY 2000 Budget over $100 million for the Office of Special Trustee. This $60 million increase is the largest percentage increase for any bureau or office in the Department.

This critical increase is needed to bring about the commercially proven systems essential to raise our trust performance to standards set forth in the Reform Act. The Budget Committee of this body and the Senate Appropriations Committee will need to provide the required budget allocations and appropriations. In addition to the FY 2000 budget, there is supplemental funding needed in FY 1999 that has been transmitted to Congress, as well as additional needs stemming from the recent court rulings and appointment of the Special Master.

Second, Congressional action is needed to stem the rising tide of fractionated ownership of Indian lands. Twice the Congress has enacted legislation to consolidate Indian land holdings, only to fail constitutional challenges in the Supreme Court. The House and Senate Appropriations Committees provided $5 million in FY 1999 to fund the cost of an Indian land consolidation pilot. The pilot effort is designed to purchase small, highly fractionated individual interests in trust lands and return those interests to the Tribes. This consolidation pilot is now underway. The President's budget provides $10 million to expand this effort in FY 2000. These are important first steps to solving the longstanding, root cause of many of the problems we have discussed today. However, without action by this body to permanently curb the geometric growth of these interests by the passage of Indian land consolidation legislation, even the gains in the pilot effort will be reversed. More importantly, the economic viability of allotted Indian lands will be severely compromised and the costs of administering development of these lands and maintaining IIM accounts will skyrocket. We need definitive Congressional action, and we need it at the earliest possible time.

Finally, as I mentioned earlier, we must come to closure on the past if the reforms we are making for the future are to take hold. Let me be specific. We can build the world's greatest trust funds system, but if it cannot begin with an agreed upon account balance, what will such a system produce? While we expect the Cobell litigation to lead eventually to agreed upon balances for the 300,000 IIM accounts, we need action from this body to settle known errors and commence a mediation based process to come to resolution on disputed tribal balances.

Conclusion

Mr. Chairman, we have an historic opportunity to fix - once and for all - the Federal Government's responsibilities for Indian trust assets and trust funds. I have made this my highest priority. I do not want to pass on to my successors what I inherited. To succeed, this effort must be a partnership with Congress. I urge you to work with me and to do all in your power to provide the assistance we need to get the job done.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D C 20240

Honorable Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are pleased to enclose responses to questions submitted to Secretary Bruce Babbitt following the March 3, 1999, joint oversight hearing on American Indian Trust Management Practices in the Department of the Interior.

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Jane Lyder

Jane M. Lyder
Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosures

cc: Honorable Frank Murkowski
Chairman
Committee on Energy and Natural Resources

Honorable Daniel K. Inouye
Ranking Minority Member
Committee on Indian Affairs

Honorable Jeff Bingaman
Ranking Minority Member
Committee on Energy and Natural Resources

Honorable John McCain

Honorable Bob Graham

Questions from Senator Campbell

1. It looks to me that the Executive Order gives the main responsibility for future reforms to the newly-created "Principal Deputy," your Chief of Staff, and Assistant Secretary Berry.

1a. Do you believe this is consistent with the 1994 Act?

The full responsibility for oversight of reforms remains where it always has--with the Special Trustee. The Secretary's Order is fully consistent with the Reform Act and preserves the Special Trustee's statutory authorities and direct reporting relationship to the Secretary. The Secretary's Order creates a Principal Deputy for day-to-day operational management within the Office of Special Trustee. This is an approach used in nearly every other bureau and office in the Department. The Principal Deputy reports to the Special Trustee and will have responsibility for day-to-day management of field organizations, principally the Office of Trust Funds Management located in Albuquerque, New Mexico and for records management functions also housed there.

1b. What role is left for the Special Trustee?

There is no change in his role. The Secretary's Order has taken no responsibilities from the Special Trustee. The Special Trustee has full responsibility for the operations of the OST, as outlined in Title II of the Reform Act. The Act gives the Special Trustee broad authority to oversee and coordinate trust fund reform efforts within the Department.

2. The December, 1998 progress report shows the Office of Special Trustee achieving a *high degree* of success in cleaning up documents, but the BIA achieving *almost no success* in achieving its reforms. Shouldn't the Special Trustee be given more authority to do what other agencies in the Department clearly cannot do?

I do not agree with the assessment of Bureau of Indian Affairs' progress. The BIA has a broader, more challenging set of tasks and responsibilities to address in its reforms

than other entities. Its responsibilities include land recordation and title functions, lease management, executing rights-of-way, sales, acquisitions, and appraisals, and a broad range of natural resource functions associated with responsibilities for the trust asset, be it timber, minerals, agriculture, or water. Given the size and complexity of these tasks, the BIA is making real progress. The BIA's issuance of its trust asset system contract was a major advance to correcting decades-old land management difficulties.

The Special Trustee is still needed to carry out the broad line authorities to fix the OST's trust fund systems and provide vital oversight and coordination of reform activities in all bureaus and offices engaged in this reform.

The relative successes of the BIA and OST to date are largely the result of the priorities and the schedules established for implementing trust management reform efforts. These schedules are outlined in the Department's High Level Implementation Plan. Funding for IIM data cleanup commenced in FY 1996. After a number of planning efforts, including piloting, in September, 1997, OTFM awarded a contract to standardize and verify IIM data and to establish an inventory of hard copy records of basic information for each trust account. This contract has resulted in substantial progress. Over 200,000 IIM account files have been through the pre-conversion data cleanup process, and the entire process will be completed by June, 1999. By comparison, specific funding for BIA data cleanup commenced in FY 1999. BIA awarded a data cleanup contract for the Billings and Juneau areas in February, 1999. BIA's pre-conversion data cleanup process is expected to be completed for all BIA areas by December, 2000.

Similarly, as a result of priority setting, OST progress in implementing the Trust Funds Accounting System (TFAS) has preceded BIA's progress in implementing the Trust Asset and Accounting Management System (TAAMS). In March, 1998, OST awarded a contract for an off-the-shelf, contractor-operated trust fund accounting system. The system was piloted successfully in Phoenix, Sacramento and Juneau in August,

1998. The Albuquerque and Navajo areas were converted in January, 1999. Tribal accounts were converted in February, 1999, and the remaining areas will be converted by December, 1999. BIA awarded a contract for its TAAMS system in December, 1998, and will begin implementation with a pilot in the Billings area in June, 1999. The balance of the areas will be completed by December, 2000.

3. **I take it you disagree with Mr. Homan's statement that:**

"When the Department of Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, *it is time to consider alternatives to the Department's future management of these important trust activities.*"

I do disagree. During this Administration, we have successfully installed commercial grade financial systems which provide the kind of sound accounting and investment management required under the Reform Act. We have a budget request now before this Congress that will bring forward the remaining reforms, including records management. Contracts with leading private sector firms to replace the Department's key trust management systems are already in place. If the requested funding is provided and BIA's June, 1999, TAAMS pilot is successful, the Department is scheduled to complete its fundamental systems reforms in less than two years. I urge you to provide the resources to get this job done.

4. **For FY 2000, the Administration has requested $100 million for trust reforms. I am frankly concerned that Congress will tire of spending money if it thinks it is being wasted. Can you provide the committee with a reasonable assurance that effective trust management systems will be in place in the near future?**

I am committed to fixing trust management problems on my watch. Obviously, fixing problems that in some cases go back more than a hundred years takes time as well as resources. The Department is committed to providing the support and the will to get the job done.

The FY 2000 budget request reflects the commitment this Administration has made to resolving this long-standing problem. The budget request for the Office of Special Trustee seeks a total of over $100 million, the largest percentage increase for any bureau or office within the Department. Of this request, $65.3 million is for trust management reform activities within the OST, BIA, and the Office of Hearings and Appeals (OHA), which will be necessary to continue systems contracts already in place, eliminate programmatic backlogs, and strengthen support functions. Specifically, the request provides:

- $21.8 million to replace BIA's key trust management systems (lease management, accounts receivable, land records, and trust resources management) by the end of FY 2000 and related pre-conversion data cleanup costs. (TAAMS)

- $12.6 million to eliminate appraisal and probate backlogs in BIA and OHA to ensure trust beneficiaries receive timely distributions of trust assets.

- $16.4 million for OST's off-the-shelf trust fund accounting systems (TFAS) that will be installed nationwide by the end of 1999, and related post-conversion data cleanup.

- $14.5 million for strengthening support functions, internal controls, records management, policies, procedures and training.

The FY 2000 budget request also includes a total of $19.6 million for ongoing trust fund operations, $5.2 million to support settlement and litigation activities (tribal trust fund settlement legislation and Cobell and other litigation), and $10 million to expand the BIA's Indian Land Consolidation Pilot.

5. **Mr Homan's statement indicates that the real drag on record-keeping and reform efforts is the Bureau of Indian Affairs. With the dozens of other tasks we ask the BIA to do, should Congress remove these responsibilities from the BIA?**

Unlike the Office of Trust Funds Management which has been able to centralize the records related to its program, the Bureau of Indian Affairs has records located in more than 100 locations and is concerned with dozens of programs and functions. Maintaining BIA's records at these locations is critical to its daily business needs, since its clients (i.e. the Tribes and individual Indians) rely upon and reference these records daily.

Devolving fundamental trust land management responsibilities out of the BIA is not the answer. The Department has developed a detailed process described in the High Level Implementation Plan to improve the entire trust cycle. What is needed from Congress are the resources and legislation to fix these problems permanently.

6. **Would you find objectionable a proposal to remove trust management practices reforms from the Department and place them in a temporary body, much like the Resolution Trust Corporation (RTC) in the late 1980's? As you will recall, the RTC performed ably in cleaning up troubled savings and loan institutions and then was dissolved when its job was done.**

Yes I would. The Savings and Loans cleaned up by the RTC had no long term relationship to a clientele woven in a rich fabric of treaties, lands, and laws. For the reasons stated earlier, I do not believe such an approach would be workable. More importantly, such an approach would seriously threaten the unique, long-standing relationship that exists between the Federal Government and the tribes.

7. **Is it your understanding that Mr. Berry has the responsibility to oversee the implementation of the Secretary's Order as well as the implementation of the High Level Implementation Plan?**

Section 4 of Secretarial Order 3208 vests the Assistant Secretary for Policy, Management and Budget with responsibility for implementing the Order. This is standard language found in all Secretarial Orders effecting organizational changes within the Department. I have asked Assistant Secretary Berry to identify and resolve any conflicts or issues that may arise between the four bureaus/offices involved in carrying out the High Level Implementation Plan during the periods between my Trust Funds Steering Committee meetings.

8. **Has a nomination to replace Mr. Homan been forwarded to the White House?**

The Department is working with the White House to identify candidates who can be considered for the position of Special Trustee. This is a collaborative effort between the White House and the Department. We have been actively identifying qualified candidates who meet the legal requirements for the position, so that the President can nominate the most qualified individual available to the Senate.

QUESTIONS FROM SENATOR McCAIN

1. **If Congress should consider changes to the American Indian Trust Fund Management Reform Act to provide more independence or autonomy to the Office of Special Trustee, what are the most critical functions that should be maintained within the Department to ensure reconciliation of Indian trust funds? What other functions might possibly be contracted or separated from the Interior Department?**

   It would be a mistake at this juncture to remove trust functions from the Department. Establishment of the Office of Special Trustee has provided the oversight framework for ensuring that Indian trust reforms are implemented, by securing trust/fiduciary expertise at the top policy-making levels in the Department and elevating the importance of Indian trust reform efforts. In the short-term, removal of OST trust fund management functions from the Department would be detrimental to reform efforts, and would further delay successful completion of reforms.

   The Department's reform efforts are well underway. By the end of 2000, the Department is scheduled to complete replacement of its core trust management systems and related key data cleanup requirements. If these reforms are derailed, tribal and individual Indian account holders will need to wait even longer for reforms.

   While the Department disagrees with a wholesale removal of certain trust functions, in the short-term the Department is doing everything possible to use private sector systems and contractors to carry out these functions. Additionally, in the longer term, serious consideration should be given to full contracting of some functions. The current state of trust systems makes it difficult to fully contract for these functions in the short-term due to factors such as disputed account balances, complex land ownership patterns, data problems, backlogs, etc. In fact, two earlier attempts in the late 1980's to turn over the investment and money management functions to the private sector failed because of these difficulties. Completion of the High Level Implementation Plan, and legislative and/or judicial

resolution of disputed account balances should overcome these obstacles.

2. **As part of your Secretarial Order, you removed direct line authority over records management from the Special Trustee. Can you explain to the Committee how the Secretarial Order you issued to reorganize the Office of Special Trustee does not conflict or negate the statutorily defined authority and responsibility of the Special Trustee as Congress enacted?**

Secretarial Order 3208 neither conflicts nor negates statutorily defined authority and responsibility of the Special Trustee. The order explicitly states: "The Immediate Office of the Special Trustee is managed by the Special Trustee, who reports directly to the Secretary, and is responsible for carrying out Section 303 of the Act. A deputy Trustee for Policy reports to the Special Trustee." Thus, the statutorily defined responsibilities of the Act as enumerated in Section 303 of the Act specifically remain with the Special Trustee. The Order clearly states that "The Principal Deputy reports to and acts in the absence of the Special Trustee..." Thus there was no usurpation of the Special Trustee's authority.

3. **You assert that the changes in your Order do not conflict with the statutory responsibilities and direct authority of the Special Trustee, yet at the same time state that you do not have time to monitor the Special Trustee and he should report to your assigned staff. How does this NOT undermine or jeopardize the Special Trustee's direct reporting and managing authority?**

No Cabinet-level Secretary can carry out his or her numerous responsibilities without the assistance of high level aides. My memo to Mr. Homan simply stated this reality and advised him that the Chief of Staff and Assistant Secretary for Policy, Management and Budget provide guidance and management coordination, as they do to every senior official in this Department including our four program Assistant Secretaries and others who have a direct reporting relationship to the Secretary.

4. **The Fiscal year 2000 budget requests more than $100 million to bring the Department into compliance. How does the Department intend to resolve the underlying inherent structural and operational weaknesses before any further funding is committed to the Department?**

The underlying structural and operational weaknesses are the result of years of inadequate funding and outdated, poorly designed, non-standardized systems. They are now being replaced and reformed.

BIA's replacement trust system, the Trust Asset and Accounting Management System, will be a centrally controlled and operated system, which will use standardized procedures and prevent modification at the local level. OTFM also has taken a number of steps to improve controls over decentralized operations. With implementation of the Trust Funds Accounting System, OTFM is centralizing all data input. In addition to these system-related improvements, the internal controls and policies and procedures sub-projects will contribute to overcoming the challenges of the decentralized operations.

Finally, the Department has greatly expanded its trust managerial expertise, through both contracts with leading private sector firms and recruitment and training of permanent employees with trust management, accounting, and auditing skills.

QUESTIONS FROM SENATOR GRAHAM

1. **What kind of day-to-day relationship will the Principal Deputy Special Trustee have with the OST's field operations? Will the role of these field offices change as a result of OST reorganization?**

   The Principal Deputy Special Trustee will provide the normal policy and supervisory guidance to OST's field operations. These operations are headed by seasoned, well-respected career executives. The role of the field offices will not change as a result of the OST reorganization.

2. **You mentioned the difficulty of obtaining the documents requested in the Cobell case as they may be located at as many as 12 BIA area and 92 agency locations. What effort is being made to consolidate or centralize these record archives?**

   We are drafting plans to respond to the court orders and Special Master and have appointed an overall records manager in each bureau, including BIA, to coordinate records production.

   The Department is also reviewing a report submitted in response to a requirement in the Secretary's High level Implementation Plan and the comments solicited when the report was circulated. This is a critical issue for the Department and the future of trust management. The issue of records consolidation and centralization will be resolved shortly based on how records management responsibilities for Indian trust records will be carried out.

3. **While the Cobell litigation will likely lead to agreed upon balances for the individual accounts, what efforts are being made to come to agreement on the tribal account balances?**

   In November 1997, the Department submitted its recommendations for settlement of disputed Tribal trust fund accounts to Congress. The recommendations were based on the Tribal Reconciliation Project, a five year, $21 million study of Tribal accounts undertaken by Arthur Andersen, LLP under the supervision of the Department. The basic

reconciliation procedures of the Project encompassed the reconstruction of $17.7 billion in non-investment transactions covering a 20 year period. Of that amount, $15.3 billion in transactions - about 86% - were reconciled. For the reconciled transactions, approximately $1.87 million in transactions were in error - an error rate of .01%. The remaining 14% of transactions ($2.4 billion) were deemed to be unreconciled, meaning that the Department could not locate all source documents required under the Project procedures to verify the accuracy of the Department's books. After completion of the Project, the Department employed the services of another independent accounting firm to reconcile an additional $.5 billion in transactions, decreasing the value of the unreconciled transactions from $2.4 billion to $1.97 billion.

Based on the work of the Tribal Reconciliation Project, the Department drafted legislation and, after a series of consultation meetings with Tribes, submitted the proposal to Congress. It was introduced by Congressman Miller, by request, on April 30, 1998 (H.R. 3782). A joint hearing of the Senate Indian Affairs Committee and the House Resources Committee was held on the proposal on July 22, 1998. The Administration's proposal envisioned immediate payment of known errors, a good faith settlement offer to all Tribes with trust accounts, informal dispute resolution for Tribes that did not accept the good faith settlement offer, and finally, litigation for those circumstances where a settlement could not be reached. The Inter Tribal Monitoring Association (ITMA) offered its own proposal as well. The 105th Congress ended without the adoption of any Tribal settlement legislation.

Departmental officials have met several times this year with representatives of ITMA to discuss principles for a new consensus settlement bill. The Department would welcome the active involvement of the Congress in developing Tribal Trust Funds settlement legislation.

SUMMARY OF ITMA'S RECOMMENDATIONS FOR TRUST REFORM

ITMA recommends that Congress enact legislation that imposes an outside regulator on the Interior Department and also transfers many of the trust functions to banks owned by Indian tribes.

Specifically, the legislation should:

- Transfer the Office of Special Trustee (OST) to one of the Federal bank regulatory agencies, from which it will oversee the trust reform effort at Interior, examine the Interior Department's management of the trust, and be empowered to impose penalties for violations, just as those agencies do to every bank and trust department in the private sector..

- As soon as the Special Trustee, in his new agency, determines it is prudent, he should contract the investing of the $3 billion in Indian trust funds to banks owned by Indian tribes. This would not diminish the trust responsibility but it would insure the trust funds are invested properly and are working in the Indian community as well as earning interest for the beneficiaries. The Special Trustee would regularly examine these banks to insure the funds are managed according to trust standards.

- As soon as the trust fund management systems are fully reformed, management of the Office of Trust Fund Management (OTFM) accounting functions should be contracted to one or more tribally-owned banks, but to the extent possible, the banks should retain the excellent and highly motivated OTFM staff that has been developed under Mr. Homan's supervision.

- The OST would operate a special program to assist tribes that wish to assume administration of the trust asset functions pursuant to the Self Determination and Self-Governance Acts:

- It will take months at best to get such legislation enacted and implemented. During this period, we cannot afford to let the present unqualified officials oversee the trust reform, particularly with the President's request for $90 million for reform efforts in FY 2000. ITMA therefore requests that the Committees write to the judge in the Cobell v. Babbitt case and ask that he appoint a Special Master to oversee trust fund reform until Congress can adopt new legislation.

If you have questions, write

PAWNEE AGENCY
P O BOX 368 ATTN IIM
ANADARKO,OK 73005-0368

(918)762-2585
Between 8.00 a.m. and 4.00 p.m
Weekdays - Local Time
Note: Please include Account Number
and Lease Number in all correspondence

OIL AND GAS PAYMENT REPORT

STATEMENT # 6846
AGENCY 807

AS OF DATE: DEC 14, 1998

KEVIN GOVER

Account Number 812U014159

Check Date DEC 14, 1998 Total Oil and Gas Check Amount $.00

PAYOR NAME / LEASE NUMBER	AC	TC	PC	SALES MO/YR	L	OWNER INTEREST	QUANTITY	UNIT VALUE ($)	GROSS VALUE ($)	ROYALTY RATE LEASE	ROYALTY RATE CALC	ROYALTY VAL. OR RENT ($)	ADJUSTMENTS ($)	OWNER SHARE ($)
PAWNERGY FIELD SERVICES,	00	01	04	10/98	L		120.84	1.010	122.05	2000	.2000	24 41		
					A	1.00000	120.84		122.05			24.41		
01621 3044J					O	.00298	.36		36			07		07
INTEREST TOTALS														.00
OWNER'S TOTALS ARE (Totals Reflect Owner Level Information)												$.07	$.00	$.07

AC Adjusted Code
00

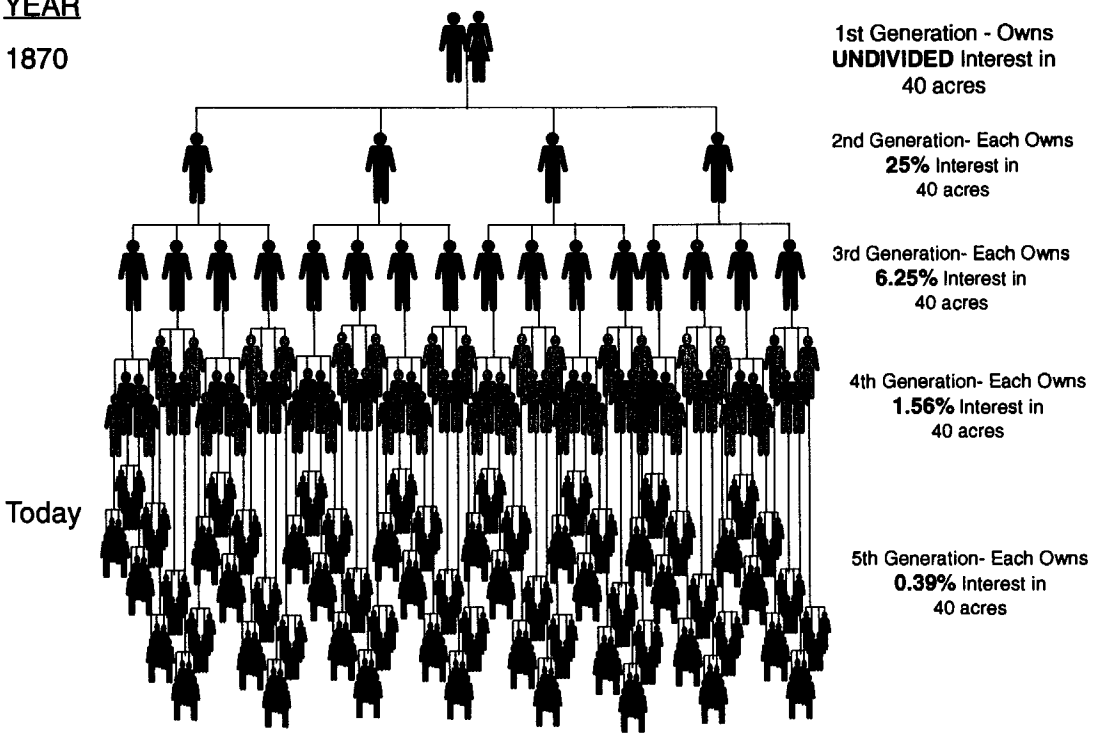
TC Transaction Code
01 ROYALTY DUE

PC Product Code
04 UNPROCESSED (WET) GAS (MCF)

L Level
L - Lease Totals at 100%
A - Allotment
O - Owner's Interest Share

Heirship Fractionation

(5 Generations with 4 Heirs/generation)



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR - 3 1999

Honorable Ben Nighthorse Campbell
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Dear Mr. Chairman:

In today's hearing, the question was asked whether the Special Trustee, pursuant to the American Indian Trust Reform Management Reform Act of 1994, certified in writing as to the adequacy of the Administration's budget "to discharge, effectively and efficiently, the Secretary's trust responsibilities and to implement the comprehensive strategic plan." The certification memorandum is enclosed for your information.

Section 303(c)(5) of that Act requires that the Special Trustee notify program managers of his certification. The provision also makes specific reference to the Special Trustee's Strategic Plan. As you know, neither the Administration nor the Congress has endorsed every element of the Special Trustee's Strategic Plan. The Department's High Level Implementation Plan adopts those provisions of the Strategic Plan that the Secretary and the Special Trustee mutually agreed could and should be carried out by the Department under existing law.

The Secretary was gratified by the recognition of the two Committees of the need for adequate funding to implement these reforms. We urge your full support and assistance in securing both Budget Committee and Appropriations Committee approval of this important initiative.

An identical letter has been sent to the Vice Chairman Inouye.

Sincerely,

John Berry
Assistant Secretary for Policy,
Management and Budget

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

March 3, 1999

Memorandum

To: Deputy Commissioner, Bureau of Indian Affairs
Director, Minerals Management Service
Director, Bureau of Land Management
Director, Office of Hearings and Appeals

From: Acting Special Trustee for American Indians

Subject: Certification of FY 2000 Budget Requests

In accordance with Public Law 103-412, the American Indian Trust Fund Management Reform Act of 1994, Section 303, I have reviewed the trust management portions of the FY 2000 Budget Requests for the Bureau of Indian Affairs, the Minerals Management Service, the Bureau of Land Management, the Office of Hearings and Appeals, and the Office of the Special Trustee.

I hereby certify that these requests appear adequate to implement the reforms in FY 2000 necessary to enable the Department to discharge, effectively and efficiently, the Secretary's trust responsibilities and to implement the approved portions of the "Comprehensive Strategic Plan", as modified and documented in the Department's ***High Level Implementation Plan***. As reflected in the Budget Justifications, full reform of the trust systems in accordance with Section 162(a) of the June 24, 1938 Act, will require a multi-year effort. Enactment by the Congress of these budget requests is essential and will advance significantly our full compliance with the Reform Act.

As you are aware, the ***Plan*** is a dynamic one and is addressing complicated, longstanding problems. We should expect to encounter additional challenges as the new systems and data clean up efforts continue. Please notify me of any changes in resource requirements as we move to implement the ***Plan***. I have already endorsed one supplemental request to this effect in FY 1999, and I am aware of similar efforts to identify funds in FY 1999 to support additional document production as a result of the recent Court order.

CENTRAL COUNCIL
tlingit and haida indian tribes of alaska
ANDREW P. HOPE BUILDING
320 West Willoughby Avenue • Suite 300
Juneau, Alaska 99801-9983

TESTIMONY OF EDWARD K. THOMAS
President of the Central Council of Tlingit and Haida Indians Tribes of Alaska, and
Member of the Advisory Board to the Special Trustee for
American Indians on Trust Fund Reform

Joint Oversight Hearing on American Indian Trust Management
Practices in the U.S. Department of the Interior

Before the U.S. Senate Committee on Indian Affairs and
the U.S. Senate Committee on Energy & Natural Resources

March 3, 1999

INTRODUCTION

GREETINGS FROM ALASKA! My name is Edward K. Thomas. I am the elected President of the Central Council of Tlingit and Haida Indian Tribes of Alaska, a federally-recognized Indian tribe from Southeast Alaska with over 23,000 members. I have served as the elected President of my Tribe since 1984. I also have served as a Member of the Advisory Board to the Special Trustee for American Indians on Trust Fund Reform since its inception in November of 1995.

Thank you for the opportunity to testify at the Joint Oversight Hearing on American Indian Trust Management Practices in the U.S. Department of the Interior. My testimony will focus on the Office of the Special Trustee for American Indians and its need for greater autonomy and independence from the Department of the Interior as a whole, as evidenced by Secretary Babbitt's January 5, 1999 order reorganizing the Office of the Special Trustee and the subsequent resignation of Paul Homan as the Special Trustee for American Indians.

AMERICAN INDIAN TRUST FUND MANAGEMENT

The Secretary's track record in managing American Indian trust funds has been less then exemplary through the years. Notwithstanding the numerous reports from the Inspector General of the Department of the Interior, the General Accounting Office, the Office of Management and Budget, and Congressional Committees concerning Indian trust funds, I regret to have to say that the Secretary has been altogether lax in correcting the Department's longstanding shortcomings.

In 1994, the Congress responded after many hearings and the consideration of the testimony of numerous witnesses, including tribal leaders from throughout the United States, and several different bills to address some of these deficiencies, by enacting Public Law 103-412, the American Indian Trust Fund Management Reform Act of 1994.

In passing this new law, the Congress sought to ensure better accountability and management of Indian trust funds through the implementation of reform measures necessary for the proper discharge of the Secretary's trust responsibilities to the 554 Indian tribes and their members. I felt then, and still do today, that the single-most important factor was to establish an autonomous Office of the Special Trustee for American Indians that would be independent from all other agencies within the Department of the Interior. I felt then, and still do today, that such an Office should be headed by a top-level Special Trustee in whom the Secretary demonstrably had placed complete and unfettered discretion so that all others within the Department know that when the Special Trustee spoke and acted, he or she would be doing so with the complete and unchallengeable authority of the Interior Secretary and of the President of the United States. I felt then, and still do today, that to be effective, such a Special Trustee should be given complete power to oversee and coordinate the reform of Departmental policies, practices, procedures and systems.

None of this can happen if the Secretary is inattentive. Or if the Secretary gives off signals that he lacks confidence in the Special Trustee. Or if the Secretary publicly or privately disagrees with and interferes with the actions taken by the Special Trustee. Or if the Secretary allows other agencies and offices with the Department to undermine the Special Trustee in the execution of its mission. Either reform and correction of the management of trust assets is the Department's top priority, or it is not. There can be no middle ground. And, Mr. Chairmen, I respectfully say that based on what I have seen over the course of years as the elected head of my Tribe and in my capacity as a member of the Advisory Board to the Special Trustee, I must sadly conclude that this Secretary and this Administration have not lived up to the goals and standards set forth in the 1994 Act, goals and standards which I might add are quite attainable. Rather, the Administration's actions since the Act was passed indicate that it is unwilling to implement the Act and trust fund management reform in a manner consistent with what Congress had intended.

While the Act was signed into law on October 25, 1994 and Paul Homan was identified as the primary candidate uniquely qualified to fill the Special Trustee position soon thereafter, it still took the Administration until late July of 1995 to forward his nomination to the Senate for confirmation at the start of the usual congressional August recess. With this delay on the part of the Administration, Mr. Homan was not confirmed and sworn in as the Special Trustee until September 25, 1995. But it was not until February 9, 1996 that the Secretary issued an order establishing the Office of the Special Trustee for American Indians and transferred the Office of Trust Funds Management from the Bureau of Indian Affairs to the Office of the Special Trustee. Thus, from the start, the Secretary chose to slow down the implementation of Act and hold off on the establishment of the Office of the Special Trustee. The Office was not up and running with a confirmed Special Trustee and support staff until well over a year after the Act was passed.

The Act directed the Special Trustee to submit to Congress within one year of appointment "a comprehensive strategic plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians" consistent with the Act. Consistent with this directive, the Office of the Special Trustee held a series of regional consultation meetings with Indian tribes to obtain tribal input in the process. Unfortunately, because of the rapidly approaching deadline, Indian tribes and individual Indians were afforded little time to digest and analyze the 120+ page draft Plan.

The Special Trustee did not submit his Comprehensive Strategic Plan to Congress until April 11, 1997, an added delay largely attributable to the resistance of the existing administrative systems within the Interior Department to be supportive of the Office of Special Trustee whose mission it was to recommend changes in that very Department which would remedy decades of mismanagement.

