STATEMENT
OF
JAMES CASON
ASSOCIATE DEPUTY SECRETARY
ACCOMPANIED BY
ROSS O. SWIMMER
SPECIAL TRUSTEE FOR AMERICAN INDIANS
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON THE DEPARTMENT OF THE INTERIOR TRUST MANAGEMENT

March 9, 2005

We are pleased you called this hearing today to examine the steps we have taken with regard to trust reform in the Department. It is important for Congress to focus on more than just a settlement to the ongoing Cobell litigation. While we all seem to agree that the Cobell case should be settled rather than litigated further, we stand in very different places with regard to how to settle.

Through the efforts of the authorizing committees, a mediation effort began last year. For a report on the progress of the mediation, I suggest the Committee speak directly to the mediators who are in a good position to brief you objectively on the details of the mediation.

While I understand this hearing was called to discuss the Department's trust reform efforts in general, and reorganization in particular, our immediate concern is the recent February 23, 2005 district court order that restored the historical accounting requirements of the district court's September 25, 2003 structural injunction that had been vacated by the Court of Appeals. Using very preliminary estimates, we believe carrying out these requirements could cost billions. My testimony also includes a chart that explains the elements of the accounting required by the district court.

As most of you are aware, in response to the original imposition of the structural injunction issued in 2003, Congress, in P.L. 108-108 stated that there was no requirement to commence or continue historical accounting activities "until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004."

Despite arguments of the plaintiffs to the contrary, the Court of Appeals, on December 10, 2004, held that this provision was constitutional. The Court of Appeals noted that Congress passed the Pl 108-108 provisions "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Congress, the court pointed out, gave itself until the end of 2004 to come up with a legislative solution.

But now, the district court points out in its February 2005 order "[O]f course, December 31, 2004 has come and gone, and no legislative solution to the issues in this litigation is available or in the offing." In fact, the district court referred to the provisions of P.L. 108-108 as "a bizarre and futile attempt at legislating a settlement of this case . . ."

To be frank, it is time for Congress to act. Both the recent district court order and the December 2004 Court of Appeals decision cry out for Congress to step in and define what it intended when it required an accounting of trust funds in the 1994 Trust Reform Act. Did you intend an accounting of the scope required by the district court and, if so, will Congress fund it?

The Court of Appeals specifically recognized the power of Congress to modify both current statutory and common law rules. In a statement given to the House Resources Committee last month, plaintiffs' attorney states the provisions of P.L. 108-108 were constitutional only because they were temporary in nature. Nowhere does the Court's opinion state this. In fact, the Court references a line of cases affirming Congress's authority to alter the duties of parties and openly acknowledged Congress's ability to change the law. I have attached to my statement the pages from the Court's decision concerning historical accounting for your review.

Just as the Court of Appeals did in its opinion, Congress must recognize that the normal requirements placed on beneficiaries in most other trust situations, i.e. the costs of accountings and general management, are not borne by the beneficiaries and derived from the monies in the trust, but are rather borne by the American taxpayers as a whole through use of the general treasury. In 1994, the Department in a letter to the House Resources Committee recognized "that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs."

The Congress must be clear in what its expectations are and be certain it provides the funding necessary to carry out those expectations, even at the expense of other Department programs. We stand ready at Interior to carry out the mandates of the Congress. However, we must be given the tools to do so, and the mandates should have sufficient clarity to not require decades of litigation to determine the precise scope of the task Congress requires.

With regard to our current trust organization, much of what I have prepared to say today has been previously heard by your Committee. I believe, however, it is vital for you to understand the background and facts in order to fully understand the current situation so that any legislative solutions proposed will be meaningful and lasting.

Background

The Department manages approximately 56 million acres of land held in trust. Over ten million acres belong to individual Indians and nearly 46 million acres are held in trust for Indian Tribes. On these lands, Interior manages over 100,000 leases for individual Indians and Tribes. Leasing, use permits, land sale revenues, and interest, which total approximately $205 million per year, are collected for 245,000 open individual Indian money (IIM) accounts. About $414 million per year is collected in 1,400 tribal accounts for 300 Tribes. In addition, the Indian trust fund manages approximately $3.0 billion in tribal funds and $400 million in individual Indian funds.

