

Statement of Senator John McCain
Chairman, Senate Committee on Indian Affairs
Hearing on S. 1439
July 26, 2005

I want to ask the indulgence of my colleagues, the witnesses and those who have joined us today to observe this hearing. All of you know that I do not ordinarily take a lot of time for an opening statement at our hearings and that I encourage our witnesses to be brief in their testimony. However, today I want to take a few extra minutes to share some of my perspective on the bill before us.

For the past several years I have heard broad-based concerns from tribal leaders and members of Congress that the Cobell litigation, which has been pending for nine years, is draining resources from Indian Country and creating a poisonous atmosphere for the administration of the Federal Government's trust responsibilities to Native Americans. In the 107th and 108th Congresses, I introduced legislation that was intended to try to correct some of the problems in the administration of the trust funds and assets. In those bills the Cobell plaintiffs asked that I include a provision that would allow the litigation to continue to its conclusion. With the support of tribal leaders, I agreed to do so. In the 108th Congress the House Committee on Resources and this Committee worked with the Cobell plaintiffs and the Departments of Interior and Justice to identify and enlist the support of two highly qualified mediators to determine if it would be possible to reach an agreement on a settlement of the litigation. I supported that effort. Unfortunately, it did not succeed and neither did any of the bills I introduced. Earlier this year, with the support of the plaintiffs and defendants in the Cobell litigation, but more importantly, with the support of many in Indian Country, I said I would make one good attempt at resolving the matter legislatively. If it did not succeed, there are many, many other issues that the Committee can attend to.

Last week, Senator Dorgan joined me in introducing S. 1439, a bill to resolve the historical accounting claims in Cobell v. Norton and begin to reform the Department of Interior's trust responsibility. We made it very clear to all parties that the bill was intended to provide a basis for discussion and review of the issues, and we welcomed comment and the opportunity to improve it.

However, before anyone had time to read and fully understand the bill, the lead plaintiff in the Cobell case was quoted in the press saying that the bill "reminded me of the Baker Massacre at Blackfeet when they gave Heavy Runner this piece of paper. They said, 'Hold it up. It will keep you safe.'

I can certainly understand that no one would be entirely satisfied with the bill. I can even understand that many would be disappointed. That is the nature of a settlement proposal. No one gets everything they want. There are no clear winners. This bill embodies a series of proposals. It reflects extensive listening and reflecting on the views of the parties to the litigation, tribal leaders, and many other stakeholders from around the country. It cannot credibly be compared to a massacre, even in a figure of speech.

I hope those who are affected most directly by the settlement of this long-standing dispute will engage constructively in the process. I am disturbed, however, by what I see is a serious misapprehension of some that settlement legislation can be enacted by being forced down the throat of either party. This simply cannot and will not happen. The idea that it might, betrays a fundamental lack of understanding of the legislative process in general and the battle ahead for any legislation that would settle the Cobell litigation in particular. If all of the people testifying here today were to join hands and reach agreement on every word in the bill, the work before all of us would just be beginning. There are many members of Congress, of the public at large, and in the claimant class, who will ask very hard questions about the amount of money we propose to pay in lieu of providing an historical accounting. I think the sizeable sum we envision and the manner of its distribution can be defended. But it will have to be defended, and unity among those here today is necessary but by no means sufficient to do that.

While they do not like to talk about it in public, the fact remains that both parties to the case face very serious legal risks if the litigation continues. Some aspects of the strong opinions of the District Court, often cited by plaintiffs, have been rejected by the Court of Appeals, which is much more selectively cited. The burden of proof that the Court of Appeals has established for the claims appears to comport with the precedent, but imposes a very real and substantial challenge to each and every claimant in the class. And while the parties may not agree on how much risk each faces, they should agree that they risk facing years and years of litigation, during which time the individual plaintiffs stand to receive nothing save the further draining of resources away from programs such as education and public safety and towards the Office of Special Trustee. The defendants face year after year of painstaking efforts to reconstruct the past while simultaneously trying to cope with seemingly inexhaustible demands to do more and better with limited resources appropriated by Congress.

I am well aware of the hardships experienced every day by the individuals who have not been and are not being treated fairly in the administration of their trust funds and assets. I have visited them in their homes and on their lands in the Southwest, the Northwest, and the Great Plains. I too would like to see them achieve some justice in their lifetimes. And, I would like to believe that at the end of the day the individuals who struggle through the drama of the litigation on both sides would like to see them made as whole as is possible in the circumstances we all confront.

I understand that the plaintiffs have reacted negatively to the proposal that the settlement funds to be made available by Congress would be distributed by a special master as opposed to having the court distribute the funds and determine attorney's fees. While the legislation does not specify a dollar amount, it does make clear that the resolution will be for billions of dollars. At a minimum, for the class of hundreds of thousands described in the bill, the bill proposes that each receive thousands of dollars in per capita payments alone. This is at a minimum. In addition to per capita payments, the legislation envisions that many claimants will receive much more than this in formula payments depending on what they were likely to have lost as a result of the Department of Interior's mishandling of their Individual Indian Money Accounts. If the federal government is going to make this money available to attempt to right a wrong perpetrated over many years of mismanaging accounts, it does not strike me as unreasonable that the legislation resolve the class action for historical accountings and remove it from the

court for a prompt and fair distribution to claimants. Congress did this for the families of the victims of the 9-11 attacks. It is not a flawless way to proceed, but it has been demonstrated to be fair and prompt.

I look forward to hearing the witnesses statements today. We are considering very complex issues and S. 1439 can be significantly improved, but it must be with the agreement of both parties to the Cobell litigation and with the support of tribes from around the nation. Although no tribe is a direct party to the litigation, it is evident to even the most casual observer that all tribes have been and are being affected by it. Let's start to put our efforts into finding a way to move forward together. We have an opportunity to try to make some genuine progress on the issues that are addressed in S.1439. Let's all approach it with the seriousness it deserves and leave the rhetoric to others. We won't have this opportunity again any time soon.