

Oral Statement of NCAI President Tex G. Hall
House Committee on Resources
July 9, 2003

" Can a process be developed to settle matters related to the Indian trust funds law suit"

Chairman Pombo, Representative Rayhall, and members of the Committee, thank you for your invitation to testify today. On behalf of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The Question posed before this hearing should perhaps considered in two parts: (1) Should a process be developed to settle matters related to the Indian trust fund lawsuit?; and (2) Can an equitable process be established?

The answer to the first question is yes. Tribal leaders have consistently supported the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting. At the same time, tribes are very concerned about the impacts of the litigation. From the beginning, the Department of Interior has operated with the primary interest of protecting itself from liability. This litigation posture has had a direct impact on Interior's willingness to provide the land management services that are so vital to Indian Country. But perhaps more significantly, the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work

together in a government-to-government relationship.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the Department of Interior to carry out its trust responsibilities. Because of this, NCAI believes that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future.

The answer to the second question is also yes, an equitable process for settlement can be developed, but it is clearly not the one provided for in Section 137 of the House Interior Appropriations Bill. We are very grateful that the Resources Committee understands the need to develop a process that would lead to settlement. The goal should be to develop a good process of consultation that will lead to the development of a settlement proposal. If a good process is developed, then the end result will have legitimacy -- and that is the larger goal -- to compensate the account holders fairly and put the issue behind us. I serve as the President of NCAI, and the organization has not yet come to a position on what a settlement process should look like. I know that good ideas will come forward from Indian country, and the very

beginning of the process should include consultation with the tribes and the individual Indian account holders. NCAI is convening a meeting among tribal leaders on July 24 in Portland, Oregon to discuss this issue, and I know we will be scheduling additional meetings on the same topic. We must develop a timetable, and I would suggest that we consult on this issue through the summer and fall, and develop a proposal by the end of February 2004.

In order to initiate discussion I would like to suggest a number of principles that I believe should be taken into account in developing any settlement process.

- 1) Take the time to do it right. We have wasted over 20 years looking for a quick fix. Developing a lasting solution is going to take time and resources.
- 2) Establish a process that will keep the pressure on for settlement. The parties to the litigation have tried several times resolve the case but have been unsuccessful in reaching agreement. I believe that this has been due in large part to a failure to establish a structured process to support settlement discussions. While settlement deliberations are in process, I believe the litigation should continue until the historical accounting has been settled, and the Department has successfully implemented the necessary reforms to ensure sound trust management in the

future. I would like to offer three specific suggestions for consideration:

- a. Congress should be involved in developing a settlement process. I believe that the House Resources Committee and the Senate Committee on Indian Affairs should forge an alliance to work on this issue and convene meetings to consult with the parties to the litigation and with the tribes and the allottee associations.
- b. Ensure that settlement also fixes trust systems for the future. The historical record has shown that DOI will only move forward in improving Indian trust systems if there is exterior pressure from the courts or from Congress. It would be disastrous to create a settlement that would resolve the past liability and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and accounting.
- c. An independent body should play a significant role in the settlement process. The tribes and the IIM account holders will distrust any process where the Secretary of Interior is in control of all aspects of the settlement. To ensure fairness, an independent body should play a significant role.

- 3) One size will not fit all. There is a great deal of diversity among account holders. Some have large stakes in very valuable natural resources, such as oil, gas, or timber. Others have only a small fractionated interest that is worth less than a dollar. Any settlement process must be able to deal with different classes of accounts and interests.
- 4) Account holders should have the opportunity to negotiate and make a choice. You cannot force a "settlement." Fairness will be determined by the ability to negotiate an arms length agreement based on a reasonable knowledge and understanding of the underlying facts and circumstances.
- 5) Move quickly to bring relief to elder account holders. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to enjoy the fruits of a settlement and improve their financial conditions immediately.
- 6) Do not allow the settlement process to prey on the most vulnerable. Many Indian people are not in a good position to evaluate whether or not they are receiving a fair settlement. They do not have good information about their property or the activities that took place on it. Many are economically impoverished or are traditional language speakers and could be wrongly encouraged

to simply accept any offer of a settlement - no matter how unfair.

7) Funds for the settlement must not deplete funding for federal Indian programs. The resources for fixing the broken system must not come from reprogramming the budget away from other vitally needed BIA services. This is one area where we agree with Section 137. The judgment fund is the right source of federal money to settle Indian trust claims, so long as the DOI is not required to reimburse the judgment fund.

8) Consider the impact on tribal trust fund claims. The tribal trust fund claims are separate and involve very different issues and will have to be resolved on a separate basis. At the same time, any settlement process will set precedents for the tribal claims and this should be kept in mind as the process moves forward.

The Views of One IIM Account Holder on Information Needed to Settle

- I am a cattle and buffalo rancher, an owner of trust land within the Mandan, Arikara & Hidatsa Nation Reservation, and also an IIM account holder.
- I would like to share my own personal views on what information I believe would be necessary for me to consider a settlement for my trust fund accounting claims.