One of the most challenging aspects of trust management is the management of the very small ownership interests, which result in many very small IIM accounts and land ownership interests. There are now over 1.65 million fractional interests of 2% or less involving more than 32,500 tracts of individually owned trust and restricted lands. The Department provides a range of trust services – title records, lease management, accounting, probate – to the growing number of land owners. We have single pieces of property with ownership interests that are less than .000002 of the whole interest. The Department is required to account for each owner's interest, regardless of size or whether we can even locate the individual. Even though these interests today might generate less than one cent in revenue each year, each is managed without the assessment of any account management fees, and the revenues generated are treated with the same diligence that applies to all IIM accounts. In contrast, in a commercial setting, these small interests and accounts would have been eliminated because of the assessment of routine management fees against the account. For instance, there are almost 20,000 accounts with no activity for the past 18 months with an average of .30¢ per account. To keep these accounts open, it costs the system $34 per account. Management costs of the IIM accounts, as well as tribal trust accounts, are covered through the general appropriations process and borne by the taxpayers as a whole, rather than by the accountholders.

History

In 1887, Congress passed the General Allotment Act (GAA), which resulted in the allotment of some tribal lands to individual members of tribes, mostly in 80 and 160-acre parcels. The expectation was that these allotments would be held in trust for their Indian owners for no more than 25 years, after which the Indian owner would own the land in fee. Over time, the system of allotments established by the GAA has resulted in the fractionation of ownership of Indian land. As original allottees died, their heirs received an equal, undivided interest in the allottee's lands. In successive generations, smaller

undivided interests descended to the next generation.

In the 1920's the Brookings Institute conducted the first major investigation of the impacts of fractionation. This report, which became known as the Merriam Report, was issued in 1928 and formed the basis for land reform provisions that were included in what would become the Indian Reorganization Act of 1934 (IRA). During discussion on the IRA, the Commissioner of Indian Affairs cautioned Congress that fractionated interests in individual Indian trust lands cost large sums of money to administer, and left Indian heirs unable to control their own land: "Such has been the record, and such it will be unless the government, in impatience or despair, shall summarily retreat from a hopeless situation, abandoning the victims of its allotment system. The alternative will be to apply a constructive remedy as proposed by the present Bill."

Congress in 1934, through the IRA, reaffirmed its commitment to tribal governments, halted the further allotment of tribal property, and required that the allotted lands be held in trust indefinitely by the United States for the benefit of the individual owners. It is important to note however, that the original versions of the IRA included two key titles; one dealing with probate and the other with land consolidation. Because of opposition to many of these provisions in Indian Country, most of these provisions were removed and only a few basic land reform and probate measures were included in the final bill. Thus, although the IRA made major reforms with respect to the ability of tribes to organize and stopped the allotment process, it did not meaningfully address fractionation (and the subsequent adverse impacts in the probate process). As a result, fractionated interests in individual Indian allotted land continued to expand exponentially with each new generation.

In August 1938, the Department convened a meeting in Glacier Park, Montana, in an attempt to formulate a solution to the fractionation problem. Among the observations made in 1938 were that there should be three objectives to any land program: stop the loss of trust land; put the land into productive use by Indians; and reduce unproductive administrative expenses. Another observation made was that any meaningful program must address probate procedures and land consolidation. It was also observed that Indians themselves were aware of the problem and many would be willing to sell their interests.

Similar observations were made in 1977 when the American Indian Policy Review Commission reported to Congress that "although there has been some improvement, much of Indian land is unusable because of fractionated ownership of trust allotments" and that "more than 10 million acres of Indian land are burdened by this bizarre pattern of ownership." The Commission reiterated the need to consolidate and acquire fractionated interests and suggested in this report several recommendations on how to do so. Many of the observations and objectives made in 1938 and 1977 are the same today.

In 1983 Congress attempted to address the fractionation problem with the passage of the

Indian Land Consolidation Act (ILCA). The Act authorized the buying, selling and trading of fractional interests and for the escheat to the tribes of land ownership interests of less than two percent. A lawsuit challenging the constitutionality of ILCA was filed shortly after its passage. While the lawsuit was pending, Congress addressed concerns with ILCA expressed by Indian tribes and individual Indian owners by passing amendments to ILCA in 1984.

