S. HRG. 106–633

INDIAN TRUST RESOLUTION CORPORATION

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

TO CREATE AN INDEPENDENT ENTITY TO SETTLE TRUST CLAIMS OF INDIAN PEOPLE

JUNE 22, 2000
WASHINGTON, DC

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INDIAN TRUST RESOLUTION CORPORATION

THURSDAY, MAY 22, 2000

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 11:09 a.m. in room 485 Russell Senate Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell and Dorgan.

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

The CHAIRMAN. We will now move to the hearing portion. This morning we will take testimony on a discussion draft that I circulated in February 2000 to tribal leaders, to NCAI, to ITMA and the Department of the Interior.

It has been very frustrating for me, after becoming chairman of this committee in 1997, in realizing the lack of progress in reforming the broken trust management system that is currently in place.

There have been endless hearings, numerous General Accounting Office [GAO] reports and several good faith attempts to legislate solutions to the problem.

At various times in the process, we have witnessed the resignation of the Special Trustee, Paul Homan. We learned that the trust documents were shredded, the trust documents were infected with Hanta Virus, the trust documents were lost, and on and on. They were being stored in garbage bags and old boxes and things of that nature.

We have also heard from the Department that just a little more time and a little more money could fix this problem, that it would be solved.

I direct your attention to the enlarged photo of a copy of the 1876 Philadelphia Press with the headline, "Indian Trust Funds Lost."

Well, it has been more than 125 years since that was printed and here we are with still lost trust fund reports. That story goes on to talk about gross irregularities in trust management. Things haven't changed in that 125 years.

This has been going on for a long time, much too long. Indians, I believe, have waited generations for some measure of justice. I don't think if such a scandal involving any other group in this Nation took place there would be the kind of dawdling and neglect that there has been with the Indian trust funds situation.

We reached the conclusion that in this instance the doctor cannot heal himself and that real independence is needed if the United States is going to live up to its responsibilities to Indian people.

I also call your attention to the pie chart at the right of the podium with poll results conducted by Indian Country Today showing that 80 percent of Indian people asked said they believed an independent entity is needed to clean up the trust funds mess.

The Indian Trust Resolution Corporation Act of 2000 will do just that by creating a kind of independent entity that is needed to settle trust claims and bring justice to Indian people across the Nation.

With that, I look forward to hearing from our two witnesses on the witnesses list. If they would take seats at the table, Eloise Cobell, Board Member, Inter-Tribal Monitoring Association; and Jeffrey Bucher, Esquire, Lillick and Charles Law Offices, Costa Mesa, CA.

Senator Dorgan, before we take testimony, did you have an opening statement?

Senator DORGAN. Mr. Chairman, let me just say that I share your concerns. I believe your comments are on the mark. I am not able to stay because of other competing hearings. We have a Commerce Committee hearing going on, but thank you very much for your concerns and your comments. I share them.

The CHAIRMAN. As our witnesses know, today Senator Inouye, our vice chairman, has received a wonderful award yesterday, a somewhat late, but well-deserved Medal of Honor for his heroic actions with the 442d Nisei Battalion in World War II. So Senator Inouye is, you might say, just preoccupied a little bit this morning at the Department of Defense in a number of activities that have been put together today in his honor.

In fact, at 4 p.m. the Senator will be honored by his colleagues here on the Hill, too.

Why don't we go ahead, Eloise, if you would proceed. Thank you for being here today.

STATEMENT OF ELOISE COBELL, BOARD MEMBER, INTER-TRIBAL MONITORING ASSOCIATION, MEMBER, BLACKFEET NATION, ALBUQUERQUE, NM, ACCOMPANIED BY DANIEL S. PRESS, ESQUIRE, VAN NESS FELDMAN, ATTORNEYS AT LAW, WASHINGTON, DC

Ms. COBELL. It is nice to be here. Good morning. I would like to thank the chairman and members of the committee for the opportunity to provide testimony today.

I, too, would like to congratulate Senator Inouye in the wonderful Medal of Honor that he received. I think that is absolutely wonderful.

My name is Eloise Cobell. I am a member of the Blackfeet Indian Tribe in Montana. I represent the Blackfeet Tribe on the Inter-Tribal Monitoring Association Board.

I give you warm regards from Chairman Bourland, the chair of ITMA who was unable to make this hearing because of the scheduling change. But he would like to have me convey his great appreciation for this wonderful proposal that you have introduced.

We would like to provide comment on it.

Mr. Chairman, before we get started, I would just like to also thank the committee for the opportunity for the Blackfeet Indian students that came and presented before the Senate committee panel showcasing their Financial Literacy Program that is going on at Blackfeet to learn more about managing your own moneys.

They have created mini-banks in the schools and it has just been a wonderful project because we want to make sure that this never happens to us again. So many tribes are working at home, in fact your tribe, the Northern Cheyenne, have replicated the model and have implemented the program.

But, so that we don't have what you showed us today from 1800's, something that is continuing today. I want to thank the panel from the Senate Committee on Indian Affairs that gave us the opportunity to give the presentation.

Basically, I guess I would like to start by just echoing your message, "enough is enough." It is time for a change. For this reason, ITMA strongly supports both title I and title II to the discussion draft that you have circulated.

It would produce real change by finally placing an independent entity in charge of the trust reform and trust settlement effort. ITMA would like to express its appreciation to you, Senator Campbell and Senator Murkowski, for putting these proposals on the table.

We know it will be tough to get this bill enacted this year, but we think it is essential at this time. Otherwise, in 1 or 2 years Congress will find that it has appropriated millions of dollars and still not have a trust system put in place.

The tribes, Congress, GAO, and others have spent an enormous amount of time on the trust reform issue over the past 10 years and yet, two things have not changed. First, the Interior Department has fought to exclude all independent entities from having any role in the trust reform effort.

They refused efforts by members of this committee to give GAO an oversight role. They also opposed the 1994 Trust Fund Reform Act and then drove out Paul Homan, our first Special Trustee, because he was too independent.

Fortunately, Congress has just confirmed a new Special Trustee that we have a lot of faith in. They have completely excluded the tribes and the I–M account holders from any meaningful role in the trust reform, even though it is our money and our land.

They have fought every effort by the Federal District Court to have an independent Special Master appointed.

Second, they have been unwilling and unable to produce a valid trust reform and trust settlement. Their refusal to allow any independent entity to have a role might have been tolerable if the Department was doing a good job in reforming the trust systems and reaching settlement with the tribes for the government's failure to adequately manage the trust funds and assets.

However, everyone on the outside who has looked at what the Interior is doing has concluded that it is a hollow effort. In the words of Judge Lambert, Interior is simply continuing to provide empty promises.

This has been the case from the beginning. Those of you who were around in the early 1990's remember all the red herrings the

Department floated, the blue ribbon panels, the tagger teams, anything but real reform.

Today, we are seeing the Department spend several hundred million dollars to produce a trust system designed to maintain the Department's power, avoid accountability and avoid having to comply with the kinds of trust standards that every private trust beneficiary takes for granted because they are the trust standards imposed on trustees by statutes and common law.

We also have seen the department putting forth settlement proposals that are so unfair they remind me of the kinds of treaties the Government used to put in front of our ancestors 150 years ago.

When the Swiss Bank had put forward fraudulent proposals like these for settling claims of the holocaust victims, President Clinton immediately expressed his outrage and successfully demanded that those banks meet their moral and legal obligations.

But in the case of Indian trust mismanagement, the United States is the bank that has cheated people. The Secretary of the Interior is able to put forward such fraudulent settlement proposals and we do not hear a peep from the White House. I call that an immoral double standard.

So what we have after 10 years is complete exclusion of all independent entities and hollow trust reform and fraudulent settlement proposals.

This takes me back to my basic message and your basic message, Senator. "Enough is enough." It is time for a change.

Title I of the discussion draft provides that needed change. It closes the circle that the late Congressman Synar, former Congressman Yates, and many of you began when you pushed through the 1994 Trust Fund Reform Act.

The act finally provides the independent entity to oversee the trust reform that we have been seeking for the last 10 years. Secretary Babbitt partially blocked your efforts 6 years ago. But today he can no longer argue that the Interior can accomplish trust reform and settlement from within.

They have failed. It is time to complete the work you started then. We recognize there are risks involved in moving trust functions in an entity outside the Interior Department, but we have concluded that the risks need to be taken.

The BIA tries to scare Indian Country by saying that these functions are moved out of Interior. The other services delivered by the BIA will be harmed. Basically, they are telling us that we have to continue to accept this hollow trust system if we want to retain other services of the BIA.

We reject these alternatives. We can and have a right to both and they are both possible. We have confidence that Congress will enable Indian people to have both.

We also support title II of the discussion draft which is a revised version of S. 739 introduced by Senator Murkowski and you, Senator.

We were pleased to see that all the changes recommended by ITMA were included in the revision. Title II would remedy the present situation in which Indian trust funds are invested solely in

instruments that 100 percent guaranteed by the Federal Government.

When most trust beneficiaries funds are invested in balanced portfolios, it also gives the private sector a major role in the investment of our trust funds, eliminating the Federal Government's present monopoly.

ITMA has submitted a number of proposed changes to both title I and title II. We have had an opportunity to sit down with staff people to go over these changes. We are optimistic that most of our concerns can be addressed. We are prepared to work with you in any way to get these bills ready for passage.

We are also prepared to mount a vigorous campaign against any Presidential veto that the Interior might threaten. We also ask the committee to do everything in its power to see that these bills are enacted this year.

I would like to make reference to the settlement of the IIM accounts, that it be deleted from some of the bill language and I didn't have an opportunity to talk with Gregg Bourland before and that we would do the litigation that is in progress and take into consideration that some of the settlement of IIM accounts be deleted.

The CHAIRMAN. Thank you, Eloise.

Ms. COBELL. Thank you.

The CHAIRMAN. That was very eloquent testimony. This thing has really been a problem for us, as you know, because the administration is not very supportive of it.

I worry about that. You know, it seems they are more concerned about turf battles than getting the thing done.

I don't have to tell you, if you were a private citizen and you had timber on your land and you had an agreement for somebody to cut the timber and there would be a direct deposit in your account at the local bank and all that took place and then you went down to the bank and decided you wanted to take out a loan to buy a home or even to pay your normal bills, your car payment or your grocery bill, and the bank told you, well, yes, the money is around here somewhere but you can't have it. We know it is yours and it is here. But you can't have it.

Most citizens would just—I mean they would go ballistic. They would get crazy. They would have a right to. Yet that is basically the same thing Indians are told, "Yes, we have the money, but you can't have it. We know it is here somewhere, but you can't have it."

But this bill, they way we wrote it, I think it is a pretty safe bill because it has a sunset provision. It is not the kind of a thing that goes on forever. When the trust accounts are straightened up, it will go back under the normal management.

Interms of private investment, if tribes do not want to participate, they simply send a resolution into the Secretary and announce to him that he can keep messing it up if he wants. So we think it is a pretty safe bill. But even at that, it probably won't get a lot of support from the administration unless there is a tremendous amount of voice from Indian Country that they want this in place.

In fact, as you probably know, when we first dealt with this bill a little bit some months ago, there was some erroneous information sent out to the tribes by the BIA telling tribes they were going to lose all their money under this provision, which is absolute bunk. It is absolutely wrong. I was sorry that that went out because it created a lot of confusion.

Why don't we go ahead to Mr. Bucher.

Go ahead, Mr. Bucher. Thank you for being here.