On the same day that the Special Trustee issued his Comprehensive Strategic Plan, the Secretary issued a statement expressing "significant concerns" with the Plan and its impact on the Federal trust responsibilities to Indian tribes and individual Indians. I can think of no more effective way for a Secretary to undercut his Special Trustee. Imagine the license which Secretary Babbitt's "significant concerns" gave to those within the Department who saw the changes proposed by the Special Trustee as jeopardizing their spheres of power and influence and as threatening to expose their personal culpability in the Department's mismanagement of these trust resources. With this statement, if not before, Secretary Babbitt sent a clear message to all Departmental officials that he had joined in the battle against the Special Trustee and that those undermining the Office of Special Trustee would have the blessing of the highest levels of the Department.

My personal role in this, in many ways bizarre, dynamic came about with the establishment by Special Trustee Homan of a nine-member advisory board for the purpose of advising him "on all matters within the jurisdiction of the Special Trustee" consistent with the Act. During the development and initial implementation of the Plan, the Advisory Board met on a regular basis to give advice to the Special Trustee and his key staff. Based on my own personal observation and participation, I can say that the progress achieved to date towards reforming the Department's management of Indian trust funds is, more than any other factor, the product of Special Trustee Homan's dedication and professionalism.

Despite the Special Trustee's conduct and demeanor, it is clear that the role and mission of the Office of the Special Trustee has not been welcomed by the Department of the Interior. Of crucial importance has been the difficulty in getting the Clinton Administration to support full funding of the initiatives set forth in the Special Trustee's Plan. The limited support for increased reform funding emerged only after the intercession of key members of these oversight Committees.

From the beginning of his tenure, Special Trustee Homan has fought an uphill battle within the Interior Department. This came to a head nearly two months ago when the Secretary issued a

memorandum and order reorganizing the Office of the Special Trustee, assigning new people to high level positions within the Office, and reassigning people from the Office to other positions within the Department. The Secretary developed and issued this edict without any consultation with the Special Trustee himself, the Advisory Board of which I am a member, the Intertribal Monitoring Association, tribal leaders, or, to my knowledge, any of the congressional Committees. Given this, I am saddened but not surprised that Paul Homan tendered his resignation from the position of Special Trustee for American Indians. I am concerned that, with Mr. Homan's departure, implementation of the Act will be relegated to the status of a pet project for the Secretary that is headed by Departmental officials entrenched in the same way of thinking that has led to the trust funds management debacle in the first place. The Secretary's edict gives this appearance. This is not reform.

While Paul Homan will be difficult to replace, I urge the Congress to insist that the President promptly nominate a successor and forward his or her name to the Senate for confirmation. It would be an even greater travesty if the Congress permitted the Department to allow the departure of Mr. Homan to become the excuse by which the Office of Special Trustee becomes impotent and the Act itself is consigned to the trash heap of history.

REFORMING THE REFORM EFFORTS — AMENDING THE 1994 ACT

Now that tribal leaders have had nearly two years to more fully understand the scope and vision of the Comprehensive Strategic Plan, I think that most would agree that the concepts and ideas for reform embodied in the Plan reflect the kind of innovative and creative approach necessary to provide for greater accountability in the management of Indian trust assets. Of course, much more tribal consultation, as well as an evaluation and analysis of alternatives, is needed. But these cannot happen, and no forward progress can be made, if the Secretary has pitted the Department against reform.

The shortcomings both on the part of the Special Trustee in his Comprehensive Strategic Plan and on the part of the Secretary in his usurpation and diminishment of the Special Trustee's authority can be remedied by the Congress. The 1994 Reform Act could be amended to afford the Office of Special Trustee greater independence from the Secretary and to direct more structured tribal consultation on a new draft Comprehensive Strategic Plan which identifies and analyzes a variety of options and approaches. Statutory reform in this manner could provide the new Special Trustee the added authority he or she needs and could provide the level of tribal involvement and input which is crucial to successful fulfillment of Congress's intent under the American Indian Trust Fund Management Reform Act.

I would encourage the Congress to consider amending the 1994 Act to accomplish these statutory goals. In doing so, I urge the Congress to look first at the draft legislation under consideration before H.R. 4833 was introduced. The original drafts under consideration, which elicited a fair amount of pressure and opposition from the Department during the developmental stages, provided for greater autonomy and independence of the Special Trustee. I acknowledge that the

Congress cannot, by legislative fiat, require the Interior Secretary to act at all times in good faith nor to give the trust functions of the Department toward Native Americans and their assets his singular and undivided loyalty. However, there are structures and procedures that can be mandated by statute whereby the Congress can be assured that an independent and autonomous Special Trustee has the unmitigated authority to act in a manner befitting the sacred trust inherent in the role of a trustee I would urge that the 1994 Act be amended in this way.

CONCLUSION

Thank you very much, Mr. Chairman and Members of the Committee, for the opportunity to present this testimony on behalf of Central Council of Tlingit and Haida Indian Tribes of Alaska and its citizens, as well as from my perspective as a Member of the Special Trustee's Advisory Board. I wish you well as you do your work in this Congress and I hope my comments are useful as you consider these very important issues.

CENTRAL COUNCIL
TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA
ANDREW P. HOPE BUILDING
320 West Willoughby Avenue • Suite 300
Juneau, Alaska 99801-9983

March 18, 1999

Senator Ben Nighthorse-Campbell
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC

RE: Response to Your Letter of March 5, 1999 on the Oversight Hearing on Trust Management Practices in the Department of the Interior

Dear Senator Campbell:

Thank you for the opportunity to respond questions you had relative to the Oversight Hearing on Trust Management Practices in the Department of the Interior. My responses will correspond, numerically, to your questions.

1. I feel that the Advisory Board did have adequate opportunity to consult and coordinate with Mr. Homan while he was Special Trustee.
2. The Advisory Board generally supported the transferring of the Office of Special Trustee (OST) completely out the Department of the Interior (DOI). It would probably operate much more effectively if it were handled just as the problems of the Savings & Loan problems were handled a decade ago with a short-term entity like the Resolution Trust Corporation empowered to make specific changes. We realize, however, care must be taken to make sure all records in DOI remain intact and available to the OST. More importantly, transferring responsibility and authority must not be a vehicle for relieving the Bureau of Indian Affairs (BIA) of its obligations to the Indian land and/or account holders.

   I must point out that it is my personal opinion that the Advisory Board agrees with the need to transfer the OST out of DOI. The board never did vote on this issue. It has always been the interest of the board to do everything possible to work cooperatively with the Secretary to fix problems associated with Trust Management.

3. I am not optimistic that the new reorganization will help move along the reforms that are necessary in BIA Trust Management. I pointed out in my verbal testimony that the Secretary has fought all reforms from day one. The Secretary, himself, indicated that he was not in favor of the OST. Given this history, I find it hard to believe that the Secretary has it in his heart to do what is necessary to have meaningful reform. Reforms of any kind need leadership that is knowledgeable and firm. That is the character we had in Mr. Homan and it remains to be seen that we will have this going forward.

4. The OST completed a **High Level Implementation Plan** that outlined what needed to be done and how much it would cost to put into place a Trust Management system that would function without repeating the problems we are currently experiencing. The computer system has been updated to function more like other financial institutes do when managing other people's money. OST entered into a contract with a private firm to reorganize and certify the completeness of files that the BIA gave them access to. Staff has begun the process of getting trained on the new computer system.

   I believe that the Special Trustee (ST) would have made much more progress on this project had he been given full authority and access to the necessary financial resources as requested in the beginning. The ST would have been much farther along on the entire records management tasks had the Secretary cooperated with the effort from the beginning. The cleaning up of the over 200,000 IIM account files that the Secretary took credit for in his testimony on March 3rd were done by the OST.

5. The Secretary has still not consulted with the OST Advisory Board on Secretarial Order 3208. He did not consult with us at any time indicating that he was not satisfied with the work of OST prior to the issuance of SO 3208. As far as I know, he did not consult with any Indian or Alaska Native group with substantial interest in this issue.

Thank you, Mr. Chairman, for the opportunity to provide testimony on this very important issue. I thank you, also, for the opportunity to clarify some issues outlined in your March 5th letter.

I want very much to believe the Secretary when he says he "does not want to pass on to his successor what he inherited" for I know that we have a much better chance of success with his cooperation and support. However, this Secretary is proposing a settlement to accounts where records are incomplete or missing and is proposing legislation that would seriously compromise the legal rights of other accountholders who are not willing to settle when their records are incomplete. His proposed legislation is a disingenuous attempt to get Congress to wipe out the rights of accountholders. He does not need legislation if all he wants to do is settle small accounts that have complete files.

I thank you and your very distinguished committee very much for all of the hard work you have put into helping us fix this problem. I believe we are making progress and we will win the battle with your continued support.

Sincerely,

Edward K. Thomas
President

TESTIMONY ON
AMERICAN INDIAN TRUST MANAGEMENT PRACTICES IN THE DEPARTMENT OF THE INTERIOR

MARCH 3, 1999

JOINTLY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS AND THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

SUBMITTED BY THE INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

Mr. Chairmen and members of the Committees, I am Chief Charles Tillman of the Osage Nation of Oklahoma. I serve on the Board of Directors of the Intertribal Monitoring Association on Indian Trust Funds (ITMA), a consortium of 39 federally recognized tribes on whose behalf I present testimony today. Please accept the gratitude of the tribes for giving us the opportunity to address these distinguished committees regarding ITMA's views on the management practices of Indian trust funds and assets by the Department of the Interior.

ITMA was deeply involved in Congress' development of the 1994 Indian Trust Fund Management Reform Act. Since that time, on behalf of tribes, ITMA has continued its involvement by monitoring and working closely with the Office of Special Trustee to ensure progress with the reforms of the Interior Department's trust funds and trust asset systems, as has the Special Trustee's Advisory Board.

The behavior of the Interior and Justice Departments over the past few months has been outrageous. They have lied to a Federal judge, been found in

contempt of court, engaged in a cover-up, issued a Secretarial Order that violates federal law, and forced the resignation of the Special Trustee, the only person in the history of the Department that has recognized that "trust responsibility" is not a buzzword but a set of rigorous legal standards the Department must comply with. These actions are consistent with the Department's behavior over the past six years, as outlined in our Chronology of Secretarial Actions on Indian Trust Issues (Attachment A to this testimony). However, other witnesses will be focusing on this outrageous behavior. In response to the Committees' request and because of our desire to see this problem solved once and for all, our testimony focuses on the underlying problem and sets out a series of very specific recommendations for solving the underlying problem. Most of our recommendations will require legislation.

Below is a Summary of ITMA's Position and Recommendations. The body of our testimony expands on these points:

> The underlying problem is that the Interior Department is the only trust department in the country that is unregulated -- and it shows. Every bank trust department is rigorously examined by state or federal bank regulators to insure they are complying with trust standards. The Trust Fund Reform Act sought to instill a trust environment, but it assumed that the Secretary would rely on his expert Special Trustee when making trust decisions, rather than

on career bureaucrats and political appointees who have no expertise in trust management. This assumption has proven false.

To correct this problem ITMA recommends that Congress enact legislation that does the following:

- While management of trust assets would remain in the BIA, the Office of Special Trustee (OST) be transferred to one of the Federal bank regulatory agencies, from which it will oversee the trust reform effort at Interior, examine the Interior Department's management of the trust, and be empowered to impose penalties for violations, just as EPA can do to federal agencies that violate environmental laws.

- As soon as he deems it practical, the Special Trustee, in his new agency, shall arrange for the management of the investing of the $3 billion in Indian trust funds to be contracted out. *ITMA has not officially presented specific options to Tribes for their review and consideration, and will do so at the Regional Tribal Leaders meeting which will be conducted in the immediate future.* The Special Trustee would regularly examine these banks to insure the funds are managed according to trust standards. This contracting out would not in any way diminish the United States' trust responsibility:

- The OST would operate a special program to assist tribes that wish to assume administration of the trust asset functions pursuant to the Self Determination and Self-Governance Acts:

- It will take months at best to get such legislation enacted and implemented. During this period, we cannot afford to let the present

- Unqualified officials oversee the trust reform, particularly with the President's request for $90 million for reform efforts in FY 2000.

- ITMA therefore requests that the Committees write to the judge in the Cobell v. Babbitt case and ask that he appoint a Special

Master to oversee trust fund reform until Congress can adopt new legislation.

A. THE UNDERLYING PROBLEM

Two recent events have crystallized a long-festering problem. First, a Federal District Court judge in Cobell v. Babbitt issued a 76 page ruling holding the Secretaries of Interior and Treasury in contempt of court. The reason for the contempt order was that Justice Department attorneys failed to produce the documents they were required to produce in that case and then, along with Interior Department officials, lied to the Federal judge and engaged in other improper actions to try to cover up the problem. A copy of the key part of the Judge's decision, (the summary and conclusion section,) is provided at Attachment B of this testimony. We urge every member of the Committee to read it. As we know from another recent event in the Senate, lying in a judicial proceeding and trying to cover it up are serious matters. Here high-ranking government officials engaged in such behavior to try to defeat the rights of 300,000 poor Indian people.

The second outrageous event was that Secretary Babbitt issued Secretarial Order 3208, reorganizing the Office of Special Trustee. From reading the judge's decision, it appears that the Secretarial Order was a thinly veiled attempt to improperly push the blame for the failure to produce the documents on the Special Trustee and his staff. But in addition, the Secretarial order is in direct conflict with the intent and legal authorities of the Trust Fund Reform Act. It also forced the

resignation of the Special Trustee, the only Interior official who understood that trust responsibility is not a buzz word but a set of stringent legal obligations the Department must follow.

The Federal judge described these actions as follows: "I have never seen more egregious misconduct by the federal government." Unfortunately, the only reason he has not seen such egregious behavior before is that he has had no previous involvement in the Interior Department's mismanagement of Indian trust funds and resources. The 1992 Synar Report "Misplaced Trust" and numerous other studies going back 150 years document similar cases of egregious behavior by our "trustee". These recent events, while extraordinary in their own right, are just one more chapter in the voluminous story of the longest running and most serious breach of trust in history.

In our view, the underlying problem, to paraphrase a recent airline commercial, is that the Interior Department is the only trust department in the country that is unregulated -- and it shows. An unregulated trustee is an invitation to abuse and misconduct, which is generally followed by the kinds of cover-up and lying we have seen in the contempt proceeding. Every bank trust department is subject to a comprehensive and rigid set of standards that are established by regulation and case law and that set out what that trustee must do, when it must do it and the qualifications of the people who must do it. The trustee is regularly

examined by state or federal regulators who go over its compliance with those standards with a fine tooth comb. A trustee who fails to comply with those standards is subject to fines and prison terms.

Further, if the trustee grossly violates those standards, the regulators have the authority to appoint a receiver to come in and clean up the problem. That receiver does not go in as a team player to work in a consultive manner with the managers who created the mess in the first place. Rather, the receiver goes in with a big club and uses it to force the reforms needed to bring that trustee back into compliance with those standards.

There is a simple reason why the law has established such strict standards and strong enforcement mechanisms when dealing with trust departments. It is because those trust departments are managing other peoples' money. It is not the trustee's money, it is not money provided by investors looking for business opportunities. It is other peoples' money that the trustee has been "trusted" with to take care of and account for rigorously. In the case of the Interior Department trust, it is not the Government's money; it is money that belongs to 200 tribes and 300,000 individual Indians

One of the bank regulators's responsibility is to review the candidates for the CEO and other high level positions at a bank or bank trust department. They would

never allow someone with no expertise in trust management to be hired to reform a large trust department that had been grossly mismanaged. Yet Secretary Babbitt's January 5, 1999 Secretarial Order placed Tommie Thompson in charge of the day-to-day management of trust reform in the Department. Assistant Secretary Gover appointed Dom Nessi to be in charge of trust asset reform in the BIA. Both of them are good and decent persons, but they are career bureaucrats. Between the two of them, they do not have a single day's experience managing or reforming a trust department. In fact, with Mr. Homan's resignation, there is not a single person in the chain of command on trust reform in the entire Department of the Interior who has a single day of experience running trust systems.

Secretary Babbitt would not want Tommie Thompson as the CEO of the bank he keeps his money in, and he does not have to worry about that, because the bank regulators would never let it happen. But Secretary Babbitt concluded that they were good enough for Indians, and there was no regulatory body to step in and stop him from breaching his trust responsibility. Another example is that the Secretary approved the High Level Implementation Plan for cleaning up the trust asset mismanagement at the BIA, even though the Special Trustee told him that the Plan would not bring the BIA into compliance with trust standards.
the Secretary apparently did this because bureaucratic concerns within his Department took priority over trust standards. Again, there was no outside regulatory body to compel him to comply with trust standards.

Unfortunately, the 200 Indian tribes and 300,000 Indian people who have the Interior Department as their trustee are solely dependent upon the good will and good judgement of the Secretary. As a result, they have ended up with a trustee who does not comply with the set of legal obligations that constitute "trust responsibility" and is able to get away with it.

The 1994 Indian Trust Fund Management Reform Act tried to provide some of the same protections to the Indian and tribal trust beneficiaries that the bank regulatory agencies provide to all other trust beneficiaries. The Act reinforced the court decisions holding that the trust is subject to the same basic trust standards as private trusts. It created the position of Special Trustee and required that the incumbent be a person with qualifications and experience in trust management and the reformation of grossly mismanaged trust departments. Mr. Homan was the perfect person to serve as Special Trustee. He had extensive experience cleaning up troubled financial institutions, both as a regulator within the OCC and as someone brought in by management to clean up financial institutions that were in trouble, such as Continental Illinois. For the first time, there was an official in Interior who was expert in trust management and understood the extensive legal obligations that go with being a trustee.

However, in order to avoid a threatened veto, a weak spot in the Trust Fund Reform Act was that it did not give the Special Trustee the club to compel reform,

as would be the case with a receiver appointed to clean up a private institution. Nor did it place the trustee outside the Department so he would be in the same capacity as a bank regulator overseeing a national bank. Instead, the club was put in the hands of the Secretary. The Act provided that Special Trustee was to report directly to the Secretary in order to insure that bureaucrats or political appointees with no trust expertise did not filter the recommendations the Special Trustee gave to the Secretary. But ultimately, it was recognized from the beginning that the success of the Act would be dependent on the willingness of the Secretary to understand the unique nature of the strict legal requirements that are at the core of trusteeship, to accept the advice of his trust expert, and to withstand the pressures from his other officials to make decisions that were not in compliance with trust standards. It all depended on the Secretary since there was no entity with legal authority over him to make him act appropriately.

Unfortunately, the Act aimed too high. Secretary Babbitt, who opposed the Act when it was being considered by Congress, has consistently placed bureaucratic and political considerations over trust standards. The Secretarial Order was simply the latest of such actions. The problem comes down to the difficulty a trust program with specific and strict legal requirements has fitting into an agency that runs governmental programs and that lacks the trust "culture" that exists in regulatory agencies and regulated financial institutions.

As indicated above, the individual coming into clean up a mismanaged trust department cannot be and never is a team player, particularly when many of these other players were the people responsible for creating or perpetuating the mess in the first place. In the Interior Department, being a team player and having "get-along, go-along" attitude has turned out to be more important than fixing the trust problems. As has been the case when reform has been attempted in the past, the Departmental officials surrounded Mr. Homan, pounded him, and eventually were able to drive him out of office. We do not believe this will ever change. The Department has indicated it will try to fill the Special Trustee position. But it is unlikely any qualified person with respect for the legal obligations of a trustee will apply, knowing that the Secretary is ready to cut the Special Trustee off at the knees whenever it suits the Secretary's other objectives. And even if a highly qualified person takes the job, he or she will be subject to the same barriers that prevented Mr. Homan from succeeding.

In sum, because there is no outside regulatory body to compel the Secretary to comply with these trust standards, the Reform Act, while making a significant start in cleaning up the gross mismanagement, has failed and will continue to fail unless it is dramatically revised. The Department will never have a trust "culture". It therefore must be imposed from outside because both the Indian people and the American taxpayers have suffered enough. The taxpayers of this country have already incurred what is likely to total billions of dollars in liability because of the

Interior Department's past mismanagement of Indian trust funds and assets. And this liability continues to mount every day that Secretary Babbitt refuses to meet his legal obligations as trustee.

B. RECOMMENDATIONS

For these reasons, it is ITMA's view that Congress needs to take two specific actions, one providing a short-term solution and one the long-term. The long-term solution involves amending the Reform Act to place responsibility and authority for overseeing the reform effort in a regulatory body, outside the Interior Department, that understands the concept of legal trust responsibility. However, that will take months, if not several years, to enact and implement. During that period, without a Special Trustee, we believe that many of the reforms Mr. Homan was able to accomplish are in danger of being undone, while the programs the Department will implement in the future, without having anyone with trust expertise to guide it, will not be properly implemented. This becomes a very serious and immediate issue because the President has proposed that Congress appropriate $90 million for trust reform in FY 2000. We desperately want that money appropriated, but we do not want it improperly spent once appropriated because, if it is, we are unlikely to get a second chance. Without trust expertise in the Department, we are skeptical that the money will be well spent.

While Congress is unable to act quickly in this situation, the courts can. For that reason, ITMA asks that as the short-term solution, the Committees write to the judge in the trust fund lawsuit, Cobell v. Babbitt, and ask that a special master or receiver be given the authority to oversee the trust reform effort until Congress is able to enact remedial legislation. The Judge has already appointed a special master to oversee the document production in the case. A communication to the judge from the cognizant legislating committees, asking that he expand the authority of that special master to include oversight of the entire reform effort at Interior until Congress can enact a permanent fix, should be extremely persuasive in encouraging the court to take that action and to take it soon.

The long term solution consists of amending the Reform Act. Those amendments need to be guided by two basic principles: 1) the need to have an outside regulator oversee the Department's trust reform and trust management efforts; and 2) the need for the Indian tribes themselves to play a larger role in the trust management area. At this point, we only have the broad outline of such amendments and even that have only initially been presented to the tribes that are members of ITMA and the rest of Indian country. We request that the Committees ask their staff to work with us over the coming 60 days to flesh out this outline. During the same time period, we will be taking these ideas out to the tribes for their review and comment. Our goal is to have proposed legislation, that has the

support of Indian country, ready for introduction by early May. Our hope is that it can be enacted before Congress adjourns in the Fall.

The broad components of our recommended amendments consist of the following:

- The trust responsibility of the United States must remain unaltered;
- Trust asset management should remain in the BIA because tribes have expressed concern about the effects of removing it from there. However, tribes that wish to should be assisted in assuming management of their assets and funds under the Self determination and Self Governance acts;
- The Office of Special Trustee (OST) should be transferred from Interior to one of the Federal bank regulatory agencies. From that location, it will oversee reform of the trust fund and trust asset systems at Interior and then continue to examine those systems once they are reformed to insure they stay in compliance with trust standards. There is ample precedent for one Federal agency overseeing another. For example, EPA regulates environmental compliance at DOD installations and has the authority to impose fines and other sanctions on the commander of a DOD installation that violates the environmental laws;
- The Office of Special Trustee, as soon as responsibly possible, would contract out responsibility for investing the $3 billion in Indian trust funds. *ITMA has not officially presented specific options to Tribes for their review and consideration, and will do so at the Regional Tribal Leaders meeting which will be conducted in the immediate future.* The funds will retain their trust status but they will be better managed, the money will be working in Indian country, and the banks will be able to offer tribes the same range of investment options available to any trust beneficiary, a much wider range than OTFM can now offer. The Special Trustee would examine those banks to insure they comply with trust standards;

- The OST would have a special program to assist tribes that wish to assume administration of the trust asset functions on their reservations, pursuant to the Self Determination and Self-Governance Acts.

That represents a general outline of our proposal to reform the Reform Act. We recognize it is just a starting point and it will change significantly as it is subjected to greater scrutiny by Indian country and Congress. However, we believe that the two basic underlying principles are valid and should guide any reform effort -- the need for an outside regulator and the need to maximize Indian self-determination.

We have one final point. The contempt order against the United States in Cobell v. Babbitt is not the first time the Government has been cited for contempt or other improper efforts to delay trust fund litigation. To the contrary, it appears to be part of a larger pattern. For example, in a case brought by a group of Navajo allottee, Mescal et. al. v. U.S., a case that had dragged on for over ten years, the Federal District Court for New Mexico found the Justice Department and the specific attorney handling the case to both be in contempt of court for using improper tactics to delay that case. Calling the attorney's behavior "uncooperative and obstructive," the court imposed a fine of $35,000 as part of its contempt order. No disciplinary actions were taken against that attorney and she continues to handle Indian trust cases today.

In Assiniboine and Sioux Tribes v. U.S., the Justice Department managed to again delay a trust fund mismanagement case (this time in the Court of Federal Claims) for over ten years. This judge also expressed his extreme frustration at the Government's foot-dragging in the case and took action against the attorney handling that case as well. In another Court of Federal claims trust suit, Oglala Sioux Tribe v. U.S., the court described a Justice Department argument in the following terms; "Such an assertion, we find, is shocking, insofar as it is a gross misstatement of the law."

It would appears that there is a pattern here -- an effort by the United States to discourage breach of trust suits by using improper tactics to delay them until the plaintiffs run out of resources. While there may be other explanations, there clearly is sufficient circumstantial evidence here to justify a Congressional oversight hearing on the Government's behavior in breach of trust law suits. We hope the Committees will hold one in the near future.

Finally, ITMA would like to use this opportunity to publicly express our appreciation to Paul Homan for his professional, selfless and dedicated work on behalf of Indian trust reform. We know it was not easy for him to work in the hostile environment he faced within the Interior Department. But despite those obstacles, he was able to accomplish more for Indian trust reform in four years than everyone else combined was able to do in 180 years. He brought OTFM into compliance with trust standards so that it can now account for every penny that

comes in. He raised the morale at OTFM so that, for the first time, people were proud to work there, you raised the level of competency at OTFM, with 98% of the work force being Indian. And finally, he refused to compromise trust standards or the interests of the Indian people. For all of these reasons, we will miss him, but wish him the best in his new endeavors.

In conclusion, we again express our appreciation to the Committees for holding this hearing. We look forward to working with you in the coming months to finally solve this 180-year-old problem.

"ATTACHMENT A"

CHRONOLOGY OF SECRETARY BABBITT'S ACTIONS ON TRUST REFORM

1. January 1993. During his confirmation hearing, Secretary Babbitt said he would have a plan ready for reforming the trust problem in 60 days after he took office.

2. February 1993. Congressman Synar introduced the Indian Trust Management Reform Act bill in the House of Representatives. Senator Inouye and others introduced a companion bill in the Senate.

3. March 1993. Secretary Babbitt told Congress that he would have his comments on the Synar Bill to them shortly. He never provided any comments, despite repeated urging by various Senators and Congressmen. As a result, Congress waited a year without acting on the legislation, in expectation of those comments.

4. June 1994. Secretary Babbitt told Congress he would submit an alternative to the Synar bill. No such bill was ever submitted

5. Summer of 1994. Secretary Babbitt's immediate staff testify against the Synar bill at various Congressional hearings. In particular, they oppose the title in the Act creating the Special Trustee, arguing that it would just create an additional layer of bureaucracy in the Department.

6. October 1994. A bipartisan group of Congressmen and Senators move the Synar through Congress despite the vigorous personal lobbying by Secretary Babbitt against the bill. President Clinton signs the bill into law.

7. 1995. Despite the fact that it is the tribes' money, Secretary Babbitt denies the tribes any role in the selection of the Special Trustee. Despite this, the tribes submit Paul Homan's resume to the Department. Secretary Babbitt recommends the appointment of Homan to the President who sends his name to the Senate for confirmation. The Senate confirms and Homan is sworn in as Special Trustee in September of 1995.

8. September 1995-July 1997. Homan is ostracized by the Department officials. Secretary Babbitt creates the "Homan containment committee" of top staff. Homan completes Strategic Plan for reforming the trust systems. Secretary Babbitt refuses to accept it and prohibits Homan from proceeding with any reform activities, freezing funds appropriated by Congress for that purpose.

9. June 1996. Individual Indian account holders file class action suit against Secretary Babbitt and others, (Cobell et. al. v. Babbitt et. al.) largely out of frustration at the Department's continued stonewalling of reform activities.

10. July 1997. The Senate Indian Affairs Committee holds a hearing on the status of the Strategic Plan. The Interior Department witness devotes his testimony to criticizing the Plan without offering any alternative. At the hearing and subsequently, Senators inform the Department that Congress will no longer tolerate the negativism and stonewalling. It must either come up with its own positive plan for reforming the trust systems or accept Homan's plan. Further delay will not be tolerated.

11.August 1997. Three weeks after that hearing, Secretary Babbitt issues a memorandum informing the Department that he and Homan have reached agreement on moving forward on certain components of the Strategic Plan and urging the other Departmental officials to give Homan their full cooperation.

12. August 1997-December 1998. Following the Strategic Plan, the Office of Trust Fund Management (OTFM) which manages the trust funds and which reports directly to Homan, reforms its systems and brings them into compliance with trust standards.

13.1998 Secretary Babbitt rejects Homan's plan for bring the BIA's management of trust assets and record keeping systems into compliance with trust standards. Instead, he adopts the High Level Implementation Plan, developed by Department officials, none of whom has any prior trust management experience. Homan opines that the High level Implementation Plan will not bring those systems into trust compliance. For example, that plan will not go back to determine that the land ownership records are accurate. As a result, the BIA will still not be able to confirm that lease income is going to the right person. Regardless, Secretary remains committed to High Level Implementation Plan, which is just now beginning to be implemented.

14. November 1998. Judge Lamberth issues order requiring Babbitt, Rubin and Gover to show cause why they should not be held in contempt in Cobell v. Babbitt and sets the trial for January 11, 1999

15. January 5, 1999. Secretary Babbitt, without consulting with Homan, issues Secretarial Order, making one of Homan's deputies the Principle Deputy Special Trustee, who while reporting to Homan, is given all day-to-day operational authority in the Office of Special Trustee. The person the Secretary names principle deputy is a career bureaucrat with no prior trust experience. Babbitt also tells Homan that he shall now report to the Secretary's chief of staff and the Assistant Secretary for Planning Management and Budget, instead of directly to the Secretary as called for in the Trust Reform Act.

16. January 7, 1999. Homan submits his resignation effective immediately

17. February 1, 1999. President's FY 2000 Budget Request asks for $90 million to clean up the trust fund problems and install new systems. This is three times what was requested in FY 99.

18. February 22, 1999. Judge Lamberth finds Secretaries Babbitt and Rubin and Assistant Secretary Gover in contempt of court.
18 During the six years he has been in office, Secretary Babbitt has not held a single meeting with tribal leaders or any other Indians on the issue of trust reform.

19. During the six years he has been in office, Secretary Babbitt has not testified at a single congressional hearing on trust reform issues. (There have been at least 10 such hearings before three different Senate and House Committees.)

"ATTACHMENT B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 96-1285 (RCL)
BRUCE BABBITT, Secretary of the Interior,	)	
ROBERT RUBIN, Secretary of the Treasury, and	)	
KEVIN GOVER, Assistant Secretary of the Interior,	)	
Defendants.	)	

MEMORANDUM OPINION

I. Introduction

V. Conclusion

The court is deeply disappointed that any litigant would fail to obey orders for production of documents, and then conceal and cover-up that disobedience with outright false statements that the court then relied upon. But when that litigant is the federal government, the misconduct is even more troubling. The institutions of our federal government cannot continue to exist if

they cannot be trusted. The court here conducted monthly status conferences where plaintiffs complained that the government was not producing the required documents. Because of the court's great respect for the Justice Department, the court repeatedly accepted the government's false statements as true, and brushed aside the plaintiffs' complaints. This two-week contempt trial has certainly proved that the court's trust in the Justice Department was misplaced. The federal government here did not just stub its toe. It abused the rights of the plaintiffs to obtain these trust documents, and it engaged in a shocking pattern of deception of the court. I have never seen more egregious misconduct by the federal government. In my own experience, government lawyers always strived to set the example by following the highest ethical standards that were then a model for the rest of the legal profession, and the Justice Department always took the position that its job was not to win an individual case at all costs, but to see that justice was done. Justice has not been done to these Indian beneficiaries. Moreover, justice delayed is justice denied. The court cannot tolerate more empty promises to these Indian plaintiffs. The time has come for action, and the court will make full use of its powers to ensure that this case gets back on track.