In 1987, the United States Supreme Court held the escheat provision contained in ILCA as unconstitutional because "it effectively abolishes both descent and devise of these property interests." (See *Hodel v. Irving* (481 U.S. 704, 716 (1987)). However, the Court stated that it may be appropriate to create a system where escheat would occur when the interest holder died intestate but allowed the interest holder to devise his or her interest. The Court did not opine on the constitutionality of the 1984 amendments in the *Hodel* opinion. However, in 1997, in *Babbit v. Youpee* (519 U.S. 234 (1997)), the Court held the 1984 amendments unconstitutional as well.

In 1984, a Price Waterhouse report laid out a list of procedures needed to align management of these funds with commercial trust practices. One of these recommendations was to consider a shift of the BIA disbursement activities to a commercial bank. This recommendation set in motion a political debate on whether to take such an action. Congress stepped in and required BIA to reconcile and audit all Indian trust accounts prior to any transfer of responsibility to a third party. BIA contracted with Arthur Andersen to prepare a report on what would be required in an audit of all trust funds managed by BIA in 1988. Arthur Andersen's report stated it could audit the trust funds in general, but it could not provide verification of each individual transaction.

Arthur Andersen stated it might cost as much as $281 million to $390 million in 1992 dollars to audit the IIM accounts at the then 93 BIA agency offices. The 1992 Government Operations Committee report describes the Committee's reaction:

> "Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken."

The Committee report then moves on to the issue of fractionated heirships. The report notes that in 1955 a GAO audit recommended a number of solutions, including eliminating BIA involvement in income distribution by requiring lessees to make payments directly to Indian lessors, allowing BIA to transfer maintenance of IIM

accounts to commercial banks, or imposing a fee for BIA services to IIM accountholders. The report states the Committee's concern that BIA is spending a great deal of taxpayers' money administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances of less than $50.

On April 22, 1993, the late Congressman Synar introduced H.R. 1846. On May 7, 1993, Senator Inouye introduced an identical version, S. 925. It was in these bills that Congress first included a statutory responsibility to account for Indian trust funds. Section 501 was entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds." Senator Inouye's bill included an effective date provision that stated:

> "This section shall take effect October 1, 1993, but shall only apply with respect to earnings and losses occurring on or after October 1, 1993, on funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian."

The Senate Committee on Indian Affairs held a hearing on S. 925 on June 22, 1993. Elouise Cobell in her capacity as Chairman of the Intertribal Monitoring Association, testified in strong support of the bill. The only amendment Ms. Cobell recommended in her oral statement, as well as her written statement, was to allow Tribes to transfer money back into a BIA-managed trust fund at any time if they so wanted. Ms. Cobell mentioned "[W]e have amendments, and we are willing to work with the committee on these particular amendments. I am not going to devote any more of my time in my oral presentation to the provisions of the bill because we feel it is an excellent bill."

The Navajo Nation and the Red Lake Band of Chippewa Indians were the only tribes to submit testimony. They supported the bill, and did not object to the prospective application of the accounting section in their testimony.

The Director of Planning and Reporting of the General Accounting Office also testified. He was asked if he agreed with the Arthur Andersen estimates I mentioned above. He stated the following:

> "In my statement I talked about how there are a lot of these accounts that maybe you don't want to audit, that maybe what you want to do is come to some agreement with the individual account holder as to what the amount would be, and make a settlement on it. We had a report issued last year that suggested that, primarily because there are an awful lot of these accounts that have very small amounts in terms of the transactions that flow in and out of them. Just to give you some gross figures, 95 percent of

> the transactions are under $500. One of our reports said there that about 80 percent of the transactions are under $50. So in cases where you have the small ones, maybe there's a way in which we can reach agreement with the account holders and the Department of the Interior on how much we will settle for on these accounts rather than trying to go back through many many years, reconstructing land records and trying to find all of the supporting material. It may not be worth it." [page 29 of S. Hrg 103-225]

On July 26, 1994, Congressman Richardson introduced H.R. 4833, which ultimately became the American Indian Trust Fund Management Reform Act of 1994. The House report on H.R. 4833 notes that H.R. 1846 was the predecessor bill to H.R. 4833. One legislative hearing was held on H.R. 4833 by House Committee on Natural Resources Subcommittee on Native American Affairs on August 11, 1994. There is no printed record of that hearing. There was no Senate hearing.

H.R. 1846 and H.R. 4833 were similar in many places. H.R. 4833 did not, however, include the effective date provision explicitly making the accounting requirement prospective only. While the report notes in a number of places why changes were made to the H.R. 1846 provisions, it is silent with respect to this omission.

