

An interview with Ross Swimmer

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by: Jerry Reynolds / Indian Country Today

Part one

Editors' note: Ross Swimmer is the Special Trustee for Indian trust funds within the Department of the Interior. The Office of the Special Trustee was authorized by the 1994 American Indian Trust Fund Management Reform Act to house trust accounts and accounting functions that were previously the province of the BIA. Broadly considered, the office is charged with reforming Individual Indian Money accounting practice. The Senate confirmed Swimmer as the Special Trustee in 2003.

Swimmer began a recent lengthy interview with Indian Country Today by recounting occasions when misinformation about the IIM trust, the subject of the Cobell v. Norton lawsuit that has pitted Interior against a plaintiff class of account holders, has made it into the media stream.

Ross Swimmer: We get a story like the little lady out in Navajo that's got pumping oil wells in her back yard. You know, "Back when granddaddy had this oil well I was getting X dollars a month. Now I'm only getting this." But it's she and 1,000 other owners now from granddaddy that are getting this. But they don't - there's not that explanation, you know. "Why aren't I a millionaire because I've got a pumping oil well?" Well it happens to belong to many, many people now, not just one like it did 40 years ago. [...]

Every time we see a name of somebody that's been taken advantage of ... in fact there's just no truth to it. And so we can't ... we're under the constraint that we can't talk about an individual's account. They [IIM account holders] can and the other side [in Cobell] can, but we can't go in and say, "Well wait a minute, John Jones, that's just not true, here's his account statement" ... because that's all under privacy of information without getting their release on it.

So we're hamstrung somewhat by that. ... When you hear these outrageous stories, I mean, it does sound like we're just, some of these cases, we're just out there beating these poor people to death. And almost invariably there's another side to the story. And just say, "Wait a minute. There are instances that are real. Let's go out and figure out why they didn't get their money."

The other point that you made in your article ["Interior calls Hall on accuracy of trust account," Vol. 25, Iss. 47] I really appreciate. Because you finally are picking up on what the lawsuit's about. It's about money. Elouise [Cobell] wants to make it about mismanagement of the asset. And it's not that. And nobody is defending or prosecuting the mismanagement of the asset. There are instances that we've had problems with that and they've been cited in audit reports, where money came in that didn't get deposited immediately, where there's overgrazing on the land, where maybe there's noxious weeds that weren't taken care of. All of those kinds of things can constitute mismanagement, but they have nothing to do with this lawsuit. It is a claim for an accounting, and it just keeps morphing.

We get to work on the other side, which is the reform, so that all of these both real and perceived allegations of mismanagement get corrected. That's what we can talk about today.

ICT: Great. And just let me make sure though - there are some, you wouldn't deny, there are some cases where, you know, people have had problems because checks didn't get out and things like that? There are some real cases like that out there?

Swimmer: ... There are many instances where I agree with past [Government Accounting Office], [Office of the Inspector General], all the audits that have been done, that we could do, could have done a better job of both managing the trust assets and the trust funds. The question is, at what cost? And that has to be part of the equation. For instance, we have situations where there are upwards of 2 million acres of land. These 2 million acres of land in the BIA have maybe two range managers who are supposed to go out and monitor for trespass, who are supposed to monitor for the condition of the land to make sure that they're not overgrazing, that you have the right number of cows out on the land and that sort of thing.

Well, you know if you say can two people do that - well, that's what Congress has given us to work with. That's what, that's what Congress says - you've got money for two people. That's the extent of the trust, in this particular trust.

Now if I were in the private sector, I would say, I might say, "I can't do that with two people, I'd go to the boss and say I've got to have six people." ... In our case Congress says, "I give you two people. You do the best you can." Now from our side we say, "Well, you know, we will do the best we can" and that's the standard that we have to abide by because that's the only resource we have without going into the trust corpus, or without going into the income.

