S. HRG. 108–389

INDIAN MONEY ACCOUNT CLAIMS SATISFACTION ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

S. 1770

TO ESTABLISH A VOLUNTARY ALTERNATIVE CLAIMS RESOLUTION PROCESS TO REACH A SETTLEMENT OF PENDING CLASS ACT ACTION LITIGATION

OCTOBER 29, 2003
WASHINGTON, DC

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CONTENTS

	Page
S. 1770, text of	3
Statements:	
Akaka, Hon. Daniel K., U.S. Senator from Hawaii	18
Campbell, Hon. Ben Nighthorse, U.S. Senator from Colorado, chairman, Committee on Indian Affairs	1
Cason, James, associate deputy secretary, Department of the Interior, Washington, DC	19
Echohawk, John, executive director, Native American Rights Fund, Boulder, CO	27
Gray, Jim, principal chief, Osage Tribal Council, Pawhuska, OK	37
Hall, Tex, president, National Congress of American Indians, Washington, DC	32
Inouye, Hon. Daniel K., U.S. Senator from Hawaii, vice chairman, Committee on Indian Affairs	17
Matt, Fred, chairman, Confederated Salish and Kootenai Tribes, Pablo, MT	34
Thomas, Hon. Craig, U.S. Senator from Wyoming	18
Upton, Brian, legal department, Confederated Salish and Kootenai Tribes, Pablo, MT	34
Waters, George	34

APPENDIX

Prepared statements:	
Cason, James	44
Echohawk, John	52
Gray, Jim	72
Hall, Tex	63
Matt, Fred	69
McCain, Hon. John, U.S. Senator from Arizona	43
Additional material submitted for the record:	
Position Statement of the Navajo Nation (with resolution)	75

INDIAN MONEY ACCOUNT CLAIMS SATISFACTION ACT

WEDNESDAY, OCTOBER 29, 2003

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

The committee met, pursuant to notice, at 10:20 a.m. in room 106, Dirksen Senate Building, the Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, Thomas, and Akaka.

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

The CHAIRMAN. The Committee on Indian Affairs will be in session.

Good morning. We are told that we will have a vote at 10:40 a.m. We will go as far as we can, take a 10- or 15-minute break, and then come back if we have not heard from all of the witnesses.

Eight long years have passed since the *Cobell* v. *Norton* case was filed. To date, we have spent hundreds of millions of dollars on accountants and lawyers. No accounting has been done, and not one penny has been paid to one Indian account holder. It is getting worse.

On September 25, Judge Lamberth issued a 400-page decision that guarantees at least 5 more years of litigation, billions more dollars spent, and no end in sight to the lawsuit. With appeals, Congressional squabbling over the money, and further lawsuits aimed at securing money damages, the case is just beginning.

The Department claims that pennies on the dollar are owed to the plaintiffs, but without billions more being spent on accounting activity, the Department cannot say for sure how much is in the accounts, or should be in the accounts. Preliminary cost estimates from the Interior Department suggest that it will take $10 billion more to comply with Judge Lamberth's order on historic accounting. The money will be spent year-after-year through at least fiscal year 2008.

Many of my colleagues and I believe this money is better spent on reconstituting the Indian land base and building a forward-looking state-of-the-art trust management system and providing more dollars to Indian health care, education, and many other things in Indian country that are under funded.

The plaintiffs claim that more than $175 billion should be in these accounts, a number that the Department vigorously contests. Last night, the Interior Appropriations Conference approved a provision that will delay the accounting ordered by the judge until Congress clarifies the obligations of the Department regarding an accounting, or by December 31, 2004. This is a stopgap measure. We were worried, obviously, in this Committee, that if that had been done on a long-term basis, it might have, in fact, eroded the jurisdiction of this committee to deal with it at all.

In my mind, that means that we have roughly 1 year to reach settlement on this matter. With Congress facing a $400-billion deficit next year, any settlement is still a long way from having the money actually appropriated. As most people know, when you get a judgment, it does not necessarily mean that you get the money then. It might be years and years. There are a lot of Indian people out there that need the money and have a right to the money.

Last week, along with Senators Inouye and Dominici, I introduced S. 1770, the Indian Money Account Claim Satisfaction Act of 2003, to reach a legislative settlement of the case. I look forward to hearing from our witnesses this morning. I would hope that they would offer some positive suggestions on how we bring this matter to a close, and not simply dig their heels in and rehash many of the old issues that we have dealt with over and over.

[Text of S. 1770 follows:]

II

108TH CONGRESS
1ST SESSION

S. 1770

To establish a voluntary alternative claims resolution process to reach a settlement of pending class action litigation.

IN THE SENATE OF THE UNITED STATES

OCTOBER 21, 2003

Mr. CAMPBELL (for himself, Mr. INOUYE, and Mr. DOMENICI) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To establish a voluntary alternative claims resolution process to reach a settlement of pending class action litigation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Indian Money Account Claim Satisfaction Act of 2003''.

SEC. 2. FINDINGS; PURPOSE.

(a) FINDINGS.—Congress finds that—

(1) since the 19th century, the United States has held Indian funds and resources in trust for the benefit of Indians;

(2) in 1996, a class action was brought against the United States seeking a historical accounting of balances of individual Indian money accounts;

(3) after 8 years of litigation and the expenditure of hundreds of millions of dollars of Federal funds, it is clear that the court-ordered historical accounting will require significant additional resources and years to accomplish and will not result in significant benefits to the members of the class; and

(4) resolving the litigation in a full, fair, and final manner will best serve the interests of the members of the class and the United States.

(b) PURPOSE.—The purpose of this Act is to provide a voluntary alternative claims process to reach settlement of the class action litigation in Cobell v. Norton (No. 96cv01285, D.D.C.).

SEC. 3. DEFINITIONS.

In this Act:

(1) ACCOUNTING.—The term ''accounting''—

(A) with respect to funds in an individual Indian money account that were deposited or invested on or after the date of enactment of the Act of June 24, 1938 as provided in the first section of that Act (25 U.S.C. 162a), means a demonstration, to the maximum extent

practicable, of the monthly and annual balances of funds in the individual Indian money account; and

(B) with respect to funds in an individual Indian money account that were deposited or invested between 1887 and the day before the date of enactment of the Act of June 24, 1938, means a demonstration of the probable balances of funds in an individual Indian money account that were deposited or invested.

(2) CLAIM.—

(A) IN GENERAL.—The term ''claim'' means a legal or equitable claim that has been brought or could be brought, asserting any duty claimed to be owed by the United States under any statute, common law, or any other source of law to an individual Indian money account holder that pertains in any way to the account holder's account, including the duty to—

(i) collect and deposit funds in the account;

(ii) invest funds in the account;

(iii) make disbursements from the account;

(iv) make and maintain records of activity in the account;

(v) provide an accounting; and

(vi) value, compromise, resolve, or otherwise dispose of claims relating to the account.

(B) INCLUSION.—The term ''claim'' includes a claim for damages or other relief for failure to perform, or for improper performance of, any duty described in subparagraph (A).

(3) CLASS ACTION.—The term ''class action'' means the civil action Cobell v. Norton (No. 96cv01285, D.D.C.).

(4) DE MINIMIS INDIVIDUAL INDIAN MONEY ACCOUNT.—The term ''de minimis individual Indian money account'' means an individual Indian money account that contains less than $100.

(5) ELIGIBLE INDIVIDUAL.—The term ''eligible individual'' means—

(A) a living individual who is or has been an individual Indian money account holder, except any such individual whose account holds or held funds only from the distribution of a judgment fund or a per capita distribution; and

(B) the estate of a deceased individual who—

(i) was living on the date of enactment of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.); and

(ii) held an individual Indian money account on that date or at any time subsequent to that date, except any such individual whose account holds or held funds only from the distribution of a judgment fund or a per capita distribution.

(6) IMACS TASK FORCE.—The term ''IMACS Task Force'' means the Indian Money Account Claim Satisfaction Task Force established by section 4.

(7) INDIVIDUAL INDIAN MONEY ACCOUNT.—The term ''individual Indian money account'' means an account that contains funds held in trust by the United States, established and managed by the United States on behalf of an individual Indian.

(8) SECRETARY.—The term ''Secretary'' means the Secretary of the Interior.

(9) TRIBUNAL.—The term ''Tribunal'' means the Indian Money Claims Tribunal established by section 5.

SEC. 4. INDIAN MONEY ACCOUNT CLAIM SATISFACTION TASK FORCE.

(a) ESTABLISHMENT.—There is established the Indian Money Account Claim Satisfaction Task Force.

(b) MEMBERSHIP.—

(1) IN GENERAL.—The IMACS Task Force shall be comprised of not fewer than 9 members, appointed jointly by the majority leader and minority leader of the Senate and the Speaker and minority leader of the House of Representatives.

(2) QUALIFICATIONS.—

(A) BACKGROUND.—Members of the IMACS Task Force shall be selected from private enterprise and academia and shall not be employees of the United States.

(B) EXPERTISE.—Of the members appointed to the IMACS Task Force—

(i) 2 shall have expertise in the field of forensic accounting;

(ii) 2 shall have expertise in the field of Federal Indian law;

(iii) 2 shall have expertise in the field of commercial trusts;

(iv) 1 shall have expertise in the field of mineral resources;

(v) 1 shall have expertise in the field of economic modeling and econometrics; and

(vi) 1 shall have expertise in the field of complex civil litigation.

(3) IMACS TASK FORCE LEADER.—An IMACS Task Force Leader shall be chosen by majority vote of the members of the IMACS Task Force.

(c) COMPENSATION AND TRAVEL EXPENSES.—A member of the IMACS Task Force shall be entitled to—

(1) compensation, at a rate that does not exceed the daily equivalent of the annual rate of basic pay prescribed under level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day the member is engaged in the performance of duties the IMACS Task Force; and

(2) travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service under section 5703 of title 5, United States Code.

(d) INFORMATION AND SUPPORT.—The Secretary of the Interior shall provide the IMACS Task Force—

(1) access to all records and other information in the possession of or available to the Secretary relating to individual Indian money accounts; and

(2) such personnel, office space and other facilities, equipment, and other administrative support as the IMACS Task Force may reasonably request.

(e) CONFIDENTIAL INFORMATION.—Section 10(b) of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the IMACS Task Force.

(f) DUTIES.—

(1) IN GENERAL.—The IMACS Task Force shall—

(A) not later than 1 year after the date of enactment of this Act, complete an analysis of records, data, and other historical information with regard to the conduct of an historical accounting submitted by the parties in the class action to the district court in January 2003; and

(B) not later than 60 days after completing the analysis under subparagraph (A), hold meetings with representatives of—

(i) the plaintiffs in that civil action;

(ii) the Department of Justice and the Department of the Interior; and

(iii) any other parties that, in the discretion of the IMACS Task Force, are necessary to allow the IMACS Task Force to carry out its duties under this Act.

(2) ACCOUNT BALANCES.—

(A) METHODOLOGIES OR MODELS.—The IMACS Task Force shall develop 1 or more appropriate methodologies or models to conduct an accounting of the individual Indian money accounts.

(B) DETERMINATION.—Using methodologies or models developed under subparagraph (A), the IMACS Task Force shall conduct an accounting to determine in current dollars the balances of—

(i) first, all individual Indian money accounts opened in or after 1985;

(ii) second, all individual Indian money accounts opened on or after the date of enactment of the first section of the Act of June 24, 1938 (25 U.S.C. 162a), and before 1985; and

(iii) third, all individual Indian money accounts opened before the date of enactment of the first section of the Act of June 24, 1938 (25 U.S.C. 162a).

(C) NOTICE OF DETERMINATION.—On making a determination of the balance in the individual Indian money account of an eligible individual, the IMACS Task Force shall provide notice of the determination to the eligible individual and the Secretary.

(g) ACCEPTANCE OR NONACCEPTANCE BY ELIGIBLE INDIVIDUAL.—

(1) ACCEPTANCE.—If an eligible individual accepts the determination by the IMACS Task Force of the balance in the individual Indian money account of the eligible individual—

(A) not later than 60 days after the date on which the eligible individual receives notice of the determination, the eligible individual shall submit to the Secretary a notice that the eligible individual accepts the determination of the balance;

(B) not later than 30 days after the Secretary receives the notice of acceptance under subparagraph (A), the Secretary shall make any

adjustment in the records of the Secretary to reflect the determination;

(C) based on the adjustment made pursuant to paragraph (B), the Secretary shall make full payment to the eligible individual of the balance in the individual Indian money account of the eligible individual in satisfaction of any claim that the individual may have;

(D) the eligible individual shall provide the Secretary an accord and satisfaction of all claims of the eligible individual, which shall be binding on any heirs, transferees, or assigns of the eligible individual; and

(E) the eligible individual shall be dismissed from the class action.

(2) NONACCEPTANCE.—If an eligible individual does not accept the determination by the IMACS Task Force of the balance in the individual Indian money account of the eligible individual, the eligible individual may—

(A) have the amount of the balance determined through arbitration by the Tribunal; or

(B) remain a member of the class in the class action.

SEC. 5. INDIAN MONEY CLAIMS TRIBUNAL.

(a) ESTABLISHMENT.—There is established the Indian Money Claims Tribunal.

(b) MEMBERSHIP.—The Tribunal shall be comprised of 5 arbitrators drawn from the list of arbitrators maintained by the Attorney General.

(c) ELECTION TO ARBITRATE.—If an eligible individual elects to have the amount of the balance in the individual Indian money account determined through arbitration by the Tribunal—

(1) not later than 60 days after receiving the notice of determination under section 4(f)(2)(C), the eligible individual shall submit to the Tribunal, in such form as the Tribunal may require, all claims of the eligible individual, with an agreement to be bound by any determination made by the Tribunal; and

(2) the United States shall be bound by any determination made by the Tribunal.

(d) REPRESENTATION.—

(1) IN GENERAL.—An eligible individual may be represented by an attorney or other representative in proceedings before the Tribunal.

(2) ATTORNEY'S FEE.—No legal representative retained by an eligible individual for purposes of proceedings before the Tribunal may collect any fee,

charge, or assessment that is greater than 25 percent of the amount of the balance in the individual Indian money account of the eligible individual determined by the Tribunal.

(e) TIMING.—To the extent practicable, the Tribunal shall—

(1) schedule any proceedings necessary to determine a claim to occur not later than 180 days after the date on which the eligible individual submits the claim; and

(2) make a determination of the claim, and provide the eligible individual and the Secretary notice of the determination, not later than 30 days after the conclusion of the proceedings.

(f) ACTION FOLLOWING DETERMINATION.—Not later than 30 days after the Secretary receives the notice of determination under subsection (e)(2)—

(1) the Secretary shall make any adjustment in the records of the Secretary to reflect the determination;

(2) based on the adjustment made pursuant to paragraph (1), the Secretary shall make full payment to the eligible individual of the balance in the individual Indian money account of the eligible indi-

vidual in satisfaction of any claim that the eligible individual may have;

(3) the individual Indian money account of the eligible individual shall be closed;

(4) the eligible individual shall provide the Secretary an accord and satisfaction of all claims of the eligible individual, which shall be binding on any heirs, transferees, or assigns of the eligible individual; and

(5) the eligible individual shall be dismissed from the class action.

SEC. 6. JUDGMENT FUND AVAILABILITY.

The funds for any payment made pursuant to section 4(g)(1)(C) or 5(f)(2) shall be derived from the permanent judgment appropriation under section 1304 of title 31, United States Code (commonly known as the ''Judgment Fund''), without further appropriation.

SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated—

(1) to carry out section 4, $10,000,000 for each of fiscal years 2004 and 2005; and

(2) to carry out section 5, $10,000,000 for each of fiscal years 2006 and 2007.

○

The CHAIRMAN. I would yield to my colleague, Senator Inouye.

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

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

Senator INOUYE. A few days ago, as you indicated, Mr. Chairman, the members of the Conference on the Interior Appropriations agreed to a House proposal that we have been advised is of questionable constitutionality. The relevant language, as pointed out, will prevent the provisions of the American Indian Trust Fund Management Reform Act, the provisions of any other statute, or any principle of common law from being construed or applied to require the Department of the Interior to commence or continue the conduct of an historical accounting of individual Indian money accounts until the earlier of the following shall have occurred:

First, the Congress acts to amend the American Indian Trust Fund Management Reform Act to, and I quote, "delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust," or, second, December 31, 2004.

As pointed out, Mr. Chairman, that puts this committee on the spot. We do not mind that, but I think this is an unconstitutional matter.

Since that time, our offices have been flooded with telephone calls, faxes, and e-mails expressing the concerns of Indian country that hundreds of thousands of Indian people have been denied their rights to seek an accounting of the funds that are held in trust for their benefit by the United States.

They ask me, and undoubtedly they are also asking other Senators who serve on this committee, whether any other group of Americans—would be singled out in this manner for such treatment. Sadly, I believe we all know the answer to that question.

However, today we embark on a new path that will hopefully lead us away from one of the sorriest episodes in my tenure of service in the Senate to a day when those who have been denied their rights will have their rights vindicated. Those of us who have joined the chairman in cosponsoring this measure know that it is just a starting point, and that is why we are having this hearing today, so that we may call upon the wisdom of those who would be affected by this legislation.

On April 8 of this year, Chairman Campbell and I wrote to the parties to the *Cobell* v. *Norton* class action lawsuit to explore their interest in settlement of the litigation. Both parties replied that they were amenable to settlement negotiations, and thereafter, there was some discussion of mediation. Before we dismiss that idea, I would like to make one small suggestion.