The Department of Justice's handling of this litigation has markedly improved since the issuance of the Order to Show Cause. New counsel, Phillip Brooks, was assigned to handle the contempt proceedings, and he performed this unpleasant task with commendable

candor, ably assisting the court in finding the facts and candidly acknowledging most of the problems that the court today discusses. The Assistant Attorney General for the Environment and Natural Resources Division attended the lengthy closing arguments in the contempt trial, where she heard the court express many of its concerns that it details today in this opinion. Shortly thereafter, the Assistant Attorney General personally filed a memorandum notifying the court of a complete restructuring of the trial team in this case, with new counsel to replace prior counsel, and additional counsel added to help ensure against repetition of the improper conduct the court today describes. The court views this as a hopeful sign, for the future, although it is too late to save the defendants from the contempt citations they have earned today.

After issuance of the order to show cause, Secretary Babbitt decided to reorganize the Office of Special Trustee and remove the key official responsible for document production in OST, Joe Christie. The Secretary did this without any prior discussion with the Special Trustee, prompting the Special Trustee to resign the next day. The Secretary took no action whatsoever to bring BIA into compliance, apparently being advised that there were few problems there and that the contempt problems all were the fault of OST. This opinion should cause Secretary Babbitt to now understand that he was badly misinformed, and that his own inattention to detail and wholesale delegation of authority to individuals who

have not served his—or the government's—interest, may cause him future problems with this court if the government misconduct continues.

The court views it as unfortunate for Secretary Rubin that he has been tarnished with this contempt citation. What personal involvement he has had in this fiasco is unknown to the court, but what is clear is that he has totally delegated his responsibility to others and they have miserably failed to comply with this court's orders, as detailed in this opinion.

For the reasons stated above, the Court finds by clear and convincing evidence that Bruce Babbitt, Secretary of the Interior; Robert Rubin, Secretary of the Treasury; and Kevin Gover, Assistant Secretary, Department of the Interior are in civil contempt of this court's First Order of Production of Information, issued November 27, 1996 and subsequent Scheduling Order of May 4, 1998.

In this regard, the court will order that:

1. The defendants are ADJUDGED and DECREED to be in contempt of court.

2. The defendants shall pay plaintiffs' reasonable expenses, including attorneys' fees, caused by the defendants' failure to obey this court's First Order of Production of Information, issued November 27, 1996 and subsequent Scheduling Order of May 4, 1998.

3. The plaintiffs shall submit to the court within 30 days an appropriate filing detailing the amount of reasonable expenses

and attorneys' fees incurred to date as a result of the defendants' failure to obey this court's two aforementioned orders.

4. A special master shall be appointed by the court in this case pursuant to Rule 53 of the Federal Rules of Civil Procedure. The special master will be named in a forthcoming order.

5. The special master shall oversee the discovery process and administer document production, compliance with court orders, and related matters. Further duties of the special master shall be set out in a forthcoming order.

A separate order shall issue this date.

Royce C. Lamberth
United States District Judge

Date:

STATEMENT OF PAUL M. HOMAN
FORMER SPECIAL TRUSTEE FOR AMERICAN INDIANS
MARCH 3, 1999

Summary

On September 19, 1995 I was appointed Special Trustee for American Indians and served in that capacity until January 7, 1999 when I resigned rather than accept the reorganization of the Office of the Special Trustee (OST) set forth in Secretarial Order 3208 dated January 5, 1999. Secretarial Order 3208 is a public document, is self-explanatory and was taken along with supporting actions by the Secretary of the Interior (Secretary) without any prior knowledge or consent by me.

In my opinion the Secretarial Order on its face usurped the powers, duties and responsibilities vested in the Special Trustee, The Office of the Special Trustee (OST) and the Advisory Board by the American Indian Trust Fund Management Reform Act of 1994 (Reform Act). For all practical purposes the implementation of the Order deprived the Special Trustee, the Office of the Special Trustee and the Advisory Board of the independence and the authority which was intended by the Reform Act. This was the principal reason for my resignation (a full statement in this regard is attached). In short, I felt I was deprived of the authority and the resources, principally managerial resources, necessary to carry out the duties and responsibilities of the Special Trustee and the Office of the Special Trustee.

The Secretarial Order and other Department of the Interior (Department) actions since 1994 relative to trust management reform demonstrate over and over again how easy it is to under-fund, under-staff, delay and otherwise frustrate the reforms required by the Reform Act in favor of higher Departmental priorities. The result has been to place the Indian trust management reform efforts in jeopardy. The Reform Act was flawed in one important respect in that it failed

to provide the Special Trustee, the Office of the Special Trustee and its Advisory Board with the independence and the authority to carry out the purposes of the Act.

The principal causes of the longstanding trust problems are well known and have resulted in conditions that are unacceptable by any reasonable standards. These conditions continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private.

History has shown that so long as the organization and management of the trust management activities remain status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. Yet, the status quo continues.

In my opinion, the Department of the Interior can no longer be trusted to keep and produce trust records. These are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries. In recent weeks a court came to share this view in connection with a class action suit brought by individual Indian beneficiaries. More important, it is a view that has long been shared by many, many Indian trust beneficiaries. Therefore, I believe it is time for Congress to consider alternatives to the Department's future management of the government's Indian trust management activities. Specifically, I recommend that Congress consider establishing an independent agency outside the Department of the Interior to manage the U. S. Government's trust management responsibilities to American Indians and American

Indian Tribes for trust resource management, trust funds management and land title and records management. Congress should take special care to ensure that these trust activities are managed according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.

History and Performance of the Office of the Special Trustee and the Department – 1995 to 1999

From the inception of OST in September 1995, neither the Special Trustee nor the Office of the Special Trustee had direct authority under the Reform Act of 1994 to initiate reforms or to implement those trust management reforms that were approved following the filing of the Special Trustee's strategic plan in April, 1997. Nor did the Secretary elect to vest the Special Trustee and the OST with the direct authority to implement the reforms except at the Office of Trust Funds Management that has reported to the Special Trustee since February 1996. Instead, the Special Trustee and the OST were limited to oversight of the vast majority of the reform efforts that were to be implemented in the same manner as previous unsuccessful reform efforts, i.e., directly by the Bureau of Indian Affairs (Bureau) and other affected units.

The record of the last three years shows a dramatic difference between the very successful reform results achieved by OST directly at OTFM; the minimal results achieved through oversight of the Bureau's reform efforts; and the negative results achieved through oversight of the Department's record keeping reform efforts.

On July 31, 1998 the Secretary of the Interior approved the High Level Implementation Plan (HLIP) which, in his view, provided the structure through which the Department could accomplish the successful resolution of the many decades-old Indian Trust Funds problems. Of 13 sub projects, OST had direct line responsibility for only 2 sub projects: Individual Indian Money (IIM) and OST data cleanup and the trust funds accounting system (TFAS) used for both IIM and tribal accounts. OST had started planning for these two tasks in 1996 and was able to begin implementation in 1996 and 1997 despite the limited managerial and financial resources which were made available by the Department. When Congress approved significant funding for

1998, OST and OTFM were able to show excellent results as reflected by the HLIP progress report dated December 1998, the last to be released to the public.

The report shows that to date, OST had collected better that 70% of the records to be cleaned, thanks in large part to the overwhelming support of the tribes. There were only three tribal protests (less than one percent of the tribes affected) and all but one was in the process of being resolved when I left the OST. The records of eight of twelve areas had been cleaned through August 1998; two more were scheduled for cleaning by the end of January 1999 and the final two were to be cleaned by June 1999. A very efficient, controlled and centralized cleanup and record keeping process had been designed and implemented by OST to clean and account for 100% of the IIM jacket files. The results so far show the Bureau's record keeping being in even worse condition than previously estimated. As of the December report OST had processed 181,754 active IIM jacket files (22,946 ahead of schedule) and with nearly no disruption to current operations or to Indian beneficiaries and no known loss of records. Unfortunately for the Indian beneficiaries, 15,893 accounts had no documents; 65% (118,631 accounts) were missing mandatory documents required by regulation or policy; and over 41,000 were affected by changes in vital statistics such as no current address. OST is actively working the files to correct as many of these historical deficiencies as possible, a task which has been long neglected by the Bureau and the Department.

The implementation of the trust funds accounting system by OST is also showing outstanding success. After being held up by the Department for over a year, OST in 1998 obtained all necessary approvals, awarded a TFAS contract, conducted a successful pilot and through August had implemented the system successfully in three areas. All areas, including OMNI tribal, are on schedule to be implemented by December 1999, six months ahead of schedule.

The same December 1998 HLIP report showed that seven sub projects that were to be implemented principally by the Bureau of Indian Affairs had no definitive plans for implementation. No significant cleanup processes had been developed or were under way. Moreover, systems design and implementation of asset management and ownership systems plans were lagging. The Bureau's record to date in this reform effort mirrors its historical failures to manage and implement meaningful reform. Once again there is now a high risk of failure or

significant delay of reforms assigned to the Bureau of Indian Affairs. Concerns over the BIA's data cleanup and systems efforts were relayed in writing to the Secretary by OST in July 1998 and for this reason the Special Trustee did not recommend approval of the Bureau's part of the HLIP. The Bureau's performance to date will almost certainly jeopardize the Department's commitment to complete the reform effort by the end of fiscal year 2000.

An even larger threat to the overall reform effort is the Department's continued inability or unwillingness to address the fundamental trust record keeping problems and systems which account for the vast majority of the Indian trust management problems. For this reason the Special Trustee and OST, in their oversight capacity, have since 1996 presented several comprehensive plans to bring the Department's trust account records management function up to the standards that would govern a commercial trustee. None of these efforts were accepted and the HLIP gave no definitive guidance on the issue. For this reason the Special Trustee noted to the Secretary on July 31, 1998:

> Since a joint Indian trust records management solution is fundamental to the successful implementation of the other Sub-Projects of the high level implementation plan and since all affected Bureaus have not yet agreed on a solution, the high level implementation plan being presented for surname and your approval will not in my opinion enable the Department to comply with the Reform Act and the Secretary's Agreement dated August 22, 1997.

The Secretarial Order purports to deal with the record keeping issue, but to my knowledge there is still no records retention policy which meets the common law trust standards, a condition precedent for any adequate trust records management system. Nor is there a records management system to retain trust documents, keep records and furnish information, sufficient to provide an accounting to the beneficiaries or to meet the accounting, accuracy and reporting requirements of the Reform Act of 1994. Furthermore, the Secretarial Order also created within OST, a new Office of Trust Litigation Support and Records. This office is now responsible and accountable for Indian trust records management, and for providing accounting, reconciliation, research, settlement and litigation support related to the management of Indian trust assets, all without the authority to carry out those duties and responsibilities. A Grade 15 career civil servant with no previous trust management experience was hired to manage the new office. This scheme on its face has little chance for success and was recently rejected by a court (see below) as a solution to litigation support document production.

The Department's failure to address and resolve the trust record keeping problems jeopardizes the entire reform effort. Without the accurate records required by the Reform Act and common law standards, systems improvements planned for trust fund accounting, asset management and land title and records will be ineffective and will not permit the Department to comply with the accounting, reporting and accuracy standards required by the Reform Act of 1994.

In recent weeks the Department has been criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the Bureau of Indian Affairs were held in civil contempt of an U. S. District Court's document production orders. The case underlying the contempt proceeding is essentially a trust administration action in which the Indian beneficiaries seek an accounting. The court has not to this point in the case addressed the detailed statutory and common law trust duties owed by the government as trustee to the individual Indian beneficiaries. Nonetheless, the court noted "it is basic hornbook law that the trustee has the duties of retaining trust documents, keeping records, furnishing information to the beneficiary, and providing an accounting." The court further noted: "the court will appoint a special master to oversee discovery, document production, and related matters and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves." When the Department of the Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities.

The recent record of the Department and the Bureau of Indian Affairs in planning and implementing trust management reform is only the most recent demonstration of their historical failures to bring about meaningful trust management reform. The Reform Act of 1994 called for a Special Trustee and an OST to oversee the reform effort but with no direct authority to ensure that the purposes of the Act were carried out. The Act was flawed in that respect. Despite aggressive oversight activities by the Special Trustee and OST over the last three years, the oversight efforts proved largely ineffective in ensuring that the Department complied with the Act. Nonetheless, the success of OST and OTFM in cleaning up the IIM records and in implementing a new trust funds accounting system demonstrated that significant reform is

possible when an office has the responsibility, the authority, the independence and the financial and managerial resources to carry out the reform.

Conclusion and Possible Solutions

As Special Trustee, I filed a strategic plan required by the Reform Act of 1994 with the Congress in 1997. I wish to reaffirm a few points I made in testimony at the time as I believe, with a few exceptions, problems with the trust management systems and the prospects for reform are much the same today as they were then.

I noted then that problems in the trust management systems are longstanding ones. Mismanagement and neglect have allowed the trust management systems, record keeping systems and risk management systems to deteriorate over a 20 to 30 year period and become obsolete and ineffective. For many of those years, including many years since 1990, the trust programs were seriously under staffed and under funded. The result was that the government increasingly was unable to keep pace with the rapid changes and improvements in technology, trust systems and prudential best practices taking place in the private sector trust industry. This gap continues today and will continue to increase until the reforms outlined in the Strategic Plan are funded and implemented. To this day, that gap has not been closed and the prospects for a timely solution are not very good.

There are three principal causes of the mismanagement and neglect that have contributed to the trust management problems both currently and in the past:

1. The primary cause of the trust management problems both historically and currently can be attributed to the trade-offs of financial and managerial resources which take place at every level of government between trust management activities (trust resource management, trust funds management and land title and records management) and other activities and programs of the Bureau of Indian

Affairs, the Department of the Interior, the Administration and the Congress. History has consistently shown these politically expedient government trade-offs of competing financial and managerial resources to be adverse and detrimental to the effective and proper administration and funding of the trust management activities.

These trade-offs have been made and are continuing to be made even in the face of a long history of court cases, which have consistently held the trust relationship between the United States and the American Indians to be a distinctive one. Decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

2. Another important cause of the trust management problems is the way the BIA is organized and manages trust management activities. The BIA's organizational alignment causes decision-making and management for Individual Indian Money (IIM) and Tribal issues to be an intricate and complex coordination process and an ineffective one at times.

3. The two causes just described acting together over many years have resulted in a third causal factor for the longstanding trust management problems: lack of competent managerial resources to manage effectively and efficiently the trust management responsibilities to the American Indians. Managers and staff of the BIA have virtually no effective knowledge or practical experience with the type of trust management policies, procedures, systems and best practices which are so effective, efficient and prevalent in private sector trust departments and companies. The BIA area and field office managers do not have the background, the training, the experience, and the financial and trust qualifications and skills, necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modern trust

environment. Thus, and through no fault of their own, and even assuming adequate financial resources were made available, they are not capable of managing effectively and efficiently the Federal Government's trust management activities on a par with that provided by private sector institutions to their trust customers.

The lack of trust managerial competence and the lack of financial trust orientation and focus throughout the BIA and the Department of the Interior have been institutionalized over many years and are now inherent in the BIA organizational culture. It is the reason in large part:

A. Why the BIA has never originated meaningful reforms of the trust management processes in the last 25 years.

B. Why the BIA has resisted and ultimately failed to implement nearly all of the meaningful reform efforts attempted in the last 25 years.

C. Why a new organizational structure, new management and massive re-training are necessary for the future management of the Federal Government's trust responsibilities to American Indians and the management of the implementation of the reforms identified in the Reform Act of 1994

The principal causes of the longstanding trust problems have resulted in conditions that are unacceptable by any reasonable standards and continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private.

So long as the organization and management of the trust management activities remain

status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. Yet the status quo continues.

When the Department of the Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities. For this reason and for the reasons stated above, I recommended in 1997 and recommend now that Congress consider establishing an agency to manage the U. S. Government's trust management responsibilities to American Indians and American Indian Tribes for trust resource management, trust funds management and land title and records management according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.

Such an agency should have a structure similar to the independent Federal Reserve Board of Governors or the Federal Deposit Insurance Corporation. It should have a board of trustees (ideally, with Indian trust beneficiary representation) appointed by the President and confirmed by the Senate and be subject to the oversight of the Congress and the appropriations process. It should be vested with the responsibility, the authority, the independence and the financial and managerial resources to carry out the purposes of the Reform Act of 1994 and manage the government's ongoing trust management responsibilities to the American Indians. It should be accountable to the American Indian trust beneficiaries and the American public for these trust activities.

March 12, 1999

Honorable Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, DC 20510-6450

Dear Mr. Chairman:

Thank you for the opportunity to present my views at the joint oversight hearings held March 3, 1999.

Attached are my answers to the supplemental questions of the Committees, which you forwarded to me in your letter of March 8, 1999.

If I can be of any further assistance to you or the Committees, please let me know and I will be happy to respond.

Sincerely,

Paul M. Homan

SENATE COMMITTEE ON INDIAN AFFAIRS
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
JOINT OVERSIGHT HEARINGS HELD MARCH 3, 1999

ANSWERS TO SUPPLEMENTAL QUESTIONS OF PAUL M. HOMAN

QUESTION 1. What models other than the one set out in the 1994 Reform Act might the Congress consider using to resolve the serious questions about how much is owed and to whom it is owed?

Answer:

Settlement legislation proposed by the Department last year contains one model for determining how much is owed and to whom it is owed. It has not proved acceptable to Congress or Indian Country.

Given the poor state of past records, there is no known way to give Indian beneficiaries a full accounting for the assets the government has held in trust for them for over 100 years. Nor is there an acceptable way to provide such an accounting using sampling techniques. Yet the government has been loath to own up to its mismanagement and neglect of its fiduciary responsibilities to Indian trust beneficiaries and proceed to settle the claims and potential claims against it for breach of trust.

A negotiated settlement, arbitrary though it may be, will have to be negotiated by the government and the Indian trust beneficiaries if these longstanding claims are ever to be reasonably resolved Failing that, a court may have to resolve the issue. The only practical model advanced so far to start the settlement process was one by the Advisory Board to the Special Trustee. It is discussed in the Department's settlement legislation proposal of last year but was specifically rejected by the Department. The federal government has addressed similar situations before by making both individual and generic settlements for claims arising out displacement of certain people and seizure of their assets (e.g., U.S. citizens with Japanese origins being interned during World War II); displacement of the native people of the Aleutian Islands during World War II; and harm to the native people of the Marshall Islands due to Atomic bomb testing during the 1950s. Any of these models might be instructive in coming to grips with how to settle with Indian beneficiaries for past mismanagement and neglect by the federal trustee.

While the ultimate settlement for past mismanagement and neglect may be a lengthy process and may turn out to be less than satisfactory to all concerned, it is possible to bring the trust management systems up to the standards of a commercial trustee in a relatively short period of time, given the necessary commitment by the federal trustee. The reforms outlined in the Special Trustee's strategic plan dated April 1997 are designed to fix the trust management systems. They should enable the federal government to both cure the current breach of trust and provide for a full accounting in the future, consistent with the accounting, reporting and record keeping reforms required by the reform act. Until the reforms outlined in the Special Trustee's 1997 Strategic Plan are implemented, the government will not be able to meet its trust responsibilities to Indian trust beneficiaries. The Department, however, has been unable or unwilling to implement these reforms and is being challenged by litigants, the courts and others who do not trust the Department to do the job, given its historical failures at trust reform. An obvious alternative is to place the reform effort and key trust management activities in the hands of an independent agency outside the Department. The agency could be modeled after the Resolution Trust Corporation or

the FDIC and could be responsible for records cleanup, systems implementation and other trust management activities on either a temporary or a permanent basis. Enclosed is a draft plan for implementing such a model.

Question 2. In particular, is there anything in the structure and practice of the Resolution Trust Corporation, as a short-term, federally-chartered agency, which might be copied as a model for resolving the mismanagement of tribal and individual Indian trust resources and funds in a manner similar to that used to resolve the failings of the savings and loan industry?

Question 3. Please identify for us the names and addresses of any senior-level people you know who have some experience with the relevant activities of the Resolution Trust Corporation by which they might be able to assist the Committee in fashioning a RTC-like response to the Interior Department's mismanagement of tribal and individual Indian trust resources and funds?

Answer to 2:

Yes. The RTC structure is ideally suited to the resolution of the longstanding Indian trust management problems. As noted above, an independent agency could be modeled after the Resolution Trust Corporation or the FDIC and could be responsible for records cleanup, systems implementation and other trust management activities on either a temporary or a permanent basis. Enclosed is a draft plan for implementing such a structure.

Answer to 3:

During 1990 and 1991 I was Senior Advisor to the Comptroller of the Currency (OCC). The Comptroller of the Currency was a director of the Resolution Trust Corporation and I was OCC's chief liaison with the RTC. Working with me at the time were the following three individuals who are still employed by either OCC or FDIC and who could provide the Committee with particular expertise regarding a RTC-like structure:

John Bovensi	FDIC's Director of Liquidations and Resolutions 202-898-6960
Wayne Rushton	OCC's Senior Deputy Comptroller for Policy OCC's former liaison to RTC 202-874-2870
Robert Serino	OCC's Deputy Chief Counsel 202-874-5200

4. **Should the Congress by statute make the Office of the Special Trustee more independent of and autonomous from the Office of the Secretary and the Department of the Interior? And if so, in what specific ways can and should that be done.**

5. **If there is a growing lack of confidence on the part of some Members of Congress in the Secretary's ability or willingness to properly expend the $100 million increase he has requested for FY 2000, what conditions would you suggest that the Congress place on**

the appropriation of any such increased funds to ensure that they are spent to fix and resolve deficiencies rather than to defend them or evade accountability for them?

Answer to both questions 4 and 5:

The Secretarial Order and other Department of the Interior actions since 1994 relative to trust management reform demonstrate over and over again how easy it is to under-fund, under-staff, delay and otherwise frustrate the reforms required by the Reform Act in favor of higher Departmental priorities. The result has been to place the Indian trust management reform efforts in jeopardy. The Reform Act was flawed in one important respect in that it failed to provide the Special Trustee, the Office of the Special Trustee and its Advisory Board with the independence and the authority to carry out the purposes of the Act.

From the inception of OST in September 1995, neither the Special Trustee nor the Office of the Special Trustee had direct authority under the Reform Act of 1994 to initiate reforms or to implement those trust management reforms that were approved following the filing of the Special Trustee's strategic plan in April, 1997. Nor did the Secretary elect to vest the Special Trustee and the OST with the direct authority to implement the reforms except at the Office of Trust Funds Management that has reported to the Special Trustee since February 1996. Instead, the Special Trustee and the OST were limited to oversight of the vast majority of the reform efforts that were to be implemented in the same manner as previous unsuccessful reform efforts, i.e., directly by the Bureau of Indian Affairs (Bureau) and other affected units.

The record of the last three years shows a dramatic difference between the very successful reform results achieved by OST directly at OTFM with both IIM cleanup and the implementation of the trust fund accounting systems substantially and successfully implemented; the minimal results achieved by the Bureau of Indian Affairs reform efforts with cleanup and systems implementation substantially yet to begin and which will almost certainly not be completed by the end of fiscal year 2000, the agreed deadline; and the negative results achieved by the Department's record keeping reform efforts which have regressed in recent weeks and months.

Secretarial Order 3208 purports to deal with the record keeping issue, but to my knowledge there is still no records retention policy which meets the common law trust standards, a condition precedent for any adequate trust records management system. Nor is there a records management system to retain trust documents, keep records and furnish information, sufficient to provide an accounting to the beneficiaries or to meet the accounting, accuracy and reporting requirements of the Reform Act of 1994. Furthermore, the Secretarial Order also created within OST, a new Office of Trust Litigation Support and Records. This office is now responsible and accountable for Indian trust records management, and for providing accounting, reconciliation, research, settlement and litigation support related to the management of Indian trust assets, all without the authority to carry out those duties and responsibilities. A Grade 15 career civil servant with no previous trust management experience was hired to manage the new office. This scheme on its face has little chance for success and is already facing challenges from litigants, an U. S. District Court and associations representing Indian trust beneficiaries.

In February 1999 the Department was criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the Bureau of Indian Affairs were held in civil contempt of an U. S. District Court's document production orders. The court noted: "the court will appoint a special master to oversee discovery, document production, and related matters and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves." When the Department of the

Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities.

The Department's History and the recent record have shown that so long as the organization and management of the trust management activities remain status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. Yet, the status quo continues.

I share the court's view that the Department of the Interior can no longer be trusted to keep and produce trust records. More important, it is a view that has long been shared by many, many Indian trust beneficiaries. Therefore, I believe it is time for Congress to consider alternatives to the Department's future management of the government's Indian trust management activities. Specifically, I recommend that Congress consider establishing an independent agency outside the Department of the Interior to manage the U. S. Government's trust management responsibilities to American Indians and American Indian Tribes for trust resource management, trust funds management and land title and records management. Congress should take special care to ensure that these trust activities are managed according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust. A draft plan to transfer some or all of the reform effort and some or all of the trust management activities, including associated budgets and appropriations, to such an independent agency is attached. As part of this transfer, the Office of the Special Trustee should sunset and its duties and responsibilities should be transferred to the new independent agency.

INDIAN RESOLUTION TRUST CORPORATION

PURPOSE AND ORGANIZATION

The IRTC plan proposes a new organizational and executive management structure to address and resolve the long-standing trust management problems and to ensure that the federal government fulfills its trust responsibilities to American Indian trust beneficiaries. The IRTC has distinct advantages over the current structure. The reorganization will:

1. Stop and reverse the steady erosion of the federal government's fulfillment of its trust responsibilities (de facto "termination") currently occurring because of lack of financial and managerial resources (capacity) and the unwillingness to address and resolve the longstanding trust problems.

2. Clearly establish accountability both to American Indian trust beneficiaries and the U.S. Congress and American people.

3. Establish an organization focusing and specializing exclusively on the trust management activities and other programs assigned to it.

4. Create an organization, which will function with a greater degree of independence and at a higher level in government than the Bureau of Indian Affairs (BIA) and the Office of the Special Trustee (OST). As an independent agency similar to the Federal Reserve Board of Governors (FRB), the Federal Deposit Insurance Corporation (FDIC), or the Resolution Trust Corporation (RTC), Congress is more likely to provide appropriate financial and managerial resources to ensure the success of the new organization than exists at present.

5. Establish at least a five person Board of Directors appointed by the President and confirmed by the Senate who will devote full time to the governance and management of the new organization. Two of the Board members will be American Indians proposed to the President by Indian Country: one shall be a nominee selected by the largest fifty tribal trust accounts and one shall be a nominee selected to represent IIM trust account holders. This will assure high level advocacy of issues important to Indian Country and accountability to Indian trust beneficiaries. The Chairman of the Board shall be the Chief Executive Officer who will be an experienced and skilled financial and trust asset and accounting manager. The remaining two board members shall be the U. S. Comptroller of the Currency and one of the non-Chairman board members of the FDIC to assure the IRTC benefits from the experience and expertise of two trust industry regulators.

6. Attract, train and retain competent senior management, skilled and experienced in trust asset and accounting management and capable of managing a modern trust operation. This will be facilitated by making the independent agency exempt from government hiring rules and compensation ceilings, enabling IRTC to compete with the private sector in attracting competent management.

7. Allow IRTC to assess, train, evaluate, compensate on a competitive basis with the private sector and replace, if necessary, those employees transferred from Department of the Interior (DOI) to IRTC.

8. Accelerate the process of self-governance by the tribes. The proposal would not interfere with the tribes' ability to contract or compact for trust functions since the Self-Determination Act and Self-Governance Act would still be applicable to these programs. Like a private trustee, the proposed IRTC would rely on a common set of laws, policies, practices, regulations, a common Trust Asset and Accounting Management System (TAAMS) and a means through annual audits and reviews and administrative oversight and supervision to assure performance by the Self-Governance Tribes. The Self-Governance Tribes would act as service bureaus under delegated authority from IRTC to provide trust management services for which they had expertise. Thus, increasingly in the future, service bureau management of nearly all of the trust management activities could and should be provided by qualified tribes or American Indians, themselves, under appropriate compacts and contracts, subject to the rules, oversight and supervision of the federal trustee (IRTC).

9. Delegate as many trust management activities as practical to third parties under generally accepted rules governing trust delegations. Like a private trustee, there is no reason a federal trustee cannot similarly delegate certain trust management activities after exercising care, skill and caution in its delegations under the general criteria governing private sector trusts. In particular, both the federal trustee and the person accepting the delegation must have a clear understanding that the person accepting the delegation must operate under the regulations, standards, prudential best practices, policies and procedures and the information, accounting and reporting systems issued, established and maintained by the federal trustee. There must also be a clear understanding between the federal trustee and the person accepting the delegation that the delegation can and will be withdrawn for cause, i.e., if the delegated function is performed in an "unsafe and unsound" manner as that term is defined by 12 U.S.C. 1818.

I. TRUST MANAGEMENT ACTIVITIES AND OTHER PROGRAMS THAT COULD BE ASSIGNED TO IRTC, PRIORITIZED ACCORDING TO THE NEED FOR ACTION BY AN INDEPENDENT ENTITY OUTSIDE THE DEPARTMENT OF THE INTERIOR

IRTC could manage and administer, directly and indirectly, all trust management activities and other programs Congress assigns to it, including but not limited to:

1. TRUST RECORDS MANAGEMENT

RATIONALE FOR USING IRTC

The underlying cause of many of the longstanding trust management activities problems is lack of an adequate trust record keeping system for trust resource management, trust funds management and land, title and records management. This problem has been identified since the mid-1980s and after several previous unsuccessful records reform efforts, there is still no records retention policy which meets the common law trust standards, a condition precedent for any adequate trust records management system. Nor is there a records management system to retain trust documents, keep records and furnish information, sufficient to provide an accounting to the beneficiaries or to meet the accounting, accuracy and reporting requirements of the Reform Act of 1994. Recently, a Secretarial Order created a new Office of Trust Litigation Support and Records. This office is now responsible and accountable for Indian trust records management, and for providing accounting, reconciliation, research, settlement and litigation support related to the management of Indian trust assets, all without the authority to carry out those duties and responsibilities. A Grade 15 career civil servant with no previous trust management experience was hired to manage the new office. This scheme on its face has little chance for success, lacks independence and objectivity and is already facing challenges from Congress, litigants and a District Court of the United States.

The Department's History and the recent record have shown that so long as the organization and management of the trust management activities remain status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resonrces sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. Yet, the status quo continues.

Recently, the Department has been criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the Bureau of Indian Affairs were held in civil contempt of an U. S. District Court's document production orders. The court noted: "the court will appoint a special master to oversee discovery, document production, and related matters and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves." When the Department of the Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities.

Various studies of the past have shown that mismanagement of the records has occurred due to ignorance, incompetence, apathy and fraud. The Department's management has demonstrated a reluctance to expose itself further by doing a credible job in cleaning and keeping accurate trust records. Using IRTC to administer and control trust record keeping, using modern hard copy and

electronic archiving techniques, will be more objective, more efficient, will mitigate the poor management, abuses and self-serving practices of the past and will provide adequate access to trust records by both the federal trustee and Indian trust beneficiaries. By centralizing the data collection, cleanup, reconciliation and trust records management processes and by the near exclusive use of outside contractors, a quality job can be done by outside experts at a reasonable cost.