There is not a single mention of the costs associated with either complying with the Act, or completing the accounting in the Committee's report. Moreover, no analysis from the Congressional Budget Office was included in the Committee's report. The Department sent a letter on H.R. 1846 and S. 925 that was placed in the Committee report on H.R. 4833. Its only mention of cost is the following sentence: "We wish to note that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs." This statement may be viewed as prophetic when one looks at the Department's budget request for the last few years. For example, trust management comprised 9% of the total OST and BIA budgets in 1994; today it comprises 24-25%. The anticipation that programs carried out under the 1994 Act may need to be derived from reallocation of funds from other BIA or Department programs is even more pointed when one examines the tasks required under the Districts Court's recent order.

Given the lack of cost analysis contained in the legislative history, one could assume that Congress in enacting the 1994 Reform Act had no idea it may have required a multi-million or multi-billion dollar accounting.

In 1996, five IIM beneficiaries filed the *Cobell v. Norton* class action lawsuit alleging that the government had breached its fiduciary duty in managing the IIM accounts. In 1999, a Federal district court held, in a decision affirmed on appeal in 2001, that the government had breached its fiduciary obligations to plaintiffs. In the litigation, the plaintiffs have sought an accounting, rather than monetary damages, but their argument is

that they are owed any money that the government collected but cannot prove was properly distributed to individual Indians since 1887, some of which the government cannot do because of the unavailability of records. Under the plaintiff's theory, they are owed as much as the total amount collected since 1887 (which is estimated to be $13 billion), plus interest. They have estimated the amount to be over $176 billion.

Organizational Realignment

In August 2001, during our formulation of the FY 2003 budget, various proposals and issues were identified concerning the trust asset management roles of BIA, OST, and other Departmental entities carrying out trust functions. By that time, the Department had heard from many sources – e.g., the Special Trustee, the Court Monitor in *Cobell v. Norton*, and through budget review – and all recommended a multi-bureau consolidation of trust functions throughout the Department. In short, the Department realized it had to provide an organizational structure that focused on its responsibilities to both individual Indians and tribal beneficiaries.

Tribal representatives agreed with the Department that the status quo was not acceptable, and that the Department's longstanding approach to trust management needed to change. Moreover, this change had to be reflected in a system that is accountable at every level with people trained in the principles of fiduciary trust management.

In November 2001, the Department of the Interior submitted to the House and Senate Appropriations Subcommittees on Interior and Related Agencies a request for approval to reprogram funds to establish a new Bureau of Indian Trust Asset Management as well as a new Assistant Secretary for Indian Trust Asset Management. The main concept of the Bureau of Indian Trust Asset Management was to consolidate all fiduciary trust functions performed by the various departmental bureaus and offices under a single, executive sponsor in a separate bureau from the BIA.

Tribal leaders objected to the proposal, articulating a number of concerns including:

1 their view that consultation done on the proposal was insufficient;

2 their uncertainty regarding the effect of the proposed reorganization on tribes that compact or contract for trust functions; and

3 their opinion that stripping trust management responsibilities from the BIA and placing these responsibilities into a new Bureau would ultimately reduce the funding available to the BIA to carry out the other services the United States provides to Indian tribes and their members.

The Senate Appropriations Subcommittee on Interior and Related Agencies asked the

Department to resubmit its reprogramming proposal after the completion of additional consultation with the Indian community, a continued review of the management and organization of the Department's trust program, and further coordination with the authorizing committees of Congress.

The Department spent many months addressing this request. Indeed, the issue of trust management reform has eclipsed any other faced by the Department in terms of the time, energy and effort brought to bear on any issue before this Administration.

Consultation Efforts

The Department committed to a consultation process on the issue of trust reform and organizational reform that was one of the most extensive consultation efforts ever undertaken. Over 45 meetings were held with Tribal leaders in which senior level officials from the Department were in attendance. The first meeting occurred in November 2001, in Spokane, Washington. Nine additional meetings followed in different locations, the first of which was attended by the Secretary. During those meetings, participants requested a different format for consultation on this issue.

Early in the process, the Tribes asked the Department to participate in a Task Force in which the Tribes and senior Departmental officers, including the Deputy Secretary, the Assistant Secretary for Indian Affairs and the Special Trustee, could sit down together and discuss collaboratively the organizational issues inherent in trust reform. In January of 2002, the Joint Tribal Leader/ Department of the Interior Task Force on Trust Reform (Task Force) was created, and funded for approximately one million dollars.

