



INDIAN REPORT

FEDERAL GOVERNMENT HAS OPPORTUNITY TO ELIMINATE FINANCIAL INJUSTICE

The word “trust” implies a relationship of special confidence, where one person relies on the integrity, ability, and character of another. In legal and banking circles, a trust is a financial contract in which a person or institution manages funds or properties of another person or group for their benefit. The trustee distributes the income generated to the beneficiary. The Department of Interior controls a significant proportion of Native American assets; as trustee, it has crucial responsibilities to uphold. Unlike banks, Interior had no standards or outside oversight; from 1887 on, it has made a hash of Indian fund accounting.

Congress has known about trust mismanagement since the 1920s but delayed passing reform legislation until 1994. Today, the federal government owes billions to Indian tribes and families but keeps up a pretense that all is well. Such incompetence and lack of integrity violates the public trust. It creates cynicism among Native Americans: “Our Great White Father promised to manage this money for the good Indians so they wouldn’t get ripped off by the big bad businessman” (*Indian Country Blog*, 3/11/05).

It is the legal responsibility of the Department of Interior to uphold the rights and protect the assets of American Indians. It is the ultimate “Indian agent” for those lands which it holds in trust. For example, it negotiates leases on behalf of tribes with those who want to use the resources on Indian lands and the revenues go into tribal trust accounts. This is asset management. Interior also serves as the bank for half a million people who have Individual Indian Money accounts for their land profits. This is trust management.

The federal government—which created this financial arrangement—has an obligation to fulfill its fiduciary responsibilities. Yet, it appears that Interior has not negotiated in good faith to maximize returns for tribes, favoring corporations instead. Moreover, it has grossly mishandled government-run accounts for individuals, with many innocent Indian families being kept poor as a consequence. Sen. McCain (AZ) has called it “theft from Indian people.”

“We always feel bad about what happened to American Indians in the past and say we would not let it happen today. Now we have a chance to turn those feelings into actions. If the public says, GET TO IT, the federal government could fix this problem by the end of the year.”

Joe Volk, Executive Secretary, FCNL

A bad situation has been made worse by the fix. The money the government has used to defend and investigate itself and to improve its trust system appears to have been taken from such services to Indian people as housing.

The federal courts have now stepped in to protect Native Americans from the very agency set up to look after their interests. Interior only began implementing reforms after Indian plaintiffs in a class-action case (*Cobell*) started winning in court. It is time for the departments of Interior and Justice to stop fighting the case in court and start meeting their obligations. The administration should stop worrying about limiting its liability and start fulfilling the federal government’s trust responsibilities. ■

THE INDIAN TRUST PATTERN: LEGALIZED TAKING AND PATERNALISM

European and early colonial law held that the nation which “discovered” the land in America became the owner of the land, and the Indian natives only retained the right to live on it. In addition, the prevailing view of early settlers was that the natives were not capable of looking after their own affairs and needed to be taken care of much as trustees do for their wards. As a result, early documents employed the language of trusts to explain the relationship between colonists and tribal members. The Indians probably did not fully understand these legal arrangements, and in any event they had no choice but to accept the trust relationship imposed on them, since the settlers were also the conquerors.

Over time, the “trust responsibility” regarding Native Americans became codified in treaties and court decisions as a keystone of the legal relationship between the federal government and the tribes today. The trust relationship has been the source of both positive and negative aspects of American policy towards Indian tribes. The concept is still reflected in the policies and laws established by Congress, the executive branch, and the courts.

Indian Trust Funds: A Special Type of Trust

As the colonists spread west, certain lands were reserved by the federal government for Indian

occupation. In 1887, Congress passed the General Allotment Act which forced the breakup of much communal Indian property. So-called “excess lands,” most often greater than half of the reservations, were made available to homesteaders coming from the East. The rest was deeded in small parcels to individual tribal members, who were encouraged to undertake farming on those lands. The deeded parcels were still held by the federal government “in trust” for individual Indians, and government agents retained total control over the sale or lease of the land as well as over use of any natural resources located on or under that land.