- I am the sole owner of seven different parcels of trust land which total slightly over 1000 acres, and I own fractionated interests in another seven or eight parcels. I directly manage three of the larger units of land in my ranch operation, so these funds do not go through my IIM account. However, the other four units of land are managed by the BIA and grouped together with other trust land to form grazing ranges that are permitted to other cattle ranchers for an annual grazing fee. The BIA has leased some gravel mining on these lands.
- The one parcel of land that I inherited from my mother's side has had significant oil development in the past. The northwest corner of our reservation had a lot of oil development and oil leasing beginning in the 1950's and continuing through the 1980's. Up to 1980, my mother was receiving significant oil revenues from an oil well on her property - which has now passed to me.
- My biggest concern with BIA accounting is that I occasionally receive a trust funds check in the mail, but I never receive any information about which property the funds were received from. I don't know what leases have been let out, or what rate they received, or whether the full amount was correctly collected, invested and distributed. All I get is a check in the mail. I am supposed to trust the BIA that everything was accounted for correctly. My mother had the same concerns with her oil lease. She would simply receive

a check from the BIA with no indication about how many barrels or the market rate at which they were sold.

- Let's say that one day the Secretary of Interior showed up on my doorstep, checkbook in hand, and said "Tex Hall I would like to settle your IIM accounting claims, how much do you need to make your claim go away?"
- Well I would be extremely surprised, and grateful, but I would have to explain that I will need some information before I am able to settle my claim.
- First, I would need a listing of all the tracts of land in which I have an ownership interest, and this includes my share in the fractionated lands where I have never received clear information. Second, I need to know what activities and leases have taken place on those lands.
- Of course I would want to have a full accounting. I would want copies of all the leases. I would want records of exactly how much was distributed in the past, to me and to my parents. I want to see the accounting ledger to see if the lease payments were properly collected, invested and distributed.
- But let's say that the Secretary responds that records are missing and a full accounting is not possible. Even in the lack of a full accounting, I could see my way clear toward a

settlement if I had some other kinds of information to make an educated estimation.

- I would still need to know exactly what property I own and have a good general sense of what activities took place on those properties. For this I believe I would need to have access to the BIA Agency Superintendent and the realty office personnel. Our local BIA people have a lot of information and I generally trust them to be truthful with me. I believe that having a cooperative and open relationship with the local BIA would facilitate settlements much more readily than the current adversarial approach.
- If we were considering the oil property, I would want to have a professional and independent opinion about how much property such as my mother's should have produced. This could be done with a direct study of any available records and analysis of prevailing market rates, or it could be done by comparison to similar properties at the same period of time. For the grazing land, I would want a different expert, and there could be any number of valid methods used to calculate the value of grazing land.
- Once I gained a general sense of how much should have been received from each property, then the burden would be on the Secretary to demonstrate how much had actually been distributed to me or to my predecessors. But then the Secretary may tell me once again that

these records are not available, so she would like to rely on a statistical sampling of the average rate of accounting error for similar accounts.

- I would want to know a great deal more about the methods she proposed to use, and whether it considered the types of errors and omissions that can occur in all phases of the trust business cycle, including title maintenance, probate, surveys, appraisal, sales procedures, enforcement of lease terms, collections, verification of resource quantity and value, accounting, investment, distribution and reporting.
- I will give you an example. In my part of the country the most common use of land is for grazing, and the BIA has never had adequate staff to enforce on overstocking - where a permittee will put more cattle on a piece of ground than allowed under the permit. After a couple of years this hurts the grazing resource, and next thing you know its carrying capacity has been cut in half. The Indian landowner is receiving only half of the value of the resource because the BIA did not properly carry out its responsibilities. This is a common problem on my reservation and I have seen it on other reservations throughout the country. Will the problems of lack of grazing enforcement in the Great Plains be factored into the methodology that the Secretary uses to determine the settlement offer? That is the kind of information I would need.

- At some point, it will come down to what number the Secretary had to offer. I would want to have the ability to accept or reject her offer based on my own understanding of what is fair and reasonable after I considered the properties involved and the activities on those properties. I would like to be able to make a counter-offer, and I may want to be able to divide up the different kinds of resources. I may feel comfortable with the analysis of grazing values, but I may want to go back and study the oil issues some more.
- At the end, I want to feel that I was treated fairly by the Secretary of Interior. Indian people have been so abused and mistreated by the federal government, we are not willing to let it happen again.
- Finally, I would like to note that this is only my own personal view of what might be necessary to settle my claims. Other account holders are in very different situations and might feel differently about what kind of information they need. One property owner might know that they have only a small interest in relatively low value land, so they would quickly accept a fixed offer. Another person might have extremely high value oil property and good reason to believe that royalties have gone uncollected. They may want much more research and investigation before they are willing to settle.

In Conclusion

I would like to note NCAI's strong opposition to Section 137 as it would be extraordinarily unfair to Indian account holders and there have been no hearings or consultation on this piece of legislation..

My written testimony contains a good deal more analysis of our concerns with the entire trust reform process, including our opposition to the ongoing BIA Reorganization, but I will leave that for your further review. On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into the trust reform effort. If we maintain a serious level of effort and commitment to work collaboratively, we can provide the guidance necessary to bring about true reform in trust administration.