Often, when mediation is discussed, it usually entails an effort to bring the parties to agreement over a monetary figure that would resolve their differences. My suggestion would be that we keep the concept of mediation on the table as we consider this bill—only rather than have the parties enter into mediation over money—we call upon the parties to enter into mediation as to which methodology, or series of methodologies, should be applied to the accounts that will bridge the gap that has been brought about

through the loss of critical information commonly considered necessary for a full accounting.

Then, as the parties have agreed they are capable of doing—that is, coming to agreement—by the time the IMACS Task Force is constituted, there will be one or more methodologies that have been blessed by the parties to the litigation, and that the Task Force can apply to each individual account, if an account holder elects to pursue that course of action.

Most importantly, I believe it is incumbent upon us to act—to act deliberately but with speed—so that this national nightmare may be brought to a close, and the first Americans of this land may have access to the moneys that are rightfully theirs.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Inouye.

Senator Thomas.

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

Senator THOMAS. Very briefly, Mr. Chairman. Certainly we have a problem before us. The Court has significantly increased the scope of the accounting. The DOI must complete the accounting. That would take decades longer and would cost of billions of dollars more than was originally planned, I believe.

All of us are interested in a settlement that is fair to willing plaintiffs. The *Cobell* case will continue for several years, if not decades, the way it is. I certainly promote the notion that we continue to look at the legislation before this committee, to provide an alternative. As one of the reservations allotted under the 1887 Dawes Act, the Wind River Reservation has thousands of individual Indian money account holders involved in this suit.

We are supportive of the concepts proposed in the legislation and urge you to move forward.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Akaka, do you have any statement you would like to make?

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

Senator AKAKA. I want to thank you, Mr. Chairman, for this opportunity to make a statement. I want to thank you, Chairman Campbell and Vice Chairman Inouye for this hearing today, and in introducing S. 1770, the Indian Money Account Claims Satisfaction Act of 2003.

In addition, I want to thank the witnesses who will testify before the committee for their participation.

For decades, the United States has been trying to resolve the accounting problems for both the individual Indian money and Indian tribal accounts. As a result, for 8 years now, litigants for individual Indian money account holders who filed a lawsuit in 1996 against then Secretary of the Interior, Bruce Babbitt, and now again Secretary of the Interior Gail Norton, have been waiting for an accurate and complete accounting of their individual trust accounts.

The historical accounting of the individual Indian money accounts still has not been rendered. With the September 25, 2003, memorandum and order that was issued by Judge Lamberth providing specific requirements for the Department to address as it completes it accounting by no later than 2007, the Department has indicated that preliminary estimates to comply with the order will cost somewhere between $10 billion and $12 billion.

Even though there is finally a deadline in which the Department must complete its accounting of these individual accounts, but I am still not certain that the Department will be able to fully comply with Judge Lamberth's memorandum and order.

Mr. Chairman, for this reason, I am pleased that you have introduced S. 1770 with Senators Inouye and Senator Dominici. While I commend you for your efforts to bring forth this legislation to address the Government's responsibility to provide an accurate and complete accounting of the individual Indian money accounts, I would like to ensure that this legislation does not impede the opportunities to mediate this matter.

I agree with the intent of S. 1770, and look forward to working with you, Mr. Chairman, and the committee. Again, I want to say thank you for holding this important hearing.

The CHAIRMAN. Thank you, Senator Akaka.

We will now start with our first witness, James Cason, associate deputy secretary, Department of the Interior, Washington, DC.

Mr. Cason, please proceed.

STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. CASON. Thank you, Mr. Chairman. It is my pleasure to be here again today talking about this very important issue. We have had an opportunity to chat on this issue a couple of times in the past. I appreciate another opportunity to do that.

We are here to talk about the historical accounting. Senators have laid the ground work for the discussion. The problem has been ongoing for quite some time. I just want to make a few points before I answer questions.

Senator Akaka made a great point that I would like to illustrate. This is the Government's responsibility to address this issue. Often we have the Department of the Interior being the root of the problem. We really are not. At the end of this, we have to recognize that ultimately Congress set up the trust as the trustor. The Department of the Interior is the principal trustee delegate on behalf of the Government. Congress, the executive branch, and the courts all have a role to play in laying out how we address this issue.

This issue is not new. It has been ongoing for quite a long time. The issue to do an accounting, obviously, is one that seems to have been unresolved for a long time. If you take a look at where the courts are right now, it says that our duty to account goes all the way back to 1887. Therefore, we have not addressed this issue for a long time.

Ultimately, all three branches of the Government are going to be involved in this as we are right now. Ultimately, the Congress is going to have to decide what will our trust responsibility be to settle this. That is what we are trying to decide. What exactly is an

accounting. Ultimately, Congress will have to decide how to pay for it.

The Department of the Interior does not have any independent funding to address this. Ultimately the bill comes here. We have to decide that nexus point of how much work do we do to address an accounting, and how much are we willing to pay for it? That is the struggle that we are going through right now.

The court is principally addressing the issue of what do we have to do to do an accounting. Congress is struggling with both points of what do we do and how do we pay for it. The Department of the Interior is trying to do the same.

Ultimately we get back to the initial point of this, and that is the 1994 act. In the 1994 act, the provision that is in question is section 102 of that act which basically says:

> The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of the Indian tribe or the individual Indian which are deposited and invested pursuant to the Act of June 24, 1938.

That is the language that is in question. It does not say anything about doing a historical accounting. It does not say go back to 1887. The legislative history does not say any of that. But we are where we are. The court has interpreted that what our responsibility is to satisfy this language—and if this language is not enough—then it is any other common law responsibility that we might have. Then we have to go back to 1887 and reconstruct the history of the Indian trust since 1887.

Ultimately the three branches of Government are going to have to decide whether that, in fact, is the task that we have to do, and how we would go about approaching that task. Certainly in this language here, if this is the root of our responsibility, then one could think that funds invested pursuant to the 1938 act, maybe 1887 is a far way back. Ultimately Congress can make that decision, too.

We need to get down to a point of being clear about what our accounting duty is and that the Department of the Interior needs to follow, and what are the parameters of that duty. Then we need to be clear of how we are going to fund the administrative process to undertake that accounting. We need also to be clear how we deal with the results.

The litigation has been going on since 1996. That is a long time. This issue does need to be resolved. So far in the Department of the Interior we have spent $53 million on this issue. It has not been hundreds of millions or billions yet, but it could get there. We have spent $53 million trying to undertake an historical accounting.

In the past what we have done is historical accounting on the named plaintiffs. This is an accounting for funds that have been placed in their accounts. What we have found through that process for the named plaintiffs is one check for $60 that went to the wrong place. We have spent $20 million getting there.

Let me be fair. Looking just that far is not statistically relevant. There is a big field of accounts that are there. That would not be statistically relevant. That is what we have found. We have also done about 17,000 judgment per capita accounts. The error rate we find there is nominal.

Unrelated in a past exercise we have also done tribal accounting. What we have found in the tribal accounting process is an error rate that was very low. But again, it is not complete. There is more work that could be done. There is a lot of history there. We could do more work.

The issue is: How much more work do we do? Exactly what kind of work do we do?

The plaintiffs believe that we owe, if the press accounts are accurate, $176 billion. There is a long way between where the Department of the Interior is and where the plaintiffs are. I think Senator Inouye's point that maybe what we need to do is take a look at the methodologies. That is probably a good idea. Take a look at the methodologies of exactly what we need to do to resolve this issue.

When we went to court for trial 1.5, there were two dramatically different methodologies presented to the court. The methodology that the Department chose was an accounting for funds with a statistical verification process of the documentation in order to contain costs.

The plan that we offered to the court cost approximately $335 million. We sought funding in the 2004 appropriations process to fund that. That was a total of about $100 million for fiscal year 2004 to undertake the accounting in our plan. It looks like our appropriations will be about $45 million. Congress is unwilling to fund that plan, or has been unwilling to fund that plan.

On the other hand, the plan that the court gave us was a very broad accounting, going back to 1887, to account for every account that has ever been, and account for all the land transactions for every allotment that has ever been, in essence. That plan is estimated to cost billions. If we cannot get $100 million to do the accounting that we are looking for, I think it is harder to believe that we will get billions to do the plan that the court has asked for. But that is what the court has told us to do. We definitely have an issue there that somehow we need to bring to resolution.

The key features of the court plan that is different than ours basically are: Who gets an accounting? We basically had the individuals who had accounts that were open as of the date of the 1994 act. The court has basically said that anyone who has ever had an IIM account is part of the class. How far back do we go? Our accounting was back to 1938 for the individuals that were in our pool. The court goes back to 1887 for anyone who has ever had an account.

The court added lands requiring DOI to do an accounting for all land allotments and all their fractionated interests. The Department had not planned to do that. We believe that the litigation was about funds. The court has directed us to go after third party records in order to do the accounting. We would be out, under this plan, seeking records from third parties like individual Indians or tribes, or oil, gas, or timber companies. The cost is dramatically different. Our plan was about $335 million over 5 years. The court's plan is in the billions in order to get it done. It has about the same type of timeframe. The risk of implementation is substantially higher with the court's plan because of the huge acceleration of work that would have to be done in a very short timeframe.

I want to applaud the committee in its leadership in introducing S. 1770. It is nice to see that the authorizing committees both in the Senate and in the House are actively engaged in the issue. Clearly this is needed. I would suggest that S. 1770, in our opinion, does not solve the problem because it offers a number of other alternatives on top of the accounting that we are looking at.

Certainly it has the advantage of giving choice to the Indian community, but it does not move us any closer to resolution of the issues. It has the same fundamental problem that we have right now which is getting adequate funding to do whatever accounting is required to meet our trust responsibilities. That is not addressed.

We would be happy to work with the committee in addressing some of the mechanics of making S. 1770 work.

Mr. Chairman, you made an opening statement in introducing the bill that what we wanted was a full, fair, and final resolution of this issue. I could not agree more that that is what we need. I would like to add one other comment about fractionation, a fourth "F." You had made a comment about fractionation. That is clearly an area that is a material problem that needs to be addressed. It is the root of a number of the problems that we have in administering this trust. We would certainly like to work with the committee in coming up with concrete ways to solve that problem as well.

With that, thank you. I would ask that my statement be included in the record in its entirety.

Thank you.

The CHAIRMAN. Without objection, so ordered.

[Prepared statement of James Cason appears in appendix.]

The CHAIRMAN. Thank you.

If S. 1770 does not solve the problem, I would ask you what does solve the problem? Giving more money does not seem to work. You mentioned yourself that we are far short of getting the amount that you need in the appropriations process. That is not going to change. We have a big deficit here. Senator Inouye and I, and I think most of the people on the committee here, have always supported as much as we can to go to Interior for any program, including trying to resolve this accounting mess.

But we are 2 out of 100 on our side of the Hill. There are a whole bunch more on the other side of the Hill that have other priorities. If we just keep going at the rate we are now, you are not ever going to get the amount of money needed to do the accounting without changing the basic methodology.

Let me ask you a couple of questions before I turn it over to Senator Inouye.

What is the estimated cost for complying with the order only for activities to be conducted in 2004? Do you know that?

Mr. CASON. Yes; in order to comply with the order and the timeframes in the order, our best estimate is approximately $3 billion.

The CHAIRMAN. $3 billion. Do you have a formal written estimate of that cost?

Mr. CASON. Yes.

The CHAIRMAN. As you know, we had that rider put on the appropriation bill yesterday. I have the feeling that very frankly that part of that was driven by the Administration. They did not do it

through me or Senator Inouye. But that was the impression I had from hearing the dialog.

Is it the Department's strategy to insert language in the appropriations bill to make this problem go away? In other words, was the Department behind that movement in the Appropriations Committee?

Mr. CASON. Mr. Chairman, as I understand it, the Department was not behind the efforts. I could not attest to who specifically ramrodded the effort. As I understand it, it began with the Appropriations Committee. I had not seen the language until yesterday. I do not know who drafted it and who shepherded it.

The CHAIRMAN. You said that on occasion that the Department of the Interior is open to reasonable settlement discussions. I guess that is still the case; is it not?

Mr. CASON. Yes.

The CHAIRMAN. We would be here all day, I suppose, if we tried to get you to explain what is a reasonable settlement discussion. Can you tell me in a nutshell what you call a "reasonable settlement discussion" when we are between $10 billion and $175 billion poles?

Mr. CASON. Mr. Chairman, I think at this point the Department of the Interior would love to settle this issue. We are consuming a ton of resources, senior management time, and lower staff time addressing this. We would love to see it be resolved so that we can begin the healing process with the Indian community for which we are the trustee. We would love to have this behind us.

Ultimately what it takes, I think, to get it behind us is to sit down and have some concrete understanding about what exactly it is we are trying to solve, and that we introduce fact over fiction into the process so that we are solving some concrete issue. Basically what we have is an amalgam over time of hundreds of thousands of accounts that are alleged to have been improperly kept.

At this point we do not have the facts to be able to say, "Yes, that is true," or, "No, that is not true," and to what degree. We do not know what exactly we are solving in trying to address the issue other than just doing an accounting to get all the facts.

If we are going to sit down and do a settlement, obviously there is a cost avoidance issue and an opportunity cost that could be a parameter for dealing with this. I think that is part of the reason we have a complicated accounting prescription here so that there is a good parameter at one end. Certainly there is $176 billion at the other end. We would have to sit down and try to make a fact over fiction settlement.

The CHAIRMAN. Well, you may never get the facts. Very clearly, we all know there are so missing documents. I do not think it is possible to get all the facts, in my view.

In his written testimony, the plaintiff's lawyer, John Echohawk, indicated that the plaintiffs are willing to engage in mediation as an alternative method of resolving issues on *Cobell*. Has the Department ruled that out as a "reasonable settlement discussion?"

Mr. CASON. No; we have not.

The CHAIRMAN. So I take it that your Department is willing to talk about some mediation efforts?

Mr. CASON. Yes.

The CHAIRMAN. Maybe my last question is: Are you willing to sit down with staff and try to work with the plaintiffs through staff to try to find a method of mediating it?

Mr. CASON. Yes; we are, Mr. Chairman.

The CHAIRMAN. Okay.

Senator Inouye, do you have any questions?

Senator INOUYE. Thank you, Mr. Chairman.

I was just intrigued by your testimony this morning in which you estimated that the cost of an historical accounting would be $335 million; am I correct?

Mr. CASON. Yes.

Senator INOUYE. But yet in July 2002, in earlier testimony you estimated that it would be $2.4 billion. What has happened in the past year to alter your estimate?

Mr. CASON. The accounting is basically an element of what it is you want to accomplish and how much work you put into it. At one end of the spectrum I think the Court has pretty well laid out the very end of one parameter which is do essentially everything back to 1887; reconstruct every single account as far back as they go to 1887; reconstruct all land ownership and every allotment back to 1887 and all the relationships of all the Indians involved since 1887. That is one end of the spectrum.

At this end of the spectrum, you could make decisions about who you are going to do an accounting for. Our plan was basically do the accounting for the individuals who actually had open accounts in 1994 when the act passed. The court's plan said do it for everybody who ever had an account since 1887.

So you cutoff work there that you do not do if you are not addressing deceased individuals or closed accounts in the past. You can do statistical work verifying accounts. Basically what we are saying there is if I had a transaction in 1945 where I received $10 of leasing income, then I could either sample that and go get the documentation on it, or as a statistical approach, I take 1 out of every 1,000 samples, 1 out of every 5,000 samples, and if I can use statistical techniques, I can cut the work down substantially and still end up with a very high degree of accuracy as to what the results are.

In our plan we used statistical verification to say that we would go after a certain set of the documentation to support the transactions on the ledger to a degree of 99 percent accuracy that we would be within the error rate identified in the process.

We were able to cut down a substantial amount of work of not going to get documentation for every single transaction that has occurred, but get a statistical set of the transaction documentation. That would cut the work down. So we were able to get down to a manageable, within the budget and the work load, type of approach that would still give accurate results in the process.

Senator INOUYE. Has that methodology ever been employed by the Government?

Mr. CASON. By the Government?

Senator INOUYE. Yes.

Mr. CASON. I am not sure, Senator, whether it has been employed by the Government. But the way we developed the methodology was that we had a statistical firm with a Ph.D. statistician

come assist the Department in designing the sample sizes. They were designed to give a 99-percent accuracy. We basically employed two times as many samples as were needed to get to that point. We also added in another process that if we actually identified errors that we would sit and explore that pocket of errors until we could get them resolved.

So we put in a process to get a reasonably high degree of accuracy of 99 percent to identify whatever the error rate was, whether it was one-half percent or 10 percent, that would not require us to do every transaction.

Ultimately, Senator, the cost on this is driven by how much work we have to do to get to the bottomline. In our plan, we were basically going to end up sampling around one-half of a million transactions in order to do the accounting. In the judge's plan, we would have to go do the documentation for about 61 million transactions.

That is where the principal cost differences are.

Senator INOUYE. I am pleased to note in your testimony that you would not be against the mediation process. I think that is a good start for us. As indicated by you, there are countless numbers of different methodologies. Do you not think it would be well if we can sit down and be able to come to some mediated consensus as to what methodology to follow?

Mr. CASON. Senator, I think that would be a wonderful thing if we could sit down and come to an agreement about how to resolve this.

Senator INOUYE. Could that be done legislatively or just administratively?

Mr. CASON. I think it could be either.

Senator INOUYE. Well, I feel better now.

Mr. CASON. Well, great.

Senator INOUYE. You have indicated a concern about the lack of clarity in S. 1770. I, for one, would be most pleased to have your staff provide us with language that would address this concern and thereby bring about greater clarity in the bill.