ACTIVITIES TO BE TRANSFERRED TO IRTC

A. ESTABLISH A NATIONAL TRUST RECORDS ADMINISTRATION AS A UNIT OF IRTC RESPONSIBLE FOR ALL INDIAN TRUST RECORDS MANAGEMENT

Objective:

1. Develop and implement a records management solution for the centralized hard copy and electronic archiving of all Indian trust records involving OST, BIA, MMS, BLM, OHA and other DOI offices. The scope includes Indian trust records management, storage, access and retrieval, control and disposition and contemplates electronic records keeping including latest available imaging technology.

2. Operate as Discrete Unit: The national trust records administration should operate as a discrete unit reporting to the Chairman of IRTC. This will ensure that it can be transferred to another department of government should Congress decide to sunset IRTC.

2. DATA COLLECTION, CLEANUP AND RECONCILIATION

RATIONALE FOR USING IRTC

Data problems are longstanding and continue despite unsuccessful cleanup initiatives undertaken by the Department. To the extent mismanagement of the records has occurred due to ignorance, incompetence, apathy and fraud, current management will be reluctant to expose itself by doing a credible job if the cleanup responsibility remains in the Department's hands. Using IRTC to administer the data collection, cleanup and reconciliation activities of all Department units will be more objective and will avoid self-serving abuses. By centralizing the data collection, cleanup and reconciliation processes and by the near exclusive use of outside contractors, a quality job can be done by outside experts at a reasonable cost. By making extensive use of outside contractors, these functions can cease to exist once the data collection, cleanup and reconciliation efforts are completed.

ACTIVITIES TO BE TRANSFERRED TO IRTC

A. OST DATA CLEANUP

Objective: Standardize and verify IIM system data for trust records and correct and establish an inventory of hard copy and electronic records for each trust fund account.

B. BIA DATA CLEANUP

Objective: Assess the quality of trust management land title and resource management data and documents, identify issues and deficiencies, determine a course of action, develop

policies and procedures to ensure quality of data/records, and provide as clean, complete and organized data/records as practical. Standardize and verify system data for trust records, correct and reconcile exceptions and establish an inventory of hard copy and electronic records for each trust fund account.

C. BIA APPRAISAL PROGRAM

Objectives: Assess certification of appraisers, identify program deficiencies, identify appraisal backlog and develop policies, procedures and a cleanup process to eliminate to the extent practical. Establish an inventory of hard copy and electronic appraisals and develop and maintain a database for tracking appraisals.

D. BIA PROBATE BACKLOG

Objective: Inventory, identify and develop plans and procedures to eliminate estate backlog.

Regulations require BIA to provide family heirship data to the Administrative Law Judge, OHA within 90 days from the date of notification of the death of an individual owning trust or restricted land. Resources have been insufficient to maintain compliance with governing statutes. The current backlog in the probate adjudication process adversely affects the accuracy of title records and the proper distribution of funds derived from trust property.

E. OHA PROBATE BACKLOG

Objective: Assess workload associated with conducting hearings and rendering decisions in Indian probate matters and develop plans and procedures to process existing caseload and anticipated increased Indian probate requests so that the probate adjudication function can be completed in a timely manner.

The current backlog in the probate adjudication process adversely affects the accuracy of title records and the proper distribution of funds derived from trust property.

3. SYSTEMS DEVELOPMENT AND ADMINISTRATION FOR TRUST FUNDS ACCOUNTING SYSTEM (TFAS), TRUST ASSET AND ACCOUNTING MANAGEMENT SYSTEM (TAAMS), AND LAND TITLE AND RECORDS MANAGEMENT (LTRO)

RATIONALE FOR USING IRTC

Mismanagement and neglect have allowed the trust management systems, record keeping systems and risk management systems to deteriorate over a 20 to 30 year period and become obsolete and ineffective. For many of those years, including many years since 1990, the trust programs were seriously under staffed and under funded. The result was that the government increasingly was unable to keep pace with the rapid changes and improvements in technology, trust systems and prudential best practices taking place in the private sector trust industry. This gap continues today and will continue to increase until the trust management reforms are funded and implemented.

The BIA and DOI lack competent managerial resources to manage effectively and efficiently the trust management responsibilities to the American Indians. Managers and staff of the BIA and DOI have virtually no effective knowledge or practical experience with the type of trust

management policies, procedures, systems and best practices which are so effective, efficient and prevalent in private sector trust departments and companies. The BIA area and field office managers do not have the background, the training, the experience, and the financial and trust qualifications and skills, necessary to manage the federal government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. Thus, and through no fault of their own, and even assuming adequate financial resources were made available, they are not capable of managing effectively and efficiently the federal government's trust management activities on a par with that provided by private sector institutions to their trust customers.

The lack of trust managerial competence and the lack of financial trust orientation and focus throughout the BIA and the Department of the Interior have been institutionalized over many years and are now inherent in the BIA and DOI organizational culture. It is the reason in large part:

A. Why the DOI has never originated meaningful reforms of the trust management processes in the last 25 years.

B. Why the DOI has resisted and ultimately failed to implement nearly all of the meaningful reform efforts attempted in the last 25 years.

C. Why a new organizational structure, new management and massive re-training are necessary for the future management of the federal government's trust responsibilities to American Indians and the management of the implementation of the reforms identified in the Reform Act of 1994.

For these reasons, the BIA and DOI cannot be trusted to design, implement and maintain either a Trust Asset and Accounting Management System (TAAMS) or a Land Title and Records System (LTRO).

A Trust Funds Accounting System (TFAS) has already been acquired by OTFM. TFAS will provide the basic collection, accounting, disbursing, and reporting functions as is common to commercial trust funds management operations. The system is commercially operated and maintained by a large, nationally known private sector service bureau. Conversion of approximately 300,000 accounts on the current IIM system will occur over a two period. The successful acquisition and partial implementation of TFAS to date was possible only because OTFM has enjoyed independence from the BIA since February 1996 and reported to the quasi-independent Special Trustee. With the usurpation of the OST brought about by Secretarial Order 3208, TFAS implementation is in jeopardy if OTFM cannot maintain its independence by being transferred to an independent agency like IRTC. If OTFM is transferred back to the BIA, it will regress.

ACTIVITIES TO BE TRANSFERRED TO IRTC

A. Trust Funds Accounting System (TFAS)

Objective: Acquire, install and maintain, using a service bureau approach, a proven commercial off the shelf (COTS) trust accounting system to replace the present BIA Individual Indian Monies and tribal accounting modules.

B. Trust Asset and Accounting Management System (TAAMS)

Objective: Acquire, pilot and implement a standardized, proven COTS general trust management system technology, to include Master Lease, Billings and Accounts Receivable, & Collection subsystems. The system selected will be commercially operated and maintained.

C. Land Records Information Systems (LRIS)

Objective: Replace current title management systems with new capabilities that interface with TAAMS and TFAS. Transfer present land title and records offices to IRTC.

D. Oversight only of Minerals Management Services (MMS) Systems Reengineering

Objective: Oversee MMS' efforts to design, develop and implement new core business processes for the royalty management function, with supporting systems that will provide revenue recipients with access to their money within 24 hours, and assure compliance with applicable laws, lease terms, and regulations for all leases in the shortest possible time.

4. RISK MANAGEMENT, AUDIT AND INTERNAL CONTROLS

RATIONALE FOR USING IRTC

12 CFR 9.9 of the U. S. Code requires that a committee of directors of a national bank audit fiduciary activities or cause suitable audits to be made by auditors responsible only to the board of directors. This requirement should also be required of trust management activities. Risk management by the DOI is inadequate and audit and internal control procedures cannot be implemented so long as records management and accounting issues remain unresolved.

Once the records management issues are resolved, care must be taken to ensure the independence of audits, external and internal. This can best be done by requiring outside audits by CPA firms, using generally accepted auditing standards, not government standards. These outside audits should be supplemented by requiring a Comptroller of the Currency trust examination on an annual basis.

Internal audits should also have a degree of independence. DOI's Inspector General Office and the Office of Trust Responsibility have been ineffective, labeling nearly every serious trust problem as being "resolved but not implemented", provided the DOI addresses the issue with plans of resolution—almost all of which are never funded or staffed. Effective internal audits can be assured by acquiring professionals competent in the field and have them report to IRTC's board of directors.

This will entail obtaining a risk management and control system that will provide for adequate operational audits, credit and asset quality audits, compliance reviews, independent asset appraisals, supervision, enforcement and liaison with outside, independent auditors. It will include annual reviews and audits of all service bureaus providing trust services under delegated authority from IRTC.

ACTIVITIES TO BE TRANSFERRED TO IRTC

A. Audit and Internal Control activities of the Office of Trust Responsibility and the DOI Inspector General's Office as they apply to trust management activities.

Objective: This will entail obtaining a risk management and control system that will provide for adequate operational audits, credit and asset quality audits, compliance reviews, independent asset appraisals, supervision, enforcement and liaison with outside, independent auditors. It will include annual reviews and audits of all service bureaus providing trust services under delegated authority from IRTC.

5. POLICY AND PROCEDURES, SYSTEMS AND PRACTICES

RATIONALE FOR TRANSFERRING TO IRTC

The Special Trustee was required by the Reform Act to ensure that "the policies, procedures, practices, and systems of the Bureau, the Bureau of Land Management and the Minerals Management Service related to the discharge of the Secretary's trust responsibilities are coordinated, consistent, and integrated; and...the Department prepares comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle." The Special Trustee was unable to comply because OST lacked the direct authority to ensure compliance. An independent IRTC should have the authority to carry out this purpose of the Reform Act.

ACTIVITIES TO BE TRANSFERRED TO THE IRTC

A. Authority to ensure that the policies, procedures, practices, and systems of the Bureau, the Bureau of Land Management and the Minerals Management Service related to the discharge of the Secretary's trust responsibilities are coordinated, consistent, and integrated; and that the Department prepares comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle.

6. TRAINING

RATIONALE FOR USING IRTC

DOI has not provided adequate training in the past and does not have the managerial resources, expertise and skills necessary to train staff in the implementation and maintenance of highly sophisticated and modern trust management systems contemplated by the reform effort. Through the extensive use of outside contractors, the staff can be quickly trained. Once the staff is competent to the task, normal ongoing training in the ordinary course can be transferred to a successor organization to IRTC.

ACTIVITIES TO BE TRANSFERRED TO IRTC

A. Transfer all training activities associated with trust management activities to IRTC.

Objective: Increase government and tribal trust personnel job performance and inter-organizational effectiveness by providing excellent, targeted training to all organizations responsible for trust management activities.

7. TRANSFER OF THE OFFICE OF TRUST FUNDS MANAGEMENT TO IRTC

RATIONALE FOR TRANSFER OF OTFM TO IRTC

The Office of Trust Funds Management (OTFM) is responsible for one of three major trust management activities: trust funds management. Trust funds management includes the deposit, investment and disbursements activities of both tribal and individual Indian money (IIM) accounts. OTFM was a troubled office for most of its history but its operations are now comparable in quality to those of most private sector trust funds management companies. This success can be attributed in large part to the transfer of OTFM to OST in February, 1996. This transfer to the Special Trustee enabled the unit to operate semi-independently and to acquire the necessary financial and managerial resources to lead two important aspects of the reform effort: Individual Indian Money (IIM) and OST data cleanup and the design and implementation of the trust funds accounting system (TFAS) used for both IIM and tribal accounts. OST had started planning for these two tasks in 1996 and was able to begin implementation in 1996 and 1997 despite the limited managerial and financial resources which were made available by the Department. When Congress approved significant funding for 1998, OST and OTFM were able to show excellent results as reflected by the HLIP progress report dated December 1998, the last to be released to the public.

The report shows that to date, OST had collected better that 70% of the records to be cleaned, thanks in large part to the overwhelming support of the tribes. There were only three tribal protests (less than one percent of the tribes affected) and all but one was in the process of being resolved. The records of eight of twelve areas had been cleaned through August 1998; two more were scheduled for cleaning by the end of January 1999 and the final two were to be cleaned by June 1999. A very efficient, controlled and centralized cleanup and record keeping process had been designed and implemented by OST to clean and account for 100% of the IIM jacket files. The results so far show the Bureau's record keeping being in even worse condition than previously estimated. As of the December report OST had processed 181,754 active IIM jacket files (22,946 ahead of schedule) and with nearly no disruption to current operations or to Indian beneficiaries and no known loss of records. Unfortunately for the Indian beneficiaries, 15,893 accounts had no documents; 65% (118,631 accounts) were missing mandatory documents required by regulation or policy; and over 41,000 were affected by changes in vital statistics such as no current address. OST is actively working the files to correct as many of these historical deficiencies as possible, a task which has been long neglected by the Bureau and the Department.

The implementation of the trust funds accounting system by OST is also showing outstanding success. After being held up by the Department for over a year, OST in 1998 obtained all necessary approvals, awarded a TFAS contract, conducted a successful pilot and through August had implemented the system successfully in three areas. All areas, including OMNI tribal, are on schedule to be implemented by December 1999, six months ahead of schedule.

OTFM operations are now subject to an outside audit. Reconciliation of records has been brought up to commercial standards in recent years and overall operations are good.

The overall success of OTFM can be attributed to good management and the independence from BIA and other DOI units the management and the unit has enjoyed in recent years. This success

may be jeopardized if OTFM is transferred back to the BIA or continues to operate within the present structure at DOI.

OTFM is a discrete unit which can be transferred to IRTC with virtually no interruption in services to Indian trust beneficiaries and other constituencies. It should be kept as a discrete unit operating within IRTC until a permanent organizational structure is determined by Congress.

ACTIVITIES TO BE TRANSFERRED TO IRTC

A. OTFM as a unit and all duties and responsibilities presently assigned to OTFM.

Objective: Ensure the continued operational success of OTFM and the cleanup and systems reforms implementation assigned to OTFM.

8. TRANSFER OF THE LAND TITLE AND RECORDS OFFICES AND RESPONSIBILITY FOR LAND RECORD INFORMATION SYSTEMS TO IRTC.

RATIONALE FOR TRANSFER TO IRTC

Land Title and Records Offices (LTRO) provide a public record of the chain of title relating to real property allotted to and held in trust for individuals pursuant to various treaties with Indian Tribes and acts of Congress relating to individual Indians. The record keeping systems for LTRO are outdated and need replacement. Yet, Department initiatives in the last few years have not been successful in bringing the LTRO function up to commercial standards.

Outputs of an LTRO generally consist of a certified Title Status Report, a certified inventory of property held by a decedent, and uncertified indications of ownership by property or by individual.

While a given LTRO may only certify properties located within the boundaries of its Area Office, uncertified ownership information may be obtained across Area Office databases to provide an indication of ownership for an individual having trust property in multiple areas.

In comparison with public land record systems utilized under the jurisdiction of states, an LTRO combines the functions of a registrar of deeds and a title abstract company. In the private sector there is a separation of duties for these functions to avoid obvious conflicts of interest. However, the scope of an LTRO goes beyond these institutions in that an LTRO may give an opinion in the case of ownership disputes, creating further conflicts.

Field data suggest that the LTRO function is adequately supported with the current LRIS application. What is missing is sufficient training, and appraisal and probate backlogs are creating barriers to effective performance of the system. The existing appraisal and probate backlogs are exacerbated by a significant lack of qualified personnel to perform the tasks on a timely basis at all levels in the process chain. If these issues were properly addressed with additional human resources allocations, the LTRO organization could provide the information necessary to enable the Land Record Information System (LRIS) application to be fully effective. Software improvements to the LRIS system, while needed to improve the interoperability at the end-user level, should be a second priority after the re-engineering of the Trust Asset and Accounting Management System. Nevertheless, while not an immediate priority, the LRIS system will need upgrading in the near term. This is because each time ownership changes, the LTRO staff must perform time-consuming manual determination and documentation of ownership interests. LRIS, as designed, is not capable

of performing automated chain-of-title calculations and it does not store chain-of-title or calculated ownership information. LRIS system improvements have been delayed for the past two years due to reduction in force and budget cuts.

There is little prospect the LTRO and land records information system deficiencies will be overcome so long as they remain in the BIA. LTRO is a discrete unit with discrete functions and can and should be transferred to an independent agency like IRTC, at least during the records cleanup and implementation of trust management reforms. There is a strong argument for the permanent separation of LTRO functions from the Department of the Interior.

ACTIVITIES TO BE TRANSFERRED TO THE IRTC

A. Land Title and Records Offices as a unit and the duties and responsibilities of the LTRO function.

Objective: Assure an independent and effective land title and record system of ownership, separate from the units which manage the trust assets.

II. THE ARGUMENT FOR THE PERMANENT TRANSFER OF THE FOLLOWING ACTIVITIES TO IRTC:

Trust Funds Management

Trust Land Title and Records Management

Trust Resource Management for IIM accounts

Trust Records Management

The eight major trust activities for transfer to IRTC mentioned above are designed to have an independent agency (IRTC) clean up the trust records and implement record keeping, accounting, funds and asset management, audit and internal control policies, procedures, practices and systems, necessary to ensure that the federal government keeps its trust responsibilities to Indian beneficiaries. Once the records are cleaned up and reconciled and once the other reforms have been implemented, there is a high risk that the federal government will revert to its historical pattern if these activities are transferred back to the Department of the Interior and if the Department is allowed to retain trust responsibility for trust funds management, trust resource management, trust land title and records management and trust records management. The recent record and the historical record are instructive.

From the inception of OST in September 1995, neither the Special Trustee nor the Office of the Special Trustee had direct authority under the Reform Act of 1994 to initiate reforms or to implement those trust management reforms that were approved following the filing of the Special Trustee's strategic plan in April, 1997. Nor did the Secretary elect to vest the Special Trustee and the OST with the direct authority to implement the reforms except at the Office of Trust Funds Management that has reported to the Special Trustee since February 1996. Instead, the Special Trustee and the OST were limited to oversight of the vast majority of the reform efforts that were to be implemented in the same manner as previous unsuccessful reform efforts, i.e., directly by the Bureau of Indian Affairs (Bureau) and other affected units.

The record of the last three years shows a dramatic difference between the very successful reform results achieved by OST directly at OTFM; the minimal results achieved through oversight of the Bureau's reform efforts; and the negative results achieved through oversight of the Department's record keeping reform efforts.

On July 31, 1998 the Secretary of the Interior approved the High Level Implementation Plan (HLIP) which, in his view, provided the structure through which the Department could accomplish the successful resolution of the many decades-old Indian trust funds problems. Of 13 sub projects, OST had direct line responsibility for only 2 sub projects: Individual Indian Money (IIM) and OST data cleanup and the trust funds accounting system (TFAS) used for both IIM and tribal accounts. OST had started planning for these two tasks in 1996 and was able to begin implementation in 1996 and 1997 despite the limited managerial and financial resources which were made available by the Department. When Congress approved significant funding for 1998, OST and OTFM were able to show excellent results as reflected by the HLIP progress report dated December 1998, the last to be released to the public.

The report shows that to date, OST had collected better that 70% of the records to be cleaned, thanks in large part to the overwhelming support of the tribes. There were only three tribal protests (less than one percent of the tribes affected) and all but one was in the process of being resolved. The records of eight of twelve areas had been cleaned through August 1998; two more were scheduled for cleaning by the end of January 1999 and the final two were to be cleaned by June 1999. A very efficient, controlled and centralized cleanup and record keeping process had been designed and implemented by OST to clean and account for 100% of the IIM jacket files. The results so far show the Bureau's record keeping being in even worse condition than previously estimated. As of the December report OST had processed 181,754 active IIM jacket files (22,946 ahead of schedule) and with nearly no disruption to current operations or to Indian beneficiaries and no known loss of records. Unfortunately for the Indian beneficiaries, 15,893 accounts had no documents; 65% (118,631 accounts) were missing mandatory documents required by regulation or policy; and over 41,000 were affected by changes in vital statistics such as no current address. OST is actively working the files to correct as many of these historical deficiencies as possible, a task which has been long neglected by the Bureau and the Department.

The implementation of the trust funds accounting system by OST is also showing outstanding success. After being held up by the Department for over a year, OST in 1998 obtained all necessary approvals, awarded a TFAS contract, conducted a successful pilot and through August had implemented the system successfully in three areas. All areas, including OMNI tribal, are on schedule to be implemented by December 1999, six months ahead of schedule.

The same December 1998 HLIP report showed that seven sub projects that were to be implemented principally by the Bureau of Indian Affairs had no definitive plans for implementation. No significant cleanup processes had been developed or were under way. Moreover, systems design and implementation of asset management and ownership systems plans were lagging. The Bureau's record to date in this reform effort mirrors its historical failures to manage and implement meaningful reform. Once again there is now a high risk of failure or significant delay of reforms assigned to the Bureau of Indian Affairs. Concerns over the BIA's data cleanup and systems efforts were relayed in writing to the Secretary by OST in July 1998 and for this reason the Special Trustee did not recommend approval of the Bureau's part of the HLIP. The Bureau's performance to date will almost certainly jeopardize the Department's commitment to complete the reform effort by the end of fiscal year 2000.

An even larger threat to the overall reform effort is the Department's continued inability or unwillingness to address the fundamental trust record keeping problems and systems which account for the vast majority of the Indian trust management problems. For this reason the Special Trustee and OST, in their oversight capacity, have since 1996 presented several comprehensive plans to bring the Department's trust account records management function up to the standards that would govern a commercial trustee. None of these efforts were accepted and the HLIP gave no definitive guidance on the issue. For this reason the Special Trustee noted to the Secretary on July 31, 1998:

> Since a joint Indian trust records management solution is fundamental to the successful implementation of the other Sub-Projects of the high level implementation plan and since all affected Bureaus have not yet agreed on a solution, the high level implementation plan being presented for surname and your approval will not in my opinion enable the Department to comply with the Reform Act and the Secretary's Agreement dated August 22, 1997.

Secretarial Order 3208 purports to deal with the record keeping issue, but there is still no records retention policy which meets the common law trust standards, a condition precedent for any adequate trust records management system. Nor is there a records management system to retain trust documents, keep records and furnish information, sufficient to provide an accounting to the beneficiaries or to meet the accounting, accuracy and reporting requirements of the Reform Act of 1994. Furthermore, the Secretarial Order also created within OST, a new Office of Trust Litigation Support and Records. This office is now responsible and accountable for Indian trust records management, and for providing accounting, reconciliation, research, settlement and litigation support related to the management of Indian trust assets, all without the authority to carry out those duties and responsibilities. A Grade 15 career civil servant with no previous trust management experience was hired to manage the new office. This scheme on its face has little chance for success and was recently challenged by a court (see below) as a solution to litigation support document production. It has also been challenged by the Inter-Tribal Monitoring Association and other Indian groups.

The Department's failure to address and resolve the trust record keeping problems jeopardizes the entire reform effort. Without the accurate records required by the Reform Act and common law standards, systems improvements planned for trust fund accounting, asset management and land title and records will be ineffective and will not permit the Department to comply with the accounting, reporting and accuracy standards required by the Reform Act of 1994.

In February 1999 the Department was criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the Bureau of Indian Affairs were held in civil contempt of an U. S. District Court's document production orders. The case underlying the contempt proceeding is essentially a trust administration action in which the Indian beneficiaries seek an accounting. The court has not to this point in the case addressed the detailed statutory and common law trust duties owed by the government as trustee to the individual Indian beneficiaries. Nonetheless, the court noted "it is basic hornbook law that the trustee has the duties of retaining trust documents, keeping records, furnishing information to the beneficiary, and providing an accounting." The court further noted: "the court will appoint a special master to oversee discovery, document production, and related matters and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves." When the Department of the Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities.

The recent record of the Department and the Bureau of Indian Affairs in planning and implementing trust management reform is only the most recent demonstration of their historical failures to bring about meaningful trust management reform. The Reform Act of 1994 called for a Special Trustee and an OST to oversee the reform effort but with no direct authority to ensure that the purposes of the Act were carried out. The Act was flawed in that respect. Despite aggressive oversight activities by the Special Trustee and OST over the last three years, the oversight efforts proved largely ineffective in ensuring that the Department complied with the Act. Nonetheless, the success of OST and OTFM in cleaning up the IIM records and in implementing a new trust funds accounting system demonstrated that significant reform is possible when an office has the responsibility, the authority, the independence and the financial and managerial resources to carry out the reform.

The problems in the trust management systems are longstanding ones. Mismanagement and neglect have allowed the trust management systems, record keeping systems and risk management

systems to deteriorate over a 20 to 30 year period and become obsolete and ineffective. For many of those years, including many years since 1990, the trust programs were seriously under staffed and under funded. The result was that the government increasingly was unable to keep pace with the rapid changes and improvements in technology, trust systems and prudential best practices taking place in the private sector trust industry. That gap has not been closed and the prospects for a timely solution are not very good for the following reasons.

There are three principal causes of the mismanagement and neglect that have contributed to the trust management problems both currently and in the past:

1. The primary cause of the trust management problems both historically and currently can be attributed to the trade-offs of financial and managerial resources which take place at every level of government between trust management activities (trust resource management, trust funds management and land title and records management) and other activities and programs of the Bureau of Indian Affairs, the Department of the Interior, the Administration and the Congress. History has consistently shown these politically expedient government trade-offs of competing financial and managerial resources to be adverse and detrimental to the effective and proper administration and funding of the trust management activities.

These trade-offs have been made and are continuing to be made even in the face of a long history of court cases, which have consistently held the trust relationship between the United States and the American Indians to be a distinctive one. Decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

2. Another important cause of the trust management problems is the way the BIA is organized and manages trust management activities. The BIA's organizational alignment causes decision-making and management for Individual Indian Money (IIM) and Tribal issues to be an intricate and complex coordination process and an ineffective one.

3. The two causes just described acting together over many years have resulted in a third causal factor for the longstanding trust management problems: lack of competent managerial resources to manage effectively and efficiently the trust management responsibilities to the American Indians. Managers and staff of the BIA and DOI have virtually no effective knowledge or practical experience with the type of trust management policies, procedures, systems and best practices which are so effective, efficient and prevalent in private sector trust departments and companies. The BIA area and field office managers do not have the background, the training, the experience, and the financial and trust qualifications and skills, necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. Thus, and through no fault of their own, and even assuming adequate financial resources were made available, they are not capable of managing effectively and efficiently the federal Government's trust management activities on a par with that provided by private sector institutions to their trust customers.

The lack of trust managerial competence and the lack of financial trust orientation and focus throughout the BIA and the Department of the Interior have been institutionalized

over many years and are now inherent in the BIA organizational culture. It is the reason in large part:

A. Why the BIA and DOI have never originated meaningful reforms of the trust management processes in the last 25 years.

B. Why the BIA and DOI have resisted and ultimately failed to implement nearly all of the meaningful reform efforts attempted in the last 25 years.

C. Why a new organizational structure, new management and massive re-training are necessary for the future management of the federal government's trust responsibilities to American Indians and the management of the implementation of the reforms identified in the Reform Act of 1994.

The principal causes of the longstanding trust problems have resulted in conditions that are unacceptable by any reasonable standards and continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and monies. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private.

So long as the organization and management of the trust management activities remain status quo and as long as the trust management activities are mingled with general trust functions and other government programs and activities, it is unlikely that any meaningful reforms will be implemented and unlikely that these activities will receive appropriate allocations of financial and managerial resources sufficient to allow them to be administered according to the high moral obligations and trust and exacting fiduciary standards the United States has undertaken and assumed. Yet the status quo continues.

When the Department of the Interior can no longer be trusted to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department's future management of these important trust activities. For this reason and for the reasons stated above, Congress should consider establishing an agency to manage the U. S. Government's trust management responsibilities to American Indians and American Indian Tribes for:

Trust Funds Management

Trust Land Title and Records Management

Trust Resource Management for IIM accounts

Trust Records Management

These trust activities should be managed according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.

Such an agency should have a structure similar to the independent Federal Reserve Board of Governors or the Federal Deposit Insurance Corporation or the Resolution Trust Corporation. It should have a board of trustees (ideally, with Indian trust beneficiary representation) appointed by

the President and confirmed by the Senate and be subject to the oversight of the Congress and the appropriations process. It should be vested with the responsibility, the authority, the independence and the financial and managerial resources to carry out the purposes of the Reform Act of 1994 and manage the government's ongoing trust management responsibilities to the American Indians. It should be accountable to the American Indian trust beneficiaries and the American public for these trust activities.

IRTC IMPLEMENTATION PLAN

I. TRANSFER OF TRUST AUTHORITY, BUDGETS AND CERTAIN STAFF FROM DOI TO IRTC

ROLE OF THE BUREAU OF INDIAN AFFAIRS, MINERALS MANAGEMENT SERVICE, THE BUREAU OF LAND MANAGEMENT, SELF-GOVERNANCE & 638 TRIBES AND OTHER SERVICERS IN FUTURE TRUST MANAGEMENT ACTIVITIES

At the inception of the IRTC, the duties, responsibilities, budgets and certain staff engaged on behalf of the U.S. Government as trustee in trust resources management, trust funds management and trust land and records management will be transferred to IRTC from the Department of the Interior. This will include all statutory authority, funding and staffing, except as noted below, including those that are in the Tribal Priority Allocation part of the President's Budget.

At inception all authority, budgets and staff of the Office of Trust Funds Management (OTFM) and the Land Title and Records Office along with staff engaged in the operation of the Land Records Information System and budgets will be transferred to IRTC. Employees transferred or hired will be assessed, trained and closely evaluated on their qualifications and performance and replaced as necessary.

Staff of the BIA, MMS, BLM and Self Governance Tribes engaged in the management of Indian land and natural resources, including all pre-lease and pre-contracting activities and lease and contract origination, will remain in place. IRTC will contract with these units and they will serve as service bureaus for the indicated trust services and activities.

BIA & Tribes (Self Governance & 638) and third parties	Land and natural resource management, except post leasing and post contracting activities and records and information system management, unless otherwise contracted.
BLM & Tribes (Self Governance & 638) and third parties	Production verification at lease site for oil gas and coal. Environmental compliance from point of production through closure. includes all current activities except records and information systems management, unless otherwise contracted.
MMS & Tribes (Self Governance & 638) and third parties	Royalty and compliance management for oil and gas, including all current activities except records management and information system management, unless otherwise contracted.

IRTC will delegate certain specified investment or management functions to BIA, BLM, MMS, Self-Governance Tribes and other third parties only after exercising care, skill and caution in:

1. selecting a delegee suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the delegee;

2. establishing the scope and terms of the delegation consistent with the purposes of the governing instrument;

3. periodically reviewing through operational and compliance audits and administrative oversight the delegee's exercise of the delegated function and compliance with the scope and terms of the delegation; and

4. controlling the overall cost and budget by reason of the delegation.

BIA, BLM, MMS, the Self Governance Tribes and other parties that operate as trust servicers and as delegees:

1. will have a duty to the trustee and to the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the delegee from liability for failure to meet such duty is contrary to public policy and null and void.

2. will, by accepting the delegation of a trustee's function from the trustee, submit to the jurisdiction of the Federal district courts or other appropriate jurisdiction and the delegee may be a party to any proceeding in such courts or jurisdiction that places in issue the decisions or actions of the delegee.

