

INTERTRIBAL MONITORING ASSOCIATION
on Indian Trust Funds
TESTIMONY

before the

THE SENATE COMMITTEE ON INDIAN AFFAIRS
AND
THE HOUSE COMMITTEE ON RESOURCES

JULY 22, 1998

Submitted by
INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
(ITMA)

Mr. Chairman and members of the Committees, I am Mark N. Fox, a member of the Three Affiliated Tribes of North Dakota. I am the Chairman of the Intertribal Monitoring Association on Indian Trust Funds (ITMA). The Association was founded in 1991 to advocate for increased tribal control over our trust funds, for reform of the Interior Department's systems for managing Indian trust funds, and for fair compensation to the tribes for the money they lost as a result of the Interior Department's mismanagement of our money and resources. ITMA represents tribes who own the majority of trust dollars managed by the United States.

The tribal Nations who are members of ITMA include, Central Council of Tlingit & Haida Indian Tribes, Kenaitze Indian Tribe, Hopi Tribe, Tohono O'odham Nation, Salt River Pima-Maricopa Indian Community, Hoopa Valley Tribe, Yurok Tribe, Southern Ute Tribe, Passamaquoddy-Plesant Point Reservation, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa, Grand Portage Tribe, Red Lake Tribe of Chippewa Indians, Blackfeet Tribe, Chippewa Cree of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe Fort Peck Tribes, Fort Belknap Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Walker River Paiute Tribe, Pueblo of Cochiti, Jicarilla Apache Tribe, Pueblo of Laguna, Mescalero Apache Tribe, Pueblo of Sandia, Turtle Mountain Band of Chippewa, Three Affiliated Tribes, Kiowa Tribe, Muscogee Creek Nation, Cheyenne River Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, Chehalis Tribe, Forest County Potawatomi Indian Community, Oneida Tribe, Shoshone Tribe, Arapahoe Tribe and the Osage Tribe. The Association is appreciative of this opportunity to testify on the critical issue of resolving the United States' liability for its nearly 200 years of gross mismanagement of Indian trust funds, trust land and trust assets.

The Intertribal Monitoring Association on Indian Trust Funds is on record officially rejecting Interior's legislative proposal and urges the Department to meet further with Tribes to formulate legislation that will fairly and fully compensate Tribes for damages suffered as a result of the United States' gross breach of trust by applying standard trust law principles. With thirty-nine tribes present at a June 5, 1998 meeting, the position was reiterated and the attached resolution was unanimously adopted. The Council of Energy Resource Tribes representing forty-five federally recognized Indian Tribes and four affiliate members of Canadian Nations a majority of which are major trust fund account holders, have

passed a similar Resolution as did the National Congress of American Indians, the largest national organization comprised of representatives of and advocates for, national, regional, and local tribal issues. The tribes of Chippewa Cree, Yurok, Oneida, Fort Belknap Community Council and the Passamaquoddy Indian Township have further reiterated opposition by tribal resolutions and letters. All resolutions are attached for the record.

ITMA member tribes would like to express our appreciation to the two Committees for the great leadership role they have played in helping progress to occur as a result of the 1994 Trust Fund Management Reform Act provided tribes with the authority to remove their trust funds from Federal trust status. The Special Trustee's Strategic Plan has provided a blueprint for reforming the Department's management of our trust funds and resources and we are impressed with the steps the Special Trustee has already taken, with funds and support from Congress, to put in place the building blocks of a legitimate Indian trust fund management system. We were glad to hear Assistant Secretary Gover set out his commitment to reforming the BIA's management of the trust assets, though we are still concerned about whether the BIA has an adequate administrative structure in place to implement the reforms, as this is a long standing, systemic problem.

Now the subject of this hearing -- compensating tribes for the losses they suffered as a result of the Federal government's continuing mismanagement of our trust lands, resources and funds. ITMA has developed draft proposed legislation. A copy of is provided herein. ITMA emphasizes that settlement is a complex issue and Indian country is still examining and discussing this draft. As a result, our draft is a work- in progress, with nothing set in stone. We ask that the Committee substitute the ITMA draft for the Department's bill, so it can be the subject of further discussion and debate, and that any Congressional action be postponed until next year. During this period, ITMA will be working with the tribes throughout the country to revise and polish the bill so we can come back early next year with a bill that has the consensus of Indian country.