Mr. CASON. We would be happy to do that.

Senator INOUYE. Thank very much, sir.

The CHAIRMAN. Without objection, so ordered.

Senator INOUYE. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, too, James. S. 1770 is certainly not a perfect bill. Very few of them are around here. In fact, I have never seen one yet that is happily supported by everybody involved. There are no perfect bills. It is a vehicle, as I mentioned earlier. We, very simply, need the Department of the Interior's help, as we need plaintiffs help, to bring this thing to closure. We just cannot find a solution by ourselves. Hopefully you are going to work with us, as you mentioned, with our staff.

Mr. CASON. We would be happy to. The only thing I would suggest, Senator, is that choice is great. But what we would like to do is to see if we could get down to "Let us choose this path," or, "Let us choose this path," or, "Let us choose this path," as opposed to trying to pursue multiple paths all at once.

The CHAIRMAN. That may work. Sometimes the same path does not fit all moccasins.

Mr. CASON. That is true.

The CHAIRMAN. Thank you.

Senator Thomas, do you have any questions?

Senator THOMAS. Thank you, Mr. Chairman.

You talked about mediation. With whom would you sit down?

Mr. CASON. Well, if we were going to do mediation, I think it is basically the Department of Interior, the Department of Justice, the plaintiffs, and some third party mediators. Certainly since the bill ultimately ends up with Congress in some fashion, or if we can do it as litigation settlement, and possibly someone from Congress who has the ability to actually settle involved in the process.

Senator THOMAS. If it were not for the court's intervention, would you have a process that works in the Department?

Mr. CASON. With regard to what, Senator?

Senator THOMAS. With regard to solving this issue.

Mr. CASON. I would say candidly probably no, because I do not think that the plaintiffs and we are close enough that we would end up agreeing mutually without some third party involved.

Senator THOMAS. So the court is an important component of this resolution; do you think?

Mr. CASON. I think there is a role to play for all three branches of Government, and in this case, all three branches are actively engaged. Now that we are actively engaged, the problem that we have is that we are not engaged in a similar way.

Senator THOMAS. Well, you know, as you listen here—we have been at this for 10 years—you are talking about methodology.

Mr. CASON. Yes.

Senator THOMAS. You do not have a methodology in mind after 10 years?

Mr. CASON. Well, actually we do, Senator. The Department has an accounting plan. The Department has actively engaged in implementing our plan. We were funded in 2003 to do it. We have substantial accomplishments under our plan.

However, what the court has said is, "Your plan is insufficient. We want you to do our plan." The difference is that their plan costs billions of dollars more. Congress is unwilling to fund our plan, much less what the court has. So that is the problem that we are in.

Senator THOMAS. I understand.

Mr. CASON. We do have a plan. We know where we want to go. We think that we are approaching the accounting obligation in a cost effective way that will also meet our trust responsibilities and do it with a high degree of accuracy. But the court perceives that we have to have a much broader, more expensive plan. That is why we are here. We need to get that resolved.

Senator THOMAS. If the Congress agreed with you on the plan and instituted it in the bills and then defended it in the court, would we be successful?

Mr. CASON. I believe so. Ultimately it is Congress' choice as the trustor, the settlor of the trust, to tell all of us what our obligations are to the trust. We do that through the statute. If Congress chooses to say:

What we meant in this language in the 1994 Act, or what we meant in previous language that has become common law is this, then this is how we want the accounting to be.

If Congress tells the Department of the Interior, "What the court told you to do is exactly what we meant. We are going to fund it for $10 billion." Okay, great. The Department will charge off and go do the work that we are supposed to do. But if Congress is not willing to fund that kind of approach, and that is not what Congress meant, and Congress meant something else, then we need to be clear about what that is so that we, the Department, can fulfill our trust responsibilities as prudently as we can, and that we have a solution that Congress is willing to support with the funding to implement it. So, yes.

Senator THOMAS. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Cason, thank you for appearing today.

With that, we will take a 10-minute break to vote.

[Recess taken.]

The CHAIRMAN. The committee will come to order.

We have a conflict. We are dealing with the supplemental for Iraq, Afghanistan, and the war effort. Senator Inouye had to go to that meeting. He will not be with us for the rest of that testimony. He may submit some questions in writing.

Our second panel is John Echohawk, executive director, Native American Rights Fund, Boulder, CO.

John, welcome. Please proceed.

STATEMENT OF JOHN ECHOHAWK, EXECUTIVE DIRECTOR, NATIVE AMERICAN RIGHTS FUND, BOULDER, CO

Mr. ECHOHAWK. Thank you, Mr. Chairman.

I am very pleased to see the interest in the committee in addressing these trust fund mismanagement problems. I am very pleased to be invited to participate here in this hearing today.

As you know, the Native American Rights Fund is co-counsel for the 500,000 current and past individual Indian money account holders. We have been involved in this litigation since 1996 on a class action basis.

In April, Mr. Chairman, you and the vice chairman sent us a letter that also went to the Secretary suggesting a mediated resolution of this case. We responded positively to that letter in May indicating that we were willing to engage in mediation. Of course, we repeated that pledge in the hearing that the committee had on that proposal in July. We had not heard an official Government response whether they were willing to participate in an attempt to settle the case through mediation until this morning. I was very pleased to hear Mr. Cason say that the Department would be willing to engage in an effort to resolve this case through mediation. I think that is a very positive development.

I think what has happened since we had the hearing in July when we started talking about mediation has been very significant. Judge Lamberth's decision of September 25 was basically holding that the Government's responsibility is to do the full historical accounting back to 1887. This is based upon the legal obligations that the U.S. Government has undertaken under the trust responsibility.

This is rejecting the efforts by Interior and the arguments they made to try to limit that full historical accounting. Both the Dis-

trict Court and the Court of Appeals have held this is required under the Federal Government's trust responsibility, under the 1994 act, which, of course, the courts have upheld. This has basically codified the Federal Government's trust responsibility in terms that require them to act as any normal trustee in any regular trust.

That has led the Department to talk about how much that would cost. As we have discussed here this morning, I think that is all the more reason why we should think about a mediated resolution of this case.

I know the efforts of this committee to try to resolve this issue and that S. 1770 has been introduced. We commend the committee for its interest there. We believe that the goals of the resolution process should include certain criteria that I have laid out in my written testimony, including that the proposal be fair, that it expedite rather than delay resolution of the case, that it not be a forum to re-litigate settled issues—issues that have already been determined by the District Court and the Court of Appeals, and that the proposal be consistent with trust law—which again is what the courts have held—is required in this situation; and the proposal must be constitutional.

We understand that S. 1770 is a starting point by the chairman and others who sponsored it to try to reach a resolution in this case. We feel as though it is only a starting point. It has many defects contained within the bill that leads us to think that it is not really a good bill and we should not go down that avenue. My written testimony contains three pages of problems that we see included in the current language in S. 1770. I will not repeat all of that here.

I would just conclude once again by emphasizing the importance of the mediation. We feel that is very possible to end the litigation. It has come out that the *Cobell* plaintiffs and the Federal Government both agree that since the IIM accounts were started in 1887, approximately $13 billion has gone into those accounts. We both agree on that. In our view, that should be the start of this mediation and settlement process.

The next step is simply to ask the Government to produce its records on how much of that $13 billion has been dispersed. How much can they prove they paid out? Whatever is the difference is what is owed, plus the interest on that money. It seems to us a pretty straightforward process that would eliminate these requests for $10 billion or so for some historical accounting which cannot be done.

I do not believe the Department thinks it can be done. I think they have admitted as much in court. I think they wanted to try to put all kinds of parameters around it to be able to perform what they would call an accounting that would basically just take into account the records that it does have. But they do not have very many records. Of course, the court rejected their plan out of hand because it is not consistent with trust law. It is not consistent with the 1994 act and the obligations that the Federal Government has undertaken.

In summary, I think we can hopefully take the Administration at its word and start these discussions about a mediated settlement

along the lines that I just suggested. If the Government wants to try to re-litigate everything that we have litigated in the last 7 years in that mediation, we are not going to get very far at all. But if we can start where are now in terms of what the courts have ruled, I think we can resolve this case.

Thank you, Mr. Chairman. I would ask that my statement be included in the record in its entirety.

[Prepared statement of John Echohawk appears in appendix.]

The CHAIRMAN. Thank you.

In your written testimony you were quoting from an April 2003 letter that Senator Inouye and I sent to you and the Federal defendants, but you quoted only a small part of it. Let me read the whole thing:

> We believe that the most effective and equitable way to resolve this threshold matter, that is, the accounting, is to engage the services of an enhanced mediation team that will bring to bear trust accounting and legal expertise to develop alternative models that will resolve the *Cobell* case fairly and honorably for all parties.

Yet, as I understand your testimony, S. 1770 is totally out of the blue. What we did with S. 1770 is really mirror what that letter said that we had sent to you. Tell me where the disparity is.

Mr. ECHOHAWK. Mr. Chairman, I think if we were able to start a mediation process, that the panel idea that you have included in S. 1770 may well be something that could help us sort through this process that I outlined in my statement. I think that is a good concept.

The CHAIRMAN. Okay. Normally when a client has an attorney they can discuss things when they make a decision. This one is a little difficult. As the counsel for the individual holders, I understand there are about 500,000 in this class action. How often do you communicate with all 500,000?

Mr. ECHOHAWK. Well, as you might guess, that is a little difficult to do. We go to as many meetings as we can, as requested by individual account holders. Of course, basically we have a small team. But we do the best we can between the named plaintiffs and the plaintiffs' counsel.

The CHAIRMAN. Well, when you are having these meetings, I do not know if you are hearing the same thing we are hearing. But when we talk with Indian people, they would rather have some measure of immediate relief than take a chance of waiting 5 years or 10 years and going through all the court room gymnastics that we have been going through over the past 8 years, and maybe another 10 years in the process.

Nine out of ten are saying they want to settle the thing, they want to settle it now, and they want immediate relief. Are you not hearing that?

Mr. ECHOHAWK. I think we are hearing that, too, but at the same time it has to be a fair settlement. It has to be a fair settlement. That is what we are proposing.

The CHAIRMAN. That is what the mediation team would be all about, is trying to find some equitable settlement that would be accepted by the plaintiffs and by the Department, too.

Are you under any obligation to communicate with all of the plaintiffs? Do you just call a meeting and invite whoever wants to come to it? How do you do that?

Mr. ECHOHAWK. We do the best we can, Mr. Chairman. These problems are inherent in a class action, and that is why the class action approach is undertaken. In the end, of course, there are due process safeguards in any settlement that would be reached. We would, of course, have that approved by the court with all the due process safeguards that are inherent in that class action process.

The CHAIRMAN. There has been some talk today about what kind of methodology should be used to conduct an historical accounting. I think that is a very important concern to the plaintiffs. As the plaintiffs' lawyer, would you oppose any methodology that would substantially understate the true balances of your clients IIM accounts? I assume you would.

Mr. ECHOHAWK. Substantially understate? No, I do not believe we would, Mr. Chairman. Again, I think we are looking to the decisions by the District Court and the Court of Appeals in terms of what is a fair methodology and what is required in terms of an accounting. I think that shows us the way to go.

The CHAIRMAN. If the Committee were to adopt legislation calling for some sort of mediated settlement, would you agree that the ultimate goal of the legislation would be to come up with a settlement that reflects the true balances of your clients IIM accounts, the true balances?

Mr. ECHOHAWK. Yes; Mr. Chairman.

The CHAIRMAN. The true balances might not be what your plaintiffs now claim and they might not be what the Interior Department claims. If we did have a methodology that was pretty foolproof and it was not anywhere near what the original number was of $176 billion, and yet it was not the same as the Department is claiming, would that methodology receive your support?

Mr. ECHOHAWK. Well, Mr. Chairman, again it would have to be consistent with trust law as determined by the District Court and the Court of Appeals.

The CHAIRMAN. Let me ask you the same thing I asked the Department of the Interior. Are you willing to commit to some substantial time and resources to work with Senator Inouye and my senior staff, in a good faith effort, to try to produce some sort of settlement legislation that is equitable to both sides of the issue?

Mr. ECHOHAWK. We certainly would, Mr. Chairman. I think with your help and with the help of the vice chairman and other members of the committee, we can get this done.

The CHAIRMAN. I think so, too, but it has to be a good faith effort by the Department and by the attorneys for the plaintiffs, too.

I have no further questions. Senator Thomas, do you have any comments or questions?

Senator THOMAS. Thank you, Mr. Chairman.

I am sorry I did not hear all of your testimony. I did read some of it. If you were in charge of the world, would you have the Congress appropriate billions of dollars for accounting now?

Mr. ECHOHAWK. No, sir; I would not. I think through a mediated process we can come up with a settlement to this case that would eliminate the necessity to do that. I think doing the full historical accounting is impossible to do. I think the Interior Department has admitted as much.

If it cannot be physically done, I do not know why all these billions should be appropriated to do that. We should sit down and figure out what we do in lieu of that. It just cannot be done.

Senator THOMAS. Well, is not the result of the *Cobell* case requiring that kind of thing?

Mr. ECHOHAWK. That is the requirement. But again if the Government cannot do that, then we need to figure out some other way to do that. Again, if we work together, I think we could find a way.

Senator THOMAS. I would hope so. It seems like the Indian people in my State are more interested in a settlement. It does not appear that the attorneys or the plaintiffs over these years have been very interested in doing anything except what they want to do in the lawsuit.

Mr. ECHOHAWK. Well, as we pointed out in our letter to the chairman and the vice chairman suggesting a mediated resolution that we sent up in May, we are willing to engage in a process to talk about mediation and settlement.

On several occasions since 1996 when we started the litigation, we have attempted to do that with the Federal Government, but none of those attempts have been fruitful.

Senator THOMAS. Fruitful depends upon which point of view; does it not?

Mr. ECHOHAWK. Well, it has not achieved a settlement.

Senator THOMAS. Absolutely.

Mr. ECHOHAWK. My point is that we have been willing to talk.

Senator THOMAS. You have been willing to change your position some?

Mr. ECHOHAWK. We are willing to talk, yes.

Senator THOMAS. That is not the answer to my question.

Mr. ECHOHAWK. Again, in a negotiation, it is a give-and-take process.

Senator THOMAS. That is right, but sometimes it requires changes on the part of all of the parties.

Mr. ECHOHAWK. Then yes, maybe we can change some of our positions as well, depending on what the trade-offs are. That is the nature of negotiations.

Senator THOMAS. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, John. I appreciate your being here.

Let me just reiterate, as I did for Mr. Cason, what happened in the Appropriations Committee yesterday was not particularly satisfying to me or to Senator Inouye. We have a year before I think something that is going to be really unacceptable happens to this committee, to the plaintiffs, and maybe to Interior, too. I think there is going to be a move to take it away from us and put it in an appropriations bill which is going to really complicate it.

There probably will be further court challenges to that. It will just go on and on. We have a year to get this thing done. If we do not, we are going to be in some pretty deep stuff around here. So I hope you are going to be serious about working with us and with the Committee as we are going to try to make sure that the Interior is going to, also.

Mr. ECHOHAWK. We certainly are, Senator.

The CHAIRMAN. Thank you very much.

The last panel will be Tex Hall, president, National Congress of American Indians, Washington, DC; Fred Matt, chairman, Confederated Salish and Kootenai Tribes, Pablo, MT; and Jim Gray, principal chief, Osage Tribal Council, Pawhuska, OK.

I have a 12:30 p.m. commitment that I cannot get out of, so I would appreciate keeping this to 15 minutes per person.

Tex, please proceed.

STATEMENT OF TEX HALL, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC

Mr. HALL. I will be as brief as I possibly can.

Senator Campbell, Senator Thomas, and members of the committee, thank you for the opportunity to testify today on S. 1770 on behalf of member tribes and individuals of the National Congress of American Indians. I would like to express our appreciation of the committee for its commitment to this issue and to Indian people.

I believe this legislation can be viewed in two ways. If this is considered as an immediate legislative proposal that would be quickly passed by Congress, then we have a great deal of concern, as we all know. This bill would give the Federal Government the ability to pick the panel of experts who would decide how much money the Federal Government owes. Indian people simply could not trust a proposal as drafted like that.

However, we believe the bill can be viewed as an effort to put forward some serious concepts for settlement and to create discussions that will push settlement forward. In that light, we welcome the bill because it could serve as a vehicle for Congress to establish a fair and equitable process for settling the *Cobell* v. *Norton* litigation.

As you know, tribal leaders have supported the goals of the *Cobell* plaintiffs and seek a correct trust funds accounting. At the same time, tribes are concerned about the impacts of the litigation on the capacity of the United States to deliver services to tribal Indian communities and nations, and to support the government-to-government relationship.

We believe it is in the best interest of tribes and individual Indian account holders that tribal leaders participate in the resolution of trust related claims and the development of an effective system for management of the trust assets.

On July 1 we testified before this committee on *Cobell* v. *Norton* settlement options. At that time NCAI set forth a set of principles for how a settlement process should be structured. Today we will respond to S. 1770 in light of those principles from our earlier testimony.

First of all, tribal leaders are impatient for Congress to put forward a serious settlement proposal. We are very appreciative of this. They really do not care about the process so much as they care about a serious signal from Congress that is willing to shoulder the costs of settling a lawsuit, and that these costs will not be taken from existing Indian programs.

Second, tribal leaders have seen a lot of quick fixes in trust reform. S. 1770 feels a little bit like another quick fix. A real solution is going to require that all parties come to an agreement. That in-

cludes the Department of the Interior, BIA, the Congress, and the tribes.