STATEMENT OF JEFFREY BUCHER, ESQUIRE, LILLICK AND CHARLES LAW OFFICES, COSTA MESA, CA

Mr. BUCHER. Thank you, Mr. Chairman. My name is Jeffrey Bucher. I am a partner with the Lillick and Charles law firm in Orange County, CA

With some hesitancy I say that for 40 years I have been practicing trust and bank regulatory law, mainly with supervision and regulation of financial institutions and I have worked a great deal with trust banks and trust departments of trust companies.

I was also the head of a large trust department at one time of a major West Coast bank. What I want to talk about are obviously title I and title II and give you some impressions that I have with regard to these particular proposed pieces of legislation from my perspective as a bank lawyer.

Don Gray, my partner, testified in July of last year, mainly focusing on the GAO report. His specialty is a little different than mine. His specialty focuses on what we call trust fixes with large institutions where documents have been misplaced, lost, records misinterpreted, very similar in many ways to what we are talking about.

I tend to be more representative of banks involved as fiduciaries in their organization, formation, investment policy, those types of activities. They are the on-going normal trust functions.

With regard to title I, let me chat about it just briefly. My remarks will not be in any great detail. But my feeling is there really are two important issues and a lot of the information I have, obviously, comes from others, including the comments you have just made, Mr. Chairman, regarding the necessity for independence in terms of somebody who can take charge of the trust funds and possibly the underlying assets and make some sense out of what obviously has been a very difficult and poorly handled situation in the past.

Second, is to bring expertise to the table. I don't have personal knowledge, but my impression is that there are not trained or at least very few trained trust professionals in the Bureau of Indian Affairs [BIA].

So with regard to independence, obviously the Act proposes to accomplish this through a RTC-type of entity. It is a little different than the RTC in that the title remains in the Federal Government.

In RTC, as you may recall, the title was transferred. It, in effect, belonged to the FDIC and then ultimately to the American taxpayers.

With regard to the issue of independence, even though the title doesn't transfer, it appears that the powers that the proposed act gives are sufficient to bring in outside experts, not only private sec-

tor experts, but experts from other parts of the Federal Government and also the BIA people, which incidentally, I think, has an interesting dimension because if you can bring in people who have been working on these matters for a number of years, you will bring some historic perspective. Also, it may involve some training.

With the sunset provision, if it goes back to the BIA, then hopefully we will have a situation where people will have gained the expertise to go forward and then manage the assets.

Also, the Special Trustee seemed to feel, with regard to the independence issue, that there is a difficulty in asset allocation within the Department of the Interior and his feeling seems to be that when dollars are divided the Indian Trust Fund projects are not getting the highest priority.

Also, with regard to independence, we have the oversight board which clearly is a high profile group. I think the recommendation that we have provisions so representatives from those various agencies, the Fed, Treasury, OCC and what have you, can come in place of the Chairman and Comptroller and the Secretary is very important.

Having four members of Indian tribes involved I think presents a perspective I think is very good. But I emphasize again that the new corporation will be dealing with copies of records, not trust title.

So there may be some issues that are raised in the future about resolution of accounts receivable and if it turns into asset resolution as well, a difficulty of dealing with some of these matters without legal title.

Basically, it is going to require cooperation of the title holder which would be the Department of the Interior.

Expertise-wise, again, I am led to believe, as I said earlier that there is a question about the qualifications of the personnel that are handling these matters.

There is also an issue of trying to ask people who have lived with it for a long period and probably have insecurities about criticisms that have arisen as a result of the management of these funds being able to go forward in an objective manner and manage the assets appropriately.

Independent contractors, I think, are very important. Obviously, that is addressed in title II, but it is also addressed in the title I provisions. I think it is important, particularly with the complexity of modern trust administration to have a number of resources at hand in connection with the management of the assets.

As I said, certainly government employees, many of them, I am sure will be well qualified. But being able to use outside resources, companies that do this on a day-to-day basis makes a lot of sense.

Again, the Oversight Board, I think, can also provide a dimension of not only independence, but also expertise through the tribal member relationship, particularly, and I don't mean to eliminate the important of the Treasury and the other agencies, but the Federal Reserve, my former agency, and the OCC, the Office of the Comptroller of the Currency, can be particularly helpful with their expertise.

The OCC has a major trust supervision operation. I think Jerry Hawke would be the representative. He is a fellow with whom I

have worked for many years. I think he could be very helpful in overseeing the process.

So basically, I think this is moving in the right direction. I think it gives the tools to the people who are in the corporation, should it be formed, to accomplish the purposes that obviously a number of people feel are necessary.

Quickly, on the technical suggestions, let me just focus on one. I think more thought has to be given to the language of the direction of investment by the Indian tribes.

If you give investment management under title II, which is an amendment to the 1994 act, to independent trustees, those trustees normally would function under the prudent investor rule as investment managers with full discretion.

When you have outside direction on investments you confuse the situation and I wonder whether the investment objectives can be met as readily.

I would recommend consulting with regard to investment instruments in the language rather than direction.

There are some other comments that are in my testimony. Some of the proposals that the ITMA and Ms. Cobell referred to I think are improvements.

I would be very happy to answer any questions you might have.

The CHAIRMAN. Thank you. Your recommendations will certainly be looked at. If you have any other ones that you think would make this a better bill, we would appreciate you sharing them with us.

I have to say in defense of the Bureau, there are a lot of very fine people who work over there. But, you know, you do well what you are trained to do. I think many of the people at the bureau are simply not trained in these kinds of fiduciary skills.

A teacher has difficulty being a doctor and a doctor has difficult being an electrician. I mean, you do well what you are trained to do. Many of the people in the Bureau came from backgrounds of natural resources, of counseling, of different service-oriented skills. I think that simply many of them do not have this particular skill.

I certainly don't, I want to tell you that. But I have always been a great believer that if you don't have the skill you had better get somebody who does have it before you make too much of a mess out of it.

Let me ask you several questions. First, I will start with Eloise. The ITMA testimony points out that each year Congress appropriates additional funds. You mentioned that in your testimony. We are putting in more than $100 million new dollars this year, as you probably know, to try to correct this problem.

Do you feel the enactment of this kind of a bill is more critical as Congress grows more tired of the problem? We just keep hearing, "We can fix it if you guys would send more money." But it doesn't get fixed.

Ms. COBELL. I really believe that we need a fresh start, that we need to start probably within a new entity that could actually address all the problems and issues that need to be addressed.

What I find is that there is a lot of not really telling the truth. Instead of really confronting it and admitting that there are real problems within the accounting systems and all the money that

was allocated to correct these problems in the reform, instead of really admitting it, it is just trying to deny it and do a fast fix.

That doesn't seem to work, so I really believe that just like the chart says over here in Indian Country it is going to be difficult for the current bureaus to reform themselves. I think a fresh start would be very helpful.

Mr. Chairman, I forgot to introduce Dan Press, who works with ITMA, on my right. He is also here to answer your questions.

STATEMENT OF DANIEL S. PRESS, ESQUIRE, VAN NESS FELDMAN ATTORNEYS AT LAW, WASHINGTON, DC

The CHAIRMAN. Dan, did you have a statement, too, or are you here as a resource person?

Mr. PRESS. I am primarily here as a resource person. There are a couple of issues, if I have an opportunity, that I would like to raise with the committee.

The CHAIRMAN. Go ahead. Why don't you go ahead and do it?

Mr. PRESS. I think Eloise hit on one of the critical points on why we need to get this bill through this year, because otherwise that $100 million could end up going down the drain.

There really is a lack of credibility. There seems to be more emphasis on show than on substance. I want to point out a couple of examples because a lot of them come back to this committee. Last September or October there was a hearing where Secretary Babbitt testified.

The CHAIRMAN. He was very critical at that time of this approach.

Mr. PRESS. One of the proposals that you asked him about was that GAO had recommended that they develop an architecture. Secretary Babbitt gave you what I thought was a condescending lecture, "Oh, architectures are things of the past. That's 1960's thinking."

Well, if you look at the March report that the Interior Department submitted to the Federal District Court in the *Cobell* case, they state that they are having problems getting their different computer systems to talk to each other and as a result it is going to cost more money and delay full integration another year.

That seems to go on and on and on. Another issue around that time, Secretary Babbitt said anybody who wants to take functions out of the Interior Department is anti-Indian because that is saying the Indian people can't do it.

The CHAIRMAN. I reminded him who was suing him. It was the Indians.

Mr. PRESS. One of the things we like about your bill, in fact we are proposing to even strengthen, what we are hearing from those BIA out in the field is,

> We want exactly what Jeff had suggested. We want people who know what they are doing. The direction we are getting from up top is a lot of smoke and not substance. We want a real system, but we are not going to get a real system. Please, give us somebody who knows what they are talking about.

We think those people, that 93 percent of the bureau that are Indian share our ideas, but that the leadership is keeping them from doing it.

So we are suggesting you even take the entire trust, every trust office in the bureau, and put it directly under the ITRC, so those people can get the kind of direction that they want and need to produce a real trust system.

The last is settlement. This committee directed the BIA and ITMA to try and negotiate language on settlement because we had submitted one bill and they had submitted another.

Last summer the bureau told us that they are terminating the negotiations, that they don't think that there are systemic problems. It is interesting. They said, "We don't think there has been systemic mismanagement in oil and gas.

At the same time the Interior Department and the Justice Department are filing law suits against every major oil company for systemic underreporting of income from Federal and tribal oil and gas.

But I remember you asked Secretary Babbitt that question and he immediately changed the subject. But there is not credibility. They are not doing an honest job. They are faking it and our view is, when we started this effort ten years ago, when Congressman Synar started it 14 years ago, it was to finally produce a trust system that gives Indian beneficiaries the same rights, the same accountability everyone else does. And it is not happening.

The CHAIRMAN. It has to do with regulations. It is something we need your help on. I am not sure what you can do, but the Secretary was proposing a secretarial order on trust policies and such legal scholars as Reid Chambers said it was flawed. Kevin Gover said, "I am not going to change it."

Somebody put a hold on an appointment until they changed it. That was the only way it came to be changed. The Interior Department is now proposing to issue new draft regulations for the major areas of trust: Grazing, leasing, trust funds, and probate.

The Inter-Tribal group of NCAI and ITMA group, that is headed by Chief Tellman and somebody from NCAI, and Reid Chambers is the attorney for that group, has concluded they are fatally flawed.

At a meeting about a month ago, 40-some-odd tribes signed a statement saying,

Please stop this process. We need to sit down and begin from scratch. Your regulations are not going to provide an accountable system.

They have nothing in there on an accounts receivable system. Again, Secretary Gover said, "No, I am proceeding."

We need whatever help we can get. They are proposing to issue these things in draft form next week. If there is anything the committee can do to get Interior to stop this regulatory process, we really need your help because those regulations would be completely inadequate. They would do nothing but perpetuate the bureau's powers and prerogatives.

Those are my comments. I will be glad to help answer any other questions.

The CHAIRMAN. Thank you. I was just checking with counsel. I am not sure at this late date what we can do. We are apparently negotiating with them now. They frankly do some things that in my view is just insulting to Indian Country.

This last settlement offered by the administration to provide 5 cents on the dollar in terms of losses suffered by its own mismanagement, do you think most Indian people would be happy with 5 cents on the dollar considering they are the ones that lost all the documents?

Eloise?

Ms. COBELL. Absolutely not.

The CHAIRMAN. I would hope not. I would hope that that is categorically rejected because I find it really insulting.

Title II, Eloise, of the discussion draft provides a preference for contracts with Indian-owned banks to manage Indian funds. By my count there are fewer than ten such banks in the United States.

Do you think the bulk of those funds will be contracted out to the large non-Indian banks such as Chase Manhattan or do you think those Indian banks will have a fair chance at getting their share of managed funds?

Ms. COBELL. I think it is appropriated in the bill that you do give a chance for Indian financial institutions that are really doing the hard work in Indian Country that are providing the loans and all the services as a sovereign nation that many banks have hesitated to come in and provide capital and credit.

