

**TESTIMONY OF CHAIRMAN TEX G. HALL
OF THE MANDAN, HIDATSA AND ARIKARA NATION
AND
CHAIRWOMAN SUSAN MASTEN OF THE YUOK TRIBE**

**TRIBAL CO-CHAIRS OF THE TRIBAL LEADER / DEPARTMENT OF INTERIOR
TRUST REFORM TASK FORCE**

BEFORE THE UNITED STATES SENATE

COMMITTEE ON INDIAN AFFAIRS

JULY 30, 2002

Chairman Inouye, Vice Chairman Campbell and Members of the Committee, we are honored to appear before you today to again discuss the progress of the Tribal Leader / Department of Interior Trust Reform Task Force. As the two tribal leaders who serve as co-chairs of the Task Force, we are here to represent the consensus views of the 24 tribal leaders who serve on the Task Force. We again greatly appreciate the opportunity to participate in the legislative process of the United States Congress and to provide this Committee with this update on this critical issue.

The corporate accounting reform bill. First, we want to point out several significant events that have occurred since we last spoke to you. This past week, Congress reached resolution on a corporate accounting reform bill, H.R. 3763, and the President has indicated that he will sign it into law. Among other things, this legislation creates an independent commission that will establish standards and have the power to enforce those standards to force corporations to report honestly their financial affairs to their shareholders.

We believe it is just as important to hold the Department of Interior accountable for the funds and resources that the Department holds in trust for Indian Tribes, American Indians and Alaska Natives as it is for corporations to be held accountable to their shareholders. American Indians, Alaska Natives and Indian tribes are just as deserving as corporate shareholders; in fact, they are in much the same position. Just as a shareholder's interest in a corporation is entrusted to corporate officials, in the case of tribes and their members, trust funds and trust resources are held for them by the Department of Interior and the Department of the Treasury. If an independent commission can be created by Congress to create corporate accountability for the benefit of shareholders, then Congress can just as well create an independent commission that will hold the Department of Interior and the Department of Treasury accountable for the trust assets those Departments control. Tribes have the right to expect no less of their trustee than shareholders expect of corporate executives.

The Department of Interior has generally said in our discussions since we last testified that they agree that we need an independent commission. As we will discuss further in this testimony, where we may differ is in the powers and functions of that Commission.

The vote in the House rejecting a limitation on the period of accounting for trust funds.

Another significant event occurred less than two weeks ago. The House of Representatives voted overwhelmingly against a proposal that would have, among other things, limited the time period of the accounting of trust accounts for individuals and tribes to 15 years between 1985 and 2000. The House took this action despite the fact that the Department of Interior had just released a report stating that it would cost \$2.4 billion to provide a full accounting of the funds held in trust for individual tribal members. We believe this vote should send the Department of Interior a signal that the time is right to provide Indian tribes and their members a full accounting for their funds and the assets that generate those funds. As noted in our testimony presented in June, without a valid accounting determining what should be in our accounts as of a specific date we will not have a starting point for the appropriate management of trust funds.

Just as important, a number of Congressmen and women said in debate that they wanted to hear from Indian tribes and their members on this issue. This testimony is our effort to tell you what we believe is essential to include in trust reform legislation, which should go forward this year if at all possible.

Tribal Cases treated as related to *Cobell*. In still another important development just last week, the court in the *Cobell* litigation agreed to treat as cases related to *Cobell* seven trust fund accounting cases filed recently by various Indian tribes in the United States District Court for the District of Columbia. In essence, this means that the tribes that filed these cases can rely on the rulings made in the *Cobell* case and can expect the Departments of Interior and Treasury to be held to the same standards of trust funds management for their Tribal funds and the assets that generate those funds as have been applied to those Departments in the *Cobell* case. This event should also send a signal to the Department of Interior that it should be in everyone's interest to work with us towards development of both internal and external mechanisms that will provide full oversight of the management of trust funds and the assets that generate those funds.