Third, as we look to settle the historical accounting, Congress should also address the problem of fractionation through land purchases as part of the settlement and support a state-of-the-art trust management system and standards so that these problems do not reoccur in the future.

In our written testimony we have outlined settlement process principles which tribal leadership developed earlier this summer. I have kept my oral remarks brief, but please refer to my written testimony. My main statement is: We need to begin a settlement process now.

We also support the mediation. I urge again all the parties, with support from the Congress and from this committee, to sit down and begin these discussions in the very near future.

Indian country cannot afford another appropriations cycle to begin without action to begin a settlement process. We are very concerned about the appropriation rider that was introduced. Again, that is not the way we should be conducting business. It should come before the appropriate authorizing committee, like this one here.

We thank Senator Campbell, Senator Inouye, and Senator Dominici for the introduction of S. 1770. I appreciate your leadership in putting this bill forward to push serious discussions to address this very important issue. This is the number one issue in Indian country right now of fixing the trust and settling the trust.

Please consider our recommendations to enhance your bill and put forward a process that all tribes can support. In closing, Mr. Chairman and members of the committee, Indian tribes are in support of settling the trust. But the Indians have to be involved in that process. If they are involved in that process, we can begin to trust that this will be a fair process. Without the Indian involvement, that trust of this process will not be there.

Thank you for giving me a brief opportunity to testify. I look forward to answering questions afterwards. I would ask that my statement be included in the record in its entirety.

Thank you.

The CHAIRMAN. Without objection, so ordered.

[Prepared statement of Tex Hall appears in appendix.]

The CHAIRMAN. Thank you, Tex.

I was reflecting in my own mind while you were speaking about how much in the past history that American Indians have been involved in the process. The answer is about that much. Just darn near nothing. You know it, and I know it, too.

This bill was not meant to be a quick fix. We started talking about mediation over 1 year ago with anybody who would listen, including the NCAI, by the way. It is meant to be a vehicle and a place holder to prevent something from happening through the appropriations process that Indian people are not going to like.

Senator Inouye and I, and most of the committee members, have worked just as hard as we can to try to find a solution on this. The bottom line is that Congress is losing its patience. I say that from a generic standpoint. There are a number of our colleagues who are just fed up with it, tired of it, and want to settle it through putting

more riders on the appropriations bill. We are trying to not let that happen.

But we cannot stop it, very frankly. We cannot stop it unless we get some help from both Interior and the plaintiffs. We cannot just dig in and say, "I am not going to move. I will not do it. They are wrong. The other side is wrong. We are supposed to get this much money." The other one is saying, "You are not supposed to get anywhere near that."

We have to find a solution, or it is just simply going to be taken away from us. That is my personal view on it. I would hope that you, as John Echohawk and James Cason have already said, that you will also be committed to try to find a solution to this thing. This is not an end bill. It is a beginning. It is a vehicle, as I said. But we have to do something. The way I figure it, we have about 1 year, or we are going to be in deep trouble.

We will go on now with Fred Matt.

STATEMENT OF FRED MATT, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES, PABLO, MT, ACCOMPANIED BY BRIAN UPTON, LEGAL DEPARTMENT, CONFEDERATED SALISH AND KOOTENAI TRIBES, PABLO, MT; AND GEORGE WATERS

Mr. MATT. Thank you, Chairman Campbell and members of this Committee. My name is Fred Matt. I am the Chairman for the Council of the Confederated Salish and Kootenai Tribes. With me today I have a member of our Legal Department, Brian Upton, and George Waters.

Thank you for the opportunity to provide this committee with views of the Confederated Salish and Kootenai Tribes. I bring you greetings from God's country. As you have heard me say many times, when you are in Western Montana on a reservation, and you pray to the Creator in the evening, it is a local call. [Laughter.]

So I bring you greetings from Montana.

The CHAIRMAN. That same sun before it gets to you comes over our reservation in Lame Deer. I just wanted you to know that. [Laughter.]

Mr. MATT. I knew you would have a comeback. Thank you.

I will summarize my written testimony. I also want to point out that the version that is on the table is not our final version. We were still making revisions as I came here yesterday on the plane. I will try to be brief. I know this is an important hearing. Once again, thank you for this opportunity.

The Salish and Kootenai Tribes have been very active in the area of trust funds management. We have participated in many intertribal discussions on how to best resolve the problems with the Federal management of the trust funds. We have also taken a more direct approach. We manage our own financial trust services program. We can report to you that our tribal government and tribal members alike are very happy with our experience in taking over administration of these Federal trust functions.

Due to this experience, we have an unique insight into the trust funds management issue since we can view it from the perspectives of both the account manager and the account holders. As the managers of these accounts, we appreciate the complexities in resolving

the accounting issues. As an account holder, we know as well as anyone that Federal mismanagement of the trust funds has long worked great injustices to the many tribal and individual Indian beneficiaries. These injustices would not have been tolerated had they occurred in any other segment of America's society. I know many of you have mentioned those same thoughts.

As you are aware, the filing of the *Cobell* litigation has resulted in the trust funds mismanagement issue receiving the attention that is long deserved. Unfortunately, that litigation was filed over seven years ago, but it was only last month that an initial decision was rendered by the Federal District Court.

We agree with you, Senator Campbell, in your introductory remarks accompanying S. 1770, that the litigation will take many more years. I believe it is both appropriate and productive for Congress to try its hand at fixing this situation.

We, too, oppose spending $9 billion doing an historical accounting. If Congress has that kind of money, it would be better going toward a compensation fund, or it could be better spent on tribal land consolidation. Consolidation would help alleviate the problems associated with fractionations of lands.

As this committee knows, fractionation creates trust fund accounting nightmares. I am truly concerned about helping our account holders. I am particularly concerned about our elders who may not live to see the end of this lawsuit.

The Salish and Kootenai Tribes oppose the concept of a receiver being appointed to manage Indian trust funds. We are glad to see that S. 1770 does not include this misguided proposal. A receiver may ultimately demand control over trust resources that generate income into IIM accounts.

As a self-governance tribe, we are the manager of trust resources on our reservation. Creation of a receiver would be a step backwards. It also would have shown little regard for tribal governments in our pivotal role in resource management on our reservation.

We are also concerned about the potential conflict between the creation of the new trust standards for the rights of the tribes to manage resources. The Confederated Salish and Kootenai Tribes are proud of our system and of trust asset management. We are proud of meeting high standards. However, we urge Congress to keep an eye on the development of these new standards.

The reason self-governance works is that it allows tribal governments to keep flexibility while still adhering to Federal standards. We must retain this flexibility even if new standards are adopted.

A few days ago, Chairman Campbell, you introduced S. 1770. Our tribal staff and tribal council are still in the process of reviewing this bill. But we generally think that the legislation is creating a settlement mechanism that can work. The bill would ensure a determination is arrived at in a reasonable amount of time so that individuals could have their trust account settled and receive their full payment.

The bill includes an option to remain in the class action lawsuit, but it does make me wonder when we will be able to finally put this case behind us. A reason for introducing this bill is to address the problems and move forward on this issue. That will not happen

if a large number of individuals in the Cobell class decide to remain in the lawsuit.

I believe it is absolutely critical that the plaintiffs are able to access the judgment fund. I believe the bill has been drafted to protect this access. However, there is reason to doubt that the current bill will be signed into law if the United States still retains the liability of the *Cobell* class action. This committee may want to consider whether the bill should settle the suit in finality.

A concern that I have, and one which I am hearing from other tribes in Montana is: Where will the money come from to fund S. 1770? Will it come from the BIA's budget and, therefore, out of the services that are funded to tribes? The bill would authorize $40 million. The money of this bill must not come from programs funding tribal governments. We ask you to work with the Budget Committee to help resolve this concern.

It is important to remember that tribes need to be part of the solution, as many have said, to this problem. Tribal governments, like my own, can help to prevent future problems. We are the closest to the tribal beneficiaries. We have the strongest motivation to properly handle these monies for our constituents. This is why we pressed for inclusion of a trust fund demonstration project for fiscal year 2004 in the Interior's appropriations bill. This project ensures our ability to continue our effective management without being impaired by any reorganization of trust functions within the Department of the Interior.

Over the last decade a great deal of energy and resources has gone into trust fund management issues. I welcome Congressional efforts to bring proper relief to individual Indian account holders. S. 1770 appears to be a good faith effort by Congress to resolve the problems at hand. S. 1770 and the recent House Resources Committee oversight hearing demonstrates that Congress is not content to sit on its hands and have the issue dealt with by the courts and the Federal agencies. I believe this engagement by Congress, with active participation of the tribal governments, can be productive in reaching the solution to a long-standing problem. S. 1770 is an important step in that direction.

Once again, Mr. Chairman, I thank you for the opportunity to provide testimony. I would ask that my statement be included in the record in its entirety.

Thank you.

The CHAIRMAN. Without objection, so ordered.

[Prepared statement of Fred Matt appears in appendix.]

The CHAIRMAN. Thank you.

You asked a rhetorical question. Where would the $40 million come from that is authorized in this bill? You have to ask the same question: Where is the $10 billion going to come from if we let this thing go on for another 8 or 10 years? There is always that worry on our behalf that someone around here may say, "Well, it ought to come out of existing Indian programs." None of us want that. When you are facing a $400-billion deficit, believe me, everything is a tug-of-war around here for money. That deficit is apparently is going to be here for the next few years, too.

Let us go on now to Jim Gray, who will be our last speaker.

STATEMENT OF JIM GRAY, PRINCIPAL CHIEF, OSAGE TRIBAL COUNCIL, PAWHUSKA, OK

Mr. GRAY. Thank you, Chairman Campbell. I appreciate the opportunity to speak to the committee this day.

I would like to present the views of the Osage Tribe. I will briefly go over some of my comments in regard to the interest of time. Most of my comments are in my written testimony that I have submitted.

We agree with the sponsors of S. 1770 that it is in the best interest of Indian account holders and the United States to have a voluntary alternative claims resolution process that will lead to a full, fair, and final settlement of existing and potential Indian money account claims.

We are concerned about provisions in this bill, particularly the definition of accounting and claim contained in section 3 of the bill. We believe that the process should be established by S. 1770 as fundamentally fair. It does not, however, take into account the unique situation of the Osage Tribe and its hybrid trust fund scheme. Any fair resolution of the trust fund situation should deal specifically with the Osage. We would like to work with the committee to address the concerns discussed in my testimony.

In the legislation we also have serious misgivings on the definition of accounting. We believe an IIM account holder should have enough information to make an informed decision about whether to accept an amount the Task Force recommends. Based on the particularly vague standards of both (a) and (b) of this definition, accounting may be an inaccurate confusing name for a determination.

We recommend that this legislation either adopt common law accounting standards or call the determination something other than an accounting, and require the Task Force to make clear the deficiencies, if any, in coming to a determination. IIM account holders have a legal right to a full accounting. This legislation should ensure that they are not confused or deceived by a determination.

We are also concerned that the definition of claim could create particular problems for the Osage Tribe. The management and the distribution of Osage trust funds are unique. In 1906, Congress directed the Secretary of the Interior to create a roll of all living Osages through July 1907. All persons on that roll received allotments of Osage reservation lands and a pro rated share of the Osage mineral estate.

These pro rated shares have been passed along over the years to Indians and non–Indians and have come to be known as head rights or the rights to receive quarterly distributions of funds derived from the Osage mineral estate. Only Osages with head rights have political rights to participate in Osage government through voting or running for elective office. Their voting powers are equal to their head right fraction.

The Osage mineral estate continues to be held in trust by the United States for the Osage Tribe. Funds derived from the Osage mineral estate are placed into a tribal trusts account in the name of the Osage Tribe. The tribal council can draw up to $1 million annually from the minerals' income for purposes of council and mineral estate administration. Each quarter the balance of the funds in the Osage tribal account is distributed to the head right

holders in accordance with their head rights share. A few head right holders have more than one head right, while most have a fraction.

The Department of the Interior has established three categories of head right holders: Osage, non-Osage Indian, and non-Indian. Osage and non-Osage Indians with head rights have Indian money accounts that funds from the mineral estate are deposited into. The non-Indians do not have an IIM account, but receive a check every quarter.

Mr. Chairman, the Osage trust fund is an unique hybrid in which funds common to a tribal account. Congress has called these funds tribal funds in statutes. The tribe has rights to these funds. The Indian head right holders receive distributions into IIM accounts, while non-Indian head right holders get a check.

The U.S. Court of Claims recently ruled that the Osage Tribe has standing to represent the right of the head right holders in litigation involving Federal mismanagement of Osage trust funds. Furthermore, a Federal statute makes clear that the Osage Tribe is the appropriate entity to bring claims against the United States. Thus, the Osage Tribe and its head right holders do not comfortably fit into the otherwise simple dichotomy of tribal claims and individual claims.

We are concerned that the definition of claim in section 3 of the bill is overly broad as it includes any duty that pertains in any way to the IIM account. Such broad terms subjects the definition to varying degrees of interpretations. The definition includes more than an accounting, and appears to include activities that occur prior to the time the money is deposited into the IIM account.

We are concerned that this definition may result in harm to Osage tribal claims brought in the Court of Federal Claims, or one we plan to bring in Federal District Court. Even though the stated intent of the bill is to resolve individual Indian account claims, Indian head right holders would appear to meet the qualifications as eligible individuals under S. 1770. Head right holders claims could subsume the Osage Tribe's existing claims contrary to the intent of the tribe to represent the head right holders. Therefore, we would like to work with the committee to amend this definition.

Thank you for the opportunity to testify today. I would ask that my statement be included in the record in its entirety.

Thank you.

The CHAIRMAN. Without objection, so ordered.

[Prepared statement of Jim Gray appears in appendix.]

The CHAIRMAN. Thank you.

You brought up another wrinkle, of course, in this whole big picture. It may be that the Osage may be better off doing their own accounting somehow. I do not know. But we will certainly work with you.

Let me ask a question or two of each of you. First of all, if you remember in your discussion with John Echohawk, the number of 500,000 plaintiffs came up. Let me ask all three of you.

The national average for life expectancy in America now is 76.5 years—getting older, living longer, and better health. There are all kinds of reasons for that, but not for Indians. You know as well as

I do that the national average for Indians is 60.6 years, living 16 years shorter life than non-Indians.

What I would ask you is this. Have you met any people now who are plaintiffs who are in their sixties? Tex?

Mr. HALL. Yes; I have, on my reservation and on several other reservations, Senator Campbell. But your point is well taken.

The CHAIRMAN. Do you see what I am getting at?

Mr. HALL. I believe they need to be prioritized in the settlement process.

The CHAIRMAN. Sure.

Mr. HALL. It is also culturally appropriate that the elders come first. They are our first teachers. They do not have that much time to live.

The CHAIRMAN. You are exactly right. They do not have that much time. For all the reasons that you know as well as I do—poor health, diet, and all kinds of different problems. But the bottomline is if this thing goes on another 10 years, most of those American Indian people that are now plaintiffs that are 65, I think a very high percentage of them will not be around to even get the benefits that they deserve and that we owe to them.

I guess that is the reason that I keep coming back to the question: How much longer do we want to go? We have to move something forward.

Let me ask all three of you, but Tex, you first. When we are talking about a mediator or mediating, would it be more important, or equally important to do mediating over methodology or over accounting, or both?

Mr. HALL. I would say probably both, Mr. Chairman. We could spend a long time talking about the methodology. The accounting probably; I would say yes. As was mentioned, the common law standard needs to apply. We could spend time disagreeing on the type of accounting. But the priority would be methodology.

The CHAIRMAN. I think we have been disagreeing for 8 years. That would not be a surprise.

Mr. HALL. That is correct.

The CHAIRMAN. Mr. Matt.

Mr. MATT. I would just echo what President Hall has mentioned. I think the methodology is probably the first step in that process. I do not think you are ever going to have a complete accounting.

The CHAIRMAN. When we are talking about accounting, for instance, do you think that we should try to arrive through some mediating efforts a total or global settlement figure up front and that money would later be distributed, or should the process focus on an account by account mediation or something in between?

Mr. MATT. I do not have a good feel for that. I know those are some of the things that I think we need to continuously try to evaluate and see what the best process would be. But I do believe that that question can be answered and we can go forward.

The CHAIRMAN. Tex.

Mr. HALL. I would definitely say, Mr. Chairman, that a figure should be put in place. If it is $13 billion—we have to have a starting point. Anybody has ownership in any kind of account, they want to know what type of money is on the table. So I think we need to have that.

The CHAIRMAN. It might not be what some people expect, however, when you have a disparity of $175 billion on one side and $10 billion on the other. I agree.

Mr. GRAY. Senator, I think what we need to look at in terms of any mediation before we come to the table, we should not preclude any particular process of methodology for discussion before we sit. I think by arbitrarily selecting one particular methodology and saying, "Okay, let us mediate," I think is undermining to certain positions that may be more acceptable in other avenues.

I think forensic accounting certainly would be a good method to be able to reconstruct some of the missing documents. Even through my understanding of what a statistical sample is, it does not take into account many of the missing documents that we all know are unrecoverable. In many cases, historically you see $100 leases here and $100 leases there. In the Osage case, in the 1920's, it was $1a million here and $1 million there.

So any kind of gap that does not take the forensic account activity of the oil and gas activity in the Osage, would certainly undermine our efforts to achieve a fair settlement.

The CHAIRMAN. I see. Fred, as well as you have the microphone there, did you attend Chairman Pombo's hearing in Billings last Saturday.

Mr. MATT. Yes; I did.

The CHAIRMAN. What was the tone of that hearing from the Indian people who spoke?