So I think it is an opportunity to continue to extend the lack of financial services for Indian communities. As you have known in traveling out to Indian Country, there is really a lack of economic development in those communities and it is because they have a lack of financial institutions.

So I think this is a start. Why shouldn't it be a start because it is Indian money that we are talking about. So I think it is good. Indian financial institutions have to comply with the same regulations as any banking industry across the street or whatever. We have to comply with the same regulatory authorities, so I think it is a nice point in the bill.

The CHAIRMAN. Okay.

Mr. Bucher, you know we have had questions come up over and over about independence. That was one of the problems. Mr. Homan did not think he had the independence he should have had. In questioning the new Trust Manager, he assures us that he believes he will have independence to make some decisions himself.

Your testimony focused on the need for independence and expertise of this proposed trust corporation. In your opinion, would the proposed structure of the corporation's oversight board provide that independent without meddling from the bureau?

Mr. BUCHER. It is my understanding that the Special Trustee will still report to the Secretary of the Interior. I think that is a continuing issue with regard to his ability to act independently.

Just from reading the background materials, clearly, this happened with Mr. Homan in his attempt to in some ways go off on his own and come up with——

The CHAIRMAN. Under the current system, he reports to the Secretary. But under this bill he has much more independence.

Mr. BUCHER. That is what I am going to lead up to. Under the bill with the separate corporation with a CEO who, as I understand, may or may not be the Special Trustee, it could be some third party, although the suggestion has been made that it be with

its own charge in terms of direction from legislation. That would be a much more independent environment in which they could operate.

The CHAIRMAN. In your background have you ever witnessed mismanagement of this magnitude, with hundreds of thousands of documents stored in garbage bags and things of that nature?

Mr. BUCHER. It is very unusual, if not unique.

The CHAIRMAN. Do you want to elaborate a little bit on your statement about the conflict of interest the Department now has?

Mr. BUCHER. Well, it is my understanding, and this is from my outside reading, there really are a couple of issues. One is that the people who have been managing the trust funds in the Department have for many years—and I'm sure this runs with individuals who have been there for long periods of time, as well as the culture itself—have, I would assume, developed a way of approaching these trust fund management issues without, number one, the expertise, and without much outside input, it sounds like. To ask those people—particularly, again, with the issues of expertise—to continue to do this, I think creates a conflict. It seems to me that history, and I can cite a few situations in the private sector where you really have to take out the individuals who have been involved in the past, and put in their place people who have an objective, unbiased approach, understanding that those people who have been there are an important resource in terms of historic input.

But as Ms. Cobell says, you really need a clean slate, I believe, and a changing culture. I think the culture is probably one of the biggest issues.

The CHAIRMAN. Did you have a comment on that, Eloise?

Ms. COBELL. Yes; I did.

I believe what's wrong is that there is a lack of sanctions, and under the existing environment, no one is sanctioned. That's why they continue to do the "same old, same old." I have given this a lot of thought. As you know, I have been involved in this as an individual and as a representative from my tribe for many years on the trust fund reform, and I really believe what we need is—the structure that I think would be needed is to actually have this separate entity that you have outlined, and have the Special Trustee, as we say, as the interim CEO or maybe the permanent CEO, and then to have a Special Master put in place, and that Special Master holds those people's feet to the fire to make sure the job gets done.

I see that as one remedy that could make this all happen.

Mr. BUCHER. Could I make one more comment, Mr. Chairman, on the independence issue?

There is an analogy with the RTC and its efforts on behalf of the savings and loan cleanup. Visualize the decision not to use the RTC, and visualize the decision to allow the savings and loans to continue to clean up their own problems. I seriously question whether we would have been successful in that enterprise, as it were.

The CHAIRMAN. You brought up maybe my last question, Mr. Bucher. You have some familiarity with the RTC and the savings and loan mess. When settlements were made, did they approach anything as little as 5 cents on the dollar?

Mr. BUCHER. Not that I'm aware of, although, frankly, there were some small percentages on the dollar settlements. But understand that they held the title, and they were dealing with very difficult real estate markets at that time. So some of the settlements, I am sure, were percentages on the dollar, but that certainly wasn't their objective.

The CHAIRMAN. The end result was that other people went to jail for mismanaging the funds and for doing some things wrong.

Mr. BUCHER. That's a good point.

The CHAIRMAN. Probably no one is going to go to jail on this, but perhaps somebody ought to.

Well, I have no other questions, but I appreciate your being here, Eloise and Jeffrey and everyone that was in the audience. If you have any further comments that you would like to submit for the record, we will keep the testimony open for 3 weeks, and any other suggestions you have to make this bill a little better, we will certainly appreciate your turning them in to us.

With that, this committee is adjourned.

[Whereupon, at 12 noon, the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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

I thank you for holding this hearing on your draft bill, the Indian Trust Resolution Corporation Act of 2000. This is an ambitious bill—it does nothing less than attempt to fix 100 years of BIA mismanagement of the Indian Trust accounts. I applaud this undertaking and hope it will be successful.

It certainly has the beginnings of success. It is modeled after the law that fixed the savings and loan crisis back in the 1980's. So we know the approach has worked before. Hopefully it will work again.

It also makes commonsense reforms. It takes the trust fund reform responsibility away from the Department of the Interior. If the Department couldn't even run it in the first place, it only makes sense that the same Department can't fix it.

It also amends the American Indian Trust Reform Act to require that the Secretary, with the advice and assistance of the Comptroller of the Currency, enter into contracts with qualified financial institutions.

This contracting-out provision probably sounds familiar to you Mr. Chairman. It was the centerpiece of a bill you and I introduced over 1 year ago. If you can't remember the content, you will certainly remember the response it got! The Secretary referred to our legislation as "condescending" and announced at a press conference that the legislation was "racially motivated."

I think this contracting out provision is a good one. Private financial institutions have been managing hundreds of billions of dollars in private trust funds for more than a century.

If they can manage private assets without horror stories that we have heard at the Department's trust agency, then why should they not have the chance to serve as trustees for Native American trust accounts?

This is a good bill. It follows a proven model. It uses commonsense. It is needed and long overdue. I look forward to hearing today's testimony and ask that I become a cosponsor of this bill.

PREPARED STATEMENT OF A. DAVIS LESTER, EXECUTIVE DIRECTOR, COUNCIL OF ENERGY RESOURCE TRIBES

Good morning. I am pleased to present this written testimony on behalf of the Council of Energy Resource Tribes, or "CERT", of which I am the executive director based in Denver, CO. CERT was begun in 1975. Today, CERT has 50-member Indian tribes.

CERT seeks to assist member tribes in developing what remains of their land and natural resources in a manner consistent with tribal interests in every sense, including financial, cultural, social, religious, and governmental interests. Overall, CERT aims to assist Indian tribes to fulfill their governmental responsibilities as sovereigns and to use their resources in ways that are most beneficial to the tribe and its members. CERT also seeks to assist Indian tribes in holding the United

States accountable to its fiduciary duties toward Indians and Indian tribes, particularly with respect to the stewardship of Indian resources.

CERT is pleased to testify in general support of the "Discussion Draft" legislation to establish an Indian Trust Resolution Corporation, "ITRC". Apart from our comments on the particular legislative details of who, what, when, and where, we believe the good intentions that have motivated the development and consideration of such a proposal are worthy of praise. And so we thank you, Chairman Campbell, for giving this proposal serious consideration and timely attention.

The gravity of the situation requires creative and dramatic change. The proposed ITRC promises to set a bold new direction at all levels of the Federal trusteeship responsible for Indian resources. We support your efforts to revise the "Discussion Draft" into a politically viable solution.

The problem that has so ensnarled the Federal bureaucracy in its mismanagement of the Indian trust resources is the conflict of interest that is inherent in the fundamentally corrupt approach taken by the United States as trustee. The present Federal trust system was established not because of Indian incompetence but because there was no other way of containing or controlling the avarice and greed of State government and private interests with respect to Indian resources. But as this Federal trust was administered over the decades, a growing Federal trust bureaucracy has become obsessed with self-preservation at the expense of the fundamental rights of Indian tribes and Indian land owners to control their own property. Consequently, Indians have been denied the property rights enjoyed by all other American property owners.

What we seek is not a reform of this corrupt system of Federal tyranny. Instead, we seek a transformation of the trust system so as to empower the owners of Indian lands and resources to pursue a life that they find desirable and worthwhile. We don't want reform. We need a dramatic transformation. The Indian Trust Resolution Corporation, if properly structured, promises to create the conditions for that transformation. In short, to end the tyranny and restore a true trust responsibility, we need Federal protections but not Federal control.

In the end, this transformation is not about the money, although all unreconciled funds should be accounted for. It is, instead, about honor. The honor of today's tribal leaders and what they owe the coming future generations of tribal members. And it is about the honor of the United States, for as one Justice of the U.S. Supreme Court has said—great nations, like great men, should keep their promises. We Native Americans have never treated the land as personal property, but rather as a sacred trust to be cared for and passed on for the use of unborn future generations.

A cursory glance at the facts should lead even a casual observer to be outraged at the callous disregard with which Federal agents have treated Indian resources entrusted to their care. And what is even more disturbing, that Federal mismanagement continues today. In our time. On our watch.

The story of Federal mismanagement of Indian trust resources is not only a sad tale about the looting and neglect of prior generations. It is today's news. It is a current event, continuing in our own era, without redress.

Dozens of breasts have been beaten about this tragedy.

Hundreds of apologies have been mouthed.

Thousands of promises for improvement have been made.

Tens of thousands of hours have been devoted to studying and reporting and recommending.

Hundreds of thousands of people have been hurt.

Millions of dollars have been appropriated and spent on supposed solutions.

And yet billions of trust fund dollar transactions are unreconciled, millions of trust fund dollars are unaccounted for, and hundreds of thousands of lease payments and gallons and cubic feet and board-feet and other Indian trust resources are missing this year, last year, and countless years before that.

This tragedy represents official corruption in its worst form. It may be legal. But it isn't right. The corruption of the Federal Indian trust system makes even good people do bad things. And Indians end up paying for the bad results. As one of the earliest Republicans, Abraham Lincoln, said during his debates with Mr. Douglas, "When the white man proposes to govern himself, that's democracy. When he proposes to govern others, that's tyranny."

Tyranny is what we have here. Federal tyranny over Indian resources. The same policies and practices that made America rich made Indians poor. And that continues today every time the U.S. Treasury receives but does not account for the fruits of Indian trust resources. The tyranny continues each day Indian tribes and Indian people are deprived, by a Federal bureaucracy overgrown with conflicts of interest and self-preservation, of our right to control our resources for our benefit.

Native Americans are beyond frustration, indeed we are outraged by the ineptitude and the callous disregard for our basic property rights. It would be bad enough if this thievery were the result of, say, jealousies of neighbors who want what we've got. Given the realities of America's frontier history, Indian tribes are very familiar with that kind of theft. But this looting is being done by the U.S. Government, the very entity which, under the U.S. Constitution and its principled protection of basic property rights, has assumed the position of being our protector against jealous neighbors. It is the U.S. Government that continues to preside over a modern-day pillaging of our Indian resources.

The proposed Indian Resolution Trust Corporation would represent a sharp departure from what has become business-as-usual in Washington, DC. The ITRC would propose to inject state-of-the-art trust management policies, procedures, and technologies in the field of Federal trust management of Indian resources. Yet this alone will not be enough. The key ingredient in the ITRC proposal must be the separation of these duties from the present decades-old bureaucracy which has demonstrated its chief mission to be protect and preserve bureaucratic power even at the expense of the trust assets and the interests of the trust beneficiaries.