When we go out into the forest and we cut the trees, 100 percent of the proceeds, less 10 percent for some replanting costs, goes to the beneficiary. Again, if you were in a private sector trust, the cost of cutting the trees would be paid for by the sale of the trees - some of the income would go to financing the cost of doing all that, the survey, the appraisal, the actual harvesting and that kind of thing. In this trust it doesn't. So in essence you have 100 percent of the benefit going to the beneficiary, and 100 percent of the cost coming from the federal budget. Congress controls that and says this is what you have to work with.

Continued in part two



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Part two

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Ross Swimmer: ... As this trust grew over the years, it was managed by as many as 80 different local agencies. And these were BIA agencies with superintendents. Each of them set up the kind of management system that they felt was needed for the local area. When you look at the management side of it, then you say, well, if you're in location A and you're remote from the bank, you don't have a depository nearby.

Farmer Jones brings his lease check into that location. That location then has to mail that check, usually to the regional office. First of all, they've got to log it in and all that, which may take them a day to do. But then they get it mailed someplace else. It may take one, two or three days. Then that office has to process the check and get it into a bank. So in the best-case scenario you could say that from the time Farmer Jones makes his payment, it's five days until that check gets deposited in the U.S. Treasury. During those five days, that person lost interest.

Now in the private sector, that would be mismanagement. You would not have a gap of that long a time, but there would be other processes in place in the private sector to avoid it, such as a lockbox. Where Farmer Jones, instead of carrying his check to the agency, giving it to someone who has to make out five sheets on what to do with it and then put it in the envelope, mail it and then they got it.

Instead Farmer Jones puts it in an envelope, mails it and the next day it gets to a lockbox where it's immediately deposited and gains interest. That's one of the reforms that we think is important, and it's not to

say that it was necessarily mismanagement because before it was five days of lost interest. The fact is that's simply the way the system operated all this time, and it was as efficient a system as you could have given the situation that was out on the ground. But in order to do that and reform this trust, so that we can improve the management, we say we're going to create a lockbox.

We're not going to take money at the local agency. ... We are able to save a lot of time by not having hundreds of thousands of checks processed at the local agencies. Now those people are freed up, maybe they can hire another range manager, or use their money more effectively to do something else. So that's what I'm talking about in the context of mismanagement. You look at the oil and gas business. There is no question that there are accounting issues from the oil and gas companies and whether they paid the right amount of royalty. So the department [of Interior] back in the '80s created what is called the Minerals Management Service.

Minerals Management Service is, their duty is to audit these energy companies to be sure that whatever method is used to tabulate the royalties is accurate, and actually does give the right amount. That was a reform that was implemented in the early 1980s with the Minerals Management Service doing these audits. Now, you go back 50 or 60 years and say, well, OK the oil company reported that they produced this many barrels of oil sold at this price and here's the royalty. Were they audited all the time? Probably not. You know, were mistakes made? Could be, you know. But again, where do you draw the line; and so how far back in history are we going to go to try to determine what the value of that might be? It's still all speculation. ...

Then we've got the case of the fellow in Oklahoma who died, and his heirs looking back now on his transactions say, well you know, he sold 20 acres of his land, and he sold it in fee, minerals and everything. Well ... somebody drilled an oil well. That oil well's produced \$6 million.

Now he - we know that old granddad never would have sold that 20 acres - he shouldn't have. He shouldn't have been allowed to sell it. Well again, you know, hindsight's great. But the fact is if you look at his ledger card, showing what he did with the money, things like he went out and bought a horse, he repaired his roof, he bought groceries - I mean he needed the money. He sold his 20 acres. So you know, whether ... that constitutes mismanagement, that's a real question. Did it? I mean where does the bureau draw the line? - "Look fella, you know, you got oil wells around here, do you really want to sell this land? Maybe you want to retain minerals? Maybe you want to take" - but the fact is that he sold it, the evidence is there, the money came in, the money went out, you know. So that's what we look at. ...