About two hundred years ago, the Federal government began coming to the tribes and telling them, 'we have bad news and good news. The bad news is that we are taking most of your land and placing you on tiny reservations that cannot really support your people. The good news is that the Federal 'government will be managing that land and the income earned from that land in trust for you, which imposes upon us the highest fiduciary obligations. "Now in 1998, the Interior Department has followed in these footsteps once again coming to us and telling us it has bad news and good news. "The bad news is that the Federal Government has grossly mismanaged its high fiduciary duty. As a result, you have lost untold amounts of income that you should have earned from your trust land and money. The good news is that we have sent to Congress a proposal to compensate you for these losses." I do not think the Indian people can stand anymore 'good news" from the Federal government.

A detailed analysis of what is wrong with the Department's bill is outlined in an attachment. A few of the unacceptable provisions are as follows: Section 4(a)(4) provides that if a tribe settles under the terms of the bill, it will extinguish all of the tribe's claims for losses it suffered as a result of BIA mismanagement, beginning with whether the amount of income provided for in the lease was properly collected, and then going through all of the subsequent stages -- timely deposit of the income, appropriate investment, proper disbursement, etc. Yet, in Section 9(c), if a tribe goes

to court, the bill would limit the court, when determining how much the tribe lost, to analysis of just the 'Reconciliation Record", which addresses only one small part of that process -- whether the BIA properly entered deposit and disbursement transactions in the general ledger. As a result, the bill effectively imposes a ban on any analysis to determine how much the tribes lost in all of the other stages. The court will then be unable to award damages to the tribes for these other stages unless the tribe can provide records that show how much it lost. Since it was the Interior Department's responsibility to maintain the records, but has failed to do so, it will be the rare tribe that can produce its own documentation. Thus, this ban on analysis will enable the Department to avoid having to pay compensation for the vast majority of the losses tribes suffered.

For example, this limitation on analysis prevents the court from addressing one of the biggest holes in the trust system -- the losses tribes suffered because the BIA never installed an accounts receivable system and thus has no way of knowing if it collected all of the money due on a lease. Since 50% of the lease documents have been destroyed, it will be impossible to recreate an accounts receivable system. The only way tribes could demonstrate their losses is through the use of the very kind of analysis the Department's bill prohibits. Thus, the tribes surrender all of their claims but can get compensated for just the one small area of loss for which the bill permits analysis.

The Department's bill is full of provisions like this one all designed to bias the outcome in the Department's favor, or which give the Secretary the upper hand at every stage. For example, under trust law, when a trustee has mismanaged his responsibilities so badly that there are insufficient records to produce an acceptable trust accounting, as is the case here, the courts have established a procedure that gives all of the benefits to the beneficiary and puts all of the burden on the trustee. Requiring anything more rigorous would be unfair to the beneficiary because it was the trustee's obligation to maintain the records and he should not be able to benefit from his failure to do so. The Department's bill turns these principles on their head, putting the Department in the driver's seat and imposing the burdens on the beneficiary.

The Department also claims that its legislation is designed for tribes that have uncomplicated trust fund histories and want an expedited settlement approach. They go on to say that the Department realizes the tribes with more complex trust fund histories will likely sue and that the legislation has no implications for those tribes. We believe this is inaccurate. The Department's bill provides that any tribe that wants to litigate must do so pursuant to the provision of that bill. The bill then goes on to unfairly stack the litigation deck in the Department's favor by taking away from tribes a number of rights they presently have in litigation against the Department. Specifically:

- + The Department's bill lets the Department meet its obligation to provide a full trust accounting simply by submitting the reconciliation record, even though that record covers only a small portion of the areas for which the Department is obligated to provide a trust accounting;
- + The Department's bill says that the only statistical analysis the court can rely on is analysis of

the reconciliation record, which, as indicated, constitutes only a small portion of the areas that require analysis;

- + The Department's bill limits the court to imposing simple interest on amounts owed by the United States, when courts presently impose compound interest in Federal breach of trust fund cases;
- + The Department's bill would prohibit the court from considering congressional legislation tolling the statute of limitations on trust fund claims when the court decides statute of limitations interest. This provision is an attempt to use the legislation to overturn a Court of Federal Claims decision the Department lost, which holds that based on that congressional language, the statute of limitations does not begin until the Department has provided the tribes with a full trust accounting.

In sum, the Department's comforting words that its bill is benign for tribes that want to sue are as misleading as most of its other actions in regard to the trust fund issue over the years. In fact, its bill would strip the tribes of many of the rights they now have when litigating trust fund cases against the Government, while giving nothing back in return. It is simply an effort by the Department to use the legislation to change many of the rules applicable to trust fund litigation in order to give the Department an unfair advantage, while telling the tribes just the opposite.