I think it appropriate to resurrect, on the 30th anniversary of his remarkable statement, the insightful remarks of President Richard Nixon in his July 1970 Indian policy address, in which he focused squarely on the conflict of interest inherent in the Federal bureaucracy:

"The U.S. Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute.

In many of these legal confrontations, the Federal Government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the Government holds as trustee.

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself, to represent two opposing clients in one dispute; yet the Federal Government has frequently found itself in precisely that position.

There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal Government is damaged whenever it appears that such a conflict of interest exists."

With great sadness I remind you that nothing has been done to correct the problem Nixon identified so clearly. The ITRC would promise to resolve this inherent, bureaucratic conflict of interest with regard to trust management.

The committee will likely receive a critique of the ITRC discussion draft from some quarters which says that by temporarily transferring trustee functions to an agency independent of the BIA and Interior Department, a permanent dismemberment of the BIA and the Interior Department will result. But the mission of the BIA and the Interior Department is not self-preservation. Rather, the mission of the BIA and the Interior Department should be the preservation and advancement of Indian trust resources and tribal government. The critics have it backwards.

Little more than 1 decade ago, the life savings of many individual Americans was jeopardized by the twin failures of the Federal regulators and a mismanaged savings and loan industry. The U.S. Congress responded by forming a new, temporary agency, the Resolution Trust Corporation, to restore sound management of assets and to reimburse, dollar for dollar, those individual Americans whose savings had been squandered or looted.

While the price tag was immense, the U.S. Congress did not shy away from making good on its promises to account holders who had relied upon the guarantee that their savings were insured by the U.S. Government. To shirk the Federal responsibility in such a situation would have called into question the very foundations of our national Government.

How, we must ask, is the Federal Government's mismanagement of Indian trust resources any different from the Federal Government's initial mismanagement of the savings and loan debacle? Here, rather than an insurance guarantee, we have the Federal Government assuming the role of a trustee for the Indian resources. A trustee's duties are of the highest order. There can be no diversion allowed. No waste permitted. No personal enrichment. Indeed, the trust resource must be cared for so that its value grows rather than deteriorates. As it did when Federal fiduciary failings were uncovered in the S&L crisis, the Congress must step in and correct

the Federal trustee's failings with regard to the gross mismanagement of Indian trust resources.

Unless there is bold and decisive action taken by the U.S. Congress, the lessons of history teach that the U.S. Departments of the Interior, of the Treasury, and of Justice, will not repair the damage they have caused through their own malpractice. Congress must remove these foxes from the hen house if the rampage and pillaging is to be stopped and rectified. It is, after all, the constitutional obligation of the U.S. Congress to regulate and manage Indian affairs where necessary. And the necessity in this case is painfully obvious.

As an organization, CERT has encouraged the Inter-Tribal Monitoring Association to take a lead role for Indian tribes on trust management issues and we are supportive of their efforts here today. But CERT shares that obligation for our member Indian tribes. Most of the revenue generated from trust resources is from energy and mineral resources. One cannot separate good management of these resources from good management of the fruits of those resources.

Enactment of the IRTC would be only a beginning, not the end. Vast sums of Indian trust dollars have not been collected much less accounted for. Even after the trust resources and revenues are accounted for and reimbursed, the whole nature of the Indian trust responsibility must be transformed. Because it emanates from a social contract in which the Federal Government, in exchange for the lands and resources surrendered, assured tribes that they would have Federal support as they develop socially and economically and with self-government. So this issue is not just about money. Indian tribes share an obligation that accompanies the rights of self-government, and that is, our responsibility to manage our own lands and resources, and share the burden of defending this country and the burden of governance with all Americans. We cannot save ourselves alone. Our well being is dependent upon the welfare of all Americans.

Let me conclude by saying that none of my remarks, nor any of the positions taken by CERT, are intended in any way to impugn the integrity of the present Assistant Secretary, the Honorable Kevin Gover, any previous Assistant Secretaries, or the thousands of other Federal officials who have worked hard for the best interests of Indian tribes and individuals. The problem we have focused on lies with the system. These Federal officials did not set up the system. They did not write their job descriptions. It is the system itself that is corrupt. Like President Gorbachev discovered when he attempted to reform the Soviet system, the problem lies at the core. The only answer is a fundamental transformation. And like the fall of the Soviet system, once fundamental change is begun it cannot be stopped.

And so, as President Ronald Reagan called upon Gorbachev to tear down the Berlin Wall, Indian tribes today call upon this committee, and the U.S. Congress, to tear down the tyrannical Federal trust bureaucracy and establish in its place an Indian Trust Resolution Corporation that will permit fundamental and transformational change.

Thank you for this opportunity to testify in favor of fundamental change in the way the Federal Government carries out its trust obligations to Indian tribes and their members.

INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
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COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
JUNE 22, 2000

HEARING ON PROPOSED AMENDMENTS
TO THE 1994 INDIAN TRUST FUND MANAGEMENT REFORM ACT
SUBMITTED BY
THE INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

Mr. Chairman and Members of the Committee, my name is Gregg Bourland. My Sioux name is "Eagleswatchoverhim". I am chairman of the Cheyenne River Sioux Tribe and chairman of the Intertribal Monitoring Association on Indian Trust Funds (ITMA). On behalf of the forty tribes that comprise the membership of ITMA, I would like to thank the Committee for this opportunity to testify today on a very important proposal to amend the 1994 Trust Fund Management Reform Act.

ITMA was established by a group of tribes in 1990 to advocate for 1) the reform of the management of Indian trust funds and trust resources by the Federal government, so that those assets and funds finally would be managed according to the high fiduciary standards required of a trustee; and 2) compensation to the tribes and individual Indians who own trust funds and trust resources for the losses they suffered as a result of the Government's gross mismanagement of those funds and resources in the past.

Since its creation ten years ago, ITMA has not spent its time, as we originally had hoped, working with the Interior Department to find solutions to the complex issues of trust reform and trust settlement. Instead, the bulk of our time has been spent in constant battle with the Interior and Justice Departments to try to get them to do what is right. For the first seven years, the fight was to get them to do anything. For the past three years, the fight has been to keep these agencies from implementing trust reform and settlement in ways that are failing to meet trust standards, that are designed primarily to benefit those agencies at the expense of the Indian trust beneficiaries, and that are designed to avoid Federal accountability for its years of gross mismanagement.

This Committee, other Committees of Congress, GAO and the Federal courts have also been compelled to devote an enormous amount of time and energy to these same kinds of frustrating battles. We have been told that many of the dedicated BIA mid-level employees in the field are also frustrated by the Department's emphasis on show rather than on substance. The situation is perhaps best summed up by Judge Lamberth in the following quote from his April 4, 2000 decision in the *Cobell* case, in which he said:

> Despite all of the personal assurances they [Secretary Babbitt and Assistant Secretary Gover] gave this Court about the priority they were placing on trust reform, the facts brought to light in this proceeding provide overwhelming proof to the Court that the defendants simply continue to provide more empty promises...

ITMA, Congress, GAO, the courts and the BIA employees in the field cannot and should not have to continue to devote the bulk of our time and energy to this continued battle with the Departments to keep them from passing off their "empty promises" as real trust reform and settlement. However, based on a growing record, it appears that this is what the future will hold, so long as these agencies remain in control of the trust reform and trust settlement efforts. After ten years it is abundantly clear that the Interior and Justice Departments are institutionally incapable of reforming trust management or fairly settling the Government's liability for long-running breach of trust. As we have been advised over and over again, it is a basic rule of management that when an institution has been grossly mismanaged, the leadership in that institution is incapable of truly reforming that institution. All of the experts will tell you that if you want true reform, it must be done from the outside.

It is time for a change. Senator Campbell's Discussion Draft will produce such a change, by transferring responsibility for trust reform and trust settlement to an independent entity called the Indian Trust Resolution Corporation (ITRC), modeled on the Resolution Trust Corporation which successful resolved the S&L crisis. While there clearly are some risks involved in launching in a new direction and creating new entities, ITMA has concluded that the risks need to be taken, given the frustrating experiences with the Interior and Justice Departments over the past ten years. When surgeons perform open-heart surgery, they remove the heart fully from the chest cavity, repair it and then replace it. The same kind of radical surgery is needed in the trust area if the trust system is ever going to truly be repaired.

For these reasons, ITMA strongly endorses the Title I of the Discussion Draft, subject to continuing consultation between the Committee and ITMA and tribes on changes needed to strengthen the Draft bill. Attached to this testimony are ITMA's proposed changes. We are pleased to report that we have been meeting with

Committee staff and are optimistic that, with just a little more work among the Committee, ITMA and the Tribes, the Draft will soon be ready for ITMA's unequivocal endorsement. We are committed to working with the Committee to make this happen expeditiously so the bill can be enacted this year.

While we recognize that this is a short legislative session, we think it is critical that this bill be enacted this year, for two reasons:

1) The $150 million plus that Congress has appropriated for trust fund reform appears to be in danger of producing seriously flawed trust systems, regulations, and policies. As a result, if the ITRC is not quickly placed in charge, Congress may find that much of the money has been wasted and much of the work will have to be done over again.

2) The BIA is trying to rush through, by the end of this year, revised trust regulations that many tribal leaders have determined to be fatally flawed because they fail to begin to establish true trust standards. (This is discussed in greater detail below.) Unless the ITRC is put in place this year, these regulations will be promulgated as final regulations despite the strong opposition of the owners of the land and funds that will be managed pursuant to those regulations and in violation of the principles of Self-determination.

I had the honor of testifying at the last hearing the late Congressman Synar ever chaired, in October of 1994. Fittingly, it was a hearing on the 1994 Trust Fund Management Reform Act bill. It was the willingness of Congressman Synar, along with Senator Inouye and many other members of this Congress, to stand up to the Interior Department in 1994 that enabled that Act to pass. Senator Campbell, in drafting and circulating the Discussion Draft, you have assumed Congressman's Snyar's mantle. On behalf of the large group of tribal leaders that voted unanimously to support this Draft at our May 17th tribal leaders meeting. I would like to express my deep appreciation to you for your courage and creativity in putting this draft before the Indian people.

This reference to Congressman Synar is particularly appropriate because the Discussion Draft effectively closes the circle that was begun in 1994. Even back then, Congress and ITMA recognized that if trust reform were to happen properly, responsibility and authority had to be removed from the agencies that had created the problem and placed in an entity with trust expertise and independence. ITMA argued that this entity had to be independent of the Secretary. However, Secretary Babbitt told the Congress that his Department could get it done internally and threatened to get the President to veto legislation that took the responsibility out of Interior's control. As a result, the Office of Special Trustee was placed in the Department and subject to the authority of the Secretary.

Six years later, the results are in on whether Interior is capable of reforming itself. It is clear that the Secretary was wrong. Other than the Department itself, everyone who has followed the Department's activities over the past six years has concluded the Department is failing in its reform and settlement efforts and is incapable of reforming itself. I went back and read my testimony from that 1994 hearing before Congressman Synar. Then, as now, the Department was stonewalling, unresponsive and looking for every possible way to avoid accountability in its role as trustee. Today, the only choices before Congress are either: 1) moving responsibility for trust reform and settlement into an independent entity such as the ITRC or 2) accepting that Indian tribes and individual Indians will never have their trust funds and resources managed according to trust standards and will never obtain a fair settlement for the losses they suffered as a result of Federal mismanagement. The second option is unacceptable to ITMA and hopefully to Congress and all fair minded people. The Department's interest in protecting its bureaucratic turf is not a sufficient reason to deny tribes and individual Indians their trust rights.