The purpose of the Task Force, as defined in the protocol agreement, was to:

> "develop and evaluate organizational options to improve the integrity, efficiency, and effectiveness of the Departmental Indian Trust Operations consistent with Indian treaty rights, Indian trust law, and the government-to-government relationship." [emphasis added]

Its charge included review of the numerous proposals for trust reform that had been submitted in response to the Department's Bureau of Indian Trust Asset Management proposal and to provide proposals to the Secretary on organizational alternatives. In addition to reviewing all proposals, the Task Force was to assist the Department in its review of current practices.

The Task Force held ten, joint, multi-day meetings throughout the country. Meetings were held in Shepherdstown, WV, Phoenix, AZ, San Diego, CA, Minneapolis, MN, and Bismarck, ND, Portland OR, Anchorage, AK, Billings, MT, Alexandria, VA, and Washington, DC.

Task Force Report

On June 4, 2002, the Task Force presented its initial report containing its findings and recommendations on the Interior trust organization. The Task Force received more than forty separate alternative organizational proposals (or submissions with observations), providing a wide variety of options for consideration. The options ranged from retaining the status quo to the creation of a new Department of Indian Affairs. Some proposals stated a preference to place only the Department's trust responsibilities outside of the Department of the Interior.

Task Force members analyzed all of the proposals and created several generic composite options reflecting the best features and major elements presented by the entire body of the alternative proposals. The Task Force report stated that the principal focus of further consultation should involve the configuration of line management officials, from top to bottom, in each alternative as well as the grouping of staff support functions. At the May 2002 Task Force meeting in Minneapolis, Minnesota, the Task Force agreed to initiate regional consultation meetings in Indian Country during June and early July for the benefit of tribal leaders who were unable to travel to any national meeting. The purpose of those meetings was to discuss the deliberations and recommendations of the task force with local tribal leaders and to receive guidance from them on moving forward.

After the regional consultations, the Task Force ultimately reached agreement to recommend that Congress establish a new position, an Under Secretary for Indian Affairs that would be subject to Presidential appointment and Senate confirmation and would report directly to the Secretary. The Under Secretary would have direct line authority over all aspects of Indian affairs within the Department. This authority would include the coordination of trust reform efforts across the relevant agencies and programs within the Department to ensure these functions would be performed in a manner consistent with its trust responsibility. Also, the Office of the Special Trustee would be phased-out.

The Task Force also reached agreement on the elevation of the Office of Self-Governance to the office of the new Under Secretary for Indian Affairs. This would enhance the abilities of the tribes that are interested in moving toward more compacting and contracting to carry out the services due to Indian beneficiaries. Similarly, the Task Force agreed to recommend to Congress that it create a Director of Trust Accountability reporting directly to the Under Secretary who would have the day-to-day responsibility for overseeing the trust programs of the Department.

In addition, a working group of the Task Force reached agreement on the restructuring of the Bureau of Indian Affairs to create separate lines of authority for the provision of trust and non-trust services. This structure would provide greater accountability and an increased focus on our fiduciary responsibilities.

The Task Force then began the development of legislation that would accomplish the

elements of the agreements regarding reorganization that needed Congressional authorization, namely the new Under Secretary position. However, the Tribal leaders on the Task Force stated that they could not support any legislation unless it also included legislative trust standards and separate provisions providing private rights of action related to trust duties. The inclusion of these provisions was not acceptable to the United States. At that point, the Task Force agreed that it could not go forward to the Congress with a legislative proposal.

On September 17, 2002, the Judge presiding over the *Cobell v. Norton* case ordered the Department to present to the Court by January 6, 2003 "a plan for bringing itself into compliance with the fiduciary obligations it owes to the IIM trust beneficiaries." The first element discussed in the Department's Fiduciary Obligations Compliance Plan is reorganization. The plan describes the reorganization as follows:

> "The reorganization within the BIA and OST places a particular focus on each organization's fiduciary duties to Indian individual and tribal beneficiaries. For instance, land and natural resource management is located in the BIA because it has demonstrated expertise in this area of the trust. The OST has been given the direction to expand its operational role in addition to its statutory oversight duties. As a result, OST will develop a regional and agency presence to ensure that trust standards are followed in the management of these assets and will retain the responsibility for financial asset management. By further developing and taking advantage of the strengths of each organization, Interior will have a more cost effective, efficient and successful trust management system. Simply put, this reorganization dedicates more trained personnel to provide consolidated trust services, increases the emphasis on tribal contracting and provides direct trust accountability."