Mr. MATT. I would say that you heard some of the same concerns at that hearing as we are hearing today. Some of the things are very apparent that were at least seeming to come to some sort of an agreement that we need to get this process in place to where we can have a settlement or we can arrive at some sort of a process. I think the same thing was said there.

The CHAIRMAN. I understand, Chairman Matt, that you are record of opposing the idea of a receiver to take over the functions of the BIA or the Department of the Interior; is that correct.

Mr. MATT. Yes, sir; I was hoping you might ask that. If you just look at what you hear in the media, and if you look at where this issue has gone, you would also get the impression that we are back in the 1880's. But there are a lot of tribes like ours that are out there that really have, through the Self Governance Act and other means, taken over these trust programs and have done an excellent job.

Indian people are humble in nature. I do not want to sound like we are bragging or that we are better than any other tribe, but we have done things on our reservation that I think really benefit our beneficiaries, the tribal members there. What we do not want to see is other layers of government added to this mix because of some court order. We feel as though we are a model program. We would like to show that off, so to speak, to Indian country. I think it does speak to what we can do if we have the chance to do it ourselves. That is part of the problem. We have had our Big Brother, BIA, watching over us.

The CHAIRMAN. I understand your tribe, too, has really set a fine progressive example of trying to reconsolidate the fractionated lands on your reservation. Many people say that the problem that

we have with fractionated lands makes this problem of trust even worse.

Mr. MATT. It is one of the big problems.

The CHAIRMAN. Jim, you pointed out some of the complications that the Osage have special to that tribe in dealing with the settlement. Would the Osage Tribe prefer to be left out of the settlement legislation altogether and to deal with it some other way?

Mr. GRAY. Well, I think the Osages would be open to having cemented with the staff to see if there might be some amenable language that might protect the Osage's interest in all this. Short of that, then maybe that would be the final option.

I just appreciate the fact that you are open to hearing our point of view on this. We are in an unique situation here.

The CHAIRMAN. Are the head right owners or at least some of the head right owners included as a member of the *Cobell* plaintiffs class action suit?

Mr. GRAY. I think to a degree they are. I think that while the definition of the right of the Osage tribal council to represent the interests of the shareholders has been worked out in the Federal Court of Claims as the legal entity to represent the interest of the tribe. You can understand my hesitancy to fully answer that question because the litigation is ongoing.

With respect to the *Cobell* plaintiffs, their arguments, their discussion, and their claims are in general and in theory the same direction we believe this discussion should go. Where there are differences of opinion pertaining to the Osage, I think we have the right to be able to protect those interests whenever we can. With respect to the actual *Cobell* case, once the funds are distributed to the IIM account holders, I think there is an interest there that the *Cobell* people can represent the interest of those individuals of our tribe.

The CHAIRMAN. Well, hopefully you will also work with the committee staff on trying to make sure that whatever we do that there is some language in there that protects the Osage people and the Osage Tribe.

I have no further questions. Chief Gray, if you would give my best to the Imholas, the Pratts, the Good Eagles, and all my old friends there that I use to pow wow with, I would appreciate that.

Mr. GRAY. I will do that.

The CHAIRMAN. Tex, the same to you. Ed and Linda Lone Fighter are friends from years and years back. I never see them anymore. But give my best to them, if you will.

Mr. HALL. He is back in the BIA again.

The CHAIRMAN. Oh, he is. Well, tell him hello.

I am sure that Senator Inouye will have questions to ask of each of you and that will be inserted in the record at this point.

Without objection, so ordered.

With that, we will keep the record open for 2 weeks for any further comments.

Without objection, so ordered.

I look forward to taking everybody up on the offer to work with our staff to try to get some resolution to this very difficult problem so that we are not dealing with the same thing 5 more years from now.

With that, the committee stands adjourned.

[Whereupon, at 12:05 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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

Mr. Chairman, thank you for scheduling today's hearing as part of this committee's continuing oversight on issues associated with the Federal Government's management of individual and tribal trust funds accounts.

Today's hearing addresses a voluntary, alternative claims resolution process to reach settlement of the class action lawsuit known as *Cobell* v. *Norton.*

As I have stated before, history and the *Cobell* case demonstrate that the Department of the Interior has flagrantly failed to fulfill its trust duties. Hundreds of millions of dollars have been spent on failed efforts to either identify reconciliation efforts, or have been spent on consultants to evaluate the extent of the Federal Government's liability for mismanagement. Despite these efforts, we still have not reached a reasonable solution.

However, the topic today addresses a potential settlement solution that is only a partial answer to a larger problem: It is merely one aspect of trust reform.

My colleagues, Senators Daschle and Johnson, and Representatives Udall and Rahall in the House, and I previously introduced "Indian Trust Asset and Trust Fund Management and Reform Act of 2003." Our bill, S. 175, would revise trust reform legislation to address the tribes, highest priority areas to improve trust funds and trust assets management. Our bill still has not received a hearing.

I urge the committee to consider our bill as part of the overall need for legislative reforms and to schedule a hearing as soon as possible.

Mr. Chairman, I take no position at this point on the legislation being discussed today until I receive input from Native American constituents and conduct a thorough review of the proposed legislation. I look forward to what the committee has to say.

I commend the committee for its continued efforts and focus on this critical issue.

STATEMENT OF
JAMES CASON
ASSOCIATE DEPUTY SECRETARY
DEPARTMENT OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON S. 1770, THE INDIAN MONEY ACCOUNT CLAIM SATISFACTION ACT OF 2003

OCTOBER 29, 2003

Mr. Chairman and Vice-Chairman Inouye, the Department of the Interior appreciates the opportunity to appear before the Committee today to give the views of the Administration on S.1770, the Indian Money Account Claim Satisfaction Act of 2003. The Administration appreciates that you have turned the attention of this Committee to the pressing historical accounting issue facing Indian Country and the Department of the Interior.

Mr. Chairman, when you introduced S. 1770 eight days ago, you stated, "I am introducing a bill that will end this lawsuit in a way to provide justice to IIM accountholders and restore some sense of normalcy to the Department of the Interior." You also stated that money of the magnitude required to complete an accounting similar to the one ordered by the judge in the case of *Cobell v Norton*, "is better spent on reconstituting the Indian land base and building a forward looking state-of-the-art trust management system and providing more dollars to Indian Health Care." Finally, you recognized that both the *Cobell* case and the challenges we face because of fractionation are legacies of Congressional efforts to "break up the tribal landmass and teach Indians to be 'civilized'."

Mr. Chairman, we appreciate the insight and sincerity of your comments. However, S. 1770 creates an additional accounting and resolution process. It does not relieve the United States in any way of the accounting work that must be done to comply with the recent orders relating to *Cobell v. Norton*. S. 1770 does not modify, nor clarify, the accounting Interior must complete to comply with its statutory obligations or any common law duties related to an accounting. Finally, S. 1770 does not establish how long the Task Force should take to actually complete an accounting. Given the task and resources which must be devoted to meeting the judge's order, the Administration can not support an additional accounting mandate and resolution process. We

are, however, encouraged by the introduction of any legislation related to this subject matter, and we would like to work with you and the Vice-Chairman, as well as other Members of Congress to find a rapid, meaningful resolution to both our duties to complete an accounting, and to develop a solution to address fractionation.

On July 25, 2002, I appeared before this Committee to discuss an historical accounting plan. I have not forgotten your words, Mr. Chairman, when you stated "there are a lot of Indian people out there that are going to die before (the historical accounting project is complete), waiting for that money, if they have to wait 10 years." On October 29, 2003, many of the individuals are still waiting for money and, if we proceed as we have been, they should expect to wait a long time.

Despite comments to the contrary, *Cobell v. Norton* is not a case about money. The plaintiffs in the lawsuit have not requested any money damages. The plaintiffs in the case, and the class they represent, have demanded an accounting. Despite some individuals' and decision-makers' preferences to give money directly to individual Indians, instead of providing that money to accountants, we are obligated, and have been ordered, to do an accounting by the court.

In 1994, Congress passed the American Indian Trust Reform Act. That Act requires the Secretary to "account" for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Nine years later, after seven years of litigation, the court in the *Cobell* case has ruled that the statute requires a process that will likely cost billions of dollars over the next three years. Obviously, to successfully accomplish this task, the Congress will need to provide the necessary funds. The FY 2004 Interior Appropriations bill currently provides $45 million for accounting, $85 million less than the Administration requested before the ruling.

BACKGROUND

This Committee is keenly aware of the challenges fractionated ownership. As trustee, the United States, acting principally through the Department of the Interior (DOI), keeps the ownership records for the lands, approves leases of the lands for a wide variety of purposes, and collects and distributes the revenues generated from the lands. The revenues are managed in Individual Indian Money (IIM) accounts. DOI charges nothing for its trustee services.

There were 279,310 IIM accounts as of December 31, 2000. The vast majority of these accounts contain revenues derived from leasing allotted lands. Other accounts contain revenues from court judgments or business enterprises, which are distributed to individual members on a per capita basis. These funds are initially deposited into Special Deposit accounts, and are then distributed to individual accounts.

These IIM accounts had balances of $416.2 million, as of December 31, 2000. The amount of IIM funds that have passed through the trust since 1887 is approximately $13 billion. From 1985 to 2000, $3.3 billion passed through the trust. The vast majority of the money moved through relatively few accounts; DOI is required to maintain thousands of accounts with less than $100 in annual throughput. Throughput is the total amount of money that goes into, and then out of, an account on an annual basis. The annual cost of maintaining an account is, on average, approximately $150.

SEPTEMBER 25, 2003 COURT ORDER

On January 6, 2003, as ordered by the court in the *Cobell* litigation, DOI filed *The Historical Accounting Plan for Individual Indian Money Accounts (DOI's Accounting Plan).* DOI's Accounting Plan provided for an historical accounting for about 260,000 IIM accounts, over a five-year period, at a cost of approximately $335 million. The Plan called for an each eligible IIM account holder to be provided an Historical Statement of Account that listed the transactions in his or her account.

The accuracy of the transactions was to be verified by reviewing support documentation on a transaction-by-transaction basis for all transactions over $5,000 and by statistically sampling for transactions under $5,000. The sampling methodology design would be designed to provide a 99 percent confidence level of any error rate. The President's FY 2004 budget includes, within the request for the Office of the Special Trustee, $130 million to significantly expand efforts to complete this accounting plan by FY 2007.

On September 25, 2003, Judge Lamberth of the District Court issued a structural injunction specifying of what the accounting must consist and when it must be done. The court decided that the accounting must provide a complete history of all financial transactions and all land ownership transactions in the trust since 1887. To understand the significance of the court order, it is useful to compare it to the historical accounting plan that DOI prepared, but which, in large part, the court rejected.

	Interior's Plan	**Structural Injunction**
Estimated Cost	$335 Million	$6-13 Billion[1]
Time to Complete	5 years	3 years for most accounting[2]
Verification Approach	Verify all transactions over $5000.00 by review of supporting documents. Verification by statistical sampling of transactions under $5000.00	Verify all transactions review of supporting documents
Trust Asset Accounting	Describe trust assets owned by each IIM account holder as of December 31, 2000	Describe all trust assets ever owned by current IIM account holders or their predecessors in interest from 1887 to the present

[1] Estimate is very preliminary.
[2] Even though the order gives until September 30, 2007, to complete the Special Deposit accounts, it requires all accountings for individual Indians to be completed by September 30, 2006.

Deceased IIM Account Holders	No accounting for beneficiaries who died prior to October 31, 1994; probate considered final	Full accounting for all IIM accounts since 1887
Closed IIM Accounts	No accounting for IIM accounts closed prior to October 31, 1994	Full accounting for all IIM accounts since 1887
Direct Pay (rents and royalties paid directly to Indians and never held in trust)	No accounting	Full accounting for all direct payments since 1887
Time Frame	Accountings back to 1938 or inception of IIM account, whichever is later	Accountings back to 1887

The structural injunction requires the review and documentation of approximately 61 million financial transactions and supporting land ownership records. DOI currently holds approximately 500-600 million Indian trust records, and the injunction appears to necessitate the indexing and electronic imaging of the vast majority of these records. In addition, the court is requiring DOI to obtain additional records from third parties, which may include state and county record offices, energy companies, timber companies, other former and current lessees, tribes, and individual Indians. The court seems to anticipate that DOI will need to subpoena documents from thousands of private sources and then evaluate the documents' relevance to the historical accounting.

The court has ordered that the bulk of the accounting be completed in three years. In addition to the historical accounting, the Court ordered DOI to fully implement a plan for trust reform by May 31, 2005. This accelerates the Department's schedule by several years, and will have significant budget implications in both FY 2004 and 2005. The extent of those additional costs

is not yet known, because the plan is not yet complete; the court has ordered it to be completed by March 2004.

S. 1770

The subject of today's hearing is S. 1770, a bill intended to establish a voluntary alternative claims resolution process to reach a settlement of the *Cobell* litigation. Mr. Chairman, the statement you made when you introduced S. 1770 aptly points out that the *Cobell* case guarantees us more litigation, and hundreds of millions and maybe billions spent without a resolution. As you stated, this case is truly just the beginning. Unfortunately, S. 1770, as currently drafted, does not address the requirements contained in the 1994 Act, or the judge's order.

As structured, S. 1770 sets up a Task Force that will spend a year looking at the historical accounting plans that both the plaintiffs and the Government submitted to the *Cobell* court in January 2003. It appears that, during this period, the Government will still be subject to the responsibilities and timetable set forth in the court's order.

After a year, the Task Force is to develop one or more "appropriate" methodologies to conduct an accounting, and use that methodology in conducting an accounting of individual Indian money accounts. The bill does not establish a deadline by which this must be completed. Once again, during this period, the Department is subject to the court's order. Finally, when the additional accounting is completed, any individual can choose to reject its results and remain a plaintiff in the *Cobell* case. Thus, notwithstanding its intent, the bill provides little incentive to pursue out-of-court alternatives.

Under this bill as currently structured, the Department must still proceed with the accounting ordered by the court. As the preceding table points out, the court order will still require Interior to account for the funds in all IIM accounts since 1887, including direct payments never passed through IIM accounts, and for all assets ever owned by current IIM account holders or their predecessors in interest from 1887 to the present.

The term "accounting" is subject to interpretation. The definition of the term "accounting" in S.1770 should be reconciled with the Congressional intent of the 1994 Trust Reform Act by making it clear what Congress meant in 1994. Applying the term only to the Indian Money Account Claim Satisfaction Act, as S. 1770 does, further confuses the issue rather than clarifying it.

We also believe that if there were to be a task force, there must be some review of the methodology the Task Force develops. It is unclear who, if anyone decides whether the methodology chosen is, in fact, "appropriate." Plaintiffs are claiming over $176 billion is owed. There will be great pressure on the Task Force to adopt a methodology that supports the expectations the named plaintiffs and their attorneys have created in Indian country. Nothing in the bill prevents the Task Force from irresponsibly adopting some methodology that opens the government up to a substantial liability, not based on facts. While we all are striving for a solution that is fair and equitable to the individuals caught in this ongoing litigation, we must act in a manner that is responsible to all the taxpayers. Congress must use caution when it unconditionally opens the taxpayer's wallet, as it does in this bill.

In addition, we believe that a constitutional problem may exist with having a Task Force solely chosen by the legislative branch reach conclusions that require the Secretary to make direct expenditures from the Federal Treasury.

Despite these concerns, the Administration sincerely appreciates your bipartisan effort to address the historical accounting issue in a meaningful way. We would like to work with you and other Members of your Committee to ensure the bill accomplishes the goal of resolving this longstanding issue.

Conclusion

On July 10, 2003, the House Appropriations Committee submitted its report on H.R. 2691, Interior's FY 2004 Appropriations bill. It included a section, section 137, which clarified the

parameters of the historical accounting of IIM accounts, and included a voluntary buyout provision. Eloise Cobell sent a letter to class members urging them to oppose this effort, and assuring them that billions of dollars would soon be available to the plaintiffs as a result of the judge's then impending decision in the trial that began in May 2003.

The judge has now ruled. He did not adopt the plaintiffs' approach to historical accounting. I believe Congress can fashion a legislative settlement of this matter that balances the goals of fairness and equity with fiscal responsibility. However, based on the expectations in Indian Country, there is little hope of satisfying all parties completely. We would like to work closely with you in this endeavor, and once again thank you for holding this hearing today.

That concludes my statement. I would be happy to answer any questions the Committee might have at this time.

John E. Echohawk, Executive Director
Native American Rights Fund

Committee on Indian Affairs
United States Senate
October 29, 2003

Good morning, Chairman Campbell, Vice-Chairman Inouye, Members of the Committee. Thank you for inviting me here today to further discuss with you and your congressional colleagues ways to resolve the on going individual Indian trust funds lawsuit, *Cobell v. Norton,* Civ. No. 96-1285 (RCL).

I am here once again today on behalf of 500,000 individual Indian trust beneficiaries, as counsel to the plaintiff class in the *Cobell* suit, which is before the United States District Court for the District of Columbia. First and foremost, on behalf of our clients – the trust beneficiaries who are the owners of all the assets managed in this trust, we want to thank you for your sincere interest and effort to exploring ways to achieve a fair and expedient resolution of the *Cobell* litigation.

What Happened to Mediation?