In the *Cobell* litigation, the plaintiffs asked the court to appoint a special master to assume responsibility for overseeing the reform effort, in light of the Interior Department's continuing "empty promises". The court said that the decision on whether to appoint an independent entity to oversee reform rests with Congress and that the 1994 Act did not go that far. The court effectively invited the Congress to take this step. Thus, all of the parties most familiar with this situation – the court, the IIM account holders, and the tribes – are turning to the Congress for help and asking it to complete the job it began in 1994.

Two recent actions by the Interior Department, in concert with the Justice Department, vividly demonstrate why these Departments have forfeited their right to retain continued responsibility for trust settlement and trust reform, such that this responsibility must be transferred to the ITRC:

> Settlement. Several months ago, Interior officials provided ITMA with the Administration's proposed legislation for settling with tribes on the losses they suffered from the Government's mismanagement of their trust funds. This proposed bill, drafted by the Interior and Justice Departments, is nothing short of unconscionable, replete with provisions carefully crafted to cheat us of our rights and our money. One would have to go back 150 years to the old treaty-making days to find a Government document that is so unfair and duplicitous.
>
> Perhaps the most deceptive provisions are the ones requiring tribes to surrender their rights to probably 95% of the money they lost as a result of Federal mismanagement in order to receive 5% of what they lost. It is

generally agreed that tribes suffered their greatest losses as a result of the Department's failure to collect the amounts due on Indian leases, given the huge hole created by the absence of an accounts receivable system. However, because there was no accounts receivable system, and because the records needed to re-create one had been destroyed or lost, the Arthur Andersen reconciliation concluded that it could make no findings about how much money the BIA failed to collected from parties that had leased tribal assets. As a result, Arthur Andersen reconciliation could make only very narrow findings, primarily about how much tribes lost because of clerical errors that occurred when entries were made in the general ledger. This represent a very small percentage of the overall losses tribes suffered as a result of Federal mismanagement. Yet the Department's proposed settlement bill would, by legislation, "deem" that the Arthur Andersen reconciliation had satisfied the Department's obligation to produce an accounting on the accounts receivable issue. Based on this fictitious addition to Arthur Andersen's reconciliation, the Department's settlement legislation contains a presumption that the Department had collected every penny due tribes from every lease, and places the burden of proof on the tribe to prove how much money was not collected -- an extremely difficult, if not impossible task, as Arthur Andersen already concluded. As a result, the Department's bill would allow the Federal Government to sneak out of the bulk of its liability to tribes for gross mismanagement of their trust funds without having to pay the tribes a penny. For the Interior and Justice Departments to provide tribes with a draft bill that is so unconscionable is clear evidence that they cannot be trusted to properly and fairly settle the trust accounts. The responsibility must be given to a third party such as the ITRC.

Trust Reform. The trust regulations are really the heart of the trust relationship because they define how the trust responsibility is to be met. TAAMS is a computer system that helps to carry out the requirements set out in the regulations. Despite the importance of the regulations, the BIA is trying to steamroll fundamentally flawed Leasing, Grazing, Trust Fund Management and Probate regulations through the process, despite strenuous objections from the tribes. The tribes have concluded that the draft regulations the Department has put forward are simply a rehash of the existing regulations, designed primarily to allow the BIA to retain its power and to avoid accountability by failing to adequately define BIA's responsibilities as trustee. For example, they fail to put in place the rules for an accounts receivable system, the biggest hole in the existing regulations. They also fail to reflect the requirements and policies of the Self-Determination and Self-Governance Acts. When the tribes concluded that the regulations needed to be rewritten from scratch and asked for more time to draft the regulations properly, the BIA denied their request and is proceeding to publish the regulations this month. This is a direct violation of

Executive Order 113804, which specifically recommends an agency adopt a negotiated rulemaking or other consensual process on matters relating to trust resources. The Department's response, that tribes can comment once the proposed regulations have been published is inappropriate in light of the Executive Order, the Self-Determination policy, and the fact the tribes are the beneficial owners of the trust funds and resources. Therefore, another reason we are supporting the Discussion Draft is that it is our hope that before the BIA ever gets to publish these totally inadequate regulations in final form, Congress will have transferred responsibility for this critical task to the Indian Trust Resolution Corporation, so they will be done right.

There is another reason the Discussion Draft needs to be enacted into law this year. One of the first questions reporters covering the trust issues ask us is "what is the Government hiding?" The reporters sense that the Interior Department's behavior - the stonewalling, misleading the Federal courts, the refusal to partner with tribes on solving this problem - the willingness of senior officials to continually open themselves up to scathing criticisms by the court, the media, and Congress, simply does not make rational sense. The reporters point out that it would have been so easy for Secretary Babbitt to say that this did not happen on my watch and then open up the process. The reporters and other observers feel that the only explanation for the Department's behavior is that it is trying to hide a very deep and dark secret. ITMA has no way to determine if they are right. If they are, only an independent entity such as the ITRC will be able to ferret it out. If they are wrong, only an independent entity will be able to credibly tell the public and the Indian community that there is no deep dark hidden secret. The Interior Department no longer has credibility on this issue in the Congress, the courts, among the tribes or among the public.

As in 1994, it is probable that Secretary Babbitt will urge President Clinton to veto Title I of the Discussion Draft. As the President considers Secretary Babbitt's likely veto request, we would urge him to compare the Federal government's approach to Indian trust fund settlement with the admirable approach the President took in settling the claims of the Holocaust victims against the Swiss Banks. In the latter situation, President Clinton did not trust the Swiss Banks to accurately determine their own liability. Instead the President created an independent commission headed by the highly respected Paul Volker, to carry out its own independent investigations and eventually negotiate a settlement. The Holocaust bank account and the Indian trust situations are very similar. The only major difference is that in the former case, the guilty party was a group of foreign banks, while in the Indian trust situation, the "bank" that cannot account for the dollars of a victimized group is the United States Government. We hope that the President will not be guilty of a double standard and will recognize that there is the

same need for an independent entity in the Indian trust situation as there was in the case of the Holocaust victims. The ITRC provides that independent entity.

In the same vein but more recently, the White House announced this month that agreement had been reached with Germany to create a $5 billion fund to compensate persons who were used as slave laborers during the Nazi era. The settlement resulted from the intensive efforts by a Deputy Secretary of State, backed by strong moral pressure from the White House. By contrast, in the case of the Indian trust settlement effort, a Secretary, an Assistant Secretary and high level Justice officials have devoted their intensive efforts to the development of the duplicitous settlement legislation discussed above. Imagine the outrage if the slave labor settlement required the victims to produce wage statements to prove they had been used as slave laborers. Yet that is effectively the equivalent of what the Department's bill requires of Indian trust beneficiaries.

The true test of a nation's morality is not that it takes the more high road when some other party is at fault. That is easy. The true test is if that nation takes the high road when it is the guilty party. The Indian trust beneficiaries are still waiting for the White House to bring the same moral standards to the Indian trust situation that it has brought to situations in which some other country, be it Switzerland or Germany, were at fault. That will show whether or not we operate under a double standard.

ITMA has recommended a number of what we believe will be improvements to Title I of the Discussion Draft. These proposed changes are detailed in Attachment A to this testimony. Also, at ITMA's May 17, 2000 Tribal Leaders meeting, the tribal leaders unanimously supported Title II of the Discussion Draft, which is a revised version of S. 739 introduced last year by Senators Murkowski and Campbell. After S. 739 was introduced last year, ITMA endorsed the bill in concept, subject to certain revisions ITMA felt were needed. We were pleased to see that all of our requested changes were incorporated into Title II of the Discussion Draft, such that the bill meets the conditions ITMA established for its support. We do have several additional changes to Title IV; these are also set out in Attachment A to this testimony.

Title II, like Title I, closes the circle. When the 1994 Trust Fund Reform Act bill was first introduced, it contained provisions that would have provided tribes with a variety of options for the investment of their trust funds while allowing them to keep those funds in trust status. Secretary Babbitt opposed those provisions, saying the money should either stay in OTFM or leave trust status completely, and successfully pressured Congress to remove them from the 1994 bill. As a result, six more years have passed in which Indian trust beneficiaries have unnecessarily received the lowest yields of any trust beneficiaries. Title II would correct that problem.

Also Title II would help promote economic activity on reservations, by requiring that, in contracting out the investment functions, the Secretary give preference to Indian-owned financial institutions and requiring all contracting institutions to invest some of the funds in ways that benefit the Indian community, consistent with their trust responsibility. Right now the $3 billion in Indian trust funds produces no economic benefit to the Indian community. As a very conservative example of what Title II could do to help Indian country, a bank could take a portion of the trust funds it is managing and invest them in Section 184 100% government guaranteed housing mortgages. The interest rates on the mortgages will be at least as good as the Treasuries that OTFM is now buying, the investment is guaranteed, and it will help to promote housing development on reservations.

As the final part of the ITMA testimony, I would like to highlight a few of the proposed changes to Titles I and II that are contained in Attachment A to this testimony:

A. Title I

1. The Discussion Draft proposes that OST and OTFM be transferred to the ITRC, along with such staff from the BIA that the ITRC concludes it needs. ITMA recommends that the legislation go the whole way, by requiring that all Interior offices carrying out trust functions be transferred to the ITRC, pursuant to a transition plan developed CEO. The ITRC will have a much greater chance of achieving success in reforming the trust systems if it has day-to-day authority over all of the trust activities, whether they are located in the BIA, BLM, MMS or other Interior agencies. In those exceptional cases in which a trust function is so intertwined with a non-trust function that it cannot be separated, the bill should require the Secretary and the CEO of the ITRC to develop an MOU to handle the situation.

2. ITMA does not believe that the bill should contain a presumption that the trust functions will be returned to the Interior Department once the reform and the settlement are completed. We think that decision should be left to the Congress and Indian leadership in place at that time.

3. It would be incorrect to conclude that all of the blame for the problems over the past ten years rests just with the Interior Department. It has become increasingly clear that the Department of Justice has played a major role in the stonewalling and unconscionable actions that have frustrated Congress, GAO, the courts, the BIA field employees, and ITMA. For example, it is believed Justice shares major responsibility for the unconscionable Settlement proposal discussed

above. It is therefore important for the Draft to include language that excludes the Justice Department from any role in the activities or decisions of the Indian Trust Resolution Corporation. Among other things, this means the Corporation needs the power to sue under its own authority rather than having to rely on Justice attorneys. It also means that Justice must not have any role in approving the settlements the Corporation reaches with the account holders, including no approval of settlements that will be paid for out of the Judgement Claims Fund (see recommendation __ below.)

(ITMA also urges the Committee to schedule a hearing on what appears to be a deliberate and concerted effort by the Justice Department to use inappropriate tactics to stonewall Indian trust lawsuits. The *Cobell* case is just one of many breach of trust lawsuits in which Federal officials or Justice attorneys have been found to be in contempt of court for engaging in inappropriate actions to obstruct the litigation.)

4. The Treasury Department is also responsible for a portion of the mismanagement of trust funds and thus needs to be subject to the authority of the ITRC. While we do not recommend that the ITRC be given direct authority over Treasury, we do recommend that the ITRC be given the authority to approve all Treasury regulations, policies and procedures involving the management of Indian trust funds and the authority to require Treasury to revise any existing regulations, policies or procedures that do not meet trust standards.