The Department established an organizational approach that differed significantly from its original proposal presented in 2001 and, instead, was closely aligned with, and was a product of, the insight gained from the consultation process the Department underwent. Importantly, the reorganization complied with concepts determined during the consultation process to be instrumental to any reorganization, including:

- **Keeping specific management decisions about trust assets at the agency level**. The reorganization left decision making at the agency level where expertise and knowledge of an individual tribe's or person's needs is greatest.

- **Creating a Trust Center and trust officers.** The reorganization created these in the Office of the Special Trustee to provide improved and consolidated beneficiary services.

- **Promoting the idea of Self-Governance and Self-Determination**. The Task

Force recommended that the Office of Self-Governance be placed under a new Under Secretary to underscore its importance and expand the ability of tribes to compact outside of the BIA. Instead, we created a new Deputy Assistant Secretary for Economic Development Policy and expanded the role of the Office of Self-Governance to include policy development and coordination for all self-determination programs.

- **Ensuring Trust Accountability by creating a new Office of Trust Accountability under the new Undersecretary.** Within OST, a Deputy Special Trustee for Trust Accountability was created to be responsible for trust training; trust regulations, policies and procedures; and a Trust Program Management Center.

- **Creating a new Undersecretary for Trust reporting directly to the Secretary**. The creation of an Undersecretary position would have required legislation. Instead of an Undersecretary, we used the existing statutory framework.

On December 4, 2002, the Department submitted letters to the House and Senate Appropriations Committees regarding the Department's intention to reprogram funds to implement the reorganization. On December 18, 2002, the Department received letters in response from the Committees that were consistent with the Department's intention to reprogram.

On April 21, 2003, Secretary Norton made the reorganization effective by signing the Department of the Interior Manual, which established clear lines of responsibility by which the BIA provides trust services and OST provides fiduciary trust oversight.

Comprehensive Trust Model

The organizational realignment of the Office of the Assistant Secretary for Indian Affairs, the BIA, and OST two years ago was only one component in the Department's efforts to develop a comprehensive approach for improving Indian trust management. Beginning in 2002, the Department undertook a meticulous reengineering effort using a collaborative approach among all the Bureaus and Offices with trust responsibility. These Bureaus and Offices were the BIA, the Bureau of Land Management (BLM), Minerals Management Services (MMS), Office of Hearings and Appeals (OHA), and OST. This collaborative approach also integrated tribal input gathered in numerous consultative meetings.

The re-engineering effort began with documentation of "As-Is" processes -- a comprehensive description of the way major trust processes were originally performed -- providing the Department with an understanding of trust business operations, an opportunity to identify needs and places for improvement, and a better understanding of variances of practice among geographic regions and their causes.

The next phase of the effort was the "To-Be" project: redesigning these processes where appropriate. To help guide the "To-Be" project, DOI developed the Comprehensive Trust Management (CTM) Plan to define an approach for improving performance and accountability in the management of the trust. The CTM provides the overall trust business goals and objectives for DOI to achieve its fiduciary trust responsibilities. In addition to the CTM, recommendations from the documented "As-Is" Business Model and DOI subject matter experts were an important part of the effort.

The CTM identified three business lines:

1 Beneficiary trust representation.

2 Trust financial management.

3 Stewardship and management of land and natural resources.

Each business line consists of common business processes focused on a particular activity, and represents a distinct group of products or services for comprehensive trust management. Each business line also encompasses other related processes, products, and services within its scope.

Defining comprehensive trust management in terms of actual business lines is critical, because it provides a logical framework for an efficient organizational structure, and helps manage the expectations of both staff and beneficiaries. The CTM laid the groundwork for trust reform by providing the strategic direction for the Fiduciary Trust Model (FTM), which Secretary Norton approved on August 11, 2004.

The FTM is designed to improve beneficiary services for Tribes and individuals, ownership information, land and natural resource assets, trust funds assets, Indian self-governance and self-determination, and administrative services. When fully implemented, trust services will be transformed by implementing the major objectives identified in the FTM, which include:

1 Operating with standardized procedures that will allow the consistent execution of fiduciary responsibilities nationwide.