The U.S. government’s Indian agents subsequently entered into many contracts with private companies for oil extraction, mining, water diversion, timber cutting, and similar uses of the lands which had been deeded to individual Indian owners. The royalties from those contracts were to be collected by the government, held by it in Individual Indian Money (IIM) accounts, and distributed to the owners of the lands from which the assets were removed. Audits and anecdotal reports during the early and mid-20th century indicated fraud and mismanagement in the government’s handling of those arrangements. Many contracts were awarded to friends of the Indian agents for far less than the fair value of the assets. Collection of royalties from the companies was also haphazard at best. Most shocking of all, much of the money which was collected by the government was never passed on to the individual Indian land owners.

When the extent of mismanagement became obvious, Congress passed legislation in 1994 to improve the handling of trust fund leases and the money accounts generated by them. However, the problems did not go away. Because of legislative pressure and an important court case, the Department of Interior is still working to improve its management of these trust assets. For example, in 2002 the department had lost track of 22 percent of the IIM account holders. Today it is finding some of those people with the help of a new toll-free information call center. One trust beneficiary with more than \$100,000 in an IIM account was recently located through that means. Progress is slowly being made. ■

The *Indian Report* is a publication of the Friends Committee on National Legislation (FCNL). FCNL policy emphasizes upholding treaty rights, insuring the fulfilment of the federal trust responsibility, and assuring the right of Native American communities to self-determination. We seek to be guided by the views of Indian tribes, communities and organizations across the country.

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THE COBELL v. NORTON CLASS ACTION LAWSUIT

Elouise Cobell was one of eight children raised in a home with no electricity, running water, or telephone on the Blackfeet Indian reservation in Browning, MT, near Glacier National Park. She attended college in Bozeman and lived in Seattle, returning to her reservation in 1976 to go into ranching. She was made treasurer for her tribe and found the books to be "in total chaos." She not only put them in order; by 1987, she had even succeeded in starting the first tribal-owned bank in the nation.

"The underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties."

– Judge Rogers, U.S. Court of Appeals for the District of Columbia Circuit, December, 2004

After persistent questioning of Department of Interior officials about land lease payments, Cobell became convinced that the federal government had not handled leases properly. The Deputy Commissioner for Indian Affairs in the George H.W. Bush administration, David Matheson, confirmed that money was being taken from these accounts and applied for other uses (*Los Angeles Times Magazine*, July 7, 2002).

When legislation in 1994 did not solve the problems she kept encountering, Cobell tried to work things out with federal officials in face-to-face meetings. She found that she and other Indian leaders were not being taken seriously. Finally, they felt they had no choice but to file suit.

In 1996, Cobell turned to Dennis Gingold, a nationally known banking attorney, who with the assistance of the Native American Rights Fund, filed *Cobell v. Babbitt* (now *Cobell v. Norton*) in federal court against the Department of Interior on behalf of Individual Indian Money (IIM) account holders. The suit seeks a full accounting of all IIM accounts, together with appropriate adjustment of accounts and the payment of all money owed. It also asks for significant reforms in the process for managing all Indian trust fund accounts to protect indigenous people in the future.

The case has proceeded as a class action suit on behalf of between 300,000 and 500,000 people. Native American lawyers estimate that up to \$10 billion has not been hand-

ed over to the rightful owners, and, with interest, the total amount might well be significantly higher. Interior has argued for nine years that the case has little or no merit. However, Interior's former Bureau of Indian Affairs Director Dave Anderson admitted the case has led to improvements in the agency's accounting performance. Attorneys for the Indians have documented in court a long pattern of sloppy record-keeping and unpredictable payments. The evidence suggests that some officials intentionally concealed what happened to many of the funds. For example, the presiding judge determined that while the case was pending, the Department of Interior destroyed at least 162 boxes of records, allowed additional records to be ruined by mold in a building in New Mexico, and then covered up those facts in statements submitted to the court. Several Interior officials, including Clinton's appointee Secretary Bruce Babbitt and G. W. Bush's appointee Secretary Gale Norton, have been found in contempt of court for their conduct.