Mr. Chairman, I testified before you on July 30, 2003 at a "Hearing on Methodologies for Settling the *Cobell v. Norton* Class Action Lawsuit." As you know, that hearing was a follow up to correspondence that you and the Vice-chairman sent to the *Cobell* parties and tribal leaders. Your initial letter of April 8, 2003 sent to both parties "strongly urge[d] all parties to the litigation to pursue a **mediated resolution** to this case."[1] I, on behalf of Dennis Gingold and Keith Harper – counsel for the plaintiffs – responded to you by letter dated May 23, 2003. While I expressed concern about Interior's readiness to enter discussions in good faith because of their past conduct, I agreed to participate in a mediation process that you urged:

> Given the disturbing history [of government delay and bad faith], plaintiffs are skeptical that Interior and Justice are prepared to resolve the *Cobell* case in good faith and in a fair manner. Nevertheless, with your involvement, we hope that is possible. **As to a firm commitment to resolve this case as soon as possible, we hereby pledge to you that we are now – and we always have been – open to a resolution that ensures our clients are treated fairly and justly**. For this reason, we welcome

[1]*Letter from Chairman Campbell & Vice Chairman Inouye to Secretary Norton, John Echohawk, et al.,* dated April 8, 2003 at 2 (emphasis added).

your efforts to begin a resolution process before the close of the year.[2]

On July 30, 2003, I testified before this Committee and reiterated our commitment to resolution through mediation: "Be assured that the *Cobell* plaintiffs are now, and always have been, willing to engage in frank and honest discussions for a fair resolution of this case." This merely restated plaintiffs' long stated position that we are prepared to participate in a settlement process. In fact, lead plaintiffs Elouise Cobell testified at a hearing before the House Resources Committee entitled *"Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?"* stated without reservation: "The *Cobell* plaintiffs believe that the answer to this question is self-evident: Of course, such a process can be developed." However, she further stated:

> It is important to note that this case has been in litigation over seven years. It is a matter of record that time and time again the case has been unconscionably delayed as a result of government litigation misconduct. * * * We, the IIM beneficiaries, on the other hand have pursued expedited resolution of this case. We have vigorously contested each and every government-sponsored delay tactic. That is the record of this case. We want resolution (more than anyone) because each and every day trust beneficiaries are dying without receiving justice.

In short, plaintiffs' good faith has been repeatedly demonstrated and evidenced by our full and express acceptance of this Committee's invitation to participate in mediation, despite our reservations regarding the government's good faith and despite the fact that we continue to prevail in the litigation.

On June 13, 2003, this Committee wrote to tribal leaders seeking their views on "explor[ing] creative, equitable and expedient ways to settle the *Cobell v. Norton* lawsuit."[3] In response the majority of tribal leaders supported exploring mediation. For example, Tex Hall, President of the National Congress of American Indians (NCAI) set forth specific "Guiding Principles of the Settlement Process," stressing, among other things, that a settlement process must be acceptable by the *Cobell* plaintiffs and must "provide for judicial review and fairness."[4]

To the best of our knowledge, the government, by contrast, did not reply to your letter, in writing, and did not accept mediation as a viable alternative to litigation. Strikingly, they have

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[2]*Letter from John Echohawk to Chairman Campbell & Vice Chairman Inouye*, dated May 23, 2003.

[3]*Letter from Chairman Campbell & Vice Chairman Inouye to Tribal Leaders,* dated June 13, 2003 at 2.

[4]Testimony of Tex G. Hall, NCAI Testimony on Potential Settlement Mechanism for *Cobell v. Norton,* Senate Committee Indian Affairs July 30, 2003 at 1, 4.

seemingly made no commitment at all to mediate – even when directly asked by members of this committee and the Resources Committee during these same hearings. What is particularly noteworthy is that the government is on the losing side of this litigation. Plaintiffs have prevailed on the merits at both the trial court and the Court of Appeals. Normally, the party that is victorious through litigation is the one resistant to mediation. Here, the victors are at the table and, inexplicably, the losing party – with what they themselves admit is a multi-billion dollar legal obligation to the other party – is recalcitrant.

In July, I made the statement to you supported by a wealth of evidence that "the executive branch – with the exception of Treasury – has been steadfast in its unwillingness to negotiate such a resolution." Accordingly, we continue to believe as we stated in July that "[w]ithout your direct and active participation in the settlement process, we have no hope that the Administration will discuss these matters in good faith." You know as well as we do that they have taken no action in the ensuing three months to change that conclusion in any respect.

The record could not be more clear. In good faith, Mr. Chairman, we, the *Cobell* plaintiffs have accepted your invitation to mediate a resolution. Tribal leaders believe in mediation. The appropriations committee has pushed for a mediated settlement in successive years. We, with your express encouragement, are at the table. Indian Country is at the table. But the government, despite your urging has refused to come to the table for no good reason.

I think the path to a solution is laid bare by these events. This Committee must bring to bear its considerable authority on the Executive to come to the mediation table in good faith. What is not needed is a message from this Committee that if Interior further delays resolution, the Congress of the United States will reward their recalcitrance by bailing them out at the detriment of trust beneficiaries' interests.

Recent developments since the July 30, 2003 hearing underscore why this committee must act now and must not send a signal to the Administration that their continuing pattern and practice of unconscionable delay will be rewarded by a congressional bailout.

Developments Since the July 30, 2003 Hearing

Mr. Chairman, as you know, since the last time I testified before you, plaintiffs have achieved yet another significant victory in the courts. On September 25, 2003, Judge Lamberth rejected the Interior Department's attempt to place arbitrary limits on the historical accounting that, by law, the government owes individual Indian trust beneficiaries. The Court confirmed, in essence, that the Department must account for each dollar and all assets of the IIM Trust back to the trust's inception in 1887. The Court further held that the use of statistical sampling – an unheard of methodology for a trust accounting as the government's own witnesses admitted – could not be used.

Plaintiffs believe that this decision has set an appropriate foundation for constructive discussions for resolution of this matter. With this ruling, we have judicial clarity – based on the well-settled principles applicable to all trusts – setting forth the specific nature and scope of the equitable accounting to which individual Indian beneficiaries have a right. Obviously, with more issues judicially resolved, there should be fewer areas of disagreement if the parties were to embark on settlement discussions.

Government officials have stated that the accounting the Court ordered through its September 25, 2003 may cost as much as $10 billion. If so, the correct way to view that number is that it has been judicially established that the government owes a $10 billion legal obligation to trust beneficiaries just to calculate the extent to which these accounts must be corrected.

Conspicuously, in discussing this decision the government seems to steadfastly avoid explanation for why the Court made the decision it did and the actual numbers produced by the parties. During Trial 1.5 – the trial that led to the September 25, 2003 decision, plaintiffs put forth a plan that acknowledged reality – the government cannot do a complete and accurate accounting of all trust funds and other assets in the IIM Trust, because of the rampant destruction of trust documents over the life of the trust. That being said, we proposed an approach that would determine the revenues from individual Indian trust land for each type of resource for each year to the inception of the trust in 1887. Interestingly, the aggregate number that we derived was $13.9 billion dollars exclusive of interest. Parenthetically, the government doing a similar aggregate approach determined that approximately $13 billion dollars was produced from these lands (exclusive of, among other things, proceeds for direct pay). Plaintiffs believe the similarity of these numbers are compelling and offer an important starting point for any proposed mediation.

The Interior Department urged the Court to reject plaintiffs approach **on the ground the government could perform a complete and accurate historical accounting of the IIM Trust.** Of course, they wanted to place a plethora of arbitrary limits on which monies they would account for and which they would not. For example, despite a clear ruling in a 1960 memorandum from then Solicitor of the Department of Interior Ted Stevens that the Department must account for direct pay monies, the government argued they had no such obligation. They contended, as well, that they had no duty to account for **any account closed prior to 1994 or even monies collected by the Department but because of government malfeasance was not deposited into an IIM account.**

The Court accepted the government's representation that it could perform the accounting but rejected these often absurd limitations and exclusions from the historical accounting. In other words, the government got exactly what it asked for in the case – to do the historical accounting instead of the more efficient and accurate approach plaintiffs urged. With the Executive Branch insisting that it could fulfill its duty to account, the Court believed that it had to give the trustee-delegate one last the opportunity to do so based of their representations.

Cynically, while telling the Court one thing, government officials have taken a different position before the Congress. They want this body to pass legislation to negate the Court ruling that they asked for – the opportunity to do the accounting.

It is our view that this attempt by Interior to play the Court off of Congress should not be tolerated. This Committee has an obligation to use its authority to reject that cynical approach and tell Interior in no uncertain terms that it must come to the table to mediate.

Since that ruling, this Committee and the appropriators both have pushed proposals to force a resolution of this case. We suspect that there will continue to be efforts to determine a sound approach to case resolution. In order to properly evaluate these proposals, we would like to suggest non-controversial criteria to evaluate the appropriateness of these and any future proposal.

Goals of the Resolution Process

A resolution of the *Cobell* case, if it is to be effective must achieve certain goals. We believe that to properly evaluate any resolution plan the following criteria must be met.

I. The Proposal Must Be Fair

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

Another consideration of fairness is the obligations of the United States as already determined by the Courts. Here, as defendants readily admit they owe a legal obligation to the plaintiff class which will cost multi-billions of dollars to fulfill. If a settlement proposal relieves the defendants of this legal obligation, the beneficiaries should be compensated appropriately over and above the correction of account balances.

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

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

II. The Proposal Must Expedite Rather than Delay Resolution

Solely because of government delays and obstinance, *Cobell* has not been resolved. To have an expedient resolution of this case, the structure of the resolution must ensure that the *Cobell* claims are resolved as a whole. Piecemeal resolution will not be expeditious and will make it difficult for beneficiaries to make fully informed and knowledgeable decisions regarding their rights. Moreover, to the extent that any provision is unconstitutional, the length of litigation may be increased rather than decreased. Due process protection must accordingly be essential to any acceptable proposal.

III. The Proposal Must Not Be a Forum to Re-litigate Settled Issues

Any resolution must not reopen or reconsider issues already resolved through the litigation. Over the last seven years the District Court and Court of Appeals have decided numerous issues and defined the nature and scope of the obligations owed to beneficiaries. The only appropriate approach is to use the Court's decisions to govern which methodologies are appropriate and consistent with law and the rights of beneficiaries as judicially established and confirmed.

IV. The Proposal Must Be Consistent with Trust Law

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

V. The Proposal Must Be Constitutional

It should go without saying that any proposal to resolve this case must past constitutional muster. With on-going litigation, particularly where the Court's have already made final unappealable decisions about the rights of a party, as here, any resolution that does not achieve full participation by the parties and informed consent to the settlement process is fraught with

material constitutional infirmities. The interests that Individual Indian Trust beneficiaries have in their trust assets is protected by the Fifth Amendment Due Process and Takings Clauses.[5] Indeed, not only the actual "interest" in the asset but also any cognizable claim (i.e. the accounting) is a 5th Amendment protected property interest.[6] In short, any legislatively imposed resolution which alters the claim in order to limit the United States liability for the breaches of trust would necessarily violate the Constitution.

Based on these elements of an effective resolution – fairness, expediency, constitutional permissibility, consistency with judicial determinations and consistency with trust law – we can now evaluate the various resolution proposals including S.1770.

S.1770, *The Indian Money Account Claim Satisfaction Act of 2003*
Will Not Provide a Fair and Expeditious Resolution to the *Cobell* Case

One proposal, Mr. Chairman, is Senate Bill 1770, "The Indian Money Account Claim Satisfaction Act of 2003" that you have recently introduced. While we appreciate and understand that the stated intention of the bill is to bring about a fair and expedient resolution of the *Cobell* case, as currently drafted, it, unfortunately, will result in fundamental and pervasive unfairness to hundreds of thousands of individual Indian trust beneficiaries, more undue delays to the resolution of this case because of the creation of a separate forum with undefined rules of procedure, would undermine the integrity of the judicial process, vitiate hard won rights of individual Indians, and violate constitutional due process safeguards.

Since this bill was introduced only last week, we have not had a full opportunity to evaluate in necessary detail all the constitutional implications of the proposed legislation and therefore our comments here should not be considered complete. But we have seen enough to know that this proposal is deeply flawed. As we read it, S.1770 would commence, from scratch, a new process using unknown and unidentified "experts" picked without plaintiffs' or the Court's consent – to determine how to perform an accounting. The proposal would have the perhaps unintended consequence of unsettling settled aspects of this case and reverse judgments already rendered by the Federal District Court and the United States Court of Appeals. Below, we set forth some obvious examples of the disabling problems associated with this proposed legislation.

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[5]*See Babbitt v. Youpee*, 519 U.S. 234 (1997) (individual trust interest protected by Fifth Amendment even if *de minimis*) ; *Hodel v. Irving*, 481 U.S. 704 (1987).

[6]*See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982) (Noting that Supreme Court struck down in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a state law that terminated the "rights which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund . . .[because it] **worked to deprive the beneficiaries of property by, among other things, cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests.**" (emphasis added; internal quotes and citations omitted)).

To begin with, we believe that certain provisions of the Findings section of the bill are just plain wrong. For example, § 2(a)(3) states in pertinent part that "the court ordered historical accounting . . . will not result in significant benefits to the members of the class." In fact, the seven and one-half year record of the case categorically rebuts this statement. An accounting action is universally recognized as the principal method for a trust beneficiary, in equity, to compel a trustee to account for his or her conduct in the administration and management of the trust as well as all items of the trust. Here, as in all other trust cases, plaintiffs have asked the Court to force the trustee-delegates to account, restate, and correct account balances in conformity with that accounting. To the extent that the trustee-delegates cannot prove what has happened to the trust assets or any particular transaction, they are presumed to owe that amount. This is a restatement of more than 500 years of trust law. Thus, at the completion of the accounting, plaintiffs will have secured a multi-billion dollar correction and restatement of the Individual Indian Trust balances. Contrary to the erroneous assertion in S.1770, such a correction and restatement are obviously of "significant benefit" to the *Cobell* plaintiffs who have had to endure generations of malfeasance and irreparable harm in the management of their trust assets.

Perhaps the most deeply flawed aspect of S.1770 is the attempt to re-define an accounting, as if it needs definition and does not have settled meaning in the law. Section 3(1) of the bill makes the determinate and objective term "accounting," indeterminate and wholly subjective. The United States Court of Appeals has held that the nature and scope of an accounting is "black letter law;" the standard is clear and unequivocal and it applies to all trusts, including the Individual Indian Trust. When there is a dispute between a trustee and a beneficiary, the Courts know which side prevails because of the clarity of governing fiduciary duties and concomitant standards. Sadly, S.1770 purports to turn trust law on its head and retroactively reverse a final judgement of the U.S. Court of Appeals, exacerbating the irreparable harm that has been inflicted on all past and present individual Indian trust beneficiaries.

It is replaced by an unprecedented, distorted definition of "accounting" as "a demonstration, **to the maximum extent practicable**, of the monthly and annual balances of funds in the individual Indian money account." (Emphasis added). There is no requirement in this definition that in deciding the appropriate "demonstration," that the chosen methodology must be in accord with trust law or the judgments rendered in this case. This failure is a monumental one and would result in an unconstitutional taking of the property rights of beneficiaries.

Take one example, although most surely not the only one. In trust law, it is well-settled that in performing an accounting, **all inferences are against the trustee and for the beneficiary**. The reason is that the trustee has possession of all the records and has a duty to keep proper accounts. Thus, as explained by the leading trust law treatise:

> If the trustee fails to keep proper accounts, **all doubts will be resolved against him and not in his favor**. The trustee is in the position to know all the facts concerning the administration of the trust, and obviously he cannot be permitted to gain any possible advantage from his failure to keep proper records. Such expenses and costs as may be incurred because of the failure of the trustee to keep proper accounts are not chargeable against the trust estate but are chargeable against the trustee personally.

IIA SCOTT ON TRUSTS, § 173.

Rather than be faithful to this rule of law, S.1770 dismisses it. And instead of the necessary presumption that is, for all the right reasons, protective of trust beneficiaries, S.1770, provides a standard that is decidedly hostile to the victims of the malfeasance – directing that the methodology be one that is merely "practicable." It is a matter of record in this case that the trustee-delegates and their counsel willfully have destroyed, lost, and corrupted most critical trust documents necessary for a complete and accurate accounting. Since the government has failed as trustee to keep proper accounts and records, one of the central issues for any methodology will be the presumption in the absence of documents. Based on the best "practicable" language if it is more "practicable" to presume the records are accurate than the appointed experts would be free to do just that. But obviously such a decision – seemingly permitted by S.1770 – would be wholly in conflict with the governing legal standard that presumptions are against the trustee, particularly where as here the trustee has engaged in the spoliation of trust records.

By failing to ensure that trust law governs – including the axiomatic principle that all presumptions are against the trustee and for the beneficiary – S.1770 may be construed to allow a methodology that further victimizes individual Indian trust beneficiaries. It is not for Congress to retroactively change the definition of an accounting in an attempt to tilt the scales of justice to the detriment of 500,000 individual Indian trust beneficiaries.

Moreover, opening up the term accounting to re-definition will merely incite the parties to re-litigate issues already decided by the Court. For over seven years, questions as to the nature and scope of the accounting to be provided have been at the heart of this case. Those issues are now fully resolved. To the extent that Interior is unhappy with those judicial determinations, they will obviously re-try them before this newly created forum unmoored from legal norms and dictates of law. In this way, S.1770 awards Interior for its practice and policy of delay and document destruction over the last seven years and will result in the elimination of some of the most crucial rights of the beneficiary class.

The second provision of the accounting definition goes from bad to worse. The *Cobell* Court has rejected Interior's argument that they need not account for pre-1938 dollars in the IIM accounts. But S.1770 would purport to reverse that decision and require only that there be a determination of "probable balances" – a term alien to trust law and the basic concept of fiduciary duties; one that is indisputably and directly contrary to prior decisions of the Court of Appeals.