Essential elements of trust reform, including reorganization of the Department of Interior

The Task Force has discussed at length what needs to be done to create true trust reform. Although many details remain to be worked out, candid dialogue, perseverance, and mutual accommodation have enabled us to develop a comprehensive approach involving many components, which taken together, holds the promise of vastly improving accountability for management of the funds and resources held in trust by the United States for Indian beneficiaries.

What we are developing is a system of internal and independent checks and balances, capacity building, technical support, and standards to create a management structure that: (a) greatly advances accountability in trust administration; (b) protects the rights and interests of tribes whether they receive direct services from the BIA or contract/compact; and (c) provide the flexibility necessary to respond to varied tribal needs throughout Indian country. While much remains to be done, we are genuinely optimistic that the thousands of hours of hard work and dedication which have been invested in the Task Force efforts by tribal leaders and high level officials within the Department of Interior over the course of the past seven months will ultimately come to fruition.

Essential elements of trust reform legislation

While we may be requesting further legislative action from Congress in the future, at this stage, we recommend that legislative efforts focus on the creation of an Independent Oversight Commission, the establishment of the position of Undersecretary for Indian Affairs, and codification of principles to guide the Department in its administration of trust funds and resources. These issues are separate and apart from the historical accounting issue, which will likely need additional legislation as well, but which is not being discussed by the Task Force at this time.

We will discuss the three principal elements in turn, and indicate where there is agreement with the Department, where there appears to be a good opportunity for consensus, and where there currently is no agreement yet in sight.

1. **Creation of an independent Commission with oversight of all aspects of trust funds management.** As we testified at the last hearing, we have proposed that an independent Commission be created. The Commission, which in our proposal exists outside the Department of Interior, would be composed of five members, three of whom would be members of federally recognized Indian tribes. All of the Commissioners would be full time and would have experience in administration, regulation, accounting or legal aspects of trust management, or have comparable experience in tribal government.

The Commission should have the power to, among other things:

- a) ensure that regulations are enacted (whether first proposed by the Department of Interior or by the Commission) through negotiated rulemaking that set minimum standards, or minimum requirements which the Department must meet in carrying out the Department's responsibility for all aspects of trust funds management, including the sale and lease of trust assets;
- b) investigate acts or omissions to act by the Department that are in violation of the minimum trust standards;
- c) order the Department to take specific actions to correct any acts or omissions to act regarding trust funds management;
- d) audit any and all trust accounts as managed by the Departments of Interior and Treasury; and
- e) review the adequacy of the Department's budgets regarding carrying its trust funds responsibility.

In carrying these duties and functions, the Commission's actions, and in fact, any authority provided in the entire act will not interfere with Tribal law, reduce Tribal

sovereignty or change the rights of allottees; or prevent a tribe from managing its own resources.

The Department of Interior has said they agree that we need an independent commission. However, they have a considerably different view of what the powers of that commission should be. – At this point, they do not want the Commission to have regulatory, investigative or enforcement power; but they have asked us what the scope of the regulatory authority would be and what kinds of sanctions would we want the independent commission to impose. Further, they do not want the commission to be created outside of the Department of Interior. The Department does agree that the Commission should be able to perform audits and report to Congress about the adequacy of the DOI budget. As always, the new Commission must be provided adequate resources to perform its duties.

Thus, there is a considerable gap concerning the idea of an independent commission. Tribes believe that a Commission must have adequate enforcement and regulatory powers to ensure that trust funds management is carried out by the Department at least consistent with minimum standards, provided that this enforcement and regulatory power is used in a manner that will protect the right of tribes to manage their own resources and protect and enhance the ability of tribes to contract and compact with the Department under the Indian Self-Determination and Education Assistance Act, as amended.

Last week the Department made a new proposal to the Task Force that the Tribal members of the Task Force are still reviewing. The Department has proposed that the Office of Comptroller of Currency (OCC) within the Department of Treasury be given the authority to investigate whether the Department is managing trust funds according to the standards the OCC sets generally for commercial banks. Under the Department's proposal, exactly what sanctions the OCC would be able to impose was not yet made clear; nor has it been made clear how the standards imposed by the OCC would apply to the Department of Interior or the Department of Treasury, in which the OCC is located.