5. In regard to settlement of the Government's trust fund liability, we have recommended that instead of requiring the ITRC to conduct a "reconciliation" or "accounting, the bill should require the ITRC to cut to the chase - instructing it to use appropriate rough justice procedures to reach agreement with the account holders on what their balance should be, and then to make the account holder whole for the difference between the amount now it that account and the correct balance. Arthur Andersen spent over $20 million dollars proving that a meaningful reconciliation is largely impossible because too many documents were destroyed or never were created. Under our recommendation the legislation would give the ITRC the flexibility to use such alternative accounting techniques as it deems appropriate for settling the accounts, without going through a lot of meaningless paper shuffling. Also, the bill should make it clear that this process is to begin on the date the account was opened since, from the day the first trust account was opened, neither tribes nor IIM account holders have ever received any form of the trust accounting they are entitled to

6. In regard to the source of the dollars to settle the accounts, ITMA believes the proper source should be the Judgement Claims Fund in Treasury, which is used to pay for the resolution of other legal claims against the United

States. The trust fund settlements are legal claims and they should not have to be funded out of appropriations, which are difficult to come by and which will ultimately be taken from other Indian programs.

7. The bill only addresses settlement of the losses caused by the Federal government's mismanagement of the trust funds. It does not address losses caused by the Government's mismanagement of the trust assets. This latter issue is much more complex and is likely to involve more substantial liability than exists in the trust fund area. Presently, it would be difficult to say with any certainty how settlement for trust assets should be achieved. Despite the urging of this Committee, the Interior Department has largely terminated a joint effort it had begun with ITMA to develop a mechanism for settling the trust asset liability issue. Instead they have told the tribes that the solution is for the tribes to file suit, (perhaps knowing full well that the Justice Department will use all of the inappropriate tactics it has used in the *Cobell* litigation to delay such suits for years. Yet this is a problem that needs a legislative solution. ITMA therefore recommends that the Discussion Draft be amended to authorize the ITRC to develop a proposed legislation that would set out a settlement approach for the trust assets area that it would submit to Congress for its consideration within one year after the ITRC is established. For example, it could propose legislation that provide for the use of estimates and other alternative damage assessment methodologies and propose some special procedure outside the court system for reaching settlement in a faster and less expensive way. The language we have proposed would require the ITRC to give the tribes several optional approaches for settling their claims, since each tribe's situation in regard to trust asset losses is different. It would also permit the class of IIM account holders to opt into this proposed procedure if they decided that would be preferable to the litigation approach they are presently following.

Also, a tribe or IIM account holder that is unwilling or unable to reach settlement with the ITRC should retain its right to litigate. While nothing in the draft specifically takes away that right, the bill should make this clear. For example, it would permit the class action plaintiffs in the *Cobell* litigation to have the option of continuing to litigate the settlement issue or use ITRC's procedure.

8. In regard to the structure of the ITRC and Oversight Board, we are concerned that it could take a long time for the President to appoint the CEO and the independent members of the Oversight Board. This would delay the start-up of the ITRC, which would be extremely destructive because it would let the Interior Department continue to squander the funds Congress has appropriated for trust reform. ITMA has therefore recommended that the Draft provide that, pending the President's appointment of the CEO, the Special Trustee serve as the acting CEO. Similarly, pending the appointment of the five independent members of the Oversight Board, ITMA has recommended that the five tribal representatives on the Special Trustee's Advisory Board serve as the five independent members. Because

the Special Trustee and the Advisory Board members are Presidential Appointees, they can be given new authorities by legislation that are similar to their existing ones, without running into Constitutional problems. An alternative would be to simply designate those five Advisory Board members as the permanent independent members of the Oversight Board. We have also recommended that the CEO have a five year term rather than serve at the pleasure of the President, so that there will be continuity during changes of Administration.

Highlights of ITMA's Proposed Changes to Title II (S. 739 as revised)

1. The Discussion Draft provides that investment of a tribe's trust funds will be contracted out unless the tribe affirmatively requests that the investment function remains with OTFM. ITMA is recommending a two part approach to this critical issue. If the legislation creating the ITRC is enacted, such that OTFM would be under the ITRC, then ITMA would support language that reverse the burden; that is, providing that the investment functions remain within OTFM unless the tribe affirmatively requested that it be outsourced to a private financial institution. Linked to that would be a provision requiring that the ITRC and OTFM work with each trust fund tribe to help it develop a plan for the investment of its funds. In this endeavor, these two agencies would help the tribe to decide which of the several investment management options is the most appropriate one for that tribe - staying with OTFM, taking the funds out of trust under the 1994 Trust Fund Reform Act, keeping it in trust but contracting the investment functions to a private financial institution, using the Self-determination or Self-governance Act, etc.

On the other hand, if the ITRC legislation is not enacted and Title II goes through Congress as a stand-alone bill, such that OTFM remains within the Interior Department, then it is ITMA's recommendation that the bill stay as it is; that is, provide that the investment of a tribe's funds be contracted out unless the tribe affirmatively requests that it remain within OTFM.

Also, at the request of the plaintiffs in the Cobell litigation, the Committee recommends to the Board that ITMA propose that IIM account holders be excluded from the bill for the time being, until the litigation is resolved.

2. Assistant Secretary Gover told ITMA that he could support legislation (not necessarily Title II as drafted) that gave tribes private sector options for the investment of their trust funds, so long as the United States' liability was reduced accordingly. We agree and have drafted proposed language that would do so.

Thank you for this opportunity to testify. ITMA is committed to working with the Committee in any way possible to ensure this proposed legislation is enacted this year.

ATTACHMENT A

PROPOSED CHANGES TO THE DISCUSSION DRAFT, TITLES I AND II, THAT WOULD AMEND THE 1994 INDIAN TRUST FUND MANAGEMENT REFORM ACT

Proposed Revisions: (Text with ~~lines through it~~ is language in the Discussion Draft bill recommended to be deleted. Text that is underlined represents language recommend to be added.)

PART I. REVISIONS TO TITLE I OF THE DISCUSSION DRAFT

1. Revise section 103 "Congressional Declaration of Policy" so it reads as follows:

It is the policy of this title to establish a Federal agency that will promptly ~~reconcile~~ provide an honorable resolution of trust fund account balances for all Indian trust fund accounts, make whole account holders for monies that cannot be accounted for, and modernize all Indian trust fund accounting systems and all Indian trust asset management systems, with the full cooperation of the Secretary of the Interior and consistent with the trust responsibility of the United States to Indian tribes and individual Indians."

Explanation: See paragraph 2 below.

2. Revise Section 105(b)(2)((A)[Settlement] so it reads as follows:

"(A)Notwithstanding any other law, including any statute of limitations, expeditiously negotiate a good faith settlement with Indian tribes and individual Indian account holders on account balances, beginning from the time the accounts were first established, and make account holders whole for monies that cannot be accounted for, using such alternative accounting procedures as are fair and appropriate given that many of the documents necessary to perform a standard trust accounting were destroyed or were never created by the United States acting in its capacity as trustee, and maintain the integrity of the trust fund accounts and other trust assets;"

Explanation:

It is probable that any useful form of reconcilation or even accounting cannot be accomplished. Arthur Andersen spent over $21 million producing a

document that just scratches the surface. Therefore, it is recommended that the ITRC focus on settlement, in which agreed-upon account balances will be negotiated , using whatever approaches will allow rough justice to be achieved in a fast and inexpensive manner. Any amounts the account holders lost as a result of the Federal Government's mismanagement of those funds will be restored to the account . It also makes clear that the process starts at the point at which the accounts were first created, since neither tribes nor IIM account holders have ever received the trust accounting to which they have been entitled over the years.

3.Change Section 105(b)(2)(B) to read as follows:

"((B) use amounts ~~appropriated under this title~~ previously appropriated under section 1304 of Title 31 of the United States Code (the Judgement Claims Fund) to adjust and reconcile each tribal or individual trust account and settle or compromise claims on behalf of the United States raised by Tribal trust or individual account holders in response to such adjustments or reconciliations. Notwithstanding any other provision of law, such settlements or compromises shall not be subject to approval by the Attorney General;"

Explanation:

In regard to the source of the dollars to settle the accounts, ITMA believes the proper source should be the Judgement Claims Fund in Treasury, which is used to pay for the resolution of other legal claims against the United States. The trust fund settlements are legal claims and they should not have to be funded out of appropriations, which are difficult to come by and which will ultimately be taken from other Indian programs.

Also, not all of the blame for the problems over the past ten years rests just with the Interior Department. It has become increasingly clear that the Department of Justice has played a major role in policies designed to ensure the Federal government is never held fairly accountable for the losses Indian tribes and individual Indians have suffered as a result of the Government's trust mismanagement. For example, it is believed that it is the Justice Department shares in the responsibility for the unconscionable Settlement proposal Interior submitted to tribes this Spring. It is therefore important for the Draft to exclude the Justice Department from any role in the activities or decisions of the Trust Resolution Corporation. Among other things, this means the Corporation needs the power to sue under its own authority rather than having to rely on Justice attorneys. It also means that Justice must not have any role in approving the settlements the Corporation reaches with the account holders, even though the Attorney General usually has to approve settlements that are paid for out of the Judgement Claims Fund.

4. Having the ITRC take over all of the Interior Offices and Strengthening the ITRC's Self-Determination role.

4a. Revise Section105(b)(2(C) [Management of Trust Fund and Trust Asset Programs] to read as follows:

"(C) Immediately assume responsibility for the management and administration of all trust fund accounts and other trust assets of Indian tribes and individual Indians and take such steps as are necessary to manage and administer such trust fund accounts and trust assets in a manner that meets or exceeds common law fiduciary standards and that permits and actively assists Indian tribes to assume certain programs, functions, services, and activities pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) " and the Indian Self-Governance Act (25 U.S.C. 458aa et seq.), but such assumptions shall be subject to the limitations set forth in Title ~~II~~ I of the American Indian Trust Fund Management Reform Act of 1994...

4b. Revise Section 105(d)(2) as follows:

(2) Transfer of Interior Department ~~Staff~~ Offices. -The ~~staff of the~~ Office of Trust Funds Management, the Office of the Special Trustee, along with ~~staff selected by the chief executive office within the Bureau of Indian Affairs~~ all other offices or functions in the Department of the Interior with responsibility for the management of Indian trust funds or trust assets, shall be transferred to the Corporation to work under the direction of the chief executive officer towards the fulfillment of the duties of the Corporation. Such transfer shall be carried out pursuant to a transition plan developed by the chief executive officer in coordination with the Secretary. The Secretary shall cooperate fully with the chief executive officer during the development and implementation of the transition plan. Pending the transfer of an office or function pursuant to this provision, the Corporation shall approve, and may revise, all regulations, policies, procedures, major decisions, and personnel actions at such offices and functions and take such other actions as the chief executive officer deems necessary to assure trust funds and trust assets are managed in a manner that meets or exceeds common law trust standards. If the chief executive officer determines that there are trust functions in the Interior Department which cannot be transferred because they cannot be separated from non-trust functions, he shall enter into a Memorandum of Understanding with the Secretary that will provide the corporation with the necessary authority to ensure those functions are managed in a manner that equals or exceeds common law trust principles and that is coordinated with the trust functions being managed by the Corporation.

Explanation:
There have been two different general approaches to putting responsibility for trust reform in an entity outside the Interior Department. One approach, following the

D.C. Control Board model, would leave the trust programs in Interior but give the outside entity the authority to direct the reform effort. The other approach would transfer the offices and staff now carrying out trust fund and trust asset management from Interior to the new outside entity. The Discussion Draft splits the baby on this issue. It gives the outside entity responsibility for management, transfers OST and OTFM to the ITRC and then leaves it to the CEO of the ITRC to decide what other staff in the BIA to transfer to the ITRC. It is the view of ITMA that this splitting approach is not good management and leaves too much undecided, which makes it difficult to explain to Indian country. If the reform is to be accomplished expeditiously, the entire trust program needs to be moved from Interior to the ITRC. In support of this approach one only needs to look at how much was accomplished at OTFM during the period Paul Homan was able to make reforms at OTFM without interference from the other Interior officials. If offices are left within Interior, experience indicates that the Interior officials and bureaucracy will do everything in their power to thwart real reform and to make the ITRC's job as difficult as possible. The history of what those officials and bureaucracy did to OST and Paul Homan once he started threatening their turf by proposing a new GSE for trust management, provides an indication of what would happen to the ITRC if it had to depend on Interior for day-today management of the trust programs ITRC was responsible for reforming. The proposed revision therefore would transfer all trust functions, offices and staff to the ITRC.