"Plaintiffs' suit draws significantly on Congress's findings of hopelessly inept management of IIM accounts and its action to remedy the resulting chaos."

– Judge Williams, U.S. Court of Appeals for the District of Columbia Circuit, December 2004

In a historic ruling in 1998, U.S. District Court Judge Royce Lamberth held that, as bankers and managers of Indian trust funds, the federal government must adhere to the same standards that would apply to any other trustee

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Corbell v Norton (continued from page 3)

who holds money for another. This means that account holders are entitled to a full accounting of what happened to the profits derived from their lands held in trust for a century. It also requires that they be given whatever money was withheld together with interest commencing from whenever the payment became due.

Interior unsuccessfully appealed this as well as many subsequent rulings to the U.S. Circuit Court of Appeals. Many observers, including the U.S. district court judge, have felt the department has been intentionally stalling progress of the case. Interior officials argue that they have made only minor errors in accounting for the funds, and that undertaking a full accounting as ordered by the judge would cost billions of dollars, more than is justified by the amount in dispute. To date, they have only audited relatively recent computerized departmental account records.

"In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics."

– Judge Lamberth, U.S. District Court for the
District of Columbia, February 23, 2005

The Indian plaintiffs are continuing to win their case in court, but progress toward a final victory has been slow. Some Indians note that many elderly members of the class of plaintiffs will die before they receive their due. In addition, the computer files for these accounts maintained by Interior are susceptible to alteration by hackers, so the judge has ordered many department functions to be taken offline, causing great inconvenience to the department. Thus, pressures toward resolving the case have been building, although the parties have found it impossible to reach agreement among themselves. ■

CONGRESS STEPS INTO INTERIOR TRUST SCANDAL

In hearings on Capitol Hill, Sen. McCain (AZ), the Chair of the Senate Committee on Indian Affairs, and Rep. Pombo (CA), the Chair of the House Resources Committee, stated their aim to pass legislation during 2005 which would resolve the *Cobell* case once and for all. That provoked intense discussions between House and Senate staff members and Indian advocacy groups.

The National Congress of American Indians (NCAI) and the Intertribal Monitoring Association on Indian Trust Funds have formed a joint Trust Reform and Cobell Settlement Workgroup which has been meeting in Washington and throughout Indian Country to define a position that most tribal leaders and individual trust beneficiaries would find acceptable. They are exploring both a financial settlement of the case and have suggested changes in the way the Department of Interior manages trust assets. Among other measures, the group will seek statutory standards against which an impartial third party can assess departmental performance in the future, both when managing Indians' money and in the leasing and contracting process itself.

Other Settlements Offer Precedent

There is ample precedent for congressional appropriation of money to resolve disputes of a similar nature and to show compassion for victims. The Victims Compensation Fund, established after the September 11, 2001, attacks, authorized payment of a substantial sum of money to the families of the victims in exchange for their giving up all legal claims against the airlines. Currently, the Senate Judiciary Committee is also debating the allocation of \$140 billion to settle all asbestos litigation which is pending or might be brought in the courts.

If written to benefit Indian families, legislation resolving the *Cobell* suit could bring significant improvements in the lives of many tribal members. The bill should allocate a multi-billion dollar sum to be distributed among aggrieved Indians. It will also have to include a distribution process; the simplest way to allocate a settlement among the class of plaintiffs is to transfer the money to the court handling the case, and let it allocate the money in the same manner other class action settlements are distributed.

Congress has not always acted in a manner helpful to those hurt by Interior's scandalous accounting mismanagement. In 2003 an Appropriations Committee member attached a policy provision to a bill to stop historical accounting of Indian trust funds. This move was done in concert with the White House, and was detrimental to the Indians' position in the case and in the negotiation of a fair settlement. If significant progress cannot be made this year in Congress, such an action might well occur again.