3. will operate under the regulations, standards, policies and procedures and the information, accounting and reporting systems issued, established and maintained by IRTC

ITRC will have enforcement and sanction powers similar to the federal banking regulators to address unsafe and unsound trust practices by the trust servicers. These will include the power to enter into formal and informal agreements to assure trust servicers are complying with trust law, rules, regulations and safe, sound and prudent trust practices. Such powers will include the power to enforce sanctions and civil money penalties for violations of cease and desist orders and the power to remove the delegation of authority from trust servicers for cause and transfer such delegation to other trust servicers.

For land and natural resources management activities, existing staff of BIA, BLM and MMS and the Self-Governance Tribes will remain in place at their current locations. Tribes will be assured the same opportunities and authority that currently exist. IRTC managers will sit down with the Tribes to prioritize programs within its jurisdiction, thus assuring Tribal input and priorities are met on a local and area basis. Further, the current opportunities of 638 contracting and Self-Governance Trihes will remain unchanged and fully available to the Tribes.

II. GUIDING PRINCIPLES OF TRUST DELEGATIONS AND OUTSOURCING TRUST MANAGEMENT ACTIVITIES

A federal trustee, like a private trustee, cannot delegate trust responsibility or accountability to the trust beneficiaries. Like a private trustee, a federal trustee, in part, must administer the account in the way a district court judge recently noted in his memorandum opinion holding the Secretary in civil contempt over Indian trust record keeping issues:

> "it is basic hornbook law that the trustee has the duties of retaining trust documents, keeping records, furnishing information to the beneficiary, and providing an accounting."

While all trustees have the duties just quoted, most private trustees delegate the actual management of trust accounts, including trust funds management and trust resource (asset) management and trust records management to others skilled in these fields. To protect both the trustee and the beneficiary the trustee should only delegate certain investment, asset management, record keeping, funds management or other trust activities to third parties (person) only after exercising care, skill and caution in:

1. selecting a person suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the person;

2. establishing the scope and terms of the delegation consistent with the purposes of the governing instrument;

3. periodically reviewing through operational and compliance audits and administrative oversight the person's exercise of the delegated function and compliance with the scope and terms of the delegation; and

4. controlling the overall cost and budget by reason of the delegation.

Persons operating under delegations from the trustee:

1. have a duty to the trustee and to the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the person from liability for failure to meet such duty should be considered contrary to public policy and null and void.

2. have, by accepting the delegation of a trustee's function from the trustee, to submit to the jurisdiction of the federal district courts or other appropriate jurisdiction, and the person may be a party to any proceeding in such courts or jurisdiction that places in issue the decisions or actions of the person.

3. have, by accepting the delegation of a trustee's function from the trustee, to agree to operate under the regulations, standards, policies and procedures and the information, accounting and reporting systems issued, established and maintained by the trustee.

Most private sector banks and trust companies have operated under these general rules for decades.

There is no reason a federal trustee cannot similarly delegate certain trust management activities after exercising care, skill and caution in its delegations under the general criteria just mentioned.

The federal trustee must also be willing to require and ensure that persons with delegated trust authority operate under the second set of general rules as well. In particular, both the federal trustee and the person accepting the delegation must have a clear understanding that the person accepting the delegation must operate under the regulations, standards, prudential best practices, policies and procedures and the information, accounting and reporting systems issued, established and maintained by the federal trustee. There must also be a clear understanding between the federal trustee and the person accepting the delegation that the delegation can and will be withdrawn for cause, i.e., if the delegated function is performed in an "unsafe and unsound" manner as that term is defined by 12 U.S.C. 1818.

Historically, the Department and the Bureau of Indian Affairs have not delegated the many of the Indian trust management activities to tribes or other third parties. Given its record of mismanagement, it can and should delegate to independent, competent third parties the management of most, if not all, of the following trust management activities:

Trust Resource Management

Trust Funds Management

Land Title and Records Management

Trust Records Management

The government could sponsor special training programs with the objective of qualifying tribes under the general criteria cited above to manage their own trust account assets under a delegation from the federal trustee, should they so choose.

Some of these same trust management activities could be delegated to private sector institutions, including tribally owned banks, many of whom have the skills and expertise to undertake the delegations.

In establishing the IRTC, Congress could include a requirement that IRTC delegate as many trust management activities as practical to qualified third parties, with a preference given to qualified tribes who wish to manage their own trusts. This would accelerate the process of self-governance by the tribes. The proposal would not interfere with the tribes' ability to contract or compact for trust functions since the Self-Determination Act and Self-Governance Act would still be applicable to these programs. Like a private trustee, the proposed IRTC would rely on a common set of laws, policies, practices, regulations, a common Trust Fund Accounting System (TFAS), a common Trust Asset and Accounting Management System (TAAMS) and a means through annual audits and reviews and administrative oversight and supervision to assure performance by the Self-Governance Tribes. The Self-Governance Tribes would act as service bureaus under delegated authority from IRTC to provide trust management services for which they had expertise. Thus, increasingly in the future, service bureau management of nearly all of the trust management activities could and should be provided by qualified tribes or American Indians, themselves, under appropriate compacts and contracts, subject to the rules, oversight and supervision of the federal trustee (IRTC).

TESTIMONY OF SPIKE BIGHORN, CHAIRMAN
ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION
ON AMERICAN INDIAN TRUST MANAGEMENT PRACTICES
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE AND THE
SENATE ENERGY AND NATURAL RESOURCES COMMITTEE
MARCH 3, 1999

I am Spike Bighorn, Chairman of the Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. We appreciate this opportunity to submit this testimony for the record of the hearing held on March 3 by the Senate Committee on Indian Affairs and the Senate Committee on Energy and Natural Resources.

Our experience suggests that the problems regarding trust funds are deep and are not close to being solved under current practices. We have trust funds under the control and management of the Bureau of Indian Affairs. The Tribes have never been furnished with an accounting of tribal trust funds from which we could evaluate whether those funds were properly administered. Essential records have been moved, lost and destroyed. The passage of time makes it increasingly unlikely that any tribe will ever secure accountings, much less information from which they may identify losses.

We have also had experience in bringing trust fund mismanagement claims against the United States. Some years ago, when Fort Peck discovered that the BIA had kept for itself the interest earned on trust funds while held in special deposit accounts, the Tribes filed suit in the Court of Claims. The Government responded first by asserting that the suit should be dismissed because the BIA had contracted to do an accounting of these funds. The BIA's contention, however, was false. No accounting was actually being done on the matter. Only after BIA officials were deposed

by our attorneys did the truth come to light. The Court imposed sanctions against the Government for submitting false information to the Court and denied the Government's motion to dismiss.

But that did not speed the litigation. The Government then raised other procedural defenses to the Tribes' claim – including arguments that the Tribes' suit was time-barred even though the Tribes brought suit as soon as they discovered the BIA's practice, and Congress had provided that the statute of limitations will not run on claims relating to trust fund mismanagement until a full accounting is provided. The Court rejected the Government's procedural defenses and then, based on the evidence, held the Government liable for its misappropriation of interest on trust funds and ordered an accounting to determine the amount of damages. The Government continued to resist producing the records necessary to measure the Tribes' loss. Only after ten years of protracted litigation did we obtain access to records, and we are now finally able to report that our case has been settled in a satisfactory manner.

Our experience in trust funds litigation underscores an important point – litigation against the Government on trust funds claims can provide a measure of justice for tribes. At the same time, our experience shows that the Government has maintained its longstanding policy to delay and obstruct such litigation, in a manner that severely impedes the ability of tribes to obtain their day in court and resolve these matters. The contempt finding of the federal Judge in the Cobell litigation was not a minor aberration. Rather, it was a part of a pattern of delay and deception that we have also faced in seeking to resolve our trust fund claims. Perhaps the contempt citation will begin a process of change in how the government handles these claims – but we are far from optimistic in

this regard. Close and ongoing Congressional oversight will in our view continue to be necessary until all these claims are fully and fairly resolved.

Secretary Babbitt, in his testimony before the Committees, not surprisingly sought to minimize the problems of the Department regarding trust funds management. For example, he suggested that the difficulties in managing trust funds arise from the allotment policy at the turn of the century – which has led to severely fractionated ownership of land by individual Indians on many Reservations. To be sure, allotment has complicated matters and has created certain difficulties in administering trust funds for individual Indians. For this reason, the Fort Peck Tribes urge Congress to move forward to address fractionated ownership and land consolidation in a priority manner. At the same time, Secretary Babbitt is wrong in attributing the problems in mismanaging trust funds to the allotment policy. First, the government should be able to manage trust funds for individual Indians notwithstanding fractionated ownership. And second, the allotment policy and fractionation provide the Secretary with no excuse with regard to the mismanagement of tribal trust funds. At Fort Peck, for example, virtually all our tribal lands are owned 100% by the Tribe. But, despite the fact that fractionation is not an issue with respect to tribal lands, we have never been provided with a meaningful accounting for our tribal trust funds. The problems with respect to tribal trust funds must be understood to be management problems of the Interior Department, and not simply a residue from the allotment policy.

Secretary Babbitt also suggested that he was within striking distance of resolving claims for mismanagement of tribal trust funds. While it is true that the Secretary made a proposal in this regard

last year, it is also the case that the Tribes, including the Fort Peck Tribes, strongly opposed the Secretary's proposal. The Secretary's proposal had a number of very critical flaws.

First, the Secretary's proposal for settling tribal trust fund claims is based in very large measure on the erroneous view that the "reconciliation" of tribal trust accounts prepared by Arthur Andersen for the Department of the Interior was an accounting of such funds. The Fort Peck Tribes received one of these reconciliation reports, and it is not an accounting. Nor was it ever intended to be an accounting. The reconciliation was not designed to answer the questions that need to be answered – particularly, how much money have the tribes and individual Indians lost as a result of the Government's mismanagement of trust funds. The reconciliation was designed merely to compare various records of the BIA against various other records of the BIA – as though the issue was the consistency of the BIA's records, rather than the losses that the tribes may have suffered. By failing to focus on the proper issues, the reconciliation became an exercise without a valid purpose. Yet, this is the document on which the Secretary's proposal to settle tribal trust fund claims is primarily based.

Second, the Secretary's proposal would authorize him to submit a proposal to each tribe, based on an undefined formula and data selected by the Secretary. Tribes would be asked to accept or reject the offer – but would not be provided with the accounting needed to determine if the offer was fair.

Third, while allowing tribes to reject the Secretary's proposal and litigate their claims, it

would establish rules to assure that the government would prevail in such litigation. For example, the Secretary's proposal would establish an insurmountable burden of proof on the Tribes. It would reverse established case law regarding the availability of interest for these claims And, it would rewrite the statute of limitations in a manner that would bar many claims that now are viable.

In short, while the Fort Peck Tribes support the development of a legislative mechanism for resolving tribal trust fund claims, the Secretary's proposal to do so is unfair to tribes and accordingly is unacceptable to us. Contrary to the Secretary's suggestion to the Committees, there is a great deal more work that is needed in this regard as well.

At the hearing, Senator Murkowski and others asked why tribes do not simply take their trust funds out of the Interior Department system, and administer their own funds. While we believe that different tribes may have different answers to that question, we would like to address the issue from Fort Peck's perspective. There are two major impediments to our taking our money out of trust. First, we are concerned that if we take our money out of trust, it will impair our ability to be made whole with respect to claims for trust fund mismanagement. We recognize that under the American Indian Trust Fund Management Reform Act, if a tribe voluntarily takes its money out of trust, the tribe is not deemed to have accepted the balance as accurate, or to have waived any claims. While this is a good provision as far as it goes, we remain concerned that, as a practical matter, if we take our money out of trust our efforts to obtain a full accounting for past mismanagement will be further impeded. If the Department resists providing records and accountings for those who are still within the trust system, we would expect even diminished cooperation for a tribe that has chosen to forego

the Interior system altogether. In other words, we are concerned that if we take our money out of trust, there may be still further adverse consequences. And second, we feel that taking our money out of trust is a step that requires a measure of professional advice. With all the various investment options available to tribes, we would not want to take our money out of trust without thorough planning and investigation of those options. While the Reform Act permits tribes to take their money out of trust, it does not provide any mechanism for encouraging tribes to do so, such as providing a vehicle for tribes to obtain the needed investment advice. We believe that if the Reform Act was amended to provide such incentives, many more tribes would seriously consider taking their money out of trust – and the government could save considerable money in the long run.

Finally, we would like to express our appreciation for the interest in this issue expressed by our own Senator Burns. During the course of the hearing, Senator Burns raised the question of whether it would be appropriate for the costs of administering trust funds to be paid out of the trust funds themselves. While we share Senator Burns' frustration regarding the cost of fixing the problem of trust fund mismanagement, we feel strongly that those costs should not be shifted to the tribes. The federal government has a special obligation to tribes and individual Indians – a responsibility arising out of the Constitution, treaties, Acts of Congress and a course of dealings spanning the centuries. Unfortunately, as this hearing reaffirmed, the federal government has in very fundamental ways failed to live up to its responsibilities with regard to the management of trust funds. The government has been unable to account for these trust funds, and when called upon in court to provide documents, has failed to provide those documents and has engaged in a pattern of deceit and coverup. It was the federal government, not the tribes, which has mishandled the trust

funds. It would therefore be grossly unfair (and in our view illegal) for the tribes now to be forced to pay out of their own funds to clean up the mess created by the federal government. The federal government should not be permitted to squander the trust assets of the tribes and individual Indians, and then be relieved of its responsibility to fix the matter by shifting the cost to the tribes.

In conclusion, we believe there is much that needs to be done on all fronts with respect to the trust funds issue. The Fort Peck Tribes appreciate the ongoing interest of both Committees on these critical issues, and we look forward to working with you to resolve these matters.

TESTIMONY OF JOSEPH PAKOOTAS, CHAIRMAN
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
AND THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
MARCH 3, 1999

I am Joseph Pakootas, Chairman of the Confederated Tribes of the Colville Reservation Business Council. We appreciate the opportunity to submit this testimony for the record of the hearing held on March 3, by the Senate Committee on Indian Affairs and the Senate Committee on Energy and Natural Resources.

The problems that have plagued the Department of the Interior's management of Indian trust funds are well-known and we do not seek to repeat them here. Following extensive consideration of those issues Congress, in 1994, sought to implement reforms by enacting the American Indian Trust Funds Reform Act. As part of this, the Act created an Office of Special Trustee for American Indians, to oversee and coordinate reforms with respect to the Interior Department's trust functions The Act, and the creation of the Office of Special Trustee, were intended to ensure accountability to tribes and individual Indians regarding the administration of their trust funds.

We appreciate Congress' continuing commitment to these goals, and the interest that the members of the Committees have taken in seeing that they be accomplished. But we are very concerned that Interior's actions on trust fund management fall far short of the standards that Congress has set.

In considering the need for effective trust fund management reform, it is important to understand the extent to which many Indian people depend on the income that is generated by their

trust property and the importance of proper management of those funds. In his testimony before the Committees, Secretary Babbitt noted, as an example of the difficulty in accounting for Indian trust funds, that the income generated by a very fractionated interest in trust property held by Assistant Secretary Kevin Gover is only 7¢ per year. There is no question that the allotment policy has resulted in the severe fractionation of trust land ownership which has complicated the administrative burdens for record-keeping. The Colville Tribes agree that measures should be considered to deal with fractionated lands. However, Secretary Babbitt's example does not accurately reflect either the amount or importance of trust income to many other Indian people, much less excuse the government from its obligation to properly manage the income generated by trust land. Unlike Mr Gover's situation, for many of our tribal members, especially those living in poverty, the income from trust property -- even if only a few hundred dollars a year -- makes a very substantial difference in their quality of life. These funds are used to pay rent, cover utility bills, or purchase food or clothing. Proper management of these funds is thus essential.

The Colville Tribes are very concerned that there has been a complete breakdown in the lines of communication between the federal agencies and tribes, and indeed even within the federal government itself regarding trust fund management reform Instead of accountability to the trust beneficiaries, there seems to be a concerted effort to shift responsibility and blame for failure to account or to implement the necessary reforms between various federal offices -- the Secretary of the Interior, the Office of Special Trustee, the Office of Trust Funds Management, and the Department of Justice. It appears that no agency or office has been willing to assume responsibility, much less give the Tribes an accurate description of the problems in the field that are still left unresolved, let alone solutions to these problems. As a result, the Tribes have no practical measure

of where we are in the trust funds reform effort.

An example of the breakdown meaningful communication can be seen in the serious problems that our tribal members have faced as a result of the process by which the Office of Trust Funds Management has sought to create a centralized records-keeping system. We understand that under the current plan, all trust fund accounting records are to be maintained at a single site in Albuquerque, and that the information from those records will -- at some point -- be networked so that access to the data would still be available locally to tribes and the agencies or area offices, with information and communication transmitted electronically. While we certainly can appreciate the potential advantages that may be realized from a centralized records system, the process by which this has been implemented has resulted in severe hardship to many of our tribal members.

Specifically, the Office of Trust Funds Management has physically removed essential trust fund accounting records that have long been maintained at the Agency office from the Agency to Albuquerque. The staff at the Agency relies on these records on a daily basis to process individual tribal members' requests to withdraw funds from their accounts. But while the Agency's records have been transferred to Albuquerque, the computer network for electronic access to them is not yet in place. This has resulted in very substantial delays in the BIA's ability to respond to and process individual Indian requests to withdraw trust funds from their accounts. Before the records were moved to Albuquerque, the local BIA agency would process and pay a voucher request for a tribal member within 24 hours from the time the person submitted the request. Now, the time line for processing a voucher request is at least five days and has been as high as fourteen days. This money is not the government's, but belongs to individual tribal members. For many of our members, access

to these funds is essential to meet basic living expenses. Five days is simply an unacceptably long time to wait for money needed to pay rent, or buy food. The Agency's need for timely access to these records should have been considered and addressed in a plan before the records were moved.

Further, while we can appreciate the potential advantages to centralized record-keeping, we remain concerned that the physical removal of records from the Agency to Albuquerque will not improve trust fund record-keeping, but worsen it by increasing the risk that essential accounting records will be misfiled, lost, or destroyed in connection with the transfer. This has occurred all too often in the past when records have been moved from Agency to Area Offices, and then to archives and other storage facilities nationwide.

Our concerns about the manner in which reforms are being implemented extend to other projects now underway. For instance, the Bureau of Indian Affairs is undertaking to implement a new trust assets management system called TAAMS – Trust Accounting Assets Management Systems. This new system will require the conversion from the existing two major asset management systems that are currently in use at the local level. No one has explained to the Tribes the benefit of this new consolidated system over the existing systems or what difficulties might be expected when this system is brought on line. It is unrealistic to anticipate that there will be no problems with a systems conversion such as this. Thus, the Tribes want an overview of what problems are anticipated and what will be done to address these problems in the event they do arise. The Tribes do know that a system is only as good as the data in the system. And to date, no one has developed any process that will guarantee that the information inputted into the TAAMS will be accurate. Thus, the Tribes have serious concerns that the TAAMS will be yet another costly failure

in legacy of the government's conduct in this area.

A number of other issues were raised during the hearing held on March 3. Among these, was discussion of the possibility of creating a new agency outside the Department of the Interior to oversee trust funds management. At this time, the Colville Tribes oppose creating a new agency to oversee this activity. It is simply not clear how the transfer of the trust fund management functions to a new agency will avoid the problems that have otherwise plagued Interior. Further we are very concerned that the creation of a new agency will simply result in yet another federal office that will disclaim responsibility for problems regarding trust fund management and seek to shift accountability elsewhere

The Tribes recognize that there are serious problems with Interior's handling of trust fund accounts. But the solution must come from the establishment of concrete measures that will create incentives to accountability, with strong oversight on implementation of reforms, meaningful communications with the Tribes regarding those measures, and the imposition of real sanctions for breaches of trust. We believe that this can be done by strengthening the provisions of the 1994 Trust Fund Reform Act and the Colville Tribes stand ready to work with Congress to develop such measures. The solution, however, will not come by simply moving the problems to some other agency in the hope that it will have a better result.

We would like to thank the Committees for the opportunity to submit this testimony and urge you to remain vigilant in your oversight of this matter.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR - 6 1999

Honorable Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Chairman Campbell:

This is in response to your letter dated March 18, 1999, concerning matters raised in the March 3, 1999, joint hearing concerning American Indian Trust Management Practices and subsequent actions of the Department.

Your letter referenced the certification process for the FY 2000 budget submission required by the American Indian Trust Fund Management Reform Act of 1994. In reviewing our records, the Office of the Special Trustee has not located any certifications executed by the former Special Trustee, Mr. Paul Homan, during his tenure. When the issue was raised at the March 3 hearing, the Acting Special Trustee, Thomas Thompson, complied that day with the certification provision. The Department provided the Committee with a copy of his action.

Your letter indicates that the certification signed by Mr. Thompson on March 3 is at variance with concerns expressed by him in a July 30, 1998, note to then Special Trustee Homan. There is no contradiction in the two documents. As required by the Reform Act, the March 3, 1999, certification deals with the adequacy of the Department's FY 2000 funding request to continue to carry out approved portions of the "comprehensive strategic plan" as modified and documented in the High Level Implementation Plan.

In contrast, Mr. Thompson's note of July 30, 1998, was an expression of concern about BIA's project approach, a concern which is shared throughout the Department. As the Secretary has stated, we are attempting to address issues and problems that have taken more than a century to evolve. Our plan for dealing with this situation is very aggressive and as such has some inherent risks. We have chosen to be very open about the risks and our resolve to address them head-on, rather than to passively allow the conditions to worsen.

As the Secretary has stated, he is determined to implement these reforms on his watch. We have a budget request now before this Congress that will bring forward the reforms, including new

systems, data cleanup and related support activities. Contracts with leading private sector firms to replace the Department's key trust management systems are already in place. If the requested funding is provided and the June, 1999 pilot of the Trust Asset and Accounting Management System is successful, the Department is scheduled to complete its fundamental systems reforms by the end of 2000.

We need the full support of the Congress lest this window of opportunity for reform close without having realized its full potential. I urge your support.

Identical letters have been sent to the Honorable Daniel K. Inouye, Vice Chairman, Senate Committee on Indian Affairs, as well as to the Honorable Frank Murkowski and Jeff Bingaman, Chairman and Ranking Minority Member, respectively, of the Senate Energy and Natural Resources Committee.

Sincerely,

John Berry
Assistant Secretary for Policy,
Management and Budget

March 10, 1999

Honorable Ben Nighthorse Campbell
Attn: Eleanor McComber
838 Hart Senate Building
Washington, D.C. 20510

Dear Senator Campbell:

This letter is in response to your invitation to submit written testimony for the record on the American Indian Trust Management Practices in the Department of the Interior Hearing held on Wednesday, March 3, 1999. I specifically request a field investigation by the Committee in Oklahoma as approximately 51 percent of oil and gas leases on trust or restricted Indian land is in Oklahoma. Because of my personal experience and family history I submit my statement as follows:

I am a grandson of Moses and Frances Bruno, full blood Citizen Potawatomi Indians, who received an allotment of land in Oklahoma in the late 1800's. My grandparents lived, farmed and raised a family on their allotment. This allotment first came under an oil lease in 1923 by Cosden Oil Company. The lease was transferred to Mid-Continent Petroleum Corp. in 1928.

Moses and Frances Bruno were very poor. They struggled to raise a family on their 80 acre allotment. In 1928 the local agency put out for bid ½ of Moses Bruno's ⅛th oil royalty interest. (See attachment #1). An appraisal was done by the United States Geological Survey (U.S.G.S.) as is required by regulations. The U.S.G.S. valued the mineral interest on Moses Bruno's 80 acre allotment at $400 per acre or a total of $32,000. (See attachment #2.)

Apparently no bids were received and A.W. Leech, Superintendent of the Shawnee Agency wrote to Washington stating that various oil companies have objected to submitting bids on the tracts offered due to the 10 year provision of the lease. Mr. Leech asked that the terms of the royalty be modified and asks authorization to readvertise without the 10 year restriction.

Then a most disturbing thing happened. Twenty acres of Moses Bruno's original allotment was taken out of trust and a Patent in Fee was issued to the purchasers, Mr. H. E. Hurford & Chas. Wells. M.E. Hurford was a local oil man and Chas. Wells was a local attorney. Hurford & Wells paid $1,311 or $66 per acre for the 20 acres. (See attachment #3.)

Just a short seven months prior to this sale the U.S.G.S. valued the royalty interest on Moses Bruno's allotment at $400 per acre. Yet Hurford & Wells were allowed to purchase surface and mineral rights on this 20 acres for $1,311. The mineral rights alone were valued at $8,000 on this 20 ($400 per acre x 20 acres = $8,000). The surface was valued at approximately $75 per acre. So Hurford & Wells were allowed to purchase the 20 acres valued at $9,500 for $1,311.

Everyone knew the value of that royalty. The Department of the Interior knew. The Shawnee Agency knew. The District Engineer of the U.S. Geological Survey knew. Mid-Continent Petroleum Corp. knew. Hurford & Wells undoubtedly knew. Yet the sale was allowed to proceed for a fraction of the actual appraised value of the royalty. WHY?

Not long after Hurford & Wells were allowed to purchase this 20 acres below the appraised value Mid-Continent Petroleum Corp. drilled an oil well on that 20 acres. This oil well was named the Moses Bruno #1. **The oil well that was drilled so long ago on that 20 acres still pumps to this day.** But, of course, Moses and Frances Bruno did not receive any royalty payments from this oil well. The land and mineral rights had been sold by the Shawnee Agent for far below the appraised value.

Department of Interior regulations at the time and presently state that the sale of Indian land cannot be for less than the appraisal value. The U.S.G.S. appraised the royalty on Moses Bruno's allotment at $400 per acre. Why did the local Indian agency allow the sale for $66 per acre?

This act alone by the local agent had a dramatic effect upon Moses and Frances Bruno's life and property. It was like a domino effect. Many things happened and were done that would not have been necessary if the local agency acting on behalf of the Department of the Interior had done what it was suppose to do. There were laws in place at that time that made it the government's duty to protect minerals on federal and Indian lands.

There are many, many more transactions conducted by the local agency on behalf of the Department of the Interior that were harmful to my grandparents. There are many other letters being sent to you by other members of the family that detail other questionable or illegal transactions conducted by the Shawnee Indian Agents.

My grandparents Moses and Frances Bruno died penniless and on old age assistance due to the incompetence and mis-management of the Shawnee Indian Agents acting on behalf of the United States Government.

Sincerely,

Leon Bruno

Leon Bruno
Rt 1 Box 295A
Tecumseh, OK 74873

Attachments

ATTACHMENT #1

MINERAL RIGHTS INDIAN LAND FOR SALE.

Sealed bids will be received at the Office of the Supt., of the Shawnee Indian Agency, Shawnee, Oklahoma, until 2 o'clock P. M. Thursday, October 25, 1928, for the sale of undivided mineral interests on the following allotments:

Mary Delonais, nee Shopwetuah, Citizen Pottawatomie allottee No. 532, an undivided one-half of the lessor's one-eighth royalty interest of oil and gas, covering the W/2 of the NW/4 of Section 11, township 8 North, Range 4 East of the Indian Meridian, containing 80 acres. Appraised at $4,000.

Mary Acton, Citizen Pottawatomie allottee No. 80, an undivided 1/4 of the lessor's one-eighth royalty interest of oil and gas, covering the NE/4 of Section 7-8N-5E of the Indian Meridian, containing 160 acres. Appraised at $6,000.

Moses Bruno, Citizen Pottawatomie allottee No. 108, an undivided one-half of the lessor's one-eighth royalty interest of oil and gas, covering the E/2 of the SE/4 of Section 31-7N-5E of the Indian Meridian, containing 80 acres. Appraised at $16,000.

Enos Rhodd, Citizen Pottawatomie allottee No. 221, an undivided 1/4 of the lessor's one-eighth royalty interest of oil and gas, covering the SE/4 of the SE/4 of Section 32-7N-5E, containing 40 acres. Appraised at $3000.

It is understood that title to such above royalty interests if sold shall run concurrently with the lease which is for a period of 10 years and as much longer thereafter as oil and gas shall be found in paying quantities.

All bidders are invited to be present at the opening of bids.

Each bid must be accompanied by a draft, or certified check on some solvent bank, and made payable to A. W. Leech, Superintendent, in the amount of not less than 10% of the bid offered, same to be as a guaranty of the bidder's faithful performance and fulfillment of his bid. The balance of the bid will be required within three days after the bid is accepted by the Indians, and the 10% deposit will be forfeited to the owner of the land, should the bidder fail to complete his bid within three days from the date he is notified of the acceptance.

Bids must be enclosed in a sealed envelope and marked "BIDS ON INDIAN LAND", and date to be opened, on the outside of the envelope. The successful bidder will be required to pay the cost of

advertising, which in no case will exceed $2.50 and in addition, he will be required to pay a $20.00 land sale fee. No bids will be considered for less than the appraised value.

The right is reserved to reject any and all bids, and the sale is subject to the approval of the Department at Washington, D. C.

A. W. Leech

A. W. LEECH
SUPERINTENDENT.

ATTACHMENT #2

L 046
45238-28
ECC

The Honorable

SEP 24 1928

The Secretary of the Interior.

Sir:

There is transmitted herewith a letter from the Superintendent of Shawnee Indian Agency requesting authority to advertise and sell an undivided one-half of the lessor's one-eighth royalty interest in and to an oil and gas lease on the allotment of Moses Bruno, covering E½ NE¼ of section 31, Twp. 7 N., R. 5 E.

The records show that there is an oil and gas lease on the allotment of Moses Bruno, approved December 18, 1923, in favor of Carson Oil and Gas Company, and that the lease is now owned by the Mid-Continent Petroleum Corporation.

In justification of his request the superintendent states in part as follows:

"There is an oil well at present being drilled about one mile from this land and if this should not be a producing well, royalty on his place would not be worth very much, while on the other hand, if it should be a producer, he would still have 1/2 of the royalty, which would bring him sufficient income for any needs he might have."

The superintendent enclosed a letter from Richard T. Bright, District Engineer, Geological Survey, wherein he estimates the royalty valuation on the Moses Bruno allotment at $400 per acre. On this basis one-half of the one-eighth royalty interest on the Moses Bruno allotment would be $16,000. In view of the foregoing, it is respectively recommended that the superintendent be authorized to offer for sale to the highest responsible bidder an undivided one-half of the lessor's one-eighth royalty interest in and to the oil and gas lease on the allotment of Moses Bruno, with the understanding that the title to such royalty interest, if sold, shall run concurrently with the lease which is for a period of 10 years and as much longer thereafter as oil and gas shall be found in paying quantities; also that the appraisement of the Geological Survey be considered as a minimum.

Respectfully,

C. J. Merritt

Assistant Commissioner.

AUTHORITY GRANTED as recommended: SEP 26 1928

Signed John H. Edwards

Assistant Secretary.

A. H. HURFORD
RESIDENCE PHONE 868-W

G. A. MALSBURY
RESIDENCE PHONE 1809

HURFORD & MALSBURY

REAL ESTATE LOANS
OIL AND GAS LEASES AND ROYALTIES
PHONE 1500
ROOMS 5-6 STATE NATIONAL BANK BLDG

SHAWNEE, OKLA., Sept. 6- 1939.

Mr. A. W. Leech, Supt.,
Shawnee Indian Agency.,

Dear Sir, on June 28 th.among other bids, We bid$1311.00 on the Moses Bruno estate, viz. W/2 of S.E/4 of the S.E/4 Sec. 31-7-5.

Thie was the highest and best bid and we were imformed later that the bid had been accepted, and on July 27 th.We sent You draft for the balance of the consideration, $1201.90

We have not received Our deed yet, and We are wondering when We can reasonable expect to receive the same, or if there is any special cause for the delay.