However, there may be trust functions that are impossible to transfer out of Interior because they are so intertwined with non-trust functions. The proposed revision addresses that by instructing the ITRC and Interior to enter into a MOU for managing such offices, with the ITRC having clear authority of the trust functions.

ITMA recognizes the complexities of drafting and enacting such legislation this year. However, it is critical that some new entity with authority over the reform effort be put in place this year, given the speed with which Interior is rushing through unacceptable regulations and spending money on systems whose effectiveness are suspect and fail to meet trust standards. If legislation is not enacted this year, most likely, with a new Congress and new Administration, it will be two years before any legislation could be enacted. By that time, too much of the damage will have been done and too much of the funds will have been misspent. Therefore, if legislation achieving the full transfer cannot be enacted this year, ITMA would support a fallback to the D.C. Control Board model for this year, with a revisiting of the complete package next year.

ITMA also recommends that the provision on the Self-Determination Act be strengthened through language that instructs the ITRC to actively assist tribes exercise their self-determination rights. We also recommend language that specifically references the Self-Governance Act, (though that may be considered part of the Self-Determination Act). Finally, we think the reference to Title II of the

Indian Trust Funds Management Reform Act in this section is incorrect; it probably should be a reference to Title I of that Act.

5.Add a new Section 105(b)(2)(D), which shall read as follows:

"Section 105(b)(2)(D).-- Within one year from the effective date of this Act, develop and submit to Congress, for its consideration, an approach for providing a trust accounting for trust assets and for settling with tribes for the losses they suffered as a result of the United States' mismanagement of their trust assets and failure to properly collect the income from said assets. The approach shall utilize such alternative accounting methodologies deemed appropriate and necessary to minimize the time and cost of achieving settlement, given that many of the documents needed to perform a standard trust accounting have been lost, destroyed or never were created by the United States acting in its capacity as trustee. The approach shall offer tribes with two or more options in light of the varied circumstances of the different tribes. It shall also permit the class of IIM account holders to opt in to the settlement process if they so choose. Pending action by Congress on its recommended approach, the Corporation is authorized to settle any trust asset claim at the request of an Indian tribe or individual Indian and the provisions of subsection 105(b)(2)(B) [Use of the Judgement Claims Fund] shall be applicable to such settlements."

Explanation:

The bill only addresses settlement of the losses caused by the Federal government's mismanagement of the trust funds. It does not address losses caused by the Government's mismanagement of the trust assets. This latter issue is much more complex and likely to involve more substantial liability than exists in the trust fund area. Presently, it would be difficult to say with any certainty how this should be done. Despite the urging of the Committee on Indian Affairs, the Interior Department terminated the joint effort with ITMA to develop a mechanism for reaching closure on this liability, instead telling the tribes that they should file suit, knowing the Justice Department will use all of the inappropriate tactics it has used in the *Cobell* litigation to delay such suits for years. While this is a problem that needs a legislative solution, it is impossible to draft one at this time that would have broad tribal support. It is recommended that the legislation be amended to authorize the ITRC to develop a proposed legislation settlement approach for the trust assets area that it would submit to Congress within one year after the ITRC is established. This language would require the ITRC to give the tribes several optional approaches for settling their claims, since each tribe's situation in regard to trust asset losses is different. It would also permit the class of IIM account holders to opt in to this proposed procedure if they decided that would be preferable to the litigation approach they are presently following.

6.Add a new Subsection 105(b)(2)(E) which shall read as follows:

"(E) Approve all new regulations, policies and procedures of the Department of Treasury involving the management of tribal and individual Indian trust funds and direct that Department to revise any existing regulations, policies or procedures that the Corporation determines are not in compliance with the United States' trust responsibility to tribes or individual Indians.

Explanation:

The Treasury Department is also responsible for a portion of the mismanagement of trust funds and thus needs to be subject to the authority of the ITRC. While we do not recommend that the ITRC be given direct authority over Treasury, we do recommend that the ITRC be given the authority to approve all Treasury regulations, policies and procedures involving the Indian trust funds and the authority to require Treasury to revise any existing regulations, policies or procedures that do not meet trust standards.

7. Making the Special Trustee the Acting CEO of the ITRC and the OST Advisory Board the Acting Independent Members of the Oversight Board

7a.Change Section 105(c) [Management] to read as follows:

"(1) Chief Executive Officer. - There is established the office of the chief executive officer of the Corporation. The chief executive officer of the Corporation shall be appointed by the President, by and with the advice and consent of the Senate and shall serve ~~at the pleasure of the President~~ for a term of five years and may only be removed for cause. Pending the appointment and confirmation of the chief executive officer, the Special Trustee, appointed pursuant to Title III of the American Indian Trust Fund Management Reform Act (25 U.S.C. 4042) shall serve as the acting chief executive officer."

7b."Pending the appointment of the five independent members of the Oversight Board, the five incumbents on the Special Trustee's Advisory Board, established pursuant to 25 U.S.C. 4046, who were appointed pursuant to subsection 4046(a)(1) of that section, shall serve in the capacity of the independent appointed members provided for by this subsection."

Explanation:
It could take a long time for the President to appoint the CEO and the independent members of the Oversight Board. This would delay the start-up of the ITRC, which would be extremely destructive because it would let the Interior Department continue to squander the funds Congress has appropriated for trust reform. It is therefore recommended that pending the appointment of the CEO, the Special

Trustee serve as the acting CEO. Similarly, pending the appointment of the five independent members of the Oversight Board, it is recommended below that the five tribal representatives on the Special Trustee's Advisory Board act as the five independent members until the President fills those positions. Because the Special Trustee and the Advisory Board members are Presidential Appointees, they can be given new authorities by legislation that are similar to their existing one without running into Constitutional problems. To avoid duplication, wee recommend that the Special Trustee's Advisory Board go out of business upon the creation of the Oversight Board. It is also recommended that legislation provide that the CEO have a five year term and that he may be removed only for cause, rather than serve at the pleasure of the President. This will be continuity during changes of Administration.

8.

8a. Add a new subsection (3) to Section 105(e) [Additional Staff] which shall read as follows:

"(3) on any employment actions pursuant to the employing of additional staff or temporary services, the chief executive officer shall provide preference to Indians so long as he determines that such actions will be consistent with the Corporation's trust responsibility."

8b. To subsection (h) ["Corporate powers"], add a new subparagraph (13) which shall read as follows:

"(13) enter into such contracts as it deems necessary to carry out its responsibilities; provided that, such contracts shall be awarded pursuant to the provisions of 25 U.S.C. 47 ("The Buy-Indian Act") so long as he determines that such actions will be consistent with the Corporation's trust responsibility."

Explanation:

Since the ITRC will be assuming much of the functions now being carried out by the BIA, it should be subject to the Buy-Indian Act and Indian employment preference. The employment preference provision was drafted to give the CEO more discretion than now exists within the BIA, to ensure the ITRC can meet its trust responsibility. However, the experience of OTFM indicates that Indian preference is not a bar to effective trust management, so long as the managers are effective and use the Indian preference provision as intended.

9.Change Section 105(h)(6) so it reads as follows:

" Corporate Powers. - The corporation shall have the following powers:

(6) To sue under its own authority and be sued in its corporate capacity in any court of competent jurisdiction."

Explanation:

See Explanation to changes to subsection 105(b)(2)(B) regarding the need to exclude the Justice Department from involvement, which among other things, requires that the Corporation have the ability to sue under its own authority, without requiring the approval of the Attorney General.

10.Change Section 105(h)9) at page 12, line 4 by adding the word "funds" between " the words trust" and "assets" so it now reads, "...including uniform regulations governing the management of Indian trust funds and assets..."

Explanation:

The change makes it clear that the authority of the ITRC includes developing regulations for trust fund as well as trust asset management.

11.Add a new Section 105(h)(12), providing a new corporate power to the ITRC, which shall read as follows:

"(12) the development of a strategic plan for conducting the Corporation's functions and activities"

In addition, take all of the language describing the contents of the strategic plan from Section 106(q), which gives the authority to develop the plan to the Oversight Board and put it under Section 105(h)(12), thereby giving the responsibility for the development of the plan to the Corporation. Section 106(q) would be changed to give the Oversight Board the role of reviewing and approving the strategic plan, but not developing it.

Section 105(h)(9) would have to be modified at page 12, line 1, to refer to "the strategic plan established by the Corporation and approved by the Oversight Board under section 106(q)...."

Explanation:

It adds too much bureaucracy and will contribute to delay if the Oversight Board has to develop the strategic plan for the ITRC. The latter should have this responsibility, with the Oversight Board having the authority to review and approve the plan.

12. Revise Section 106(e) (Compensation of the Oversight Board) as follows:

On line 7 p. 15. "The independent members shall be paid at a daily rate determined by the President..."

Explanation:
The bill is not clear on whether the independent members positions constitute a full-time job or just require a limited number of days a year. It is recommended that they be part-time, so the positions can attract key tribal leaders. The proposed change makes it clear that they are being paid at a daily rate, which is the standard for members of Federal boards who work just a limited number of days a year.

13.Change Section 106(m) to read as follows:

"Except with respect to one of the meetings required by subsection (n), nothing in this section shall preclude a member of the Oversight Board who is a public official from delegating his or her authority to an employee or officer of such member's agency or organization if such employee or officer has been appointed by the President with the advice and consent of the Senate."

Explanation:

Compelling the Chairman of the Federal Reserve Board and persons of similar stature to attend six meetings a year on Indian trust funds could generate unnecessary opposition to the bill. The proposed change would require the officials named in the bill to attend at least one meeting a year but to be able to delegate all other functions to presidentially appointed subordinates.

14.Change Section 106(q) to read as follows:

"(1) In general.-- The Oversight Board shall ~~develop~~ review and approve ~~a~~ the strategic plan for conducting the Corporation's functions and activities that was developed by the Corporation."

Explanation:

See Change above which recommends that the responsibility for developing the strategic plan be given to the ITRC and that the Oversight Board review and approve the plan.

15. Strike section 106(q)(2)(D), (requiring the Oversight Board to develop procedures for establishing the market value of trust assets.

Explanation:
There is no reason to further determine the market value of trust assets than already exists in common law.

16. Strike Subsections 107(a) "Transfer of Records' and 107(b) "Transfer of Functions and Responsibilities."

Explanation:
With the actual Interior trust offices moving to the ITRC subsection (a) is no longer necessary. The issue of transfer was dealt with in proposed revised section

17. Revise Section 108(a) (Audits) so it reads as follows:

(A) Audits-

(1) Annual Audit-~~Notwithstanding section 9105 of Title 31, United States Code, the Comptroller General~~ An independent accounting firm shall annually audit the financial statements of the Corporation in accordance with generally accepted Federal Government auditing standards. Such audit firm shall be subject to suit by Indian account holders.

Explanation:

GAO generally does not express financial opinions. The audit needs to be done by an outside entity that is accountable, just the way a firm auditing a bank is accountable.

18. Change Section 108(a)(2) as follows:

"(2) Access to Books and Records- All books and records accounts, reports, files and property belonging to or used by the Corporation or the Oversight Board shall be made available to the Comptroller General and to the Tribal and individual Indian trust holders upon request.