Full Restitution Needed

FCNL is particularly concerned to see that the opportunity for resolving past injustices does not slip away. At the very least, a settlement of the claims arising out of major Interior malfeasance in the past is called for. That would give the many victims of errors and fraud a chance to benefit from the natural resources owned by them and their ancestors. Improvements in Interior's management of its trust responsibilities would also be a welcome part of such a bill, but that goal is secondary to the need for full restitution to the Native Americans who have been unjustly deprived of the fruits of their land holdings. ■

What Others Are Saying

"A shameful tale of greed, incompetence and bureaucratic menace gets uglier with each new revelation in court.... This case represents a violation of trust stretching over 100 years. Payments are owed and long overdue. Years of stalling and duplicitous government behavior only compound the insult and injury.

"Do what it takes to settle a historic wrong driven by what the judge described as greed for tribal land holdings and a quest to eradicate their culture. This is an opportunity for the Bush administration and Interior Secretary Gale Norton to be the new broom that sweeps clean. Every penny owed ought to be paid with contrition and humility....The time is ripe for the government to hang its head and start writing checks."

– *The Seattle Times* editorial, Aug. 21, 2001

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IMMIGRANT WAGONS COMIN THIS WAY

The musical Oklahoma tells the tale of farmers and cowboys, rivals for ownership of the land, and their respective roles in "settling" the state. Even today, school children dress up to celebrate the 1889 Oklahoma Land Run, but many Native American parents discourage their children from participating in what they consider to be a tragic event, according to The Oklahoman newspaper (4/22/05). Creek and Seminole families lost land to white families dashing to secure 160-acre homesteads or city lots. Land runs set up by the government affected many other tribes as well. In his art work called "Impending Doom" exhibited in Oklahoma, artist T. C. Cannon (Caddo/Kiowa) conveys feelings of Indians through humor: "Look! 500,000 Immigrant Wagons comin this way."

Such history is relevant today in practical as well as ethical terms. The break-up of Indian lands in 1887, the forced sale of some lands at 60 cents per acre, and the decision to put other Indian lands under federal control led to the current problem of checkerboard land holdings and economically useless properties in Indian Country. Native and non-native land sometimes is so intertwined that a tribe cannot put together enough property to create business enterprises. Land allotted to an Indian family passed down to multiple heirs until today some small parcels have hundreds of owners or allottees.

This fractionated ownership problem also has led to massive problems for the Department of Interior which manages Individual Indian Money account holders. Interior recently announced that it has 110,000 boxes and 7 million pages of IIM records. In recent years, keeping track of tiny shares of heritable land is more costly for Interior than these shares are worth to individual account holders.

Congress regulates the sale, lease, and handing-down of Indian land it holds in trust. For Native people, this has contributed to complex estate problems, protracted probate settlements of property after death, and severe mortgage title problems. The federal government continues to have a hand in Indian inheritance rights.

Address Root of Problem Say Native Leaders

With bipartisan support, Congress took a step to right a few old wrongs and to help Interior with fractionation when it passed S. 1721, the American Indian Probate Reform Act of 2004 (which amends the Indian Land Consolidation Act). The law creates a uniform Indian probate code, offers estate-planning services on reservations, and provides a source of money for poorer tribes to purchase land in order to achieve more coherent boundaries and adequate land holdings that could accommodate economically viable projects. Future legislation should promote tribal ownership systems while preserving the rights of allottees. Tribes want the government to expand the voluntary buy back program. So far, only eight percent of the land they lost to allotment in 1887 has been regained.

Unfortunately, the White House requested barely enough to fund the land consolidation program in fiscal year 2005 (FY05) and Congress ultimately appropriated only \$35 million. In FY06, the administration again did not push for adequate funding for the program. **Native leaders and FCNL urge full funding and staffing for this program, an essential part of trust reform. ■**