We believe that there should be settlement legislation. However, the Department's bill is so flawed and unfair that it cannot serve even as a starting point for such legislation. We therefore request that Congress discard the Department's bill and begin working from the principles and draft legislation ITMA has prepared and which is still being reviewed by our member tribes. I will discuss the matters we want to see addressed in any final legislation during the remainder of my testimony.

The Department has asserted that settlement legislation is primarily for the benefit of the tribes, such that they must be prepared to accept lesser compensation through settlement than they could receive through litigation. To the contrary, it is the Executive Branch that is the primary beneficiary of settlement legislation because its alternative is to be forced to litigate 200 separate complex lawsuits against 200 different tribes and to have to admit to the court in each case that it so grossly breached its trust responsibility that it cannot even produce the records needed to determine damages. In fact, settlement legislation benefits both sides by reducing the time and cost involved in resolving the Government's breach of trust. Tribes will strongly oppose any effort to use settlement legislation as an excuse to reduce the Government's liability.

The Department has also tried another tack in its efforts to escape the full consequences of its mismanagement. It has tried to leave the impression that because the Department has made such a mess of the records and trust management systems, any effort to fully determine the amount of loss tribes suffered would be so expensive that Congress has no choice but to enact a superficial process that will largely permit the Government to escape most of the financial consequences of its gross mismanagement. However, the courts refuse to let a trustee benefit from his mismanagement. Congress must do nothing less.

The courts have been able to maintain this principle by developing a well established set of procedures for use when a trustee has not only breached its trust obligation, but has also destroyed or failed to develop the necessary records and systems, so that it is impossible to determine through regular accounting procedures how much the beneficiary lost as a result of the breach of trust. These procedures provide that the beneficiary is permitted to develop a methodology for obtaining a fair and reasonable estimate of how much was lost. Requiring anything more rigorous would be unfair to the beneficiary because it was the trustee's obligation to maintain the records and he should not be able to benefit from his failure to do so. The burden is then on the trustee to disprove the estimate, but all benefits of the doubt are resolved against the trustee. This is the standard that the courts likely would apply in tribal lawsuits against the United States for breach of trust if settlement legislation is not enacted.

Estimating the tribes' losses through alternative damage assessment methodologies can be done relatively inexpensively and quickly. It does not use the Arthur Andersen Reconciliation Report approach of trying to find and review millions of pages of documents, which is labor intensive but of little value when so many records are missing or were never developed. Instead, it involves substituting brainpower for extensive manpower by using forensic accounting approaches such as comparative analysis. It is no different from what the IRS does regularly when it needs to determine the taxes due from a taxpayer who has destroyed or never kept any financial records. IRS develops such estimates quickly and at far less cost than the Arthur Andersen approach. It simply uses forensic accounting techniques to develop the best estimate it can in a fixed period of time. The court will then give it the benefit of the doubt, knowing that it was the taxpayer's fault that this problem exists, just as in the case of Indian trust funds, it is the Federal Government's fault. Thus, what needs to be done is not rocket science but something that is done in the legal-accounting world every day.

Let me provide an example of how a damage assessment methodology might work. We know the Interior Department has mismanaged the tribes timber resources (see the Mitchell case) and has inadequate systems to insure the timber companies are reporting the correct amount of timber they are taking off the reservation or are paying the correct price. Because no adequate trust resource accounting systems were put in place by the BIA, it is now impossible to use existing documentation to determine how much a tribe lost as a result of the Federal Government's breach of trust in regard to timber. Instead, a process of estimation would be used.

One somewhat simplistic example of how this could be done would be to identify ten tracts of tribal timberland on different reservations throughout the country and then, for each tract, find a comparable tract off the reservation that was properly managed and for which adequate records exist. The amount of income that was earned of the comparable tract would be compared to the amount of income the BIA records show were actually collected from the reservation tract managed in trust. Let us say that after examining the difference in income on all ten tracts, it is found that on the average, the BIA produced 6% less income than was earned from the off-reservation tracts. Then 6% would be held to be the universal percentage of income tribes lost from the BIA's mismanagement of their timber resources, (since a trustee is obligated to produce the highest yield possible). Thus, each timber tribe would be awarded, as damages for the timber mismanagement component of the trust process, an amount equal to 6% of the total timber income the BIA has collected for that tribe

over the years.

Is this method precise and absolute -- no. Are there variations and local circumstances that would produce a higher or lower percentage on a particular tract -yes. If a tribe or the Federal Government wanted to take the time and incur the expense involved in examining a particular tract in detail, it can do so. But assuming the parties want to avoid such costs and time, this type of approach provides a fast, inexpensive rough justice methodology that is similar to what the IRS or others do when a party that is liable has lost or destroyed all of the records needed to do a normal accounting. Experts would have to develop valid damage assessment methodologies phase of the trust management process -- oil and gas, hard rock minerals, investments, etc. As discussed below, ITMA's draft legislation establishes a mechanism for the development of appropriate estimation methodologies on a universal basis, so that each tribe and each court does not have to do it independently in 200 separate lawsuits.