The Task Force is seriously considering the proposal made by the Department. Just as they want more information from us about our proposal, we need more information from them about their ideas.

The key to the discussion about an independent commission, or providing those powers to some other agency, is recognizing that whoever does the enforcement must have adequate authority to enforce minimum standards that set forth what must be done by the Department to carry out its responsibilities to trust beneficiaries in all aspects of trust funds management and management of the assets that produce those trust funds. We have also agreed that we do not want the independent Commission to interfere with the right of a tribe to manage its own resources, and we want the Commission to “enhance and protect” the right of a tribe to contract or compact with the government under the Indian Self-Determination and Education Assistance Act, as amended.

Finally, our discussions lead us to believe that the primary failure of the 1994 Trust Reform Act was that it did not provide the Office of Special Trustee with sufficient powers to fully carry out trust reform. This remains the biggest reason we are still here discussing this issue today. This problem must be corrected once and for all if Congress really wants trust reform to occur.

The Department's most recent proposal is as close to a recognition of the need for adequate authority as we have seen, and we are encouraged by this development. However, we are not yet in a position to see consensus occurring on this issue. We have provided you with a copy of the draft of our version of an independent trust oversight commission.

2. **Creation of the position of Undersecretary for Indian Affairs.** General consensus was reached with the Department about the need to create a new position within the Department of Interior above the level of the Assistant Secretary for Indian Affairs who would answer to the Secretary on Indian matters. This represented a part of the Alternative 5 proposed by the joint Task Force in the report provided to the Secretary on June 4, 2002. The Department and Tribal leaders have reached consensus that the new position should be created as an Undersecretary, rather than a Deputy Secretary. The Undersecretary designation fulfills particular organizational needs regarding executive branch management within the Department, as we discussed in our previous testimony. This position would be created through legislation. While we do not have the legislation in final draft form, we are close to a consensus on a full specification of the duties of that position.

These duties and responsibilities include the following:

- 1) Direct line authority over all aspects of Indian affairs within the Department including the coordination of trust reform efforts across all of the relevant agencies and programs to ensure that functions are performed in a manner that is consistent with trust responsibility.
- 2) Responsible for ensuring and advocating that the policies and law of tribal self-determination and self-governance are maximized and implemented throughout DOI.
- 3) Responsible for all trust reform/administration efforts in DOI.
- 4) Responsible for ensuring that the BIA establishes practices to maintain accurate data regarding ownership and lease of Indian lands.
- 5) Responsible for monitoring and maintaining the reconciliation of tribal and Individual Money trust accounts to ensure a fair and accurate accounting to all trust accounts.

- 6) Responsible for establishing and implementing policies and systems that allow for proper accounting and investing of trust funds monies and the preparation of timely reports to account holders.
- 7) Responsible for ensuring that BLM establishes adequate practices, policies and procedures to enforce compliance with Federal requirements relating to the lease of Indian lands.
- 8) Responsible for ensuring that the MMS establishes practices to enforce compliance by lessees of Indian lands with reporting of production and payment of lease revenues, including the auditing of leases.
- 9) Responsible for coordinating policies within the Department to ensure that the policies, procedures, practices and systems related to trust within the Department of the Interior are coordinated, consistent, and integrated, and that the Department prepares comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle.
- 10) Responsible for ensuring that the trust fund investment, general ledger, and subsidiary accounting systems are integrated and adequate to support the trust fund investment needs of BIA.
- 11) Responsible for ensuring the integration of land records, trust fund accounting, and asset management systems among agencies.
- 12) Responsible for developing a coordinated Trust Management Program budget throughout the Department of Interior.
- 13) Responsible for providing guidance for Trust Administration, developing a strategic plan on trust reform, in consultation with the Indian Tribes, and reporting to the Secretary and Congress on the progress made.
- 14) Required to work with affected American Indian and Alaska Native tribes to resolve conflicts which may arise between tribal laws, policies, and cultural and traditional practices and Departmental actions, functions, regulations, and procedures and applicable federal law.
- 15) Act as the principal liaison for the Department with the Trust Oversight Commission, and be responsible for acting upon the recommendations/directions of the Commission.
- 16) Responsible for ensuring that Departmental actions and functions concerning tribal trust management are developed in consultation with American Indian and Alaska Native tribes.

