Testimony of
John E. Echohawk, Executive Director
Native American Rights Fund

Hearing on S.1770, the Indian Money Account Claims Satisfaction Act of 2003.

Committee on Indian Affairs
United States Senate
October 29, 2003

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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**

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

> **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 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]

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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.

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 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.