The other thing, we obviously in our listening conferences we've attended through [the InterTribal Monitoring Association], we have picked up on a lot of concern from individuals who say, "I can't get information. I just go to the BIA and they shuffle me around from one person to another - I just, you know I'm frustrated. I can't get account information, I can't find out you know when my leases are due or who's leasing my property, and I want to know these things."

So we've created the call center. We've said we want to give every beneficiary a number, toll-free, where they can call and get basic information, and if there's a complex issue involved, like a trespass or something, they can be sure that when they call the beneficiary call center, that information will get passed on to the trust officer.

The trust officer - think about this. You have a retirement account with a fiduciary bank and trust company, a 401(k) or a Schwab account.

If you want information on that, you're generally going to talk to what is called a trust officer. You're going to talk to somebody that has some general, pretty good information on investments, can give advice, who understands what the term "fiduciary" means and has some knowledge about your particular situation.

Maybe you've got a 401(k), it's got a half-million bucks in it; you want to know, well, you know we didn't do too well last year, what do you think some investments for this year might be that would be better perhaps than what we were in last year? So you've got somebody you can sit and visit with.

This [IIM] never had a trust officer available to a beneficiary until three years ago, two and a half years ago. ... Doesn't mean that the work wasn't being done appropriately. It's just that there was no one in the BIA at the agency offices that was tasked with the title of trust officer. You had social workers, you had realty people, had people doing probate, you have law enforcement, education. But if you went in and said, "I've got an account that's got \$100,000 in it from this lease we just signed, and I want to talk to a trust officer."

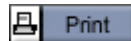
You know all they could do is scratch their head and say, "What's that?" So they would get sent to realty.

Well, realty might say well, yeah, we did, we leased that land like you - you know, we talked about it, we leased the land. I have to go over to finance and see where the money is. I'm not sure when it came in, I imagine we've got it but it'll take me a couple days because she's on vacation, but I'll let you know in a few days whether we got the money and where it is and you know, that sort of thing.

Well, if you called the bank and said, "Can you give me an account balance?" Well, you know, our bookkeeper's out today, probably can't do it for a couple weeks or three days - you wouldn't feel real comfortable. Again, that would come under a claim of mismanagement. But it might not be. It might be, in fact, that that's the system, that's the way it worked.

So our response to that in the trustee's office is look, let's get trust officers out there who have one single duty, and that is to communicate with the beneficiary. They don't have to build roads, they don't have to lock people up, they don't have to do social work; they have to be there to meet and talk with the beneficiary and connect with that person and be available. ...

Continued in part three



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Part Three

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Swimmer: So we've got trust officers, we've got the lockbox, we've got the beneficiary call center. What we do now is we look at the systems. How does this system work? The BIA, because of the way it developed over the years - I mentioned the 80 agencies - came into the information age by developing a lot of homegrown IT [information technology] systems. Whenever an area director, in some cases the superintendent, decided he would like to ... manage information in a data base, he'd grab ahold of whoever the latest computer jock was and said I need you to write me a program, so I can manage this realty business. And so they would write up a little program. As a result of that we've got MADS, GLADS, RIM, RDRS, IRMS - I mean there are 10 or 12 of these.

Indian Country Today: BITAM - don't forget BITAM.

Swimmer: Well, you know, we'd like to forget BITAM. So we have all these computer programs out there and none of them speak to each other. We had a 30-year-old title program that didn't speak to itself, I mean it was developed regionally. So if you had land in three regions, you had to every single, each one of those regions, to find out if you owned land there. You couldn't just put your name in the system and have it pop up for three properties.

Today, the average individual beneficiary has 12 or 13 properties, and often on that many reservations. So we had to do something about this. An attempt was made in the late '90s by the BIA. It was called TAAMS.

Unfortunately, it didn't work. They took an off-the-shelf system and then decided to customize it, and it just basically blew up on them. So beginning, then, in - with the development of the comprehensive trust management plan, which was sort of elementary, I mean a plan at least for what you're going to do to modernize this trust. We developed that in '03. Then we said, "Okay, we have the plan; but before we implement it, before we go buy all this software and start doing things, let's find out exactly how all these processes are done to date." And that you've heard referred to as an "as-is study."