We believe that we are close to complete consensus on these duties and responsibilities. We have not discussed in any great detail the appointment process for this position, nor have we discussed whether the person appointed to this position would serve a term of years.

3. Trust responsibilities and legal obligations of the Department. Tribes also believe that the legislation should generally define the trust responsibilities and legal principles that the Department must follow in carrying out its management of trust funds and the assets that generate those funds. These principles have not yet been agreed to by the Department of Interior, but they are taken directly from Secretarial Order 3215, *Principles for the Discharge of the Secretary's Trust Responsibility*, which has been accepted by the current Administration. The Secretarial order was derived from the case law, the 1994 Indian Trust Fund Management Reform Act. A copy of proposed Findings and a statement of the trust principles are attached to this testimony.

We invite your careful review of this document, because it goes considerably beyond a simple statement of what the components of trust management ought to be. The trust principles state specific actions that must be taken and legal requirements that must be followed in order for the trust responsibility regarding trust funds management to be properly carried out by the United States. These principles do not tell the Department of Interior or the Department of Treasury how to do these things, but rather they set forth the things that must be done in order to carry out trust funds management functions.

These principles are not new, but have been applied in the private sector for many years. We believe these principles must be placed into positive law, enacted by Congress, to ensure that there will be no future challenge by the government to its trust obligations in this area.

4. Oversight of the trust responsibility at the regional and local level. Another essential component of trust reform is internal oversight of the Department of Interior as it carries out its trust responsibilities. This reorganization is at the heart of the discussion about the Department's proposal to create a "Bureau of Indian Trust Assets Management" (BITAM) in November that resulted in the formation of the joint DOI/Tribal Trust Reform Task Force.

The principal goal of the Tribal Task Force members is to have a single point of decision making at the level at which a tribe interacts with the Bureau of Indian Affairs, whether that is the local agency level or at the regional level, coupled with an adequate internal oversight mechanism which will seek to ensure that trust funds management functions are being carried out appropriately.

To accomplish this, we propose that the organizational realignment will involve all levels of the Department of Interior.

- At the highest level, the Task Force proposes to establish a new Undersecretary for Indian Affairs to coordinate and unify policy direction for the Bureau of Indian Affairs

and all other agencies operating programs or providing services to Indians within the Department of Interior, as discussed above.

- An office of Self-Determination/Self-Governance will report to the Undersecretary to advance long-standing policies that support greater involvement of Indian tribes in managing programs for the benefit of their communities.
- A new office of Trust Accountability would report to the Undersecretary to provide internal control and quality assurance in trust administration throughout the Department as well as ensuring timely resolution of problems.
- Within the Bureau of Indian Affairs, a trust services section will provide technical support for field operations, train services for BIA and tribal staff, and controls to ensure that programs are administered in accordance with defined standards for trust administration, and help avoid problems before they reach serious proportions. The trust services section would also be responsible for operating trust fund accounting, cash management, and appraisal accountability functions.
- The structure will retain a single line of authority for delivering programs and services to tribal communities in accordance with overwhelming tribal preferences. However, substantial changes to current operations will occur. Adequate staffing and funding levels would be sought, personnel would be well qualified to perform their responsibilities, technical assistance will need to be readily available, and performance standards reflecting modern practices of trust administration will need to be established and enforced.

