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TESTIMONY

*“GENERAL ACCOUNTING OFFICE’S REPORT ON TRUST FUNDS MANAGEMENT
WITH THE DEPARTMENT OF THE INTERIOR”*

July 14, 1999

Before the Senate Committee on Indian Affairs
and
Committee on Energy and Natural Resources

My name is Mark Fox and I am vice Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. I also serve as the Chairman of the Intertribal Monitoring Association on Indian Trust Funds (ITMA) which represents a consortium of 49 tribes who have a vested interest in tribal trust funds matters. On behalf of the tribes, ITMA appreciates the opportunity to testify before you today.

Mr. Chairmen and members of the Committee, the Intertribal Monitoring Association on Indian Trust funds (ITMA) strongly supports the Department’s appropriation request of approximately \$100 million for trust reform in FY 2000. However, tribes believe the Department is taking an unacceptable risk with tribes’ and taxpayers’ money. Outside trust experts who have reviewed the plan, including the General Accounting Office and the former Special Trustee, have determined that the plan the Department is proposing is seriously flawed and is likely to result in developing systems that will fail to meet trust standards. For that reason, ITMA has concluded, and this testimony proposes, that it is imperative the overall control of the trust reform effort be placed under the authority of an independent entity such as a "trust reform control board" with trust reform expertise and that does not have the conflicts of interest the Department has.

Based on the analysis of the experts and ITMA, there are serious concerns whether the \$3 billion dollars in trust funds and the 50 million acres in trust land, with their extensive timber, oil, gas, coal and other resources will be managed in the future according to trust standards. Given the enormous losses tribes and individuals have suffered as a result of the Department’s mismanagement over the past 150 years, ITMA considers this is a critical issue for the future economic well-being of all tribes and individuals. Also of serious concern is whether the \$100 million the Department is seeking for trust reform will be properly spent and will produce a trust system that meets trust standards. The Interior Department recently informed Congress that the \$400 million of taxpayers dollars

appropriated to create a new BLM land management system (LMRS) had to be written off because the Department of Interior failed to produce a workable system. If the systems Interior is proposing to install do not work properly, the question is who will be liable for the losses the tribes and individual Indians will suffer in the future as a result of the Department's inability to comply with trust standards.

The stakes are very high. By the time it is known whether the new trust systems work or not, Secretary Babbitt and the other present Interior officials will be long gone from the Department and the new administration will simply do as administrations before come back to Congress and ask for more money. The critical question before the Committees today is whether Congress and the Indian trust beneficiaries should take the gamble of trusting the Interior Department to develop and properly implement the trust reform plans without any outside controls. At the March 3, 1999 hearing Chief Charles O. Tillman of the Osage Tribe spoke of how, for 150 years, the Interior Department told the tribes and individual Indians, "trust me, trust me", and how we trusted them to our great detriment. Once again, the Interior Department is telling us and the Congress, "trust us".

This time they want us to trust them with the exclusive control over the trust reform effort. Every indicator tells us the Department's course is likely to fail. As a result, it is ITMA's view that it would be a big mistake to trust the Department to properly implement such a large project without the benefit of experienced trust experts. Consider the following:

1. Every outside trust expert that has looked at the Department's plans has expressed serious concerns that it is likely to fail. We are not aware of a single outside expert that has spoken in favor of the plans.

The General Accounting Office's report is of particular concern because it appears to identify the same kinds of problems that caused the BLM system to fail. ITMA is also aware that in the 1980's, the Department spent over \$500 million to put in place a new system for MMS. Yet that system fails to comply with trust standards and is causing tribes and IIM account holders to lose millions of dollars in mineral royalties. Given the Department's track record, it seems to be a huge and unwise gamble to put the Department in charge of designing and installing the Indian trust system.

- A. What is most significant about the conclusions of the other outside "trust reform control board" experts is that they all reinforce GAO and each other. For example, Don Gray, in a letter to Congressman Don Young, stated that "...DOI is simply throwing money at systems with no reliable foundation or practical game plan..." such that "...two years down the line, after expenditures of a few more hundreds of millions of dollars, the rehabilitation efforts and the Indian interests will not have been significantly advanced." In other words, he is predicting a repeat of the BLM and MMS debacles. His recommended solution is that Congress creates an entity

outside of the Department with the necessary independence and expertise to control the reform effort.

- B. Similarly, Paul Homan has told this Committee and the Federal District Court in *Cobell v. Babbitt* that in his expert opinion “the High level Implementation Plan will not allow the Secretary to discharge, effectively and efficiently, the Secretary’s trust responsibility...” Mr. Homan has previously provided the Committees with his proposal, similar to Mr. Gray’s, for an independent entity to manage the reform effort.

- D. Another witness in the *Cobell* trial was former Congressman William Clinger who, in his capacity as ranking minority on the House Governmental Affairs Committee, Subcommittee on Environment, Energy and Natural Resources, co-authored the 1992 “Misplaced Trust” report with the late Congressman Synar. At the end of his testimony, he was asked by the Judge if, based on his experience dealing with the Department during the four years his Subcommittee investigated the trust fund problems, Congressman Clinger felt the Department was capable of cleaning up the problem today. He answered that he felt they could not and that the only solution was the appointment of a special master or some other form of outside authority to administer the reform effort.

To reiterate outside experts, the Department’s plans and capabilities has a high likelihood of failure and has recommended that the responsibility be transferred to an independent entity with trust reform expertise. In contrast, ITMA is not aware of a single expert outside the Department who has indicated confidence in the Department’s ability to successfully reform its trust systems. When qualified experts express this level of concern, clearly it would be an unacceptable risk to permit the Department to proceed unassisted by individuals with trust expertise.