We literally went across the country, talked to hundreds of people, and said, "I want you to document every trust activity, whether it's check collection, management of land, cutting timber, whatever it is I want you to document how you do it, what pieces of paper do you push to get this done?"

In '04, we then did what we call the "to be." We said "Okay, now we've seen how you're doing it, we have this comprehensive plan for how we think globally this program should work. Now, let's create the ideal trust model to manage this trust. What would you do instead of what you're doing or in addition to what you're doing, as far as leasing the land, collecting the money, investing, managing the assets, and all that? What - how would you do it?"

We spent almost a year ... it's about a thousand pages. And we went through all the business lines, all the business processes, said, "Okay ... here's how we think we should do it." And out of that came this fiduciary trust model. If I'm going to set up as good as possible of a trust company within the Department of the Interior to manage the trust assets and the money, how would I do it?

This [fiduciary trust model] is what we chose. And this was basically agreed to by all the participants. ... So we did that, and we began what I call the modernization process. Now - now we know what software we need. We knew because of what we saw that we had to have some title software. Back in the '90s an effort had been made to develop a title software program. We completed the development of that with a company down in Texas called CGI. CGI - we still call it the TAAMS, but they took the title program, completed the ... development work on it and we installed it across the BIA, so every title plant now has new software.

But one of the things we found as we studied this situation was that for many, many years - I don't know how many, it's been 40 or 50 years, I guess - the BIA operated - and you'll hear this reference made sometimes in some of the [court] testimony - the BIA operated two ownership systems. ... You got two systems, one is the record ownership, one is who gets paid. Ideally, they would be reconciled. But they didn't always get reconciled.

Again, part of it was staffing. The one thing the BIA wanted to be sure of is that the right people got paid. So guess which system they kept up. They would always make sure, to the best they could, that the payment system ... was current. So when a probate occurred, they would make sure that they went through and recorded the heirship in the IRMS, or the MADS, GLADS or whatever system they were using. So that when the money came in, that money would be distributed to the right people.

However, while they should have at the same time updated the official title system, and put the new heirs in with their proportion of ownership of the land, they didn't always do it immediately. And so if you went to the two title systems as they were using them, you would find they were not in balance. ... Both systems didn't always get reconciled like they should.

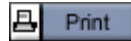
Again, this is used in the public as saying, "Well, they don't even know who owns this land. They don't even know who the beneficiaries are." That's not true. We do know. It's just that again, it takes a lot of manual time. For instance, somebody says, "I want to get a title status report on my land. I'm going to sell it, or I want to find out what it's worth, or I may want to gift it to somebody." So they go to the LTRO [Land Record Title Office], like a county courthouse, and say, "I want to know who owns this property." It could take three or four months. Because the LTRO officer ... would have to go over to the IRMS system and say, "I need all the documents, I need all the leases, I need all of the probate information you've recorded over here because I've got to bring my records current on this individual in order to get him a title status report." It could be done, but it couldn't be done tomorrow for 260,000 people.

ICT: No efficiency possible?

Swimmer: None, none. It was an antiquated system, 30, 40 years old; it was the beginning of information technology, far away from where we are today. So another reform - collapse it. One title system, one pay system. The title system becomes the pay system. And if there are anomalies, where somebody gets paid that doesn't own, that's recorded in the title system. So the title system becomes, as it should, the system of

record. We eliminate all these other so-called payment systems out there.

Continued in part four



An interview with Ross Swimmer

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Part Four

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Ross Swimmer: We've created the accounts receivable, or what we call the funds receivable. We've created the invoicing system. We've created the single title system. We have now three IT systems that are basically replacing about 12, maybe more, legacy systems, older systems, and most of them are at least 30 years old now. So these three systems, called the payment system, the ... accounting system ... and the title system, they all communicate so when information comes in on one of them it gets spread to the others, automatically.