We will appreciate Your advice on this matter, Very Resp. Yours,

Hurford & Wells,
By- A. H. Hurford

CHAS. E. WELLS
ATTORNEY AND COUNSELLOR AT LAW
ELKS BUILDING - PHONE 884
SHAWNEE, OKLAHOMA

July 29, 1929

Mr. A.W. Leech, Supt.,
Shawnee Indian Agency,
Shawnee, Oklahoma.

Dear Sir:

IN RE: THE PUBLIC SALE OF THE WEST HALF OF THE SOUTHEAST OF THE SOUTHEAST OF 31-7-5.

We herewith enclose Cashier's check for $1201.90 which we understand to be the balance due in connection with the sale of this land. If this amount is not correct, will you kindly advise us.

When the patent finally issues, it should be issued to A.H. Hurford or Alonzo Hurford and Chas. E. Wells as we were joint purchasers of this tract.

Very truly yours,

Chas. E. Wells

O.K. - Refund #89627 Aug. 1, 1929

Land Sale 8 Special

CEW/dv
Enc.

Moses Bruno
Land balance 1179.90
20.00
Sale fee 2.00
1201.90

March 10, 1999

Honorable Ben Nighthorse Campbell
Attn: Eleanor McComber
838 Hart Senate Building
Washington, D.C. 20510

Dear Senator Campbell.

This letter is in response to your invitation to submit written testimony for the record on the American Indian Trust Management Practices in the Department of the Interior Hearing held on Wednesday, March 3, 1999. I specifically request a field investigation by the Committee in Oklahoma. Becasuse of my personal experience and family history I submit my statement as follows:

I am a direct descendant of Moses and Frances Bruno, Citizen Potawatomi Indians, who received land allotments in Oklahoma in the late 1800's. Moses and Frances Bruno were full blood Potawatomis. Shawnee Indian Agency records and family oral history indicate that Moses and Frances did not drink, were devout Catholics and were hard working members of the Potawatomi Indian community. Moses and Frances Bruno lived, farmed and raised a family on Moses allotment.

Family oral history has long contended that transactions conducted by the local Indian agency on behalf of Moses and Frances Bruno did not add up My family has done extensive research into Moses and Frances Bruno's allotment and records. What we found was far worse than was suspected by the family.

On September 27, 1935 John M. Alden, U S. Department of the Interior Geological Survey, wrote a letter to Mr. Hale B. Soyster, Chief Oil and Gas Leasing Division, Washington, D.C., informing him that there was a problem with the Superintendents of all Indian Agencies that had oil and gas activity within their jurisdiction
Mr. Alden's letter stated that there are many examples of Indian Agents unprofessional manner of handling monies that belong to Indian people. He wrote that the agency employees are inexperienced and unfamiliar with the details of proper royalty accounting. This example

is included to show that the inadequacies of all Indian Agents were evident to other professional organizations who observed the gross mismanagement and reported it. If the plan outlined in Mr. Alden's letter had been followed, maybe there would not have been the mess we now have. Furthermore, when it comes to fixing the mess, this plan could be the basis for solving the problem.

This is just one of many examples of careless, unethical practices that Indian people endured at the hands of the U.S Government. Moses and Frances Bruno died penniless and dependent on Old Age Assistance, due to the incompetence and mismangement of the Shawnee Indian Agency acting on behalf of the U.S Government.

Sincerely,

Robert L. Bruno

Robert L. Bruno II

See attachment

C
O
P
Y

UNITED STATES
DEPARTMENT OF THE INTERIOR
Geological Survey

September 27, 1935

Mr. Hale B. Soyster
Chief, Oil & Gas Leasing Division
U. S. Geological Survey
Washington, D. C.

Dear Mr. Soyster:

With your letter of September 21, 1935, you forwarded copies of a form letter signed by the Assistant Commissioner of Indian Affairs presumably to be addressed to the superintendents of all Indian agencies having oil and gas activities within their jurisdiction. The form letter directs that all royalty payments are to be made direct to the appropriate superintendent and not be routed through the Geological Survey office for recording. You request that we submit justification for the routing of these payment through the supervisor's office, along with an outline of the manner and detail in which the accounting work should be handled.

First, I would like to make a few brief comments on the Assistant Commissioner's form letter. It appears that some of the statements contained therein are based on a misconception or misunderstanding of the manner in which the matters discussed are handled by the Survey. It is stated "That no additional protection will be afforded the interests of the Indians by having payments routed through the supervisor." This will be shown to be erroneous by some outstanding examples which are given later in this report. It is also stated that "the practice might be subject to technical objection by the Comptroller General as the royalties are individual Indian monies and Survey representatives are not bonded for the purpose of handling such transactions." In reality the Survey representatives do not handle remittances for royalties and rentals any more than any clerk in the office of a superintendent of an agency and these clerks, of course, are not bonded. The checks, money orders, or whatever form the remittances may take, are always made payable to the superintendent, or in the case of the Five Civilized Tribes, to the Cashier, are mailed to the supervisor's office, recorded and immediately forwarded the same day to the appropriate Indian agency. Since the remittances are always payable to the representative of the Indian Service no representative of the Survey can deposit, disburse, or cash any payment made, hence there is no necessity for them being under bond. The situation is exactly the same as has prevailed since

October, 1933, whereby all rentals and royalties due on public land leases are paid through the proper Geological Survey office and in turn transmitted by that office direct to the General Land Office.

In April, 1931, the Geological Survey inaugurated the determination of royalties due on all producing leases under the Pawnee, Shawnee, Kiowa, and Cheyenne & Arapaho Indian agencies in Oklahoma, and on November 1, 1934, at the request of these agencies, following instructions issued by them to all lessees within their respective jurisdictions, the Survey began receiving and recording rental and royalty payments. The survey endeavored to obtain from these agencies lease balances that had accrued between April, 1931 and November 1, 1934. This they were unable to do and in order to ascertain these balances it was necessary for the Survey to make an audit of agency records. This information was desired in order that we could correctly inform each agency of the exact status of each lease account and thus make our records more valuable to them. In making this audit many irregularities were discovered and I wish to emphasize that these irregularities and discrepancies occurred during a period when the Survey was determing royalties only and did not receive any of the remittances for royalties or rentals nor any information relative thereto. I emphasize this to show what happens when the Survey is not furnished complete information. A few of these irregularities are cited below:

The Department has ruled that the amount of advance royalty is the minimum amount required on a producing lease. A number of instances were discovered in which large acreages were being held by a very small production royalty. No record had been made at the agency of the advance royalty deficiency and no effort was being made to collect any amounts due by reason of annual production royalties being less than the advance royalty. Advance royalty deficiency balances accrued from April, 1931 through October, 1934, amounted to approximately $1100. There is positive evidence that a much greater amount is due as advance royalty prior to 1931, however, it appears improbable that the balances can be collected as it is believed impossible to determine the amounts due from agency records without Survey records as a guide.

Under the system of accounting used by the Survey the lease accounts are charged with the advance royalty in advance as stipulated in the lease and the advance royalty balances are adjusted currently as production royalties are paid. Under this

method the superintendents are informed each month by the Survey of the exact balance due on each lease.

A certain lease producing oil was also producing and selling casinghead gas to a gasoline plant. In the audit it was discovered that no casinghead gas royalty had ever been paid on the lease. Production began in 1929 and the accrued casinghead gas royalties amounted to approximately $900. The fact that oil royalties were being paid currently appears to have satisfied the demand of the allottee and income from the lease and the casinghead gas royalties were being entirely overlooked.

One lease had ceased producing in the seventh year of the term of the lease. The lessee did not surrender the lease and did not pay the rentals and advance royalties as they accrued. When the 1935 rentals and advance royalties became due an investigation was made by the Survey revealing that rentals and advance royalties amounting to approximately $260 were delinquent. Four other leases that have not been cancelled and on which rentals and advance royalties have not been paid for preceding years have been discovered. These discoveries are made by current rentals and advance royalties becoming delinquent and leading to an investigation of previous rentals and advance royalties. These four cases were discovered in a nine months period and it is probable that other discoveries could be made in the next three months as rentals and advance royalties have been paid through this office on approximately nine-twelfths of the leases.

In the several instances of payment of incorrect amounts of rentals and advance royalties discovered by the Survey, it has been noted that the amounts due for previous years were likewise incorrectly paid and that the errors were not detected by the Indian agencies. In the course of examining individual Indian money accounts to ascertain balances as of November 1, 1934, it was discovered that royalties paid for certain leases had been erroneously credited to the allottee of another lease. The royalties incorrectly credited totalsd approximately $1800. Payments passing through the Survey are verified for correctness as to the lease for which the payment is extended; the remittances, therefore, are pre-audited to this extent before the agency receives them and lessens the likelihood of error in distributing the monies to the proper individual Indian account. The above instances of payment being credited to the wrong accounts would indicate that this pre-audit is a valuable service to the Indian Agency in this respect alone. All remittances are inspected soon

after they are received. If it is discovered that a check is incorrect, adjustment of the error usually can be secured by direct contact with the lessee as a large majority of rental and royalty checks for Oklahoma Indian leases originate in Tulsa. Particular care is given to forwarding payments on the same day they are received. Our record to date in this matter is that all checks have been forwarded to the proper agency or to the payor for correction the same day that they were received.

The Indian agencies do not have an adequate accounting set-up, particularly with respect to royalty and rentals due and royalties and rentals paid. This is the natural result of inexperience and unfamiliarity with the details of proper royalty accounting. This condition is undoubtly responsible for some of the irregularities and discrepancies above cited. The system of accounting used by the Geological Survey may be compared to the system used by all progressive commercial companies and the major oil companies. When merchandise is sold a charge is made against the purchaser of the merchandise; when payment is made credit in the amount of payment is given to the purchaser's account. The work of the Survey follows exactly in these two distinct channels. The amounts of royalties and rentals are determined, observing carefully all lease terms and regulations. The amounts so determined are then charged to the lease account. A complete and accurate record is made of monies paid through this office and credit is given to the proper lease account. The need for adequate lease records can be better appreciated when it is considered that over fifty percent of the oil royalty payments now passing through this office are incorrect. In a large number of cases differences cannot be collected as they are discovered. In the event of an appeal by the lessee it may be a year or longer before collection can be made. During the time the difference is in controversy, prudent administrative practice would require that a permanent and accurate record of the amounts due be made.

It is believed that discontinuing of lease accounts by the Survey would unquestionably be a step backward in the administration of Indian leases. The royalties and rentals may be carefully determined but this function alone is worthless unless the records are made that are necessary to insure collection of the amounts due. The cooperation of the Geological Survey with the Indian agencies has lead to the correction of many irregular practices on leases under the jurisdiction of the four Western Oklahoma Indian agencies. The progress was slow at first because of lax royalty requirements in the past. At present progress is handicapped because of the attitude taken by lessees that they can pay royalties on a basis not consistent with lease terms and regulations to one agency

in Oklahoma without complaint and that they should be permitted to do the same on leases under the jurisdiction of the Western Oklahoma Indian agencies. This attitude is encountered so frequently that it points conclusively to the fact that compliance with lease terms is not being required by that one agency.

The typical cases cited earlier in this letter are examples of errors that may be aliminated in the future by continuing the present system. It has been our observation that thekeeping of these records is a work that is best handled by an organization specializing in the administration of oil and gas leases and having actual contact with field conditions through technically trained men.

As previously stated, all public land royalties and rentals are routed through the appropriate Survey office for transmittal to the General Land Office in Washington and a record of lease accounts is kepy by that office. Presumably the General Land Office is adequately equipped from a bookkeeping standpoint to handle the accounts accurately. You will recall, however, that so many differences are being discovered between the balances determined by the General Land Office and the balances as determined by this office that the correspondence on differences became so voluminous that it was necessary for you to instruct us to correspond directly with the General Land Office. In this connection it might be mentioned that because of our close contact with public land leases and our specialized work on oil and gas leases only a small number of these differences have proved to be errors in the records of this office.

The Assistant Commissioner's letter of September 16th states that information on payments may be obtained by the lessee furnishing copies of lettems of transmittal to the Geological Survey. It is believed that this source of information would be very unsatisfactory and place an unnecessary burden on the oil companies holding these leases. In other words, if this procedure is followed we would require the oil company to report to the agency and furnish a deuplicate report to the Survey. Any records that might be kept using the letter of transmittal as evidence of payment obviously would not be dependable and, therefore, of no value to this office or the superintendents.

In connection with the manner and detail in which the accounting work should be handled, I suggest and recommend that the procedure as outlined which is now followed in part in the Five Civilized Tribes jurisdiction and in full in all of the agencies in Oklahoma except Osage, be observed for all Indian lands except Osage:

First, that the quintuplicate copy of all approved leases be furnished your office by the Indian office and in turn transmitted by you to the appropriate Survey field office.

Second, that the lessees be required as provided in the lease form of October, 1933, and the Secretary of the Interior's order No. 731, to furnish to the supervisor copies of all run tickets, tank tables, production reports and all other data necessary to the Survey in determining royalties.

Third, that all royalty and rental payments be routed through the Survey for recording (this will be absolutely essential in any cases of unit operation).

Fourth, that all royalty and rental payments be transmitted promptly by the supervisor to the appropriate Indian agency superintendent.

Fifth, that the supervisor furnish each agency superintendent a monthly statement in detail of all royalty and rental due each month and a report of all payments that have been routed through the office.

Sixth, that the supervisor's office will periodically compare or audit the agency records with the Survey records.

As stated, all of the foregoing is now being done by this office for the four Western Oklahoma agencies and only requires the services of one petroleum accountant. If a ~~xingix~~ similar service is rendered to the Five Civilized Tribes Agency possibly two additional oil accounts would be required by reason of the large number of producing leases in that jurisdiction. If the foregoing suggestions are not placed in full effect in the Five Civilized Tribes jurisdiction, it is recommended that we discontinue any activities whatsoever for that agency and confine our efforts entirely to the four Western Oklahoma agency jurisdictions where Survey superivision is deisred. As requested, a complete set of forms for royalty and rental accounting for a typical lease is enclosed. In connection with this matter I am enclosing for your information copy of a letter from the Assistant Superintendent of the Five Civilized Tribes Agency dated September 24, and a copy of my reply thereto dated September 26, Both of these letters are self-explanatory.

Yours very truly

JOHN M. ALDEN

JMA:IK

Chinook Indian Tribe

Chinook Nation

The Honorable Ben Nighthorse Campbell
Chairman, Indian Affairs Committee, Room 838
Hart Senate Office Building
United States Senate
Washington, D C. 20510

March 18, 1999

Re: Senate Oversight Committee Hearings; Dept. of The Interior Mismanagement

Dear Chairman Campbell;

I am writing on behalf of the Chinook Indian Tribe (of Washington State) concerning the record of the recent Joint Oversight Hearing on the Trust Management Practices in the Dept of the Interior.

The Chinook Tribe strongly supports a full investigation of the Department of Interiors' mismanagement of tribal and individual land and related trust resources

Less than one year ago the Portland Area Office, BIA contracted (or compacted) with the Quinault Tribe to "transition" its services from the BIA, thus resulting in a Quinault tribal reservation wide management of resources. The history of the Quinault Reservation is unique in that it was enlarged and set aside for several tribes of Washington State. These tribes were the Chinook Tribe, Chehalis Tribe, Cowlitz Tribe, Hoh Tribe, Makah Tribe, Quiluete Tribe, Shoalwater Bay Tribe as well as Quinault. This reservation was created and allotted for these tribes' members. See Halbert v. U.S. 283 US 753 (1931) Some 52% of allotments issued on the Quinault Reservation were issued to members of the Chinook Tribe.

The U.S. Dept. of the Interior has already mismanaged the reservation treaty trust resources, such as poor logging practices, unfair stumpage prices of timber, not allowing an allottee to be allowed a fair market bid (right to meet a highbid) for timber profits, etc This matter was litigated for several years in the U.S. Court of Claims in a bitter fight which resulted in a settlement of multi-millions of dollars in damages in 1987. [See Mitchell v. United States, 463 U.S 206 (1983)]

The nightmare still goes on.

During this last year the Chinook Tribe, Chehalis Tribe, Cowlitz Tribe, Hoh Tribe, Quiluete Tribe and Shoalwater Bay Tribe had to legally object to and appeal the Dept. of the Interior,

P.O. Box 228 • Chinook, Chinook Indian Country 98614 • Telephone 360-777-8303 • Fax 360-777-8100

BIAs' proposed compact with the Quinault Tribe to Transition its field office services of realty and forestry to the Quinault. The Quinault Tribe has repeatedly (over years) demonstrated its anamosity to the other tribes affiliated treaty trust resources rights in this Quinault Reservation which was created for **several tribes** not just the Quinault.

If the BIA cannot properly manage the several trust related resources of this reservation--How can it expect the Quinault Tribe, an adversial entity, to manage the trust of forestry and realty and trust records of the other tribes' allotted members?

This matter is currently under administrative appeal to the Interior Board of Indian Appeals, Arlington, Va and is entitled Chehalis Tribe et al. v. Portland Area Director, No. 98-113-A. Because of the nature of this "illegal agreement" with Quinault Tribe (solely) and the further bureacratic ignorance of the BIA, The Chinook Tribe strongly supports your Oversight Committee investigation of Dept.Of The Interior continued malfeasance.

I wish this letter to be a part of the record in the U.S. Senate Oversight Hearings and the enclosed 3 copies of the Appellant Tribes Briefs in Chehalis Tribe et. al. v. Portland Area Director, IBIA No 98-113-A, to support the Chinook Tribes objecton to BIA malfeasance and mismanagement

Senator Campbell I urge you and your Committee to take any necessary steps to correct the **"institutional rot"** you spoke of regarding this matter, and to uphold, honor, the sovereign treaty trust agreements and trust resources of all Native Americans.

I respectfully request your staff or committee acknowledge receipt of this letter and concerns.

Great Thanks

Sincerely,

Timothy P. Tarabochia

Timothy P Tarabochia
Chairman

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

CHEHALIS TRIBE, et al.,	)	
	)	
Appellants,	)	**Docket No. IBIA 98-113-A**
	)	
vs.	)	**APPELLANTS' OPENING BRIEF**
	)	
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)	
	)	
Appellee.	)	
	)	

COME NOW the appellants CHEHALIS TRIBE, CHINOOK TRIBE, COWLITZ TRIBE, HOH INDIAN TRIBE, QUILEUTE TRIBE, SHOALWATER WAY TRIBE and the ALLOTTEES ASSOCIATION AND AFFILIATED TRIBES OF THE QUINAULT INDIAN RESERVATION (herein known as "ALLOTTEES ASSOCIATION"), by and through their undersigned attorney of record, and respectfully submit their Opening Brief on appeal.

I. INTRODUCTION

This matter concerns a so-called "Cooperative Agreement Between the Department of the Interior, Bureau of Indian Affairs and the Quinault Indian [Tribe] for the Transition Operation of Trust Land Forest Management and Realty Services."[1] The stated objectives of the agreement include establishing a Bureau of Indian Affairs ("BIA") Field Station on the Quinault Reservation to transition the Quinault Reservation

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[1] Administrative Record Item No 36

forest management and realty services from the BIA to the Quinault Tribe [2] This transfer is proposed to be implemented over the objections of the appellants, all of which have adjudicated rights at the Reservation equal to those enjoyed by the Quinault Tribe.

The BIA has failed to consider the objections of the appellants, even though land within the Reservation is allotted to members of every appellant By ignoring the concerns and objections of the appellants, the BIA would turn over management of the allotment lands to a tribal entity which does not represent appellants' members and which has a demonstrated antagonism towards the rights of all allottees, including those enrolled with the Quinault Tribe itself.

II. STANDING OF THE APPELLANT TRIBES

By its Order for Administrative Record of July 27, 1998, the Board advised the appellants that they would be required to demonstrate standing to litigate this appeal. Sections II and III deal with the standing issue and it is clear that appellants have standing by virtue of their adjudicated rights at the Reservation.

In order to understand the nature of appellants' standing in this matter, it is critical for this Board to understand the history of the Quinault Indian Reservation. Only with this knowledge can the Board fully understand the current status of **(a)** the Reservation and **(b)** the various tribes for whom it was established. As is clear from the

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[2] The Area Director attempted to obscured this long-term impact in his Response to [Appellants'] Motion to Extend Briefing Schedule by stating at page 1 that the Cooperative Agreement was intended to establish a BIA field office while allowing the Quinault Tribe "to fulfill its desire for greater self-determination and self-governance." However, at page 2 of its Opposition, the Quinault Tribe made clear the ultimate objective of the agreement "It also memorializes the parties' intent to have the Quinault Indian [Tribe] eventually assume responsibility for realty and forest management functions [at the Reservation]."

following discussion, there are several indisputable facts which are relevant to this Board's review and determination of the issues presented:

1) the Quinault Indian Reservation was established for eight Indian tribes: Quinault, Quileute, Chinook, Cowlitz, Chehalis, Hoh, Quit (or Queet) and Ozette (or Makah),

2) the tribes listed at paragraph No. 1 not signatory to the Treaty of Olympia are now affiliated with the signatory tribes as a matter of law, a statement which has been confirmed by federal courts in several rulings;

3) the affiliated tribes have full and coequal substantive rights under the Treaty of Olympia of July 1, 1855, and January 25, 1856 (12 Stat. 971),

4) the Quinault Indian Tribe is not an IRA tribe, although the Quinault Indian Reservation is an IRA reservation; and,

5) as a matter of law, the Quinault Indian Tribe has never been recognized as the governing body of the Quinault Indian Reservation.

Detailed histories of the Treaty of Olympia are found in Halbert v. United States 283 U S 753 (1931); Wahkiakum Band of Chinook Indians v. Bateman, et al., 655 F.2d 176 (9th Cir. 1981); The Quinaielt Tribe of Indians v. The United States, 102 Ct.Cl. 822 (1945); and Solicitor's Opinion, D-40140 (September 2, 1916). There is no serious dispute as to the accuracy of any portion of the following discussion.

A. **Treaty of Olympia.**

The history of the Reservation must begin with an understanding of the background of the Treaty, supra, which was executed by the Quinault and Quileute tribes and bands

The Treaty of Olympia was preceded by the so-called Chehalis River Treaty Council held in 1855 prior to the treaty session at Olympia. Governor Isaac I. Stevens convened all the coastal and interior tribes of the area without understanding the alliances and animosities which existed between them. It was his intention to place all of these tribes on a single reservation which previously had been set aside for other Indians by the Treaties of Medicine Creek and Point-No-Point.[3/] Virtually all of the tribes refused to accept such a plan and Governor Stevens angrily dismissed the treaty council.[4/]

Although the Chehalis River negotiations failed to achieve their full purpose, they did contribute to a treaty between the United States and the Quinault and Quileute Tribes. Later in 1855, aides of Governor Stevens met with the two tribes and signed the treaty which was presented to him in Olympia in early 1856.

The treaty guaranteed to the Indians a reservation "sufficient for their wants" and ARTICLE VI specifically provided that the President "may consolidate them with other friendly tribes and bands" on that reservation.

3/ Duwamish, et al v. United States, 79 C Cls 530, 601 (1934)

4/ In addition to the other case citations noted in the text, the Indian Claims Commission found that the Chehalis River Treaty Council was an unsuccessful attempt to negotiate a treaty with the Chinook Indian Tribe and various bands of Chinooks which now are components of the Chinook Tribe. The Chinook Tribe and Bands of Indians v. United States, 6 Ind Cl Comm 177, 195 (1958)

B. Executive Order of 1873.

In 1863, an area of 10,000 acres was tentatively defined for the reservation authorized by Article VI but it was never formally established as such

Ten years later, the Reservation was created by the Executive Order of November 4, 1873.[5/] By this order, President Grant stated that he intended "to provided for other Indians in that locality" by withdrawing lands from the public domain "for the use of the Quinaielt, Quillehute, Quit, and other tribes of fish-eating Indians on the Pacific Coast" [Emphasis supplied.] A total of 220,000 acres was set aside for the Reservation

C. Land Allotment Laws and Practices.

Under authority of the Dawes Act of February 8, 1887 (24 Stat. 388), allotments were being made on the Reservation by 1900. However, the tribes which were affiliated on the Reservation by the Executive Order were having difficulty in obtaining allotments, a situation which Congress sought to remedy through the Allotment Act of March 4, 1911 (36 State. 1345).

The Allotment Act of 1911 directed the Secretary of the Interior to make allotments on Quinault Reservation --

> to all members of the Hoh, Quileute, Ozette [now known as Makah] or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty [of Olympia]. . .and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set apart for those tribes. [Emphasis supplied.]

In Halbert v United States, supra, the Supreme Court noted that both the BIA and Congress recognized that eight (8) tribes had reserved rights under the Treaty of Olympia

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5/ Kappler, "Indian Affairs Laws and Treaties," Vol II, p 923

either (1) by virtue of their status as treaty signatories or (2) under post-treaty affiliation, and that the 1911 Allotment Act was enacted specifically to direct the Secretary of the Interior to recognize the rights of the members of all of the tribes to land within the Reservation.

D. The Lighthouse Reserve.

There has been a consistent recognition by Congress and the Courts that all of the affiliated tribes had coequal rights within the Quinault Reservation By the Act of August 22, 1914 (38 Stat. 704), Congress authorized the Secretary of the Interior to set aside Indian lands within the Reservation for lighthouse purposes, for which payment was to be deposited in the United States Treasury not in favor of the Quinault Tribe but rather "to the credit of the Indians of the Quinaielt Reservation" [Emphasis supplied] In addition, Congress reserved the mineral rights within the Lighthouse Reserve "for the use and benefit of the Indians of the Quinaielt Reservation" (emphasis supplied), and not just the Quinault Tribe.

E. Supreme Court Ruling in the Halbert Litigation.

Around 1916, the allotment process was halted at the Reservation after more than 600 allotments had been issued. The stated reason for this cessation was the BIA Forestry Staff had concluded that timber lands were not suitable for allotment and should not be allotted. Since all agricultural and grazing lands within the Reservation had been allotted, there was no land remaining which was "suitable" for allotment under this administrative declaration.

An unallotted Quileute tribal member named Tommy Payne sued to obtain an allotment from the timber land sections of the Reservation, and the Supreme Court ruled that he was entitled to an allotment of "timbered lands capable of being cleared and cultivated." United States v. Payne, 264 U.S. 446, 449 (1924). Thus, the BIA's position that timber lands should not be allotted was rejected, and timber lands within the reservation were to be allotted to the tribes of the Reservation
as a matter of law.

Following Payne, allotments primarily were made to Quileutes, Hohs and Quits, but few allotments were being made to Chinook, Cowlitz or Chehalis Indians. As a result, those three tribes were forced to litigate their entitlement thereto in litigation known as Halbert v. United States, supra.

In Halbert, the Supreme Court ruled that individual Indians who were members of the Chinook, Cowlitz and Chehalis Tribes had a right to allotments at the Quinault Reservation because, as a matter of law, they were affiliated with the signatory tribes to the Treaty of Olympia. The Court specifically cited the Executive Order of 1873 and the Allotment Act of 1911, and noted that Interior had consistently taken the position (beginning in 1913) that the 1911 legislation provided for tribes such as the Chinook and Cowlitz and that further legislation was not necessary to protect their entitlements to the allotments within the Quinault Reservation.

The Court found that post-treaty affiliation clearly was contemplated by the Treaty of Olympia·

> Strictly speaking there was no affiliation in the treaty But the treaty did contain a provision under which affiliation might be brought about [Emphasis supplied.] (283 U.S. at 759)

As for the inclusion within the affiliation provisions of the treaty and the Executive Order of 1873 of tribes not named in the Allotment Act of 1911, the Court observed that the affiliating language unquestionably applied to them.

> By 1855, the Quinaielt, Quillehute (also called the Quileute), Chehalis, Chinook, and Cowlitz Indians were neighboring tribes in the southwesterly section of what is now the state of Washington. They were all known as "fish-eating Indians" and lived in small villages adjacent to the Pacific coast and the lower reaches of the Columbia River. The Quits and Ozettes were also fish-eating tribes living in coast villages a little north of the others*** [Emphasis supplied.] (283 U.S. at 756)

As evidence that it always was contemplated that tribes not named in the trust or the Allotment Act of 1911 would be part of the affiliation process, the Court noted that they directly were referenced in the local superintendent's recommendation that the proposed 10,000 acre reservation be expanded:

> Under the treaty a reservation of about 10,000 acres at the mouth of the Quinaielt River was provisionally selected and its boundaries surveyed. Some years later the local superintendent reported that the reservation by reason of being small and containing but a small amount of agricultural and pasture lands, had proved unattractive to the Indians; that the Chehalis, Chinook and other coastal tribes in southwestern Washington, like the Quinaielts and Quillehutes, who were parties to the treaty, were all "emphatically fish-eaters," drawing their subsistence almost wholly from the water and that of all these fish-eating tribes should be collected on a single reservation, including suitable fisheries. To that end he recommended that the existing reservation be greatly enlarged and designated the territory which he believed should be included in it. This recommendation led to [the Executive] Order of November 4, 1873.*** [Emphasis supplied.] (283 U.S. at 757)

In addition, the Supreme Court noted several additional facts which further support the determination that the post-treaty affiliation had occurred:

i) prior to 1911, over 750 allotments had been made at the Quinault Reservation, more than half of which were made to members of tribes other than the two treaty signatories,

ii) more than 20 percent of the pre-1911 allottees had never resided on the reservation, and

iii) as of 1911, Congress and the BIA felt it "altogether appropriate" to "speak of" the other tribes as being affiliated under the treaty

(See, 283 U.S. at 759-61.)

Finally, it is noted that by virtue of the ancestry of its membership and organization under the Indian Reorganization Act of 1934, the Shoalwater Bay Tribe is also among the affiliated tribes of the Quinault Reservation.

F. Post-Halbert Case Law.

Since the 1931 ruling, other courts have looked at the situation at the Quinault Reservation and the question of post-treaty affiliation. Without exception, those courts have held that there was a post-treaty affiliation under the treaty of Olympia and the Executive Order of 1873, and that the affiliated tribes have legal rights as a result of affiliation.

1. The "Boundary Dispute" Litigation Involving the Rights of All of the Appellant Tribes and Groups.

A survey error at the time of the original Reservation set-aside led to an incorrect drawing of Reservation boundaries and a slight reduction in total land area. Congress authorized litigation in the United States Court of Claims to recover from the

United States the value of land erroneously excluded from the Reservation through this survey error.[6/]

The Quinault Tribe filed the litigation solely in its own name, but the Claims Court rejected the claim, ruling that the case could not go forward because the Quinault Tribe does not have exclusive rights to the Reservation. The Court confirmed the Halbert determination that the Chinook, Quileute, Hoh, Quit, Chehalis, Cowlitz and Ozette Tribes hold rights in addition to, and the equal of, those of the Quinault Tribe. See The Quinaielt Tribe of Indians v. The United States, 102 Ct.Cl. 822 (1945). Among its Findings of Fact, the Court of Claims stated the following:

> After the date of this Executive Order [of 1873] the plaintiff and the Quillehutes, Hohs, Quits, Chehalis, Chinook, Cowlitz and Ozette tribes, and any other tribes of the Territory of Washington who may have been affiliated with the Quinaielt and Quillehute tribes were entitled to equal rights in this reservation. [Emphasis supplied.] Finding of Fact No. 3. (102 Ct.Cl. at 825)

Recognizing the interaction between the treaty provisions allowing for affiliation and the Executive Order of 1873 and citing Halbert, the Court found that all of the affiliated tribes were "entitled to equal rights in the reservation"[7/] by virtue of the fact of affiliation, affirmatively stating the ultimate conclusion:

> It is plain, therefore, that the Quinaielts are not entitled to exclusive rights in the reservation. The Quillehutes, Hohs, Quits, Chehalis, Chinook and Cowlitz tribes are also entitled to an interest therein. (102 C.Cls. at 835).