A simple example may help illustrate the issue. If Interior has a account ledger that says there was $2000 prior to 1938 that was derived from a particular allotment and all the money was paid out to the beneficiary, but no supporting documents were located is the "probable balance" as of 1938 zero dollars? Arguably, yes since no documents exists to disprove that clearly erroneous "probable" balance. If so, by simply destroying incriminating evidence, the trustee-delegate would be rewarded by this Congress for its breach of trust duties that the United States government owes to the *Cobell* plaintiffs. Under these circumstances, the greater the destruction – the more liability the trustee-delegate would evade. In essence, based on the language of S.1770, for pre-1938 dollars, there rule imposed seems to be that presumptions are **against the beneficiary and for the trustee – the opposite of the rule of law for non-Indian trust beneficiaries in this country.**

Furthermore, this legislation will do nothing but cause more delay. Mr. Chairman, in your letter to us of April 8th of this year, you mentioned the protracted nature of this case. Indeed, we have been in litigation for over seven years. And the record is unmistakably clear as to which party is responsible for the delay –it is the government. The government has destroyed

documents, intimidated witnesses, violated court orders, lied to a United States District Court judge and this Congress, and repeatedly breached its trust duties. Indeed, **the government argued for nearly five years that it did not even have a duty to account** even though Congress reconfirmed in 1994 that they must account for "all funds." For four years we were forced to address – repeatedly – that untenable claim while the trustee-delegates hoped that this Congress would bail them out of the mess they alone created.

Accordingly, there can be little argument who is responsible for the protracted nature of this case. Importantly, the perhaps unintended consequence of S.1770 is that it would both reward the government's delay tactics and give them incentive to delay further. The reward is that after the long hard battle to confirm unequivocally the right of individual Indian trust beneficiaries to a "full and fair accounting," S.1770 would purport to relieve Interior of that obligation and encourage the government to re-litigate that issue before the IMACS. Not only that, the issue before IMACS will not be governed by trust law, but rather a clearly inferior standard that is susceptible to cynical manipulation– that which is "practicable." In addition, the legislation will allow direct communications to members of the class without due process protection, creating grave risks of further deceptions and harm.

Even though the provision as presently written is "voluntary," does not mean that it is constitutional. To pass constitutional muster, the provision would have to, among other things, ensure due process protections such that decisions made by beneficiaries are based on knowing and fully informed consent. In effect, these beneficiaries would be consenting to the forfeiture of their vested property rights that are protected by the Fifth Amendment to the Constitution.

Also, it is not clear how S.1770 would expedite resolution. Because the alternative process does not offer adequate protection of beneficiary interests, we suspect that the vast majority of beneficiaries would eschew this woeful alternative. In any case, we can all agree that out of a class of more than 500,000 trust beneficiaries – a few thousand may choose the legislated process and others will remain in the litigation where their rights are fully and fairly protected. The end result will be that instead of a streamlined all-in-one adjudication through the class action, you will have separate individualized adjudication – perhaps 2,000 or 3,000 individuals who will never be fully informed about the nature and scope of their trust assets – and also the on-going class action.

Moreover, the transaction cost for this costly approach will be borne by the beneficiary-victims of the mismanagement, because they could no longer rely on class counsel to protect their interests. They will need their own individual counsel and pursuant to the bill will have to pay such counsel out of the sorry judgment they would likely get. By contrast, in the class action, the government as malfeasant trustee must bear the cost because the beneficiaries are "prevailing parties" pursuant to the Equal Access to Justice Act and otherwise.

If instead, Congress decided that they would then make this separate model delineated in S.1770 mandatory, that would make the situation worse still. First, such a mandatory settlement would be unconstitutional on its face as it would violate both the Due Process and Takings clauses of the Fifth Amendment, not to mention Separation of Powers Doctrine.

CONCLUSION

The bottom line, Mr. Chairman, is that S.1770 as currently drafted is deeply hostile to the interests of Indian Country generally and individual Indian trust beneficiaries specifically. It will not lead to a fair resolution. It will not expedite a resolution. The only thing it will do is lead to more protracted litigation and undermine the rights that it has taken us seven years to secure through the Courts. S.1770 is divide and conquer through legislative fiat.

By contrast, mediation offers the possibility to resolve this case fairly and expeditiously consistent with equitable considerations, due process and the Constitution. We support it. Tribes support it and this Committee has previously voiced support for it. Only the Secretary of Interior – who has lost every phase of this case in Court is refusing to come to the settlement table. It is incumbent on this Committee to require the Secretary to participate in settlement discussions and bring this dispute to a just conclusion in the interests of the beneficiaries and the taxpayers.

Thank you.

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Testimony before the United States Senate
Committee on Indian Affairs

Hearing on S. 1770

The Indian Money Account Claims Satisfaction Act of 2003

October 29, 2003

Introduction

Chairman Campbell, Vice-Chairman Inouye, and members of the Committee, good morning and thank you for your invitation to testify today. On behalf of the member tribes and individuals of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people.

We have been asked to provide our views on S. 1770, the Indian Money Account Claims Satisfaction Act of 2003. There are two ways in which this legislation can be viewed. If this is considered as an immediate legislative proposal that would be quickly passed by Congress, then we have a great deal of concern. This bill would give the federal government the ability to pick the panel of experts who would decide how much money the federal government owes while stripping the beneficiaries of protections they now enjoy as part of the class action litigation. Indian people simply could not trust such a proposal. However, the bill can also be viewed as an effort to put forward some key concepts for settlement and to create discussion that will push settlement forward. In that light, we welcome the bill because it could serve as a vehicle for Congress to establish a fair and equitable process for settling the *Cobell v. Norton* litigation.

As you know, tribal leaders have supported the goals of the *Cobell* plaintiffs in seeking to correct deficiencies in trust funds accounting. At the same time, tribes are concerned about the impacts of the litigation on the capacity of the United States to deliver services to tribal communities and to support the government-to-government relationship. We believe it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of an effective system for management of trust assets.

In July, I testified before this committee on *Cobell v. Norton* settlement options. At that time, NCAI set forth a set of principles for how a settlement process should be structured. Our testimony today will respond to S. 1770 in light of the principles set forth in our earlier testimony.

At the outset, I would like to make three points. First, tribal leaders urge Congress to put forward a serious settlement proposal that signals its willingness to shoulder the costs of settling the lawsuit without diminishing funding to support other Indian programs. Second, tribal leaders are concerned that S. 1770 in its current form feels like another quick fix. A real solution will require the parties to the litigation come to an agreement, and involve both Congress and tribal leadership. S. 1770 appears to set a settlement process in place without taking the time and effort to get "buy in" by affected interests. Third, the proposed settlement is limited to claims relating to historic accounting for individuals who either have current Individual Indian Money (IIM) accounts or who had such accounts open when the 1994 American Indian Trust Reform Act was passed. Congress should also address settlement of accounts for deceased account holders, support land consolidation as a part of the settlement to prevent the problems of trust administration from escalating due to fractionation, and support the funding necessary to implement a state-of-the-art trust management system and standards, so that these problems do not recur in the future.

Principles for *Cobell* Settlement

1) Involve all necessary parties in a conflict assessment to scope and frame the settlement process. The parties, the tribes, and the Congress all have a significant interest in a settlement that will address claims for monetary damages and correct deficiencies in trust administration. We strongly urge Congress to make appropriations for a contract with a

professional mediator to perform a conflict assessment among interested parties to the litigation. Our suggestion for appropriations language is attached. A conflict assessment is a well-established mechanism to assist parties in identifying goals and expectations for settlement and designing a structure for settlement discussions. The assessment should result in a report to Congress with recommendations on how to proceed with a settlement process. A conflict assessment would serve as a mechanism for all parties' interests in developing a settlement process, and allow for formal acceptance of a settlement process.

We recognize that some Members of Congress are impatient to resolve the lawsuit, but we truly believe that adequate preparation will ultimately expedite settlement. NCAI has witnessed trust reform efforts since the 1980's as one quick fix after another has been proposed, implemented, and eventually fallen to the wayside. We have wasted over 20 years and millions of dollars looking for a quick fix. The conflict assessment should take place as soon as possible, but we should allow the affected parties to define the settlement process together rather than quickly imposing a process that may not be well received and will ultimately result in failure.

2) An independent body should play a significant role in the settlement process. NCAI feels strongly that an independent body should play a key role in the settlement process so that all parties can work from a common basis. Certainly an independent body of experts is the key feature of S. 1770. We urge that the parties have a say in selection of the panel of experts contemplated by S. 1770 so as to minimize potential for out of hand rejection of the experts' conclusions. Selecting a group of experts acceptable to the parties would minimize potential for controversy and facilitate full and careful consideration of recommendations. By doing so, this group could be set up as a legitimate, fact-finding body in support of settlement.

3) Account holders should have the opportunity to negotiate and make a choice. Choice is also an important and commendable feature of S. 1770, which would allow individual account holders to accept a settlement offer, choose arbitration, or choose to continue as a part of the class action. A fair resolution will allow account holders the ability to negotiate an agreement based on knowledge and understanding of the underlying facts regarding their trust assets.

We are concerned about the fairness of several aspects of S.1770. First, by using terms like "to the maximum extent practicable" and "demonstration of the probable balances" in the definition of "accounting", the burden of proof could be shifted onto the beneficiary to demonstrate that the amounts determined by the IMACS Task Force are indeed incorrect. Beneficiaries should be entitled to presumptions in their favor while the trustee should have the burden to prove that those presumptions are erroneous.

Second, S. 1770 should clearly state that beneficiaries are entitled to accrued interest on the amounts that should have been deposited into their accounts. Third, fairness to account holders will require that they have advice of adequate counsel. While eligible individuals may retain legal counsel for the arbitration process at their own expense, no provision for legal counsel or court oversight is provided under paragraph (g) of Section 4 when a decision must be made as to whether or not to accept the amount determined by the IMACS Task Force. Fourth, paragraph (f)(3) of Section 5 on arbitration would close the Individual Indian Money (IIM) Account for individuals pursuing this route. While damage claims for historical accounting claims prior to the arbitration settlement date should be foreclosed, we don't

understand why the IIM Accounts should be closed since future payments would still be made to those accounts.

Fifth, the intent of the appropriations limitation set forth in Section 7 is unclear. Is it Congress's intent that the damages be limited to these amounts even if the IMACS Task Force determines that the IIM beneficiaries are entitled to more? Lastly, we note that the definition of "eligible individual" contained in S1770 leaves unanswered settlement of claims on behalf of individuals who had passed away prior to enactment of the American Indian Trust Fund Management Reform Act of 1994.

4) Move quickly to bring relief to elder account holders. S. 1770 contemplates a speedy resolution, and this is also very desirable. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to settle their claims without delay.

5) One size will not fit all. S. 1770 envisions that the accounting might take place under "one or more appropriate methodologies or models." This also seems wise. There is a great deal of diversity among account holders. Some have large stakes in very valuable natural resources, such as oil, gas, or timber. Others have only a small fractionated interest that is worth less than a dollar. Any settlement process must be able to deal with different classes of accounts and interests.

6) Take the time to do it right. See #1 above. A structured conflict assessment should take place as soon as possible, but we should allow the affected parties to define the settlement process rather than quickly imposing a process that may not be well received and could very well spell failure for the process advanced.

7) Provide for judicial review and fairness - S. 1770 does not offer much in the way of protection for the procedural rights of the individual plaintiffs. Settlements should be judicially approved pursuant to the Federal Rules of Civil Procedure. The settlement process must ensure that Indian people are situated in an equitable position to evaluate the fairness of any settlement offer. The settlement process should require full disclosure of all material facts – the government has the burden of providing beneficiaries with all records from government agencies and contractors pertaining to their trust claims. Many individuals do not have access to legal counsel to review settlement documents; therefore review by the courts is necessary to avoid any unfair settlements.

8) Establish a process that will keep the pressure on for settlement. The parties to the litigation have tried several times to resolve the case but have been unsuccessful in reaching agreement. We believe that this has been due in large part to a failure to establish a structured process to support settlement discussions. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement. While settlement deliberations are in process, I believe the imminent threat of the litigation should continue. Further, I urge that members of the Senate Indian Affairs and House Resources Committees work with the Parties to the Cobell litigation and tribal leaders to design a settlement process and monitor its progress. I believe Congressional involvement will be essential to keep pressure on the Administration for settlement.

9) Ensure that the settlement also fixes trust systems for the future. It would be disastrous to create a settlement that would resolve the past liability for trust mismanagement and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and

accounting today and in the future. We believe that an ultimate settlement proposal, such as the one proposed in S. 1770, should not only settle accounts, but should also offer to purchase and consolidate fractionated interests in tribal hands so that the land does not continue to fractionate in the future; and should establish systems and standards for trust management in the future.

Opposition to Current BIA Reorganization Efforts

As you know, NCAI remains strongly opposed to the current trust reform reorganization effort that the DOI is engaged in. In our view, effective organizational change to effectuate trust reform must contain three essential elements:

(1) Systems, Standards and Accountability—a clear definition of core business processes accompanied by meaningful standards for performance and mechanisms to ensure accountability

(2) Locally Responsive Systems—implementation details that fit specific contexts of service delivery at the regional and local levels where tribal governments interact with the Department

(3) Continuing Consultation—an effective and efficient means for on-going tribal involvement in establishing the direction, substance, and form of organizational structures and processes involving trust administration.

These elements are lacking in the current proposal of the Department of Interior (DOI) for reorganizing the BIA.

We are extremely concerned that the lack of definition of the responsibilities and authorities of new OST offices will cause serious conflicts with the functions performed by the BIA Agency Superintendents and/or Indian tribes. The OST was designed by Congress to play an oversight role, but the reorganization would now give the Office both oversight and management responsibilities, a clear conflict. Moreover, we believe that funding and staff need to flow directly to the agency and regional levels—not just to the new Trust Officers—to address long-standing personnel shortages needed to fully carry out the trust responsibility of the United States. We are certain that it was never Congress's intention to establish an entire new management bureaucracy at the Office of Special Trustee.

The Department may be headed in a positive direction with its reengineering efforts, but the reorganization effort is premature. New business processes should be devised through a collaborative process involving both BIA employees and tribal leadership. We must include the input of tribes and BIA employees so that the great numbers of people who must implement changes in trust administration understand and support necessary reforms. Only then, as a final step, can we design an organizational chart to carry out the functions of trust management without creating conflicting lines of authority throughout Indian country. The history of trust reform is filled with failed efforts that did not go to the heart of the problem and do the detailed work necessary to fix a large and often dysfunctional system.

At this time, Congress should prevent the DOI from proceeding with its proposed reorganization plan and focus instead on funding core Indian programs where there are severe and well documented needs, and to programs such as land consolidation, title, and accounting that will in time reduce the cost of trust administration.

Conclusion

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into the trust reform effort. If we maintain a serious level of effort and commitment by Congress, the Administration, and Tribal Governments to work collaboratively to make informed, strategic decisions, we can make serious progress in resolving the litigation. Our strongly held view is that a mediated process will be the quicker path to a conclusion that will, no doubt, contain many of the commendable elements of S. 1770.

Proposed Line Item Appropriation:

> *$300,000 to the U.S. Institute for Environmental Mediation to contract for an independent mediator to conduct a conflict assessment on the pending case of Cobell v. Norton. The assessment shall provide a report to the House Committee on Resources and the Senate Committee on Indian Affairs identifying the entities who are substantively affected by the litigation; identifying a preliminary set of issues relevant to the litigation and potential settlement; evaluating the feasibility of using settlement processes to address these issues; and, in consultation with the parties, the Committees, and the Indian tribes, recommending a proposed structure for a settlement process. The report shall also include any other recommendations deemed relevant by the mediator.*

D. Fred Matt
Tribal Council Chairman
Confederated Salish & Kootenai Tribes

Chairman Campbell, Co-Chairman Inouye and Committee members, my name is Fred Matt and I serve as the Chairman of the Confederated Salish & Kootenai Tribal Council. Thank you for the opportunity to provide this Committee with the views of the Confederated Salish and Kootenai Tribes.

The Salish and Kootenai Tribes have been very active in the area of trust funds management. Not only have we participated in the many inter-tribal discussions on how best to resolve the problems with federal management of these trust funds, we have also taken a more direct approach: under the authority of the Tribal Self-Governance Act, we manage our own financial trust services program including the IIM functions. I am happy to report to you that our Tribal government and Tribal members alike are very happy with our experience in taking over administration of this federal trust function. Due to our experience, we have a unique insight into the trust funds management issue since we can view it from the perspectives of both the accounts manager and account holders. As manager of these accounts, we can appreciate the complexities in resolving the administration and accounting issues. As an account holder, we know as well as anyone that federal mismanagement of the trust funds has long worked great injustices to the many Tribal and individual Indian beneficiaries - injustices that would not have been tolerated had they occurred in any other segment of American society. We appreciate that Congress is continuing to look at ways to correct these injustices and to prevent mismanagement in the future.

As you are aware, the filing of the *Cobell* litigation has resulted in the trust funds mismanagement issue receiving the attention that it has long deserved. Unfortunately, that litigation was filed over seven years ago and it was only last month that an initial decision was rendered at the federal district court level (and at that, there is obviously going to be much more litigation coming). In short, litigation is an extremely lengthy process and we agree with Senator Campbell's introductory remarks accompanying S. 1770, the litigation, the appeals and the subsequent claims for money, will take many, many more years. I believe it is both appropriate and productive for Congress to try its hand at a remedy for the situation.