So all this stuff, in theory - and it's not, it's - we've only converted one region completely, the Anadarko region. In theory what happens is the lease is made, the payments are agreed to, invoicing goes out, payment comes in the lock box, immediately gets spread to the owner of the property via the electronic input to the title plan, immediately gets booked into Treasury and gets put on that person's account, and then a check is cut automatically to that person and goes out, assuming the check's more than \$15. Or if it's a direct deposit, then it goes in no matter what amount it is.

So, you know, again, this kind of technology, this kind of operation, we now have what I call a proven concept because it works, and it's installed fully in one region, which is our highest income producing region in the bureau, the Anadarko, mainly because of oil and gas payments.

We are now converting Rocky Mountain and Great Plains. By the end of ... this year we will have roughly 60 percent. By the end of 2007, we should have captured ... 95 percent of all income and all individual beneficiaries in the new system. ...

The other thing that we have done, the statute, the '94 reform act, says that the department will send a statement of account to individual beneficiaries that will contain the source, type, status of funds, ending balance, gains and losses ... The BIA had not previously sent statements out that contained the source of funds. Once again, another sore point for the beneficiaries and rightfully so. I mean if you got a statement, again, from your trust company and said you had earnings this month of a thousand dollars, and you had multiple properties you'd say, "Well, which one did it come from?" Well, we can give it to you, but it's going to take a little while to figure it out. Because all this money came in and went into your account.

Indian Country Today: The systems don't talk to each other?

Swimmer: Right. The new asset statements are generated from the new systems. The asset statements will contain a listing of all of your property holdings, and it will contain encumbrances against them - does this

piece of property have a right of way, does it have a lease, does it have - is there a pending sale, whatever? And it will show the income came from those different properties. Now again, that is in place in Anadarko and those asset statements are going out to people now. ...

I think that by 2008, 2009, we're going to be in what I call sort of a steady state, where we're going to be operating the basic trust operation. ...

We still have these intractable problems of [land] fractionation. ... There are some 3, 3.2 million interests owned by 213,000 people. Something's got to be done, and certainly I think we would like to be there to help guide that effort, you know, if Congress really gets engaged and decides they want to do something about it. ...

ICT: Do you have any thoughts to share on the legislated settlement possibilities [in Cobell v. Norton], or are you going to stay out of that?

Swimmer: Well, we're sort of like everyone else: we would love to get rid of this case. ... It is incredibly burdensome. ... What has resulted from this case, just one instance, is the lack of Internet. We don't have it. We've got intranet, and the judge is even trying to shut that down [in Cobell, over security concerns]. ... So we want out of it too. We'd love to settle.

Unfortunately, we're having trouble finding a basis for a number [a dollar figure to award IIM account holders for losses]. The expectations from the lawsuit are such that a lot of Indian people think there's going to be a huge payday. ... As we talked earlier, the lawsuit is about an accounting. And it's [the accounting] not showing that there's a lot of money missing. ... We're spending money to reconcile a transaction that results in someone getting paid 58 cents. And it costs, on average, couple thousand dollars to reconcile a transaction. I mean you go back to 1985, and you had a lease for \$300, 400 people got some money out of it, each one of those is a transaction when that lease was paid, each one of them we have to go through and we plug it in to the tool, then we have to go find the lease, we have to see the amount, we have to compare it with what came in - I mean all this is done to verify a transaction.

From 1985 until 2000, there were somewhere around 30 million-plus transactions. Twenty-five million of those were less than a dollar. I mean those are the kinds of things we're dealing with. It doesn't make any sense. We've done enough accounting. And we'll continue to do accounting. We can account, you know, from now on. But the accounting is going to show what it shows. And where you go from there I don't know, but it doesn't give you a real good feeling to have to say, "Well, based on what you've found so far, can we cobble together a basis for \$10 billion, or \$27 billion or \$176 billion?" So we have to come up with something else, and that's where I think the Congress is really trying to focus. What can we put into this thing to make it reasonable? ...