6/ Act of February 12, 1925 (43 Stat. 886)

7/ 102 Ct Cl at 835

In addition to its 1945 opinion in the Boundary Dispute, the Court of Claims looked at the case a second time in The Quinaielt Tribe of Indians v. The United States, 118 Ct.Cl. 220 (1951). Again citing the Supreme Court determinations in Halbert, the Court observed, "the Chehalis, Chinook, and Cowlitz tribes were [found by the Supreme Court to be] entitled to equal rights in the reservation. [Emphasis supplied.]"[8/] And it is significant, for example, that the members of those tribes were allotted in large numbers after the Halbert decision was rendered.[9/]

2. Wahkiakum Fishing Rights Litigation Adjudicating Chinook Treaty Rights.

Certain Chinook Indians litigated the issue of post-treaty affiliation and whether they have federally protected rights to fish as Indians pursuant to the Treaty of Olympia in the case of Wahkiakum Band of Chinook Indians v. Bateman, et al., supra. Although the Wahkiakum Band sued in its capacity as en entity separate from the Chinook Tribe, its members are members of the Chinook Tribe and it today is a part of the Chinook Tribe.

Declaring that Halbert "does state that the Chinook are affiliated with the Quinaults under the Treaty of Olympia,"[10/] the Ninth Circuit reaffirmed that a post-treaty affiliation of Chinooks had occurred at the Quinault Reservation and that Chinooks have coequal and joint rights and jurisdiction at the Reservation:

> As members of a tribe subsequently affiliated with the Quinault under the treaty, [the affiliated tribes] are, however entitled to share such rights as

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8/ 118 Ct.Cl. at 226

9/ Ibid.

10/ 655 F 2d at 178

> are granted to the original signatories by the treaty. [Emphasis supplied.] (655 F.2d at 179-80)

Notwithstanding the firm and uncompromising conclusions articulated by the Ninth Circuit, the BIA continues to ignore the principles of law so clearly articulated in the Wahkiakum case.

3. The Williams v. Clark Litigation Adjudicating Quileute Rights at the Quinault Indian Reservation.

While the Wahkiakum was in the courts, a member of the Quileute Tribe sought to bequeath his allotted Reservation lands to a nonlineal descendant – specifically a cousin – and this Board determined that the heir was not a permissible devisee of the property. This ruling was appealed to the federal courts and went to the United States Court of Appeals for the Ninth Circuit, where the court found for the devisee. Williams v. Clark, 742 F.2d 549 (9th Cir. 1984).

In Williams v. Clark, the court specifically confirmed the long-standing rule of law that the Quileute Tribe is a tribe which has jurisdiction over the Reservation and is a tribe in which lands are located for the purposes of the Indian Reorganization Act of 1934. Thus, the Court rejected arguments that the Reservation was exclusively the jurisdictional area of the Quinault Indian Tribe and – in the process – implicitly confirmed that all of the affiliated tribes retain jurisdictional rights at the Reservation.

The federal defendants then sought certiorari, but the Supreme Court refused to hear the case effectively affirming the Ninth Circuit's determination.

Remarkably, within days of the Supreme Court's refusal to hear Williams v. Clark, the BIA declared that the case had been wrongly decided and would not be

followed. That position has been BIA policy since although the rationale has never been explained.

G. **The 1935 IRA Election.**

As a final factor to be noted, members of all of the affiliated tribes -- regardless of whether the voters then resided within the Reservation -- were permitted to vote in the 1935 election at the Quinault Reservation in order to determine whether the IRA would be applicable thereto.

The Quinault voters rejected the IRA, but the off-Reservation voters overwhelmingly adopted IRA application to the Reservation. Thus, by virtue of the 1935 election, the Quinault Reservation is an IRA reservation. However, the BIA failed to implement the results of that election and did not develop an IRA Constitution for reservation governance which would have provided for the participation of all of the tribes for which the Reservation was established.

H. **The Quinault Governing Document.**

At this time, the BIA treats the Quinault Tribe as the exclusive governing body of the Reservation. However, there is no IRA Constitution by which the Reservation is governed. Instead, the Quinault Tribe operates under a Constitution which (1) more than once has been determined by the Department of the Interior to contravene federal law and (2) does not provide for any governmental participation by the affiliated tribes or their members.

In this regard, on every occasion on which the Department of the Interior has examined the Quinault Constitution, the conclusion has confirmed the statements in the

foregoing paragraph. **Exhibit A** to this Brief is a copy of a Memorandum dated September 8, 1975, from former Commissioner of Indian Affairs Morris Thompson to the Portland Area Director of the BIA. That letter concluded that the Quinault Constitution "is inconsistent with Federal laws in some instances and contains a number of questionable provisions." Although Commissioner Thompson stated that the document is recognized as the "medium through which the Quinault people elect their representatives," it has never been approved by the Department of the Interior due to the failure to follow federal law. Moreover, it is interesting that Commissioner Thompson confirmed that Quinault Indians can operate under the document, but there is no suggestion that the document can be utilized to govern or manage the rights of **(a)** the other tribes with adjudicated rights at the Reservation or **(b)** Indians with interests at the Reservation who are not Quinault enrollees or who otherwise reject the Quinault right to do so.

In 1979, the Quinault Constitution again was examined by the Department of the Interior -- this time by Associate Solicitor for Indian Affairs Thomas W. Fredericks. Mr. Fredericks' Memorandum report dated April 15, 1979, is **Exhibit B** to this Brief, and at page 3 he confirmed the document's "inconsistency with federal law in some instances" and its inclusion of "questionable provisions."

And several years after Association Solicitor Fredericks' look at the Quinault Constitution, the document was revisited still again by former Assistant Secretary for Indian Affairs Kenneth Smith. The results of Assistant Secretary Smith's examination were reported in his Memorandum to the Portland Area Director dated December 1,

1982, a copy of which is **Exhibit C** to this Brief. At page 2, Assistant Secretary Smith confirms the prior findings of Commissioner Thompson, and at page 3 he raised questions about Quinault claims of "tribal jurisdiction over land and resources held in trust by the United States for Indians."

The result is that the Reservation is being "governed" pursuant to a document which is inconcistent with the requirements of federal law and without participation of tribes who have no role in governmental decisions affecting the land belonging to their allottee members beyond their ability to work through the BIA and the Western Washington Agency.

The Secretary's trust responsibilities to the affiliated tribes and the individual allottees are not being met through the current situation at the Reservation. There is need for immediate action by this Board and the Secretary to insure that the Reservation rights of the affiliated tribes and the individual allottees are fully protected in a manner which guarantees full and fair administration of applicable laws and removes this administration from the hands of a tribal government which operates under illegal governing documents.

I. Standing of the Tribes Is Beyond Question.

In light of the foregoing discussion, it is clear that the appellant tribes have legal rights at the Reservation equal to those of the Quinault Tribe. For this reason, the appellant tribes are indispensable parties to any contract for forest management and realty services at the Reservation and their interests cannot be ignored with regard to the

proposed Cooperative Agreement which would transfer all BIA responsibilities to a single tribe.

The standing of the appellant tribes to prosecute this appeal is adjudicated and simply beyond serious question.

III. STANDING OF THE ALLOTTEES ASSOCIATION

Almost certainly known to this Board is the long- and bitterly-litigated case known as Helen Mitchell, et al. v. United States, United States Claims Court litigation seeking compensation for the mismanagement of the forest resources within the Quinault Indian Reservation. That case was litigated on behalf of more than 1,000 allottees at the Reservation; those allottees are represented by the ALLOTTEES ASSOCIATION.

During the course of the Mitchell Litigation, the case went to the United States Supreme Court several times on various legal issues pertinent to the final resolution -- which, for the record, was a settlement and cash payment to the plaintiffs which was managed through the ALLOTTEES ASSOCIATION. One of the issues directly resolved by the Supreme Court was the nature of the trust relationship between the United States and the individual allottee members of the ALLOTTEES ASSOCIATION.

The ALLOTTEES ASSOCIATION's standing to maintain this appeal was affirmatively adjudicated by the Supreme Court in Mitchell v. United States, 463 U.S. 206 (1983) (which decision is commonly referrd to as "Mitchell II"). Specifically, the Court confirmed that there is a direct trust relationship between the United States and individual allotted litigants (represented by the ALLOTTEES ASSOCIATION):

> Our construction of these statutes and regulations is reinforced by undisputed existence of a general trust relationship between the United States and the Indian people [allotted at the Quinault Reservation]. [Emphasis supplied.] (463 U.S. at 225)

Given the adjudicated trust responsibility between the allottees and the United States, it is beyond dispute that the allottees and their representative organization, the ALLOTTEES ASSOCIATION, have standing to contest actions of the United States to contract with the Quinault Tribe for the management of forest trust lands and realty services.

IV. THE COOPERATIVE AGREEMENT WAS EXECUTED IN VIOLATION OF LAW

The United States and Quinault Tribe both assert that the agreement was executed pursuant to the provisions of Public Law 93-638, as amended, 25 U.S.C. Section 450, et seq. (referred to herein as PL638").[11]

With this predicate, it is beyond question that the requirements of that law were not met during the development and execution of the Cooperative Agreement. For this reason, the Board must reject the Agreement as failing to satisfy the very federal law under which it was executed.

Section 4(c) of PL638 stipulates that the appellants should have been consulted throughout the process of developing and executing the agreement:

> Provided that in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract of grant. [Emphasis supplied.]

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[11] See Brief of Assistant Secretary, dated July 22, 1998, Quinault Memorandum in Opposition, dated October 29, 1998

Moreover, the process utilized for the development of the agreement contravenes the provisions of Public Law 103-413, 25 U.S.C. Section 458cc(f), which provides that the agreement must be served upon each Indian tribe which is served by the Agency serving the tribe with which the agreement is to be signed. Although there was a great of communication from various tribes to the Portland Area Director about the proposed agreement, nothing in the Administrative Record evidences that the statutory requirement of formal service on each of the tribes served by the Agency was met. Accordingly, this Board must accept the conclusion that the requirement ws not met.

It is axiomatic that the Department of the Interior is required to follow its own regulations, yet such was not done in this case. Part 512 of the Interior Departmental Manual requires at Section 2.4.B that actions affecting the trust resources of tribes shall only be taken after there have been consultations with the tribes in order to insure a full evaluation of the potential impact on the trust resources. Nothing in the Administrative Record evidences that this requirement was met.

Executive Order 13084 (May 14, 1998) reinforces the same duty of the Department to consult on such matters. Nothing in the Administrative Record evidences that this requirement was met.

V. THE QUINAULT'S HISTORY OF RESERVATION MANAGEMENT IS INCOMPETENT AND NOT ACCEPTABLE TO APPELLANTS

Over the past several years, the Quinault Tribe has been given broad powers by the BIA with regard to Reservation matters. The Tribe's record of nonfeasance and malfeasance is so clear as to render it ineligible to assume forest management and realty

services over any portion of the Reservation, let alone those portions allotted to members of the appellants.

The examples are countless and legendary throughout Western Washington. Indeed, no single document -- especially this Brief -- could begin to document them all. However, for the purposes of Board assessment of the inappropriateness of contracting such services to the Quinault Tribe, appellants will illustrate the problems of Quinault management with two very current examples.

1. **Quinault Mismanagement of Pre-Commercial Thinning of Timber within the Reservation.**

The Quinault Tribe conducts its forestry and reservation management through en entity known as the Quinault Department of Natural Resources ("QDNR"). It now is clear that QDNR is conducting business in a manner which is concealed from the BIA and calculated to deprive allottees of considerable proceeds from timber harvesting on their lands.

Exhibit D to this Brief is a report prepared by John Barnett on November 6, 1998. As his report notes, Mr. Barnett has been a professional logger for some 35 years, and from 1974 to 1990 was a Forestry Consultant to the appellant ALLOTTEES COMMITTEE.[12]

Recently, Mr. Barnett discovered several pre-commercial thinning operations on allotment property which were being managed by QDNR. In each instance, the operations were being conducted in a manner inconsistent with legitimate and accpted

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[12] Mr Barnett also is Chairman of appellant COWLITZ INDIAN TRIBE

logging practices and calculated to deprive the Indian trust landownes of up to some 40 percent of the timber revenue otherwise going to them.

The Barnett Report is documented with photographic evidence, and the original photographs are filed with the Board's copy of this Brief.[13] The photographs -- which evidence the situations described by Mr. Barnett -- demonstrate the pre-commercial thinning of Western Hemlock of 22-25 years in age, the cutting and abandonment of timber of commercial value, inappropriate thinning of Red Alder and the pre-commercial thinning of Red Alder of 15-20 years of age. As Mr. Barnett explains, all of these practices are contrary to industry practices and evidence a mismanagement of resources belonging to individual Indian allotment owners.

From the Barnett Report, it is clear that the Quinault Tribe and QDNR are utterly unqualified to manage the trust timber resources of the Reservation. The BIA attempt to contract away its trust responsibility without consulting the appellants must be rejected.

2. **Timber Trespass on the Thomas Williams Allotment.**

Attached to this Brief as **Exhibit E** is a file evidencing the mismanagement by QDNR of a timber trespass on the Thomas Williams Allotment - Allotment No. 452. As the file indicates, the trespass occurred, the allottee was not advised of the trespass, the Quinault Tribe assessed a fine for the trespass, the Quinault Tribe collected the fine and the allottee was kept uninformed and has never been compensated.

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[13] Photocopies of the original photographs are furnished to the parties on the Distribution List

The facts are clear:

i) The trespass is reported by QDNR as having occurred on July 30, 1998, although there is evidence that the actual occurrence was prior to that date

ii) The trespasser did not inform the BIA of the illegal action until September 18, 1998, when he telephoned Mike Kupka to report the incident.

iii) Despite their claims to be the entities in charge of day-to-management of the Reservation forest, the Quinault Tribe and QDNR either did not know of the trespass or did know of it and elected to remain silent. There was no report from them to the BIA.

iv) The allotment owner was not informed of the trespass until October 8, 1998, when she was advised by Ron Graham of the BIA.

v) The Quinault Tribe and QDNR attempted to stop the allotment owner from removing the timber which was down as a result of the trespass.

vi) QDNR levied a fine against the trespasser for $140,200 to cover "damages and investigative costs."

The damages were suffered by the allotment owner, but the file does not indicate that any portion of the fine was paid to the allotment owner. The assessment for investigative costs is curious, since the trespasser reported the incident himself -- the trespass was not discovered by QDNR and it is unclear whether any investigation was necessary.

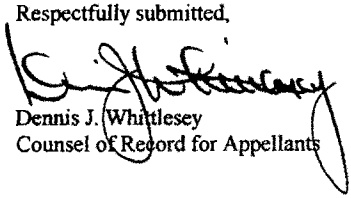
All of this again makes clear that the Quinault Tribe is simple incompetent and unqualified to manage the Reservation forestry and realty on behalf any allottee, and particularly the allottees represented by the appellants.

VI. CONCLUSION

The Cooperative Agreement was not adopted in the manner required by the applicable statutes and regulations and, for this reason, the Area Director's decision should be reversed and the agreement should be ordered invalid. The record makes clear that the Quinault Tribe does not represent the interests of the appellants or their members. Moreover, the Quinault history of resource management is a continuing tale of mismanagement and failure to protect the interests of the allotment owners. There is no authority or justification for the BIA's attempts to turn over its trust responsibilities at the Quinault Reservation to the Quinault Tribe.

DATED this 10th day of November, 1998.

Respectfully submitted,



Dennis J. Whittlesey
Counsel of Record for Appellants

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

CHEHALIS TRIBE, et al.,	)	
	)	
Appellants,	)	Docket No. IBIA 98-113-A
	)	
vs.	)	APPELLANTS' REPLY BRIEF
	)	
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)	
	)	
Appellee.	)	
	)	

COME NOW the appellants CHEHALIS TRIBE, CHINOOK TRIBE, COWLITZ TRIBE, HOH INDIAN TRIBE, QUILEUTE TRIBE, SHOALWATER BAY TRIBE and the ALLOTTEES ASSOCIATION AND AFFILIATED TRIBES OF THE QUINAULT INDIAN RESERVATION (herein known as "Allottees Association"), by and through their undersigned attorney of record, and respectfully submit their Reply Brief on appeal.

I. INTRODUCTION

By their Briefs filed on or about December 14, 1998, the United States and Quinault Indian Tribe have contested the appeal submitted by the Appellants A careful reading of their opposing materials in light of the Appellants' Opening Brief shows that they have failed to rebut the arguments presented by Appellants and that the decision of the Area Director should be reversed and the Cooperative Agreement overturned.

Central to this case is the adjudicated fact that the Quinault Reservation is unique in that it was created for many tribes and not just one This unique element renders irrelevant the case law dealing with other reservations which were created for a single tribe but upon

which members of other tribes were allotted The jurisdictional entitlements of the tribal appellants are clear and unimpeached by the opposing briefs of December 14, and their rights cannot be ignored by this honorable Board Moreover, the Allottees Association represents vast numbers of allottees who have adjudicated rights at the Reservation, as well as a Supreme Court confirmed special trust relationship with the United States Secretary of the Interior Again, these are adjudicated entitlements which cannot be ignored and must sustained by this Board

II. DISCUSSION

A. The Cooperative Agreement Is the Vehicle for Transferring All BIA Reservation Responsibilities.

The United States has suggested that the Cooperative Agreement calls for nothing more than the relocation of Bureau of Indian Affairs ("BIA") functions to a "Field Station to be located on the Quinault Reservation."[1] Indeed, the tenor of the federal response is "We are not divesting ourselves of any responsibilities, so what's the big deal?"

The Cooperative Agreement says otherwise at Paragraph I.B in explaining the purpose of the document. "The purpose of this Agreement is to establish a BUREAU OF INDIAN AFFAIRS Field Station in Taholah [on the Quinault Reservation] transition the functions remaining at the Olympic Peninsula Agency. . .to the Quinault Indian [Tribe] " [Emphasis supplied.]

It is not disputed that the Appellants were not involved in the decision-making and it is not disputed that they will be excluded from all Reservation management functions under the Cooperative Agreement Accordingly, the issue relevant to this appeal is not the impact

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[1] Area Director's Answer at 2

of the Cooperative Agreement -- as the Area Director apparently contends -- but whether the Appellants have rights at the Reservation which are protected by the federal trust relationship between the Secretary and the Appellants and which must be protected and preserved through continued BIA management of the Reservation resources

In addition, the Area Director somewhat disingenuously claims that there will be no impact on the trust responsibility of the Secretary to the Appellants because the Preamble of the Cooperative Agreement states that such will not occur. (Area Director's Answer at 5) Indeed, it is noted that BIA will continue to have some sort of undefined "oversight function" under the agreement (Ibid) However, once one gets past the Preamble, it is clear that the transfer of all functions is total and unequivocal. And this is despite the fact that the Quinault Tribe has a documented history of mismanagement of the reservation resources, as well as refusal to deal squarely with the tribes of the Reservation and the allottees.

B. The Appellants Have Standing.

The standing argument raised in the Area Director's Answer does not appear to be very serious.

The issue turns on whether this Board will follow the long and unbroken history of federal court determinations that the Appellants have rights at the Reservation and the Quinault Tribe is not the exclusive governing body of the Reservation.

If the basic legal entitlements are recognized, then standing is beyond dispute -- a point conceded by the Area Director in the discussion affirming that a claimant must show a legal right in the matter at issue in order to mount a legal challenge Thus, the disposition of this issue must turn on whether the adjudicated rights of the Appellants are to be recognized by this Board If those rights are recognized, then standing to maintain this appeal is beyond

question

C. **Appellants' Reservation Rights**

Are Clear and Adjudicated.

The argument on this issue was not addressed by the Area Director other than to say that he agreed with the Brief being filed by the Quinault Tribe And the Quinault Brief at best is lame, disingenuous and pettifogging.

The principle of the cases cited by Appellants is clear and uncontradicted: the Quinault Reservation was created for several tribes -- of which Quinault was only one -- and all of them have equal rights at the Reservation. Certainly, this point was made without equivocation in Halbert v. United States, 283 U S. 753 (1931); Williams v. Clark, 742 F.2d 549 (9th Cir 1984), Wahkiakum Band of Chinook Indians v. Bateman, et al., 655 F.2d 176 (9th Cir. 1981), The Quinaielt Tribe of Indians v. The United States, 102 Ct Cl. 822 (1945), and Solicitor's Opinion D-40140 (September 2, 1916).

To the contrary, all the Quinaults can show this Board is the case of Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496 (9th Cir. 1991 -- a case which not not litigated because of Rule 19 of the Federal Rules of Civil Procedure and the Quinault Tribe's refusal to enter the litigation so as to permit a full and fair adjudication of the issues -- and legislative history from Congressional debates on legislation without some showing that the statutes being discussed were ambiguous And, as counsel for the Quinaults knows, it is improper and impermissible for courts to examine legislative histories without first determining that there is an ambiguity in the statutes requiring examination of Congressional intent

Moreover, the Quinaults failed to tell this Board about the correspondence from

former United States Senator Brock Adams on the very legislative history which they claim shows that Congress intended to recognize the Quinault Tribe as the governing body of the Reservation. Exhibit A to this Reply is Senator Adams' August 8, 1990, letter to the Department of Justice expressly asserting that Congress did not intend to recognize the Quinault Tribe as the governing body of the Reservation through its enactment of legislation in 1988.

The law and case law discussed in Appellants' Opening Brief is unimpeached by anything written by the Quinault Tribe. The Appellants have federally-protected rights at the Quinault Reservation and the Cooperative Agreement would contravene those rights. It must be rejected by this Board.

D. The Cooperative Agreement Violates Federal Law and Regulation.

The Area Director defends his decision with the argument that there is no requirement that the BIA protect the rights of individual allottees who are not enrolled Quinaults from the actions of the Quinault Tribe. (Area Director's Answer at 7-8) Moreover, the Area Director incorrectly asserts without citation to any authority or evidence supporting the statement that "[v]irtually all reservations with significant amounts of individually owned land have the situation where landowners on the reservation are members of many different tribes." (Area Director's Answer at 8) This unvalidated statement simply is not true; moreover, if it were true, it ignores the specific holdings of the Supreme Court and Ninth Circuit that there are jurisdictional entitlements of other tribes at the Quinault Reservation. See, e.g., Halbert v. United States, supra, Williams v. Clark, supra. So, even if other reservations are as described by the Area Director -- a point sharply at odds with the facts presented by

Appellants and otherwise incompetent for the purposes of this Board's review due to lack of verification through the presentation of competent and admissible evidence -- it still remains that the Quinault Reservation is uniquely adjudicated as having been created for many tribes, all of which enjoy rights equal to those of the Quinault Tribe

E. **The Quinault Tribe's Mismanagement of the Reservation's Resources Is Uncontroverted.**

Verbal shots have been taken at the Appellants' presentation of the Quinault mismanagement of Reservation resources (Area Director's Answer at 6), and three Declarations of BIA functionaries are submitted in support thereof However, the Declarations do not attest to the competency of the Quinault's management of the resources and they do not contradict the substance of Appellants' initial presentation in the Opening Brief[2] Moreover, filed in conjunction with this Reply is the Declaration of John Barnett dated December 20, 1998 -- attached hereto as Exhibit B -- in which this professional and veteran forestry expert further explains the Quinault mismanagement previously described. Moreover, he encloses as an Exhibit to his Declaration, a hand-written note from one of the Area Director's own declarants that (1) the Quinault forestry management program needs to be reviewed by the BIA but that (2) the review cannot be commenced until 1999 -- or until at least several weeks subsequent to the preparation of the Area Director's Answer asserting that the Quinault programs were fine.

Moreover, Messrs Moulder and Kupka have created evidence concerning the timber

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[2] The Area Director submits three declarations The Declaration of Mike Kupka does not even purport to characterize the Quinault management of the Reservation resources The Declaration of Wayne Moulder similarly fails to address this issue Finally, the Declaration of Ron Graham also fails to attest to this matter; indeed, to the contrary, Mr Graham says "I believe [the Quinaults]. . .are striving to accomplish good forest management practices for the landowners of the Quinault Reservation " [Emphasis supplied] This may be a classic case of "damning them with faint praise "

trespass previously discussed by the Appellants which clearly show that the BIA has ignored the law applicable to this appeal Enclosed as Exhibit C to this Reply are three memoranda to which they were parties clearly showing that the BIA already is honoring the Cooperative Agreement, notwithstanding the stay which this appeal created as a matter of federal law

F. The Cooperative Agreement Is Illegally Being Implemented Despite This Appeal.

Part of Exhibit C is a memorandum dated September 18, 1998, and entitled "DOCUMENTATION" concerning a telephone call to Mr. Kupka concerning the trespass previously discussed A copy was forwarded to Mr Moulder with the notation "Wayne M. FYI & FILE." The memorandum states "BIA is providing trust oversight & providing guidance to [Quinault Tribe] when they have a question " These are the words from the Cooperative Agreement and the Area Director's Answer in describing what the Cooperative Agreement would do and permit should it ever be implemented.

It sounds as though Messrs. Moulder and Kupka should be questioned by the Area Director about the apparent illegal implementation of the Cooperative Agreement, rather than the Area Director hollowly arguing that the landowners at the Quinault Reservation have no rights to question the legitimacy of the Agreement At least, these two BIA functionaries did not submit false Declarations asserting the competency of the Quinault management of the Reservation resources. Again, it is noted that they said nothing in this regard and they did not contradict the submissions of the Appellants in their Opening Brief.

III. CONCLUSION

As discussed above and in Appellants' Opening Brief, the Cooperative Agreement was not adopted in the manner required by the applicable statutes and regulations For this

reason, the Area Director's decision should be reversed and the agreement should be ordered invalid

That the Quinault Tribe does not represent these Appellants is dramatically underscored by the antagonistic Brief filed by that tribe in opposition to this appeal It is beyond dispute that the Reservation rights of the Appellants and their members will not be in good hands if the Cooperative Agreement is concluded and the BIA functions transferred to the Quinault Tribe.

The adjudicated rights of the Appellants and their members can only be protected by continued management of the Reservation by the Department of the Interior.

DATED this 29th day of December, 1998.

Respectfully submitted,

Dennis J. Whittlesey
JACKSON & KELLY
2401 Pennsylvania Avenue, N. W. - Suite 400
Washington, D. C. 20037
Telephone: (202) 973-0200
Facsimile: 202-973-0232

Counsel of Record for Appellants

Exhibit A

Appellants' Reply

BROCK ADAMS
WASHINGTON

United States Senate

WASHINGTON, DC 20510-4702

August 8, 1990

Honorable Richard B. Stewart
Assistant Attorney General
United States Department of Justice
Environmental and Natural Resources Division
Washington, D.C. 20530

Re: Confederated Tribes of Chehalis Indian Reservation, et al. v. Lujan, et al., Docket No. 90-35192 (Ninth Circuit).

Dear Mr. Stewart:

I am writing in regards to certain statements in court by attorneys in the Environment and Natural Resources Division of the United States Department of Justice regarding the Act of November 8, 1990 (Public Law 100-638). These statements contradict both the statute and Congressional intent.

As you know, Public Law 100-638 conveyed certain public lands to the Quinault Indian Nation in trust for inclusion in the Quinault Indian Reservation. In the development of this legislation, Congress was very aware of the existence of conflicting legal claims of tribal jurisdiction at the Reservation. We were very careful to ensure that this legislation did not include any Congressional recognition of the Quinault Indian Nation as the exclusive governing body of the reservation.

With this in mind, I specifically clarified our intentions not to tamper with any extant legal rights in my floor statement of October 7, 1988:

"Finally, issues have been raised as to the impact of this bill on any other rights which may exist in the reservation as it existed prior to the passage of this bill. In my opinion there is no effect. To be specific I do not believe this bill overrules, limits, or expands the legal rulings which may apply to the situation on the reservation. This includes cases like Williams v. Clark, 742 F.2d 549 (1984), Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176 (1981), and Halbert v. United States, 238 US 753 (1931) which have concerned the possible existence of other rights in the reservation. It also includes those cases, including Quinault Tribe v. Gallagher, 368 F.2d 648

(1966), Cardin v. De La Cruz, 671 F.2d 363 (1982), and Sechrist v. Quinault, 9 Indian L. Rep. 3064 (1982), which have concerned the exercise of jurisdiction and governmental authority over the reservation by the Quinault Indian Nation."

(See Congressional Record for October 7, 1988, at p. S15303

It is fair to say that Congressional action in transferring the lands in question to the Quinault Indian Nation was consistent with the BIA's long practice of treating the Quinault Indian Nation as the governing body of the reservation. There is, however, no legislative language formally endorsing this custom, and there is explicit legislative history clarifying that the bill does not constitute such an endorsement.

Notwithstanding the clear language of Public Law 100-638 and the clear legislative history of Congress' intent on this matter, your attorneys have presented arguments to the contrary in the litigation referenced above. Indeed, they have maintained that the 1988 law affirmatively recognized the Quinault Indian Nation as the exclusive governing body of the Reservation.

As you know, the litigation is now pending before the United States Court of Appeals for the Ninth Circuit. The Justice Department's Brief contains a flat misstatement of Congressional intent and the language of the 1988 law.:

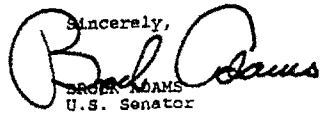
"Congress recently reaffirmed the Quinault Nation's legitimate role as the exclusive governing body of the Quinault Indian Reservation by enacting Public Law No. 100-638, 102 Stat. 3327, Act of November 8, 1988."

(See Federal Defendant's Brief on Appeal, p 19.)

For Government attorneys to be arguing notions which flatly contradict the law and its legislative history is unacceptable to me. I urge you to take steps to notify the Court of these misstatements, and to refrain from such misstatements in the future.

I look forward to seeing this matter clarified promptly.

Sincerely,



BROCK ADAMS
U.S. Senator

Exhibit B

Appellants' Reply

December 20, 1998

To: United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Indian Appeals

From: John Barnett
Chairman, Cowlitz Indian Tribe
Cowlitz Allottee on the Quinault Reservation

Subject: Additional comments regarding forestry issues on the Quinault Reservation.

DECLARATION OF JOHN BARNETT

PRE-COMMERCIAL THINNING ON ALLOTTEE TRUST PROPERTY:

After reading the Area Director's answer submitted by Colleen Kelley, attorney for the Pacific Northwest Region, with respect to my "claimed problems," I raise the following discrepancies. On page 6, Ms. Kelley states; "With respect to the claimed problems raised by John Barnett, BIA's professional evaluation was not consistent with Mr. Barnett's. After visiting the site with Mr. Barnett, BIA staff discussed the activity taking place on the property with the Quinault Nation's foresters. Based upon the discussion and explanation offered by the Nation's foresters, BIA concluded no further action was necessary. BIA did not conclude that any mismanagement had occurred or that the Nation was unqualified to manage timber on the Reservation." Please refer to the note to me from Ron Graham alluding to the possibility of a program review of the QDNR forest development program.