With this kind of damage assessment technique as the core component to provide a fast and cost effective way to determine the amount of the Government's liability, fair and reasonable legislation will consist of the following elements:

1. Optional approaches. It would offer tribes several optional approaches for resolving their trust claims, in recognition of the fact that each tribe's trust situation is different. For example, some tribes had only small amounts of money go through the trust process and have uncomplicated claims. It would not be useful to make them go through a complicated procedure. On the other hand, some tribes' trust situation is so complicated that it would be impossible to settle it through any means short of complex damage assessment methodologies. It would be a waste of time and money to make such tribes go through the motions of a negotiation process before they can get to the damage estimate stage. Thus, using IRS terminology, there needs to be a short form and a long form.

(The Department's bill would lock all tribes into a single convoluted and biased procedure.)

2. Comprehensive. It needs to be comprehensive in that it must provide compensation for all of the areas of trust management in which the Department has breached its legal trust responsibilities to the tribes; beginning with the Government's obligation to properly manage the land or asset and taking it all the way through to the investment and disbursement of the funds. It would not make sense to enact settlement legislation if, at the end, there were a whole set of claims still to be litigated. While being comprehensive will make the process more complex, it will ensure that at the end, this entire 180 year trust mismanagement mess is history.

(The Department's bill would extinguish all claims beginning with the point in the system at which income should have been collected, leaving open all claims for the failure to properly manage and lease the trust assets. Also, as discussed above, the bill would make it impossible for the court to effectively analyze most of the areas of the trust process.)

3. Coverage. It will cover all of the years the Government has been mismanaging tribal trust funds, not just the 1972-1998 period covered by the Secretary's proposal. Otherwise it will still be

necessary for 200 tribes to file lawsuits to obtain compensation for the pre-1972 period.

4. Trust law principles. It will follow trust law principles, particularly the principle that when a trustee is unable to provide a trust accounting, the approach is to produce an estimate of his loss based on sound damage assessment methodologies, with the burden on the trustee to disprove the estimate but with all doubts resolved against the trustee. For purposes of the Indian trust situation, this requires the development of sophisticated methods of analysis that can produce valid estimates of what was lost at each stage of the trust management process, particularly, in such complex economic sectors as oil and gas or timber.

(The Department's bill imposes such severe restraints on the kind of analysis that can be conducted that it would prevent any adequate estimate of the losses tribes actually suffered. It also stands trust law principles on their head by letting the Secretary prepare the estimate and imposing the burden on the tribes to rebut the Secretary's estimate.)

5. Fixed time and costs. It is preferred that the legislation contain specific time frames and cost limitations so it will not go on for 50 years, as have the Indian Claims Commission cases. The costs for attorneys and expert witnesses for both sides would be fixed through a budget and then paid, on an as-incurred basis, with Federal dollars. This issue is under continued discussion by tribes.

(The Secretary's bill imposes no limitations on the time and costs of litigation, while requiring the tribes to pay for their attorneys and experts. It also imposes improper limitations on tribes' ability to access to the Equal Access to Justice Act for attorneys fees.)

6. Special forum. It will take place in a special forum established for the purpose of this issue, so that it will not clutter the courts and so that one set of judges can develop the necessary expertise in this area of the law, and develop a set damage assessment methodologies that may be used by more than one tribe. Congress has frequently created temporary courts to handle large numbers of lawsuits that have a common issue, e.g.; the temporary court established to hear appeals of windfall profits cases during the oil crisis. The issue of the process for selection of the special forum is under continued discussion by tribes.

(The Secretary's bill requires the first stages of the process to be controlled by the Secretary and gives him powers that will enable him to bias the process in his own favor. After that, the litigation is funneled into the regular Court of Federal Claims.)

7. Direction. The individual must be independent of the Secretary's control and must have adequate authority to maintain control of the process, such as in the form of a Special Master as is done in most complex litigation. The position needs to have complete access to all Government records and files. This issue is under continued discussion by tribes.

(The Secretary's bill puts no one in charge, except the Secretary, who is hardly a neutral party.)

8. Non-appropriated source of funds to pay damages. The funds to compensate the tribes will come from a source that does not cause existing federal funding to Indian programs to be diminished. The appropriate source is the Permanent Judgment Claims Fund, the permanent appropriations system Congress has established to pay monetary judgements against the United States. Payments from this Fund are not charged to any appropriations subcommittee's allocation.