Explanation:
Account holders should have full access to all records and files and should not face the problems that occurred when Arthur Andersen refused to release its work papers unless the tribe paid for them, this after Arthur Andersen had received over $21 million from the BIA to do a largely meaningless reconciliation.

19. Strike section 108(b)(2)(C) [requiring that the annual report include the number of Indian firms ITRC contracted with].This would no longer needed in light of the Buy-Indian Act provision that is proposed to be added.

20. In Section 108(c)(1)" Additional Reports", strike "April 30", so that the ITRC and the Oversight Board have to submit reports only once a year. Otherwise the reporting load could overwhelm their other activities. For the same reason strike 108(d) "Supplemental Unaudited Financial Statements". Also, strike 108(b(2)(F), a subsection requiring detailed reports on the utilization of Indian contractors. As mentioned above, the proposed inclusion of the Buy-Indian Act reduces the need for this reporting requirement.

21.Change Section 108(c)(2)(A)

(A) A statement of the total amount of all trust fund accounts ~~reconciled~~ resolved and the number of accounts yet to be ~~reconciled~~ resolved.

Explanation:

See Change # 2 which points out that Arthur Andersen has proven that a reconciliation is impossible.

22.Change Section 109 "Federal Trust Responsibilities" to read as follows:

"Nothing in this title shall be construed to-

.....

(2)diminish the trust responsibility of the United States with respect to trust account funds or trust assets."

Explanation:

Since the ITRC is going to have responsibility over trust assets as well as funds, this change is necessary.

23. Revise Section 109 [Federal Trust Responsibility] as follows:
Put an (a) before "Nothing in this title shall be construed to-" and then add a new subsection (b) which shall read as follows:

"(b)Federal courts are authorized to hear any suit in law or equity and to award equitable relief or damages for any breach of the United States' fiduciary obligations to tribes or Indians and the sovereign immunity of the United States is waived for such suits.."

Explanation:
The bill needs language permitting tribes and individual Indians to sue both the ITRC and the other Federal agencies that are managing Indian trust funds or assets, both for damages and equitable relief. The reason private trustees rigorously comply with their trust obligations is because they know they will and can be sued if they fail to do so. However, suing the United States for breach of trust, both for damages and equitable relief has been a major problem for tribes. The most egregious court decision on this issue was the recent one issued by the Court of Federal Claims in a breach of trust lawsuit brought by the Navajo Nation. The court found that the Secretary of the Interior grossly violated his fiduciary obligations as a trustee in handling certain coal leases, but went on to hold that it had no authority under any statute to award the Navajo Nation any damages for the losses it suffered as a result of the Secretary's breach. Also, the courts have generally been less and less willing to find implied causes of action against the Federal government in any area, concluding that if Congress wanted to create a cause of action under a statute, it should include it in the statute. It is time that Indian trust beneficiaries had the same legal rights that are available to all other trust beneficiaries and time for the ambiguities in this area be cleared up. It is the best assurance that the horrendous trust mismanagement that occurred over the past 150 years will not be repeated in the future. For these reasons, ITMA is recommending language that would not only permit the ITRC to be sued if it breaches its trust responsibility, but would permit suit against any Federal agency that has statutory trust responsibilities."

24. Sunset Provisions

Strike all of Section 111, which would return the trust functions to the Interior Department once the accounts have been settled. It is the view of ITMA that there should not be a presumption that these functions are to be returned to the Interior Department once the reform and settlement is completed. That decision should be made from a clean slate at that time by Congress and the Indian tribes and individual account holders, based on the track record of the new entity.

25.Add a new Section 112 "Non Exclusive Remedy" which shall read as follows:

"Section 112. Non-Exclusive Remedy
A tribe or IIM account holder that is unable to reach settlement with the ITRC on the most accurate accounting possible or which chooses not to engage in a settlement process with the ITRC shall retain its existing rights to litigate in a court of competent jurisdiction."

Explanation:

A tribe or IIM account holder that is unwilling or unable to reach settlement with the ITRC should retain its right to litigate. While nothing in the draft specifically takes away that right, the bill should make this clear.

PART II. CHANGES TO TITLE II OF THE DISCUSSION DRAFT (Revised S. 739)

1. Generally - Incorporate the ITRC

In light of Title I of the Discussion Draft, which creates the ITRC, and transfers OTFM to the ITRC, then all of the functions that Title II now gives to the Secretary of the Interior under Title II, all of which are OTFM-related, need to be assigned to the chief executive officer of the ITRC and all references to the Interior Department need to be changed to the ITRC.

2. Section 401(a) - IIM Account holders

Strike the term "and individual Indians". It is ITMA's position that given the fact that the IIM accounts are now deep in litigation, it is not an appropriate time to provide for their outsourcing. ITMA hopes to be able to come back to the Committee in the future, once the litigation is no longer an issue, with recommendations for the investment of the IIM accounts.

3. The Default Position on whether a tribe must affirmative act in order for the investment of its funds to remain with OTFM or whether it must affirmatively opt for the investment of its funds to be outsourced -- Section 401

Under the present draft, after one year, the investment of a tribe's trust funds automatically gets outsourced and invested pursuant to the prudent investor rule unless the tribe opts to continue to have its funds invested by OTFM or asks that the funds be outsourced but wants them invested in a manner other than, but no more risky than, the prudent investor rule. ITMA's position on this key section depends on whether or not Title I is enacted, (under Title I OTFM will be transferred to the ITRC). If this happens, ITMA's position is that a tribe's funds should remain in OTFM (under the ITRC) until a tribe opts to have them outsourced, but that the ITRC should be tasked with the responsibility of working with each trust fund tribe to educate the tribe about its investment options under Title II of the 1994 Act, this title, the Self-determination Act, etc. and to help it to develop an investment strategy regarding how it wants its funds invested under the various options available; that is, does it want them to continue to be managed by OTFM where they can be invested only in 100% government guaranteed investments, outsourced under this Act to a private financial institution but remain in trust status, does it want to take them out of trust pursuant toTitle II of the Trust Fund Reform Act, etc.

However, if Title I does not pass and Title II is enacted independently, then ITMA endorses the present language in the Discussion Draft (providing for outsourcing unless the tribe affirmative requests its funds continue to be invested by OTFM) except we recommend that the bill increase from one year to three years the amount of time that must pass before the Secretary outsources the funds of a tribe that does not select an option. We take this position because if OTFM remains in Interior, we are not comfortable, based on tribes experience with OTFM in regard to use of Title II of the 1994 Act, that tribes will receive accurate and unbiased information about their options. Proposed language for each option is set out below. We also recommend that the funds held in trust which tribes have refused to accept, be outsourced immediately under either option.

Option # 1, to be used if OTFM is under the ITRC
Strike subsections 401(a) (b) and (c) and replace them with the following:

"(a) Contracts - At the request of a tribe, the chief executive officer of the ITRC shall enter into a contract with a qualified (as determined by the ITRC) financial institution, to manage the investment of some or all the tribe's trust funds. The chief executive officer shall afford the tribe an opportunity to designate the qualified financial institution it wishes to manage its funds under said contract and the manner in which its funds are invested so long as the funds are invested in a manner that does not exceed the prudent investor rule as established in the jurisdiction in which the financial institution is located. Unless a tribe designates a specific institution, the chief executive officer shall select a qualified financial institution, giving preference to financial institutions that are 51% or more owned and controlled by tribes or individual Indians. Unless a tribe designates the manner in which its funds are to be invested, the funds shall be invested in a manner consistent with the prudent investor rule of the jurisdiction in which the financial institution is located.

(b) Within one year after the establishment of the ITRC, officials of the ITRC and OTFM shall meet with each tribe that has funds managed in trust by OTFM to educate the tribe about its investment options under the various titles of this Act and the Self-Determination Act and to assist the tribe develop and implement a plan for the investment of its funds, utilizing whichever option the tribe so chooses.

Option # 2, to be used if OTFM remains within the Interior Department.

Retain subsections 401(a)(b)(c) but revise it as follows:

"(a)Contracts.-- Not later than ~~1~~ 3 years after the date of enactment of this title, or sooner if so requested by a tribe, the Secretary, with the advice and assistance of the Comptroller of the Currency, shall enter into contracts with qualified financial

institutions, that are regulated by a Federal bank regulatory agency, for the investment of all funds presently managed in trust status for Indian tribes and individual Indians ...."

4.Section 401(d) - If Option # 1 is used, strike subsection 401(d)(1) and (2). If Option 2 is used, retain those two subsections.

5. Under either option. Revise Section 401(h) as follows:

"(h) NO SETTLEMENT.--

(1) The management of the investment of any trust funds now managed by the Office of Trust Funds Management for which a tribe(s) has refused to accept ownership, shall, after notification to such tribe(s), be contracted to one or more private financial institutions, with a preference to institutions that are 51% or more owned and controlled by Indian tribes or individual Indians. Such funds shall be invested pursuant to the Prudent Investor Rule of the jurisdiction in which said institution(s) is located.

(2) The outsourcing of the investment of any funds under this Title shall not-
(i) constitute, and shall not be interpreted as constituting, for any purpose, the acceptance by an Indian tribe or individual Indian account holder of a settlement of any claim that such tribe or individual Indian account holder has not otherwise accepted; and

(ii)otherwise alter, in any manner, the legal status of such funds.

Explanation:

This would require the outsourcing of trust funds tribes have refused to accept, while making it clear that such outsourcing does not constitute any form of acceptance of those funds by such tribes. This section should be include regardless of which option is chosen under paragraph 3 above.

6. Under either option, add the underlined text to the end of subsection 401(d)(4) and to the end of Section 401(e)(2) so they read as follows:

"(d)(4) require that the financial institution be liable for any financial losses incurred by the trust beneficiary as a result of its failure to comply with the terms of its contract, the investment instructions provided by the tribe, its general fiduciary obligation, or the prudent investor rule. The financial institution shall not be liable for any financial losses incurred by the trust beneficiary that occurred as a result of investment activities carried out by the financial institution in a manner that was consistent either with the investment instructions provided by the tribe and approved by the Secretary, or, if the tribe did not provide any such instructions, with the provisions of this Act;"

"(e)(2) LOSSES. - The Secretary shall be responsible for any losses incurred by a trust beneficiary for which a financial institution is liable under subsection (d)(4) but shall be entitled to subrogation of any claim to the extent the beneficiary receives compensation from the United States. The United States shall not be liable for any financial losses incurred by the trust beneficiary that occurred as a result of investment activities carried out by the financial institution in a manner that was consistent either with the investment instructions provided by the tribe and approved by the Secretary, or, if the tribe did not provide any such instructions, with the provisions of this Act;"

Explanation:

Assistant Secretary Gover told ITMA that he could support legislation (not necessarily Title IV as drafted) that gave tribes private sector options for the investment of their trust funds, so long as the United States' liability was reduced accordingly. We agree and have drafted proposed language that would do so. The proposed additional language in these two paragraphs would make it clear that neither the financial institution nor the United States bears any liability for losses that the tribe incurred from investments that satisfied the prudent investor rule or the investment plan developed by the tribe and approved by the Secretary.

7.Add a new Subsection 401(d)(8) which shall read as follows:

"(d) Requirements of Contracts.-- Any contract entered into [with a financial institution to manage the investment of trust funds] under this section shall, at a minimum, include provisions acceptable to the Secretary that will-

.....

(8) require the financial institution to sponsor a "mini-bank" or similar financial literacy program in the schools on the reservation of each tribe whose trust funds it is investing;"

Explanation:

As the Blackfeet National Bank has demonstrated, a mini-bank program is an excellent way to prepare the next generation of tribal members to be knowledgeable about banking. Sponsoring such a program is not expensive and is an appropriate responsibility for a financial institution that is profiting from the investment of that tribe's trust funds.