In a meeting with Ron Graham in early December, he advised me that he had talked with Bruce Jones, Director of QDNR, about a possible forest development review early in 1999. Mr. Jones was not receptive to the idea and gave no indication when he would be. It is apparent to me that what Mr. Graham and Mr. Kupka observed during the field trip indicated serious problems with the aspect of pre-commercial thinning of Allottee trust timber. Prior to the field trip, they had no knowledge of the project and had not instituted any type of follow up evaluation which should be an integral part of the trust responsibility of the BIA. Of interest, Melvin Youckton, the long time chairman of the Chehalis Indian Tribe, is one of the owners of one of the Allottments in question. He, and the other owners, have a tort claim for damages and trust responsibility violations in the United States Court of Claims. At this time, they are unaware that any of this has happened as they rely on the BIA, as trustee, to look after their interests.

From 1970 to 1983, I was actively involved in logging timber on trust Allottments under both advertised timber sales and Special Allottment Timber Cutting Permits(SATCP). I logged over 600 acres of trust timber under the

supervision of the BIA. Logging under a SATCP, I was required to replant the cut over lands with Douglas Fir seedlings 2.0 years of age. The BIA requires 300 trees per acre. At my own cost, I planted 600 trees per acre with the intent in mind of the BIA selling for the Allottee a Commercial Thinning Sale. This would be instigated at about a stand age of 25 years. This commercial thinning would yield about 10% more value to the Indian timber owner when added to the value of the final clearcut harvest. This is current timber industry practice as well as U.S. Forest Service and State of Washington Department of Natural Resources practice. Commercial thinning programs have been going on for the past 15-20 years. There has yet to be a Commercial Thinning Sale on the Quinault Reservation.

After a recent personal field trip to many of the Allottments that I had previously logged, I found, much to my dismay, that QDNR had gone in and pre-commercially thinned these Allottments. This practice resulted in a net loss to the owners of 20-30%. All of the allottments alluded to were of very high site ground condusive to the growth of 600 stems per acre, especially with a growth release factor at the time of a commercial thinning.

QDNR TREE PLANTING PRACTICES:

Since the takeover of the BIA trust responsibility for replanting logged over or rehabilitated lands under P.L. 638 Contracts, QDNR has continued to plant Sitka spruce trees as a viable species on the Quinault Reservation. Sitka spruce has a extremely serious problem with Spruce tip weevils. The tip weevil destroys the growth leader on the tree top and over time the tree will contain multiple tops and grow out instead of up. This eliminates any commercial value for the tree except for pulp wood. QDNR contends that the tip weevil will not attack the tree in the "fog zone" or within one mile of the ocean. Thus, they have continued to plant Sitka spruce on trust Allottments near the coast. Through observation, I find this planting practice to be totally unacceptable and, once again, contrary to planting practices with the industry and have noted no areas where the tip weevil is not present.

THE RIGHT TO MEET THE HIGH BID ON ADVERTISED TIMBER SALES BY QLTE:

In 1988, Joe DeLaCruz, the Presidented of the Quinault Tribe crafted an agreement with Stan Speaks, the Area Director, to allow the Quinault Land and Timber(QLTE) the right to meet the high bid on advertised timber sales on the Quinault Reservation. Shortly after, the Quinault Business Committee passed a resolution waiving the right to meet the high bid when the high bidder was an enrolled Quinault member and also a bonafide Indian logger.

For the past ten years, there have been an average of two bidders per sale, namely Gary Davis, an enrolled Quinault logger, and QLTE. Mr. Davis does not bid on all sales and thus many go for the minimum bid which must be met by QLTE.

In comparison, Rayonier Timberlands annually sells between 80-100 million board feet of timber by advertised timber sales. They consistently get between 10-15 bids on each sale in a pure competitive setting. These sales are all basically in the Grays Harbor area in which the Quinault Reservation is located.

I have talked with several administrators for large timber buying companies here in Aberdeen, Wa and they all tell me the same thing. They say it costs them around $2,000 to cruise and evaluate a timber sale. Then if they are the high bidder, to have QLTE, a land and timber branch of the Quinault Tribe, to have the ability to match their high bid and be awarded the sale. They say that they will not waste their time and money in such a non-competitive situation.

On another interesting note, QLTE has entered into joint venture agreements to buy land and timber with Quinault Logging Corp. This relationship has been going on for the past 10-12 years. Quinault Logging Corp. is owned by Larry Black, the son-in-law of Don Mechals who is a past Chairman of the Chinook Indian Tribe and also an enrolled Quinault Tribal member. Mr. Black is a non-Indian. Several months ago, I researched Quinault Logging Corp. at the Assessor's office in the Grays Harbor County Court House in Montesano, Wa. I discovered, much to my amazement, that it is listed as a "Foreign For Profit Corporation" based in the Cayman Islands. This fact should raise speculation as to the motives behind such a discovery as Quinault Logging Corp. has a large log yard in Aberdeen.

This "Meet the High Bid" Agreement expired in October, 1998 and could be continued upon agreement by both parties. It is interesting to note that the BIA has removed the clause giving QLTE the right to meet the high bid from its most recent timber sale advertisement. This is a step in the right direction but by doing so admits that Allottee timber has been sold at less than competitive market value prices for the last ten years.

THE COOPERATIVE AGREEMENT:

I direct your attention to pages 1 and 2 of the "Area Director's Answer" entitled The Cooperative Agreement. Ms. Kelley would have you believe that this is merely a transfer of current BIA employees from Aberdeen to a Field Station in Taholah on the Quinault Reservation, that the day to day administration of the forestry program will be under the direction of the Quinault Tribe, and that all work and programs will remain subject to the continuing supervision of a BIA official who will be responsible for the trust responsibility.

The following is a true and factual account of what is happening under the Cooperative Agreement.

For the past 6-8 months, BIA employees in forestry at the Olympic Peninsula Agency in Aberdeen have been actively seeking employment elsewhere within the BIA system. Over 50% of the BIA Staff have resigned or transferred to other employment. Current staffing at the OPA consists of less than ten people in the forestry division. These vacant positions are not being filled and the monies available are being withdrawn by the Quinault Tribe and used to fill these positions by QDNR.

The eventual goal of the Cooperative Agrement is to remove all BIA employees, replace them with tribal foresters with but one man left to manage the trust. One man is incapable of meeting such a large job description and will ultimately be subject to increasing pressure by the Quinault Tribe. I question

under what authority the monies being withdrawn come from. I also question the authority to conduct business as usual while a formal appeal is being processed.

At the present time there are three tribal foresters filling previously held BIA positions and are actively involved in timber presale work including timber cruising and timber evaluation.

CONFLICT OF INTEREST ISSUES:

Prior to the signing of the Cooperative Agreement in May, 1998, the BIA had exclusive control over all aspects of the timber sale program. This currently includes advertised sales, SATCPS, and negotiated sales. Under the cooperative agreement, all work and supervision will be under the control of the Quinault Tribe and only will require a sign-off by the BIA trust officer.

The Quinault Tribe is agressively pursuing the purchase by negotiated sale of individual Allottee Allottments. They have a priority list consisting of over 30 Allottments based on timber value, accessibility, and environmental restrictions. They purchase the "best first."

With all the work being done by and under the supervision of the Quinault Tribe, an obvious conflict of interest exists and the trust responsibility of the BIA will be seriously eroded. Under Mitchell v. United States, the trust responsibility to individual Indian Allottees has been clarified and expanded. The BIA is expected to remain a third party overseer of the trust and must have no personal gain from any outcome. This cannot be said for an entity that specifically enters into work for personal gain. To be very candid with you, the direction that the Quinault Tribe has taken, in my opinion, is an experiment in socialism with innocent Indian people being used as pawns in the process.

I declare under the penalty of perjury that the foregoing is true and correct. Dated the 20th day of December, 1998 at Aberdeen, Washington.

JOHN BARNETT

Include as an exhibit.
12/30/98

12/6/98

John,

Enclosed is what I had previously sent to you. I discussed with Mike Kupka and we are not currently ready to comment, however we will be discussing with the Tribe in the near future the possibility of a program review of their forest development progra Our proposal would be that the review occur in 1999.

Ron Graham

Exhibit C

Appellants' Reply

CASE # 91-0026

UNITED STATES GOVERNMENT

A-E

2-Way Memo

Subject Q 452 Treespud

From Jared Eisen

INSTRUCTIONS

Use routing symbols whenever possible

SENDER (Originator of message)
- Use brief, informal language
- Conserve space
- Forward original and one copy

RECEIVER (Replier to message)
- Reply below the message, keep one copy, return one copy

DATE OF MESSAGE	ROUTING SYMBOL
7-31-98	

SIGNATURE OF ORIGINATOR

Wayne Moulder

TITLE OF ORIGINATOR

Forester

FOLD FOLD

MESSAGE

Enclosed are 2 plots of GPS data taken on Q 452 on 7-30-98. One is at a Scale of 1" = 500'; the other at 1" = 1000' (plot scale). As stated over the phone, I have questions about all 3 corners plotted here; will discuss w/ Rich Shatto ASAP. I also enclosed our latest log prices (please disregard the March prices written in alongside). I noticed there was some WRC sawlogs cut as well. Looking forward to your report. Any questions about the prices, please give me a call (or Henry Romero).

REPLY

To

DATE OF REPLY	ROUTING SYM

SIGNATURE OF REPLIER

TITLE OF REPLIER

OPTIONAL FORM 27 (Rev. 7-81)
GSA FPMR (41 CFR) 101-11.6
NSN 7540-00-003-3447

Wayne H—

INTEROFFICE MEMORANDUM

TO MIKE KUPKA
FROM JARED EISON
SUBJECT. ALLOTMENT Q452 TIMBER TRESPASS
DATE: 09/11/98

As you are aware, a Timber trespass occurred on Trust allotment Q452. The timber from this trespass is still on-site and needs to be disposed of as quickly as possible to prevent further damages from theft, bugs, etc.

There are three options for the disposal of this timber, they are:

1. Let the violator remove the timber after posting bond, thus eliminating any road use issues.
2. Offer an emergency timber sale for the downed timber and assign it to the highest bidder.
3. Leave the timber where it is and do nothing with it.

Please review these options and inform me of your decision as quickly as possible. If you have any options other than those listed above, please advise me of them.

Thank you,

Jared Eison

Jared Eison

PAO 145 (Rev.)
January 1962

Wayne M. FYI & FILE

A-

DOCUMENTATION

(Telephone Call or Personal Visit)

Person(s) called or visited and station: Mr. Peles

Person(s) calling or visiting and station: George Minke # 877-6845

Date and Time: 9.18.98 8:15 AM.

Purpose of Call or Visit:

RE: Trespass near rodeo. Returned my call of 9 Follow-up to his call of 9.11.98 re disposition of case. Relayed to Mr. Minke that QIN has contracted totally this program from the BIA. Any payments or arrangements for payments will be with the QIN: Eisen/Gallegos/Welch. BIA is providing trust oversight & ~~assistance~~ providing guidance to QIN when they have a question

Comments or follow-up action:

BIA will disperse to owners damages collected by Tribe and turned over to BIA for disperusement

Use this form to document both incoming and outgoing calls or visits.
BE BRIEF. Use longhand--one copy only--file in subject file.
When appropriate, have copy made to confirm instructions or directions given field offices.
Route to appropriate branch or Assistant Area Director before filing if subject warrants.

April 10, 1999

99 APR 16 11:23

The Honorable Ben Nighthorse Campbell
Chairman, Indian Affairs Committee
Room 838, Hart Senate Office Building
United States Senate
Washington, D.C. 20510

The Honorable Frank Murkowski
Chairman Senate Energy and Resource Committee
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman.

I am Helen Sanders, formerly known as Helen Mitchell. I am an original allottee, an owner of trust property and my name is on the Quinault tribal roll. I am Chairperson of the Allottees Association of the Quinault Reservation, Vice-President of the Indian Land Working Group.

We are individual Indian land owners of trust allotted lands on the Quinault Reservation. This reservation was 100% allotted to individuals. Some of us have interests in land on the Chehalis, Shoalwater Bay, Quileute and Hoh reservations.

We are the allottees who filed suit against the Bureau of Indian Affairs for mismanagement of timber lands held in trust by the United States government. The Supreme Court in U.S. v. Mitchell held the United States subject to suit for money damages The ruling that the federal timber management statutes governing road building, rights-of-way, Indian funds, government fees and the regulations promulgated under these statutes imposed fiduciary duties upon the United States in its management of forested allotted lands

The Court found that all the necessary elements of a common-law trust are present – a trustee (The United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds).

The United States Supreme Court decision fell on the deaf ears of Stanley Speaks, the Area Director of the Portland Area Office, and Ray Malonado, Superintendent of the Olympic Peninsula Agency and their branch chiefs.

These two employees of the Department of the Interior have forged ahead with the unlawful policy and practice that took us to the court in the first place, then with what

appears to be a further unlawful new policy that is more detrimental to the forests and the individuals that own it than the previous practices.

The damages are continuing every day that passes. We cannot tolerate the breach of trust any more. The present Assistant Secretary, Kevin Gover, and all of his staff can not correct this mess. It cannot be done by them and their system. Corrections cannot be made without the following:

A. Establish a Reservation Management Office separate from and not a part of the B.I.A. system.

B. Fund the office with appropriated funds already designated for application to this reservation.

Fact: There is a crisis in the Department of the Interior. Interior has gutted its probate adjudication system at a time when the case load due to fractionation and escheated lands is at a peak. The following needs to be done in order for the BIA and the Department of the Interior, our trustee, to come into compliance with trust law which govems these issues

1. Provide a probate judge and staff to reduce backlog which cannot possibly be done under the present reduced system.

Fact: This is a news release by the Department of the Interior, October 2, 1998. "BIA announces the reopening of escheated land cases". Nothing has happened since.

2. Return all escheated allotted lands and proceeds, including lease and IIM funds, to the proper legal heirs. This clears all title records so there is a database to work from.

Fact: The Indian Land Working Group, the only voice of individual land owners, has prepared legislation to accomplish ease of land transactions. Pass this legislation.

3. Adopt a liberal method of land transactions between members of families to consolidate fractionated land for those who choose to do so.

Fact: Trusteeship is not being practiced in conformance with the Mitchell decision.

4. Practice sustained yield management of the forest which is the law for the trustee to follow. It will take time but would make 220 thousand acres of forest trust lands under environmentally sound management as directed by the Court.

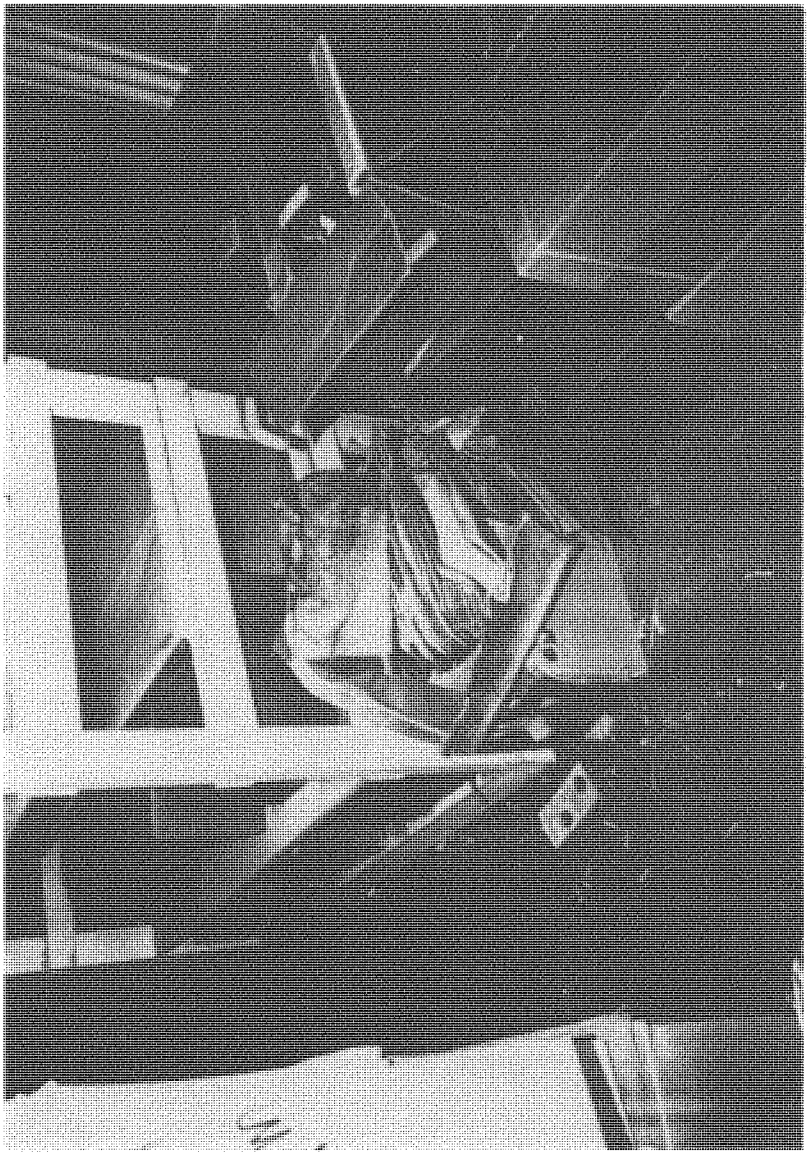
5. Compel the BIA and Interior to come into compliance with its trust duties and responsibilities regarding the management and administration of allotted Indian lands. Upon advice of counsel, it is my understanding that the management and administration

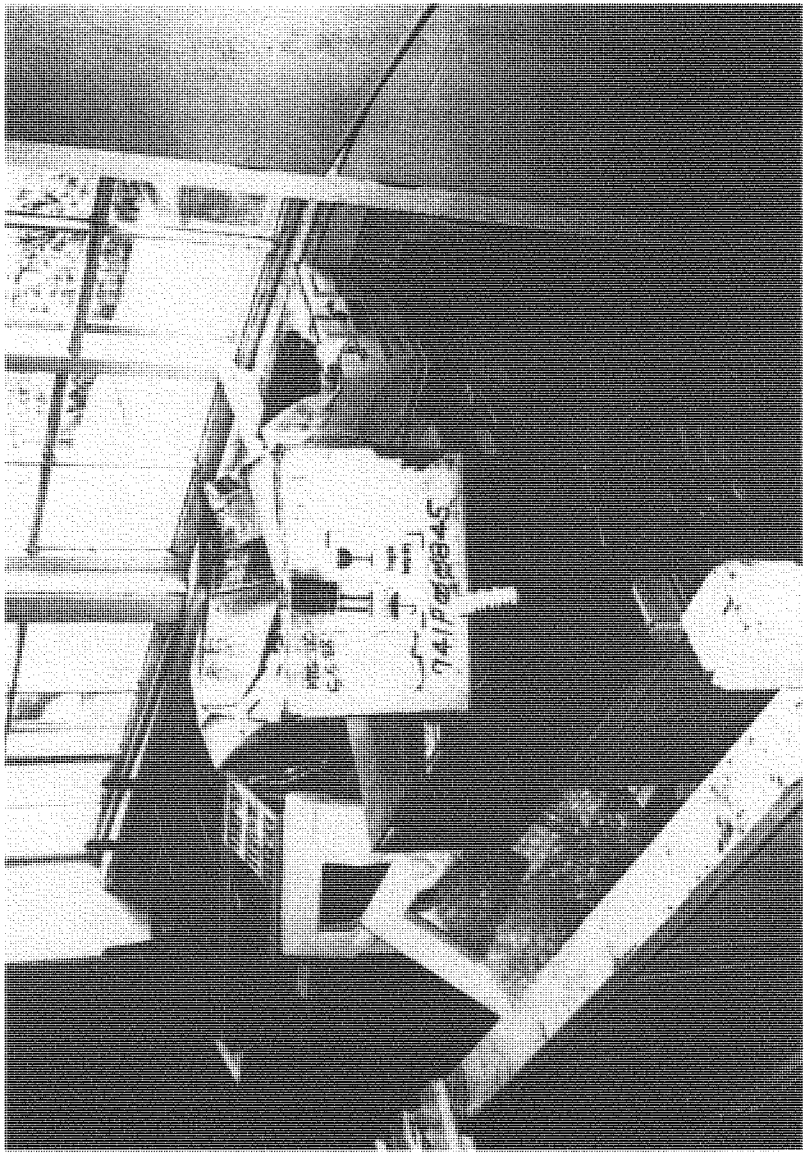
of Indian trust lands constitutes an inherent federal function which cannot lawfully be delegated to other entities.

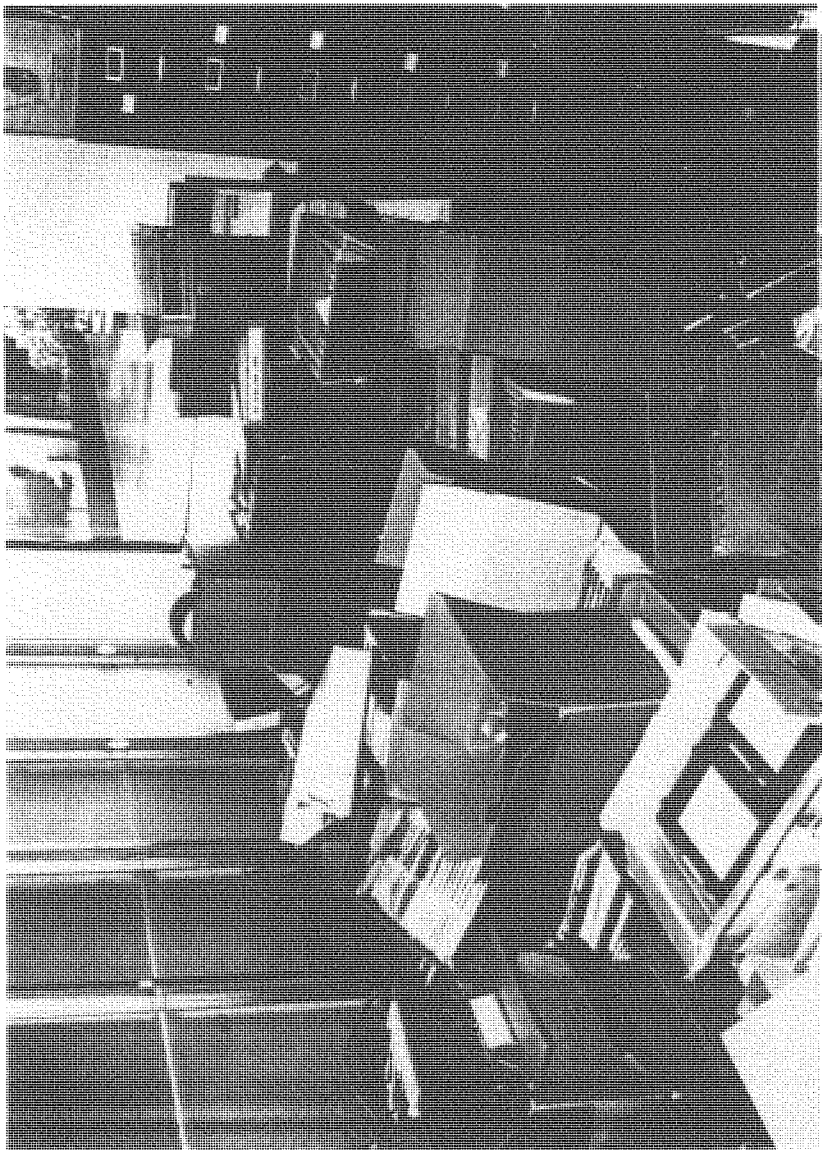
Please add my statement to the record of the recent Joint Oversight Hearing on the Trust Management Practices in the Department of the Interior.

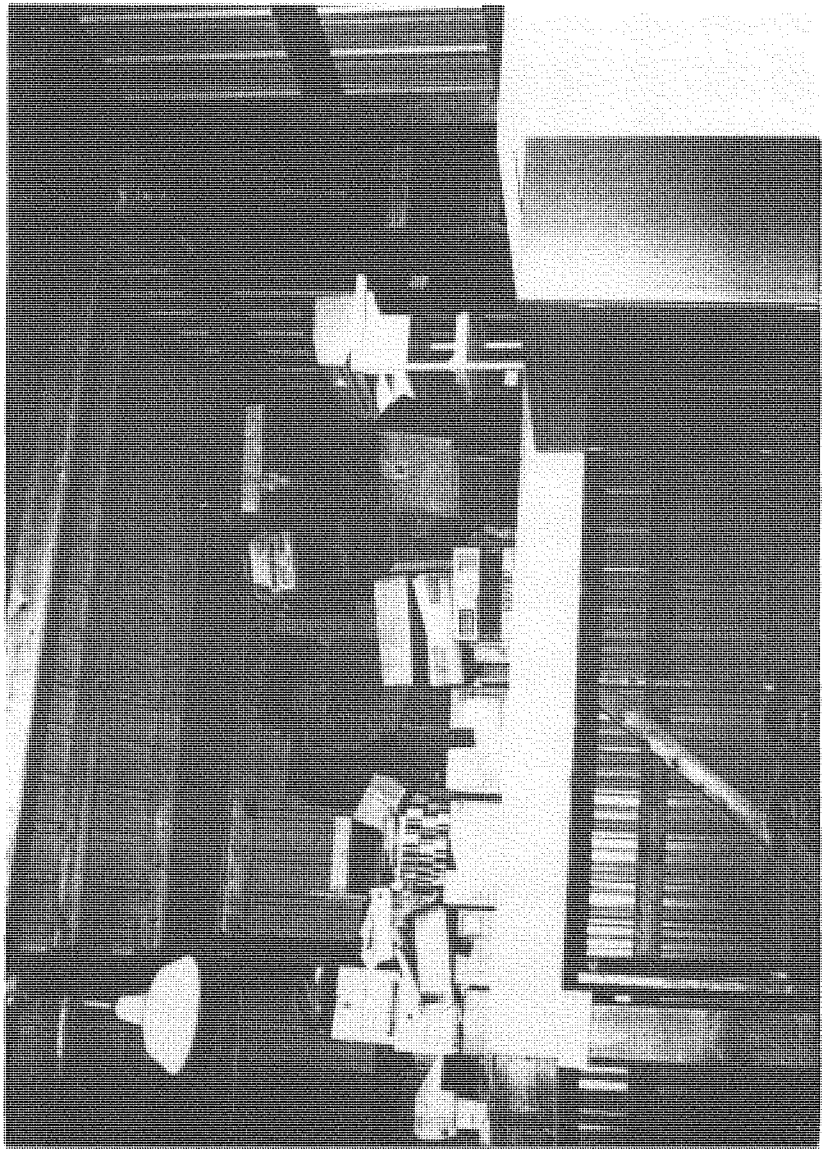
Respectfully submitted,

Helen Sanders









Clarence L. Johnson
Rt. 1 Box 73
Holdenville, Ok. 74848

Dear Sir,

We, the heirs of Nicey Lowe then Johnson, fullblood Creek 6603, ours by inheritance mineral interests in the NW/4 of section 35, Township 8 north, Range 10 East, Hughes County, Oklahoma. Have not recieve any Royalty payment, since 1993 for the oil and gas lease with the operator Mr. Bud Richardson II, Graham, Texas 76046, (940)-549-2861.

The last correspondence I had with Bud Richardson was six months ago. He inform me the Royalty checks were ready to be sent out. The only hold-up on the checks were he didn't have the correct addresses.

Over the years, we have contacted Bud Richardson about Royalty payments and he does not intent to pay us. Also, I had an Attorney write to him in treat of a possible suit to pay us. He never bother to answer the letter. The problem is, We do not have the money to take Bud Richardson, to court on this matter.

I have enclose copies of the lease, monthly production report, a letter from Bureau of Indian Affairs to Oklahoma -

Indian Legal Services, Inc., and a letter from Bud Richardson in the early nineties which as partners. I felt like that we share the cost in maintance, but not in the profits. I do wish and pray that you could help us in this matter.

Thank you

Sincerely
Clarence L. Johnson

Smiley Barnett
Manager

Muscogee (Creek) Nation
Branch of Land Operations
Division of Tribal Affairs

Page James
Land Analyst

Vicky Watashe
Secretary

November 16, 1993

TO: Rodney Durossette
Realty Officer

FROM: Page James
Land Analyst

SUBJECT: REPORT OF INSPECTION:
PROPERTY OF NICEY LOWE, CREEK 6603;
NW/4 OF SECTION 35-T8N-R10E,
HUGHES COUNTY, OKLAHOMA.

Per your request, I inspected the above mentioned property on November 15, 1993.

The Powell #6 is pumping and producing gas. The pumper informed me this well was not producing any oil and was only pumping salt water. The pumper also informed me the Powell lease is producing 85,000 cubic feet of gas each day. Also gas is being taken off the property to two (2) households, a Mr. Dilday and his son. The pumper is aware of this and these people are not heirs.

Bud Richardson is the operator. Telephone: (817)-549-2861.

Photographs are attached.

If there are any questions, please contact this office.

PJ/vw

Attachments;

Bud Richardson II
P.O. Box 741134
Dallas, Texas 75374-1134

Dear Partner,

Enclosed is your revenue check for September production from the Powell No. 6. You probably have already noticed that this distribution is about two weeks late in coming. Let me explain. I needed to open a separate account to distribute the monthly revenue. In order to open the account I needed the gross check from our gas purchaser. The check arrived the week prior to Thanksgiving. Unfortunately, I was not here to check my mail because I was in Oklahoma putting the Powell No. 1 on-line. Therefore, it was not until the Monday after Thanksgiving that the account was opened and checks ordered. Finally after about ten days here we are and I apologize.

You probably have also noticed that your check is of the ugly, handwritten, poor boy variety. Again I apologize. I will not be connected into my computerized accounting service until late December or early January. At that time you will receive both fancy printed checks and statements that will look very professional.

My statement concerning the well itself is: Daily production is stable, gas prices are too low, and operating costs are too high. My current plans are to try a few techniques to increase production. The gas prices are something I have no control over, although I do believe they will increase as we get into winter. The operating costs will be reduced 40-50% with the addition of Powell No.'s 1 & 2 to production. To be specific, all costs associated with the compressor will be divided among three wells instead of just No. 6.

Finally, let me say that I am very proud to be your partner and operator in this well. I realize that we all have a sizeable investment here and that you have entrusted a great deal of confidence in my ability. If you need any further information feel free to call anytime.

Merry Christmas,

Bud Richardson II

Bud Richardson II
/cc

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Muskogee Area Office
101 N. 5th Street
Muskogee, Ok 74401-6206

IN REPLY REFER TO
Trust Services
Minerals (IMR)

OCT 1997

Oklahoma Indian Legal Services, Inc.
Attention: Mr. C. Steven Hager
5900 Mosteller Drive, Suite 610
Oklahoma City, Oklahoma 73112

Ladies and Gentlemen:

This is in reference to the recent telephone conversation concerning Mr. Willie Harjo, one of the heirs of Nicey Lowe then Johnson, fullblood Creek 6603, who owns by inheritance mineral interests in the NW¼ of Section 35, Township 8 North, Range 10 East, Hughes County, Oklahoma.

Previous correspondence to Mr. Bud Richardson, II, Graham, Texas 76046, concerning this matter has been unsuccessful. Recent information provided by Duke Energy Field Services, Inc., Denver, Colorado, at (303) 389-1912, verifies 100% of the royalties are paid to the operator, Bud Richardson. For your additional information, enclosed is previous correspondence from this office to the operator and recent Petroleum Information (PI) production report.

We trust this information will assist your office. If you have any questions, please contact Ms. Bobbie Jane Sealy, Realty Specialist, at (918) 687-2324.

Sincerely,

Trust Officer

Enclosures

cc: Willie Harjo, Rt. 1, Box 74, Wetumka, OK 74883
Clarence L. Johnson, Rt. 1, Box 73, Holdenville, OK 74848
Christopher Powell, Rt. 1, Wetumka, OK 74883