(The Department's bill does provide for the payments to come from this Fund.)

9. Elimination of stalling tactics. It must eliminate all of the defenses the Justice Department has used to stall trust litigation in the past. In particular, it needs to make it clear, as has earlier legislation, that the Statute of Limitations does not begin to run against trust claims unless and until the Government has provided the beneficiary with an acceptable trust accounting for that year.

(The Department's bill goes in the other direction, seeking, without ever acknowledging it is doing so, to overturn court decisions holding that based on earlier legislation, the Statute of Limitations does not begin to run until the Secretary has provided the account holders with an acceptable trust accounting.)

10. Known errors. The United States must immediately make the tribes whole for the losses they suffered as a result of the known errors identified by Arthur Andersen in its Reconciliation Report. The overpayments resulting from such errors should be written off, as every bank is required to do if it fails to catch overpayment errors within a reasonable period of time.

(The Secretary's bill would net a tribe's overpayments against its under payments.)

ITMA is committed to working with the Committees and with the Department of Interior to explore this complex issue and develop acceptable legislation that will fairly and expeditiously compensate tribes for their huge losses. We also request the assistance of these Committees to ensure that productive discussions with the Department can begin as soon as possible.

Thank you again for the time and effort you have devoted to this complex and important issue.

ITMA'S PROPOSED LEGISLATION

ITMA is developing proposed legislation that meets all of these criteria. A copy of our present draft is provided at Attachment C. We wish to emphasize that settlement is a complex issue and Indian country is still examining and discussing this draft. As a result, our draft is still a work in progress, with nothing set in stone. We ask that the Committee substitute the ITMA draft for the Department's bill, so it can be the subject of discussion and debate, but that any Congressional action be postponed until next year. During this period, ITMA will be working with the tribes throughout the country to revise and polish the bill so we can come back early next year with a bill that has been thoroughly reviewed by and has the consensus of Indian country.

ITMA's draft legislation provides for the following:

1. The creation of a special three judge court, appointed by the Chief Justice of the United States, composed of two sitting district court judges and one judge from the Court of Federal Claims.
2. A requirement that the court appoint a Special Master, who would hire accountants, economists and other experts. This team, in conjunction with the tribal plaintiffs (all tribes who opt for this procedure) and the United States (represented by the Interior and Justice Departments) as defendant, would have 18 months to develop for estimating the losses the tribes suffered in the different areas of trust management. Following the submission of the models to the court, the plaintiffs and defendants would have 120 days to present arguments for changes to the models. The court would rule on the final models within 180 days.
3. The Special Master, the tribes and the United States would then have 18 months to apply to each tribe's circumstances. The findings, including the total amount of compensation the tribe is entitled to, would be submitted to the court and either party would have 120 days to contest the findings. The court would rule within one year's time.
4. The Government would be prohibited from raising any of the procedural arguments it has used in the past to delay litigation. Specifically, it would be prohibited from raising the Statute of Limitations as a defense since basic trust law principals provides that the Statute of Limitations does not begin to run against a trustee until he has provided a full accounting. (The United States has never provided such an accounting in all of the years it has managed Indian trust funds and assets.)
5. The court will be authorized to establish a budget for the tribes' and the Government's attorneys' fees and costs, which will be funded from Justice Department appropriations and paid on a present-time basis. Under standard trust law, a trustee is obligated to pay the beneficiary's attorneys fees and costs in a successful breach of trust action. Here the Government's liability is already acknowledged; all that is at issue is the amount of its liability for that mismanagement.
6. The damage awards to the tribes will come from the Permanent Judgment Claims Fund, the source of money for all damage awards against the United States. Payments from this Fund do not get charged to the congressional budget process, so it will have no impact on appropriations for Indian programs.
7. There would be no right of appeal on any issue by any party.
8. Known losses identified by the Arthur Andersen Report would be paid immediately. Overpayments would be written off.
9. It provides several different alternative settlement avenues for tribes that choose to opt out of the temporary court procedure described above. One option it makes available is for the tribe to request direct negotiations with the Department. A second is for the parties to use

mediation or arbitration. These options most likely would be used by tribes that have relatively uncomplicated trust situations and do not need the economic modeling approach to determine their losses. A third option provided for in the ITMA draft legislation is for a tribe to file a lawsuit in Federal Court under the regular claims procedure, if, for whatever reason, it concludes that the temporary court approach is not suitable for its situation. Tribal self-determination and the vast variety of tribal trust situations require that tribes be offered this kind of range of options.