2 Utilizing automatic tracking and accountability for trust funds, from collection of receipts through disbursements and reporting to beneficiaries.

3 Providing accountability and protection of trust land and natural resources.

4 Developing partnerships with beneficiaries by engaging them in the management and use of their trust assets.

5 Migrating from 50+ fragmented data systems to an integrated nationwide system with automated workflow tools.

The new organization for trust programs places OST trust officers at the regional and agency level to ensure that the Department meets fiduciary trust responsibilities in the management of these trust assets. These trust officers are the first line of contact for tribal and individual beneficiaries for issues related to their ownership and use of trust assets. Within BIA, the reorganization separates the management of trust functions at the regional and agency levels, establishing regional and agency deputies for trust operations. The overall impact of the new organization is that Indian beneficiaries have an OST employee dedicated to providing answers to specific trust questions while allowing BIA employees to focus on their primary responsibilities. To date, 44 Fiduciary Trust Officers have been hired nationwide to serve as the primary point of contact for beneficiaries. An additional 8 will be hired by June 30, 2005. Within BIA, additional staffing to provide 12 deputy regional directors and 25 deputy agency superintendents for trust will permit more decisions to be made at the local level and provide for more efficient management of trust assets.

Examples of improvements to be made in 2005 and 2006 through implementation of the Fiduciary Trust Model include:

1 Continuing work to migrate from fragmented information data systems to an integrated nationwide system.

2 Standardizing documents to be recorded for approved conveyances and encumbrances in title transactions.

3 Providing for more secure fund processing by use of commercial lock boxes for receipt of funds.

4 Providing for improved and coordinated services for beneficiaries through a nationwide Beneficiary Call Center -- which went online in December 2004, and is currently providing beneficiaries with 95% first-line resolution.

Fractionation

The fractionation of individual Indian interests in the land that the federal government holds in trust remains one of the greatest challenges facing successful fiduciary trust management. As mentioned earlier in this statement, with each successive generation the individual interests in the allotted lands have become further subdivided or fractionated among heirs, each of whom gets a smaller and smaller interest in the land. As the number of individual interests grows and the size of the interests decreases, it becomes increasingly difficult and costly for the Federal government to manage the tracts and put them to their best economic use.

Many issues contribute to the problem. Individual owners are restricted from selling their interests to non-Indian third parties, and there is a cultural reluctance among some Indians to make wills, which would limit the subdivision of their interests in probate. Further, unlike private trust holdings, the Department maintains an IIM account for each Indian owner at no cost, even if the cost to manage the account far exceeds its revenue. Also, the lands are tax exempt and not subject to bankruptcy. Moreover, because the ownership interests are often very small, individual owners may see little benefit from ownership and have little incentive to find economic opportunities to maximize economic returns on the land.

The number of interests has been increasing annually even though the amount of land is not increasing. The Department worked extensively with this Committee on ways to amend the Indian Land Consolidation Act to halt this growth. The American Indian Probate Reform Act, signed by President Bush on October 28, 2004, contains new tools to improve probate and help slow the growth of fractionation. This new law creates a uniform probate code for Indians who have land held in trust and requires that a highly fractionated interest (less than 5 percent in a parcel of land) be inherited by a single heir when someone dies intestate. This will help prevent the further fractionation of extremely small interests. Also, the new law allows a co-owner of highly fractionated property at any time to request that Interior conduct a partition or forced sale among co-owners, assuming the co-owner is willing to pay at least fair market value for the entire parcel. While the new law is expected to slow the growth in fractionation over time, it will not solve the existing fractionation problem.

Interior spent an estimated $220 million for administrative costs related to management of individual interests in trust lands in FY 2003 and costs continue to grow. These costs will continue to increase as the number of interests continues to grow. The Federal government's costs to manage very small interests can be especially high. For example, Interior maintains about 20,000 individual accounts with a balance between one cent and one dollar, which have had no activity (no revenue or disbursements) for the previous 18 months. The total sum included in these accounts is about $5,700, with an average balance of 30 cents.