- 2. The programs and systems being installed by the Department are being administered and implemented by individuals who have no experience or expertise on trust systems. ITMA believes that permitting the reform effort to be developed by persons with no systems expertise and trust experience is an unacceptable risk that would not be tolerated in any other situation and would be a breach of the United States’ trust responsibility to the Indian beneficiaries. It should not be tolerated just because the Department appears determined to “prove itself” competent. Indian people demand the same level of expertise that the users of any bank would demand.

- 3. The issue remains, the entire trust reform effort continues to be under the jurisdiction of the very offices that has mismanaged the trust for the past 150 years. Management experts say, and ITMA believes, that to correct this failed

system requires an outside entity to come in and conduct clean up. ITMA is concerned that reforms will be implemented in a way that insures any improprieties by the Department are not brought to the forefront to be dealt with appropriately.

These fears were given new validity just last month when the Navajo Nation filed a \$600 million damage lawsuit against Peabody Coal Company. The suit alleges that a former Secretary of the Interior, after being successfully lobbied by the coal company, took steps to prevent Navajo from receiving the best royalty possible from that coal company, an action that, if true, clearly violated the Department's trust responsibility and cost the Navajo Nation hundreds of millions of dollars.

In summary, according to the outside experts, the Department is requesting sole control over \$100 million to implement a plan that has a high risk of failure and which will be implemented by persons who have no expertise in trust reform and have at least the appearance of a vested interest in covering up the past.

Oversight of the Interior's reform efforts by Congress and GAO are necessary, but we believe they are not sufficient to insure the reform is done properly. Former Congressman Clinger testified to this very point in the *Cobell* case. He described how his subcommittee, despite its best efforts, simply did not have the time to stay on top of the Department's activities in the manner needed to keep the Department in line. He was specifically asked by the Judge, "Based on your experience, do you have any expectation today that further congressional oversight can solve the problem, or would it require something further?" His response was that it would require something further, a "hands-on administration of reform", but that Congress is unable to provide the "kind of day-to-day hands-on that this particular, almost unique situation requires." Neither Congress nor GAO has the resources to provide this kind of daily oversight. As a result, we believe it is essential that an outside entity be established whose full time job it is to insure that the trust reform efforts is properly implemented.

It is instructive to compare the efforts to reform of the Indian trust systems with Congress' efforts to reform the District of Columbia Government. Approximately five years ago, Congress concluded that both were in a big mess and needed to be reformed. When addressing the District of Columbia problem, the Congress did not give the mayor \$100 million and tell him to clean up the D.C. Government. Instead through legislation enacted in 1995 and amended in 1997, Congress created the D.C. Control Board (officially, the District of Columbia Financial Responsibility and Management Review Board). The Board was situated outside of the D.C. Government and was composed of highly respected and experienced financial and management experts. The legislation gave the Control Board the full and exclusive authority to develop the plans for reforming the D.C. Government and gave it overall authority for implementing those plans. It also had the authority to remove any D.C. manager who failed to cooperate with the reform effort. Today, four years after that Board was created, the D.C. Government has made major strides and is well on its way back to financial and managerial health.

It is now time for Congress to enact the legislation that will provide the expertise needed to properly oversee the trust reform effort. Specifically, ITMA recommends that Congress enact legislation creating a Control Board for the trust reform that is similar to the one that successfully engineered the reform of the D.C. Government. Attached to our testimony is proposed draft legislation to that would enact such an approach.

The proposed legislation would provide for the following:

1. Create the Indian Trust Management Reform Authority composed of three members, two shall be persons with expertise in trust management reform and one a representative of the Indian account holders who has extensive experience in trust issues. The Federal Housing Finance Board is proposed as the regulatory authority, contingent on their willingness to assume this responsibility. Other options may be considered as well. The three members of the authority shall to be appointed by the Chairman of the Finance Board after consultation with the Indian beneficiaries.
2. The Trust Management Reform Authority would have the full authority to develop the plans for reform of Interior 's trust systems and would hire the outside experts to do so. While this will delay the reform effort for a short time, it will result in a plan that is developed by objective experts. The trust management functions would remain within the Interior Department but the Authority would have authority to direct the implementation of those plans, working with the Department but having the final say, as was the case with the D.C. Control Board. Finally, it would have the authority to require the Secretary to remove from his or her position any Department manager who fails, or whose employees fail, to comply with the instructions of the Authority in implementing the new plan. This is the approach any owner would take if his company were being mismanaged. It was the approach used to clean up the S&L's and the D.C. government and must be applied to the Indian trust situation as well.
3. Finally, the bill calls for the Authority to sunset once the reform effort is completed. However, to insure that the new systems installed within Interior do not deteriorate, the bill calls for the Federal Housing Finance Board to establish an Office of Indian Trust Regulation, which would examine the Department's trust management on an on-going basis, just as the various federal bank regulatory agencies monitor and examine federally chartered banks and trust departments.

ITMA urges the Congress to enact such legislation prior the Department's expending the FY 2000 appropriations to ensure funds are appropriately used. ITMA has endorsed the concept of S. 739 subject to certain modifications as proposed by ITMA. The bill, introduced by Senators Murkowski and Campbell provides for the outsourcing of the investment management of certain Indian trust funds. ITMA requests that the Committee on Indian Affairs combine S. 739 as amended, and the Association's proposed bill into a single bill, the 1999 Trust Reform Act Amendments, for enactment this year.

Thank you, again, for this opportunity to voice our concerns to the Congress regarding the trust funds matters.