We certainly oppose spending $9 billion - or more - doing the historical accounting that Judge Lamberth ordered. To date, millions of dollars have been directed to accounting firms while the Indian people who may be owed money have received nothing. I am particularly concerned about our elders who may not last the additional years it will take for the accounting to take place and for the litigation and the appeals to run their course. If the Congress has that kind of money, it could go toward a compensation fund and/or be spent on tribal land consolidation that could help alleviate the problems associated with fractionated heirship of lands and the trust fund accounting nightmares that accompany income associated with property that may be owned by hundreds and even thousands of people. It could better yet go to properly fund Indian health care!

We have also been long opposed to the concept of a receiver being appointed to manage Indian trust funds as had been proposed by the plaintiffs and we are glad to see that no vestige of

that idea is contained in S. 1770. . Our concern was that a receiver would ultimately demand control over trust resources that generate income into IIM accounts. As a Self Governance Tribe, we are the manager of trust resources on our reservation. Such a proposal would have been a step backward in this era of Tribal Self Determination and showed little regard for the rights and roles that many tribal governments are now playing relative to resource management on their homelands. In that same vein, we remain concerned about the potential interplay between new trust standards and the rights of tribes to manage resources. We will put up our system against anything the BIA proposes but we urge the Congress to keep an eye on how far the BIA or Judge Lamberth goes in coming up with and implementing standards. The beauty of Self Governance – the reason it works – is that it allows tribal governments to retain flexibility in meeting standards. It is critical that we retain the flexibility we now have to meet any new standards.

A few days ago, you introduced, S. 1770, the "Indian Money Account Claim Satisfaction Act of 2003". Our Tribal staff and Tribal Council are still in the process of reviewing this legislation. However, at this time we generally support the bill's approach of providing individual Indian account holders with alternative approaches toward addressing the problem.

The first option involves the establishment of an Indian Money Account Claim Satisfaction (IMACS) Task Force, which would be charged with analyzing the trust records and accounts, developing methodologies for an accounting, and subsequently determining the balances of individual accounts. If the account holder agrees with the determination, then the bill establishes a mechanism by which the Interior Secretary would then make a full payment in the amount determined, in exchange for a signed accord and satisfaction. Upon completion of this, the individual account holder would be dismissed from the *Cobell* class action litigation.

However, if the individual did not agree with the IMACS Task Force determination, a second option would allow the individual to submit the issue to an arbitration tribunal, which the bill would create. That arbitration would be binding on both the individual and the federal government and, like the first option, would also result in the individual being dismissed from the class action litigation.

The third option in S. 1770 is for the individual to remain part of the *Cobell* class action litigation. While I understand the need for this third option - basic good old American due process and the need for the plaintiffs to have their day in court - it does beg the question of whether we will be able to finally put this case behind us. A rationale for introducing this legislation is to put the case behind us and move forward but will that happen if a large number of individuals in the Cobell class decide to exercise the third option? We believe it is absolutely critical that the plaintiffs are able to access the Judgment Fund and we support the fact that you have drafted the legislation that way. We are somewhat doubtful that the bill will be signed into law with such provisions intact if the United States still retains the liability inferred in Option 3. Stated another way, perhaps this legislation should settle the suit in finality.

A concern that I have and one which I am hearing from other tribes in Montana is how the authorization for appropriations in S. 1770 will be scored? Stated more directly, will it come out of the BIA's budget? The bill authorizes $40 million to fund the two major parts of the bill ($10 million in each of fiscal years 2004 – 2007). We would hope that there would be a manner, perhaps by working with the Budget Committee, in which these funds could be appropriated but not in such a fashion as to cut into already terribly underfunded programs at the BIA.

I should note that, like the *Cobell* litigation, S. 1770 does not directly address trust fund accounts where Tribes themselves are the account holders/beneficiaries. However, with respect to the individual Indian account holders, the bill appears to be a good faith effort by Congress to satisfy the accounts of many people, as quickly as is reasonably possible given the circumstances, while still preserving their ability to pursue other avenues in the event they disagree with the determination by the IMACS Task Force.

I would like to emphasize that I believe it is important to remember that Tribes themselves can be part of the solution to this problem. Tribal governments, like the Confederated Salish & Kootenai Tribes, who contract administration of trust fund accounts to continue our successful trust management programs can help to prevent future problems. Tribal governments are the closest to the trust beneficiaries, and we have the strongest motivation to properly handle these monies for our constituents. That is why we have pressed for inclusion of a Trust Reform Demonstration Project (section 134) in the FY '04 Interior appropriations bill (S. 1391). This demonstration project would ensure our ability to continue this effective management without being impaired by any reorganization of trust functions within the Interior Department. On behalf of our Tribal Council, I want to convey our appreciation for the support of this project by our friends in the Senate.

Over the last decade, a great deal of energy and resources has gone into the trust funds management issue. This is true of all three branches of the federal government, as well as scores of Tribal governments. I welcome Congressional efforts to bring proper relief to individual Indian account holders. As Judge Lamberth observed in his decision on the *Cobell* case, Congress was an original catalyst on this issue via the 1992 House Report titled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund".

S. 1770, and the recent House Resources Committee oversight hearing, demonstrate that Congress is not content to sit on its hands while the issue is examined by its sister branches of government. I believe this engagement by Congress, in conjunction with active participation from Tribal governments and individual account holders, can be productive in reaching a solution to a long-standing problem. S. 1770 is an important step in that direction.

Mr. Chairman, thank you for the opportunity to provide my views to this Committee.

TESTIMONY OF PRINCIPAL CHIEF JIM GRAY OF THE OSAGE TRIBE BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS ON S. 1770, THE INDIAN MONEY ACCOUNT CLAIM SATISFACTION ACT OF 2003

OCTOBER 29, 2003

Chairman Campbell, Vice-Chairman Inouye, and other distinguished Members of the Senate Committee on Indian Affairs, I thank you for the opportunity to testify on S. 1770, the Indian Money Account Claim Satisfaction Act of 2003, and to present the views of the Osage Tribe. We thank the sponsors of this bill – Chairman Campbell, Vice-Chairman Inouye, and Senator Domenici – for introducing S. 1770 and commend the Committee for trying to bring justice and closure to many of the individuals who have Individual Indian Money accounts.

The Cobell lawsuit has focused attention on the federal government's failure to live up to the most basic requirements of a trustee to IIM account holders. The effort to obtain justice for IIM account holders began in the 1980's in Congress when Oklahoma Congressman Mike Synar first investigated the federal government's shoddy IIM and trust resource management and accounting practices. His investigations immediately brought federal and public attention to the scope and magnitude of this problem. His efforts also resulted in legislation preventing the transfer of IIM accounts into private banks until the beneficiary of the account received an accounting. A similar provision is now included in the annual Department of Interior appropriations bill to prevent the statute of limitations from beginning to run on any claims for losses to or mismanagement of individual or tribal trust money until the beneficiary receives an accounting. In 1992 the Government Reform Committee published its report *Misplaced Trust*, which revealed the magnitude and scope of the trust resource accounting and management fiasco. All of Indian Country owes Congressman Synar a great debt for his diligent effort to uncover these systemic problems and abuses. He is sorely missed.

We agree with the sponsors of S. 1770 that it is in the best interest of Indian account holders and the United States to have a voluntary alternative claims resolution process that will lead to a full, fair, and final settlement of existing and potential Indian money account claims. While we are concerned about provisions in this bill, particularly the definitions of "accounting" and "claim" contained in Section 3 of the bill, we believe that the process that would be established by S. 1770 is fundamentally fair. It does not, however, take into account the unique situation of the Osage Tribe and its hybrid tribal - headright holder trust funds scheme. Any fair resolution of the trust funds situation should deal specifically with the Osage. We would like to work with the Committee to address the concerns discussed in my testimony.

S. 1770 would: (1) establish a task force of experts to conduct an accounting of the IIM accounts; (2) determine a balance owed to eligible IIM account holders and notify them of it; and (3) allow the eligible IIM account holders the opportunity to accept the determined balance, challenge it through arbitration, or reject the balance and remain a part of the Cobell class. As stated earlier, this process is basically fair, but portions of this bill should be amended to ensure this.

We are concerned with finding #3, which states that a "court-ordered historical accounting . . . will not result in significant benefits to the members of the [Cobell] class." While we disagree that this is the case, we also are concerned that this statement could be interpreted to undercut the basic theory of tribal and Cobell common law accounting claims, that funds the trustee cannot account for are owed to the beneficiary. This finding also should be read in context of the federal government's effort for eight years to eliminate or evade its responsibility to provide an accounting to IIM beneficiaries. The most notable and nefarious example of this evasion was the sham consultation process with IIM beneficiaries. As a consequence of the federal government's failure to perform an accounting over the years, we recognize that any fair attempt to provide an historical accounting required by law will be expensive. Even so, the basis for Cobell and tribal claims should not be undercut. We are confident that the Committee shares our desire to avoid the misinterpretation or misuse of this Finding. We would like to work with the Committee to eliminate any possible misuse or misinterpretation.

We also have serious misgivings of the definition of "accounting". We believe that an IIM account holder should have enough information to make an informed decision about whether to accept the amount the IMACS Task Force recommends. Based on the particularly vague standards of both (A) and (B) of this definition, "accounting" may be an inaccurate, confusing name for an IMACS determination. We recommend that this legislation either adopt common law accounting standards, or call the determination something other than an "accounting" and require the Task Force to make clear the deficiencies, if any, in coming to a determination. IIM account holders have a legal right to a full accounting, and this legislation should ensure that they are not confused or deceived by an IMACS determination.

We are also concerned that the definition of "claim" could create particular problems for the Osage Tribe. The form of Osage government as well as the management and distribution of Osage trust funds are unique. In 1906, Congress directed the Secretary of the Interior to create a roll of all living Osages through July of 1907. All persons on that roll receivec allotments of Osage Reservation lands and a pro rata share of the Osage mineral estate. These pro rata shares have been passed along over the years to Indians and non-Indians and have come to be known as "headrights," or the rights to receive quarterly distributions of funds derived from the Osage mineral estate. Only Osages with headrights have political rights to participate in Osage government through voting or running for elective office, and their voting power is equal to their headright fraction. The Osage mineral estate continues to be held in trust by the United States for the Osage Tribe.

Funds derived from the Osage mineral estate are placed into a tribal trust account in the name of the Osage Tribe. The Tribal Council can draw down up to $1 million annually from the minerals income for purposes of Council and mineral estate administration. Each quarter, the balance of the funds in the Osage tribal account is distributed to the headright holders in accordance with their headright share. A few headright holders have more than one headright, while most have a fraction. The

Department of the Interior has established three categories of headright holders: (1) Osage, (2) non-Osage Indian, and (3) non-Indian. Osage and non-Osage Indians with headrights have Indian money accounts that funds from the mineral estate are deposited into. The non-Indians do not have IIM accounts but receive a check every quarter.

So, Mr. Chairman, the Osage trust funds system is an unique hybrid in which funds come into a tribal account (Congress has called these funds "tribal funds" in statutes), the Tribe has rights to these funds, and the Indian headright holders receive distributions into IIM accounts while the non-Indian headright holders get a check. The U.S. Court of Claims recently ruled that the Osage Tribe has standing to represent the interests of the headright holders in litigation involving federal mismanagement of Osage trust funds.[1] Furthermore, a federal statute makes clear that the Osage Tribe is the appropriate entity to bring claims against the United States.[2] Thus, the Osage Tribe and its headright holders do not comfortably fit into the otherwise simple dichotomy of tribal claims and individual claims.

We are concerned that the definition of "claim" in Section 3 of the bill is overly broad as it includes "any duty" that "pertains in any way" to the IIM account. Such broad terms subjects the definition to varying and different interpretations. The definition includes more than an "accounting" and appears to include activities that occur prior to the time the money is deposited into the IIM account. We are concerned that this definition may result in harm to Osage tribal claims brought in the Court of Federal Claims or one we plan to bring in federal district court, even though the stated intent of the bill is to resolve individual account holder claims. Indian headright holders would appear to meet the qualify as "eligible individuals" under S. 1770. Headright holder claims could subsume the Osage Tribe's existing claims, contrary to the intent of the Tribe to represent the headright holders. Therefore, we would like to work with the Committee to amend this definition.

Thank you for the opportunity to testify today.

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1 *Osage Nation v. United States*, 57 Fed. Cl. 392 (2003).

2 Act of June 28, 1906, Pub. L. No. 59-318, 34 Stat. 539, 544.

POSITION STATEMENT OF THE NAVAJO NATION REGARDING S. 1770, THE INDIAN MONEY ACCOUNT CLAIM SATISFACTION ACT OF 2003

1) Navajo Nation Comments

The lawsuit brought against the DOI, the Secretary of the Interior, and other federal officials by individual Indian allottees, known generally as the Cobell litigation, has resulted in historic precedent for full historical accounting of Individual Indian Money (IIM) accounts for Indian allottees. The Navajo Nation Council and its standing committees have supported the efforts of the Indian allottees in the Cobell litigation, including the adoption of Navajo Nation position statements, proposals for trust fund and trust asset management and appropriation of Navajo Nation funds to assist Navajo allottees during the 2002 DOI suspension of payments to IIM account holders.

The Shii Shii Keyah Allottees Association, an organization of Navajo allottees, on April 14, 2003 considered and passed a resolution, copy attached, Reaffirming the Support of Elouise Cobell in the Class Action Lawsuit Against the United States/Department of Interior on Behalf of Indian Allotment Owners with Individual Indian Monies Accounts and Objecting to Any and All Attempts by the United States/Department of Interior and Certain Members of Congress to Resolve this Matter through a Legislative Settlement Process.

2) Navajo Nation Position on S. 1770

The Navajo Nation opposes adoption of S. 1770, or other legislative settlement processes for resolution of the Cobell litigation. Navajo allottees have stated their opposition of the resolution of the Cobell litigation through a legislative settlement process and the Navajo Nation supports Navajo allottees in this position.

As well, the Navajo Nation has particular concerns relative to the provisions of S. 1770, including limitations on the historical accounting of claims going back to 1887 contained within Section 3(1). Definitions; the qualifications of members and lack of Indian tribe and IIM account holder membership on the proposed Indian Money Account Claim Satisfaction (IMACS) Task Force, as set forth in Section 3(6), and Section 4; the duties of the IMACS Task Force, in particular, the development of multiple methodologies for the historical accounting and the prioritization of claims as set forth in Section 4(f); the effect of acceptance of voluntary settlement on claims undervalued because of inadequate DOI recordkeeping, as addressed under Section 4(g); the lack of approval by Indian tribes and IIM account holders over the arbitrators to be selected for the Indian Money Claims Tribunal under Section 5(b), the short time periods for acceptance or rejection of proposed payment amounts contained within Section 5(c); the limitation on attorneys fees set forth in Section 5(d)(2); and the closure of IIM accounts following payment of amounts owed, pursuant to Section 5(f).

IGRO-218-03

RESOLUTION OF THE
INTERGOVERNMENTAL RELATIONS COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving the Navajo Nation's Position in Opposition to S. 1770, the Indian Money Account Claim Satisfaction Act of 2003

WHEREAS:

1. The Intergovernmental Relations Committee of the Navajo Nation Council is established and continued as a standing committee of the Navajo Nation Council with the purposes to coordinate all federal, county and state programs with other standing committees and branches of the Navajo Nation government and to ensure the presence and voice of the Navajo Nation, 2 N.N.C. §§821 and 822; and

2. The Intergovernmental Relations Committee of the Navajo Nation Council is authorized to assist and coordinate all requests for information, appearances and testimony relating to proposed county, state and federal legislation impacting the Navajo Nation, 2 N.N.C. §§824 (B)(2); and

3. On April 14, 2003, the Shii Shi Keyah Association of Bloomfield, New Mexico, which represents hundreds of Navajo allottees and their families, adopted a resolution reaffirming support for Elouise Cobell in the class action lawsuit against the Department of the Interior and objected to any and all attempts to resolve the *Cobell* litigation through a legislative settlement process, attached and incorporated herein as Exhibit "A"; and

4. On October 21, 2003 United States Senator Ben Nighthorse Campbell of Colorado introduced "S. 1770, Indian Money Account Claim Satisfaction Act of 2003" with co-sponsors Senator Daniel K. Inouye of Hawaii and Senator Pete V. Domenici of New Mexico, attached and incorporated herein as Exhibit "B"; and

5. The Intergovernmental Relations Committee of the Navajo Nation Council finds that the proposed position of the Navajo Nation, attached and incorporated herein as Exhibit "C", is in the best interests of the Navajo Nation and the Navajo people.

NOW THEREFORE BE IT RESOLVED THAT:

IGRO-218-03

1. The Intergovernmental Relations Committee of the Navajo Nation Council states its strong opposition to "S. 1770, Indian Money Account Claim Satisfaction Act of 2003" pertaining to its intent and the impacts it will have on affected Navajo allottees.

2. The Intergovernmental Relations Committee of the Navajo Nation Council adopts the position of the Navajo Nation, attached hereto as Exhibit "C", for immediate presentation to the United States Senate.

3. The Intergovernmental Relations Committee of the Navajo Nation Council directs representatives of the Intergovernmental Relations Committee, the Office of the Attorney General, the Office of Legislative Counsel., the Office of the President and Vice President, and the Office of the Speaker of the Navajo Nation Council to oppose "S. 1770, Indian Money Account Claim Satisfaction Act of 2003" and to advocate on behalf of the Navajo Nation and the Navajo allottees.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Intergovernmental Relations Committee of the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 9 in favor, 0 opposed, and 0 abstained, this 24th day of October, 2003.

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Lawrence T. Morgan, Chairperson
Intergovernmental Relations
Committee

Motion: Willie Begay
Second: Duane Tsinigine

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