

**TESTIMONY OF
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BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS**

July 25, 2002

Mr. Chairman and Members of the Committee:

I am pleased to be invited here today to share with you some of my views regarding whether and how mediation might be employed to resolve what I will generically refer to in this statement as the Indian Trust Fund problem currently being litigated in the case of Cobell v. Norton in the United States District Court for the District of Columbia.

As we all know so well, the Indian Trust Fund problem is a matter of immense scope, layered complexity, and enormous past, present, and future financial ramifications. It involves millions, if not billions of dollars, at least two Cabinet departments and dozens of employees in those departments, the attention for several years of numerous committees of the Congress, investigation by the General Accounting Office, the Inspector General, several independent accounting firms, and, of course, the commitment of huge expenditures in the Cobell litigation.

To get right to the point, there seems to be almost universal agreement that the Indian Trust Fund problem needs to be resolved- as quickly, as fairly, and as inexpensively as possible. Unfortunately, a quick, fair, and inexpensive resolution of the problem to date has not come about through the litigation process in federal court that by its very nature is adversarial and confrontational. Reading the hundreds of pages of court decisions shows that the courtroom is not the most conducive environment for rational and thoughtful settlement of this complex problem. Resolution of the underlying issue- getting money to those Native Americans who are owed that money- is diverted by ancillary issues of contempt citations, sorting out departmental bureaucracy and accountability, and the integrity of government computer systems.

It seems that the time has come for all of the parties in this matter to look for another vehicle to resolve this complicated issue. One method would be for the parties to agree voluntarily to public dispute resolution through mediation - what has been called by some "assisted negotiation" and by others as the "Multi-Gains Approach." The use of voluntary public dispute resolution through mediation is not new to the settlement of complicated public policy issues. For example, escalating confrontation, needless costs,

and unnecessary litigation has been avoided in the area of international environmental negotiations. Voluntary public dispute resolution is being used in the relicensing of hydroelectric dams by the Federal Energy Regulatory Commission. Public mediation has been successfully employed in resolving affordable housing issues in Hartford and Greater Bridgeport, Connecticut. Large land use controversies have been resolved through voluntary public mediation in Massachusetts.

However, the litigation history of the Indian Trust Fund problem leads me to be less than optimistic that all the involved parties will willingly agree to submit these issues to mediation. Nevertheless, I believe that the parties would be well served to consider seriously some form of public dispute mediation of this complicated matter if we are ever going to see a final resolution of the Indian Trust Fund problem.

What exactly is public dispute mediation, and how is it different from the more traditional forms of mediation that we see in everyday, private, two-party matters? For one thing, public dispute mediation invariably involves multi-parties- here we could be talking about dozens of parties. Also, public dispute mediation invariably involves large sums of money- here we already know that we are talking about millions, if not billions, of dollars. Finally, public mediation deals with major public policy questions or the efficacy, integrity, or wisdom of governmental behavior or decisions- this issue certainly has its share of those kinds of questions. But while public dispute resolution through mediation involves many parties and complex issues, like that in the Cobell litigation, my experience is that the principles that apply to simple, two-party private mediation also apply in complicated and involved multi-party public mediation.

For example, my experience in mediating cases has taught me that it is imperative for the mediator to instill in all the participants the understanding of the need for creativity and flexibility throughout the entire mediation process. Indeed, in my view, it is the creativity and flexibility of the mediation process that makes it such a valuable and successful tool in resolving all kinds of cases, including cases that involve complex public policy issues. Participants in complex mediation need to understand that the approach to successful mediation does not encompass the concepts of “who wins and who losses,” or what steps should a party take to create their next best advantage if mediation fails. Because the parties to mediation are not bound by the more traditional court rules of litigation or the dictates of congressional parliamentary procedure, new rules can be sculptured to meet the needs and expectations of the participants and the issues. Finally, the participants also need to understand that they cannot prevail on every issue, and that giving up some minor issues in order to save their arguments for some major issues does not reflect weakness or submissiveness or defeat in the mediation world. To the contrary, my experience has been that it is the participants who show the most flexibility and sensitivity to the needs of other parties that achieve the greatest success in mediation.

There are other equally valuable principles that apply to mediation, whether it be a simple, two-party matter or a complicated, multi-party matter like the Cobell litigation. Here is what seems to be important for participants to understand and employ if mediation is going to be successful:

1. Participants need to understand that issues can only get resolved if they are candidly and truthfully explored. In this regard, the advantages of full disclosure far outweigh the disadvantages.

2. Participants need to select spokespersons who are trustworthy and committed to a program of open and free discussion without pre-determined prejudices and agendas. In mediation, it is more important to listen than to talk, whether one agrees or not with what is said.

3. Participants need to explore practical solutions to the problems at issue without the need or desire to protect or promote self-contained values and principles. The phrase "This is a matter of principle" that we hear so often in the courtroom really does not serve well in the mediation room.

4. Participants need to understand that mediation is a process of continuing dialogue. Issues invariably are interrelated and in many cases inseparable. The parties need to resist the temptation to prejudge issues and positions- a party may be premature in doing so.

With these basic principles of mediation in mind, permit me to address more specifically how mediation might work in exploring a resolution of the many complicated issues in the Cobell lawsuit.