Indian Land Consolidation Program

The Interior Department operates the Indian Land Consolidation Program to purchase individual Indian interests from willing sellers at fair market value to consolidate property interests and reduce fractionation. As of December 31, 2004, the program had purchased 117,661 ownership interests. The President's FY 2005 Budget proposed $70 million, more than triple the $22 million appropriated for the program in FY 2004, and Congress ultimately appropriated $34.5 million in FY 2005. The President's FY 2006 budget proposes $34.5 million, the same as the 2005 enacted level. This funding will provide for a nationwide acquisition program that can acquire an estimated 46,000 highly

fractionated interests.

The Purchase of fractional interests increases the likelihood of more productive economic use of the land, reduces record keeping and large numbers of small-dollar financial transactions, and decreases the number of interests subject to probate.

Historical Accounting

Section 102 of the American Indian Trust Fund Management Reform Act of 1994 requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. §4011 (a))."

On January 6, 2003, as ordered by the court in the Cobell litigation, the Department filed The Historical Accounting Plan for Individual Indian Money Accounts. The Department's 2003 accounting plan provides for a historical accounting for about 260,000 IIM accounts over a five-year period at a cost estimated in 2003 of $335 million using both transaction-by-transaction and statistical sampling techniques to develop assurances of the accuracy of the statements of accounts.

The 2006 budget request for historical accounting by the Office of Historical Trust Accounting is $135 million, an increase of $77.8 million over the 2005 enacted level. This amount will provide $95.0 million for IIM accounting, an increase of $50.0 million above the 2005 level, and $40.0 million for tribal accounting, an increase of $27.8 million above the 2005 level.

The 2006 budget request for IIM accounting is based on an estimate of the Department's costs to continue implementation of the Department's January 6, 2003 plan. However, on February 23, 2005, the U.S. District Court in the *Cobell* case reinstated its version of the historical accounting as set out in the district court's September 25, 2003, structural injunction.

To understand the significance of the court order, it is useful to compare it to the historical accounting plan that DOI prepared, but which, in large part, the court rejected.

	Interior's Plan	**Structural Injunction**
Estimated Cost	**$335 Million1**	**$10-12 Billion2**
Time to Complete	**5 years**	**3 years for most accounting3**

1 2003 Estimate

2 Estimate is preliminary and may possibly be significantly more.

3 Even though the order gives until September 30, 2007 to complete the Special Deposit Accounts, it

Verification Approach	**Verify all transactions over $5000.00 by review of supporting documents. Verification by statistical sampling of transactions under $5000.00**	**Verify all transactions by review of supporting documents**
Trust Asset Accounting	**Describe trust assets owned by each IIM account holder as of December 31, 2000**	**Describe all trust assets ever owned by current IIM account holders or their predecessors in interest from 1887 to the present**
Deceased IIM Account Holders	**No accounting for beneficiaries who died prior to October 31, 1994; probate considered final**	**Full accounting for all IIM accounts since 1887**
Closed IIM Accounts	**No accounting for IIM accounts closed prior to October 31, 1994**	**Full accounting for all IIM accounts since 1887**
Direct Pay (rents and royalties paid directly to Indians and never held in trust)	**No accounting**	**Full accounting for all direct payments since 1887**
Time Frame	**Accountings back to 1938 or inception of IIM account, whichever is later**	**Accountings back to 1887**

The structural injunction requires the review and documentation of approximately 61 million financial transactions and supporting land ownership records. DOI currently holds approximately 500-600 million Indian trust records, and the injunction appears to necessitate the indexing and electronic imaging of the vast majority of these records. In addition, the court is requiring DOI to obtain additional records from third parties, which may include state and county record offices, energy companies, timber companies, other former and current lessees, tribes, and individual Indians. The court seems to anticipate that DOI will need to subpoena documents from thousands of private sources and then evaluate the documents' relevance to the historical accounting.

The recent court order will have significant budget implications in both this fiscal year and ones to follow. The cost of doing the historical accounting will rise from the

---

requires an accounting for individual Indians to be completed by September 30, 2006.

hundreds of millions envisioned by the Department's plan to the billions.

Summary

Trust reform has remained a high priority for this Administration. We have made significant reforms in trust management during the past four years and we will continue to evaluate and improve our management of the trust. Mr. Chairman, we cannot do it alone. We stand at a crossroads in history and must work together to resolve issues, such as *Cobell*, promptly and in a meaningful way that will fulfill our responsibilities to our beneficiaries and to the American taxpayer. This concludes my statement. I would be happy to answer any questions the Committee may have.