This is the proposal that has been developed by a small sub-workgroup involving Tribal representatives and Departmental representatives, and in schematic form is attached to this testimony. Consensus on this proposal has not yet been fully achieved, in part, because from the beginning of our discussions, Tribes have made it clear that they do not want to increase the bureaucracy with which they have to deal on a day-to-day basis. To do that would delay things like economic development decisions, land transfers, land leases, probates, and many other points of interaction between the Tribes, their members, and the Bureau of Indian Affairs. Thus, the proposal outlined above needs to be fully considered by all of the Tribal members of the Task Force before full consensus can be obtained.

However, our differences are now relatively narrow on these issues. As we pointed out at the last hearing, the key to this issue has been the tension between the need of the BIA to provide critical resources to Tribes in areas they manage, such as law enforcement, education and other needs, and the need for the BIA to be responsible trustees of trust funds and assets. This tension is created by a lack of resources at both levels. While we cannot necessary fix all of the resource issues, we do believe the proposal under close consideration by the Task Force as presented in the attached schematic provides the most economical way to resolve the problem while still providing adequate oversight authority to ensure that trust reform in this area is carried out.

5. Fractionation of interests in land. In addition, the assistance of Congress will be needed to stem the tide of increasing fractionation of ownership that exponentially increases the complexity and cost of federal administration, deprives Indian beneficiaries of the full potential benefit of their resources, undermines the ability of tribes to protect communal resources like water, fish, and wildlife, and jeopardizes the security of our reservation homelands by eroding tribal sovereignty. While this may not be part of the legislative package regarding trust reform that needs to be passed this year, the fractionation of ownership must be dealt with soon.

As part of the task force efforts, a special committee has been formed to begin looking at creative ways to solve this century old problem. It is in part because of the number of fractionated ownership interests that the cost of administering trust funds is so expensive.

Further Task Force efforts.

Completion of Legislation. The Task Force needs to continue its efforts to resolve our differences in the proposed legislation. We will next be meeting in Anchorage in late August, just before the end of the Congressional recess, and will seek to exchange and refine our proposals on the independent commission, on our statement of trust responsibilities and legal obligations, and make the final adjustments to the duties and responsibilities of the undersecretary.

In the meantime, we are placing our trust in the expertise and political acumen of the Senate Committee on Indian Affairs, to assist us to move legislation forward this year. We believe it is certainly possible to get this legislation passed by Congress yet this session. If Congress can pass in a few short days a bill creating an independent board providing for financial accountability of corporations, it can certainly pass legislation that will provide for accountability by the Department of Interior and the Department of Treasury to Indians and Alaska Natives. We look forward to working with you and your staffs to move this effort forward as quickly as possible.

Continued Existence of the Task Force. We believe that the Task Force will need to continue for some time to complete its work. Aside from determining the final legislation that will be needed, the Task Force must further refine the local and regional structures needed to ensure that trust reform is carried out. In addition, the Task Force will want to examine the “as is” model of the Department, pursuant to the Department’s contract with EDS, and propose the necessary changes in that system, where it doesn’t work, and learn from those places where the trust responsibility is being handled well.

We will also need to assist the Department in choosing effective systems for managing its trust responsibility that provide all the information that a beneficiary would want to know about his or her account with the Department (accountability), and that would allow the beneficiary to understand how his or her accounts are being managed (transparency). This will be a great deal of work, but Tribes are prepared to continue this effort to ensure that this trust reform effort will not turn into a dream.

Resources Needed. In order to carry out all these functions, we need to have continued resources appropriated by Congress. We are asking that Congress supply us, through its appropriation to the Department of Interior, with the tools we need to ensure that trust reform does finally happen. We will be glad to work with Committee staff and the Department to work out an appropriate budget.

Conclusion

We believe that we have made significant progress towards a legislative package since the last hearing held on this issue. The Tribes believe they have most of the legislation ready to go, and trust that the Committee will use its best judgment to assist them to go forward with this effort. We also believe that we have reached consensus, or are close to consensus with the Department of Interior on a number of issues. While we know that there are only a few legislative days left in the 107th Congress, we also know how important this issue is to Tribes and their members.

We most respectfully ask you to consider how we can yet resolve these issues in this Congress, and we again thank you for the opportunity to present our views.