Perhaps the most difficult- and most immediate- issue to confront in mediating the issues in the Cobell litigation, as in all public dispute resolution, is who should be invited to the party- who are the so-called stakeholders in the dispute, or in other words, what individuals and groups will be affected by a resolution of part or all of the dispute. A mediation of the Indian Trust Fund problem, for example, will of course involve the represented parties in the Cobell lawsuit and most if not all of the affected non-parties to that litigation. But consideration should also be given to whether other individuals and groups should be invited to participate in the process, including, for example, the Special Master and Special Monitor appointed by Judge Lamberth, various groups such as the Tribal Task Force on Trust Reform, the Commission on Native American Policy, or any number of organizations, such as various tribal groups, that protect and service the interests of our Native American population. Thought needs to be given to how the Executive agencies, such as the Bureau of Indian Affairs and the Office of Special Trustee for American Indians, will be represented in this mediation process. In any event, great care and time must be spent in deciding what individuals and groups should and must participate in the process if the process is going to be successful.

As I mentioned a moment ago, all individuals and groups who should participate in a voluntary mediation of the Indian Trust Fund problem may not be willing to give up what they believe may be the advantages and strongholds that they think they currently have through the litigation process. Mediation is essentially a voluntary process that works only if all interested and affected parties invest in the process. In the Indian Trust Fund

problem, voluntary mediation will be possible only if the major participants in the Cobell case agree to put the litigation process aside and commit to the less restrictive but also less expensive and more promising prospects of mediation. Of course, this would include the class representative plaintiffs and the Executive departments and individual agency employees involved in the Cobell lawsuit. This will not be easy, for my experience has been that class plaintiffs and the Federal Government, particularly the Department of Justice and the various federal departments and agencies, are suspicious of mediation and are reluctant to participate in any mediation process. But all the major participants surely should understand that successful mediation will reduce the time, cost and energy that a continuation of the litigation will consume, even if the mediation process takes months to complete.

Of course, it is possible that all the parties involved in the Cobell case will not voluntarily consent to mediation. In that case, it may be necessary for the Congress to pass legislation that creates an independent body that not only compels the participation of all the parties in the Cobell litigation, but also sets forth the mechanisms to facilitate mediation of these issues, such as rules and procedures for conducting the mediation, a source of funding for not only the administration of the independent body but also finding that can be used for payment of attorneys fees and other monetary issues that are intertwined with the substantive policy issues in the case. In this regard, something on the order of the September 11 compensation fund, established through the September 11 Victim Compensation Fund of 2001, might be a model for legislation to establish an independent body to resolve the Indian Trust Fund matter.

In any event, let me take a moment to explore some of the ways that might be employed to overcome any hesitation on the part of affected and necessary parties to submit to voluntary mediation of this matter or through the development and passage of legislation to create an independent body to resolve the problem. One way is to have the parties participate fully and actively in the earliest development of the structure of the mediation format and the agenda for the major issues to be initially considered. Parties will feel more willing to participate in the process if they truly believe that they have a say in how the process will unfold. For example, in order to encourage the Federal Government to participate in the process, one suggestion might be to decide whether Executive Department employees at all levels will have some form of immunity from potential liability and existing contempt orders so that they will be encouraged to offer their valuable knowledge and insights on the history of the problems involved and the steps that need to be taken to find solutions to those problems. Another issue that might encourage the Federal Government to participate in the process is to decide whether agency employees should be compensated in some way for their past litigation expenses. To encourage the class-represented plaintiffs and the various Native American groups to participate in the process, thought should be given to development of a formula for payment of attorneys fees to lawyers for the represented class plaintiffs. As a mediator in complex cases, I have found that if not addressed at an earliest phase, the issue of attorneys fees can infect the entire mediation process. When the issue of attorneys fees can be taken off the table early in the process, the likelihood of eventual success in resolving the dispute is substantially increased.

There are many other issues in the Indian Trust Fund problem that a mediator might want to explore at the early stages of the process or that the Congress might want to consider in creating an independent mediation body that might help the parties ease their concerns about participating in mediation. For example, input from the parties should be sought regarding what team of experts should be employed to assist a mediator or an independent body in deliberations and who should pay for those experts, what Interior Department records will be made available for the mediation, whether all GAO and independent accounting studies should be released and disseminated, and to what extent should the media be made aware of the activities and progress of the mediation.

Once these issues are resolved, either through the voluntary participation of the parties or through the involvement of the parties in the development of legislation to create an independent body, the more complicated and long-term policy issues then can be addressed through a some designated mediation format. This would include issues such as what methodology should be employed to do an accounting, can an accounting realistically be conducted before 1985, which I believe is the post-accounting date contained in the House Appropriations bill, how and to what extent should past and present government employees be held accountable for the Indian Trust Fund problem, to what extent and at what stages should the Congress approve the activities and decisions of the mediator or independent body, and what legislation likely will be necessary to implement some or all of the resolutions arrived at during the mediation process. Finally, thought will have to be given to what final order should be entered by the court to terminate the Cobell litigation.

In conclusion, it seems that the time has come for the parties in the Cobell lawsuit to agree to some form of mediation to resolve these important and complicated Indian Trust Fund issues, or if that is not feasible, for the Congress, working with the parties and perhaps a mediator-facilitator, to develop a means to resolve these issues in a more efficient and less expensive format. All concerned will benefit.

Thank you for giving me the opportunity to share these views with the Committee.