

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

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President
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On S. 1439 – The Indian Trust Reform Act of 2005

July 26, 2005

Good morning Chairman McCain, Vice Chairman Dorgan, and members of the Committee. I am Ernest L. Stensgar, the President of the Affiliated Tribes of Northwest Indians (ATNI) and a councilman at the Coeur d'Alene Tribe. In 1953 progressive tribal leaders in the Northwest formed the Affiliated Tribes of Northwest Indians, and set its priorities as the protection of tribal sovereignty and promotion of self-determination. Contemporarily, ATNI is a nonprofit organization composed of 54 Northwest tribal governments from the states of Oregon, Idaho, Washington, southeast Alaska, Northern California and Western Montana. ATNI is an organization whose foundation is composed of the people it is meant to serve -- Northwest Indian people. Representatives from the member tribes set the policy and direction through committees by adopting resolutions at their three yearly meetings. A seven member Executive Board carries out the duties and directives of ATNI. As the President of the ATNI and a member of the Executive Board, I am here today to convey ATNI's comments on the legislation introduced by Chairman McCain and Vice Chairman Dorgan, known as the *Indian Trust Reform Act of 2005*.

The ATNI has been intimately involved in the debate regarding settlement of the *Cobell* litigation and reformation of the Department of Interior (DOI) in order to be more accountable when administering the federal Indian trust responsibility. Over the past several years and after numerous court issued declarations in the *Cobell* litigation, the

ATNI realized that resolution of the litigation in the court system would take many years and that a settlement of the litigation would probably not result in action that would compensate the plaintiffs along with individual Indian trust account holders to a level that would be fair and equitable. Therefore, the ATNI decided to focus on working cooperatively with Congress and other stakeholders in creating a legislative resolution of the *Cobell* litigation while at the same time accomplishing reorganization of the DOI to fit the needs of Indian country. On April 16, 2005, the ATNI submitted Indian trust reform legislation to Senator Cantwell and asked that it be considered on an expedited basis by the Senate Indian Affairs Committee. That legislation was essentially identical to the legislation that Chairman Hillaire from the Lummi Tribe presented to the Committee during the oversight hearing the Committee held on March 9, 2005.

The ATNI proposed trust reform legislation was based substantially upon the previously sponsored legislation of Senator McCain and former Senator Daschle in the 108th Congress known as *S. 1459*. The ATNI proposal had five main provisions as its foundation. The first provision sought to elevate the Assistant Secretary for Indian Affairs to a Deputy Secretary of the Interior. The intent of this provision was to ensure that the principal officer assigned to fulfill the trust responsibility would have the authority over the constituent agencies in the Department of Interior that have an effect or impact on the trust responsibility. The second provision sought codification of the standards for the administration of trust duties that were adopted by Secretary Babbitt in the year 2000. The third provision sought settlement of the *Cobell* litigation by authorization of a mediator that would submit recommendations to the Court on settlement issues and allow the Court the ability to implement the recommendations

without having to submit to a drawn out trial process. The fourth provision sought the creation of an independent legal entity that would have some oversight authority over administration of the federal trust responsibility. The fifth provision sought the establishment of a demonstration project that would build on the work of those tribes that have been administering their own trust programs pursuant to authority granted by the Congress in appropriations bills. The stated goal of the ATNI proposed legislation was to spur discussion and deliberation so that tribally driven provisions could be included in legislation that would inevitably come out of the Committee. It appears now that Indian country has *S. 1439, Indian Trust Reform Act of 2005*, which will undoubtedly spark discussion and ultimately lead to a final version of the legislation that will take into account tribally driven provisions. The ATNI is prepared to proceed forward in that discussion and resolution because it supports the substantive provisions of *S. 1439*.

The ATNI sought to elevate the Assistant Secretary for Indian Affairs to a Deputy Secretary of the Interior. Under Title V of *S. 1439* there is an Under Secretary for Indian Affairs (Under Secretary) position created that is directly subordinate to the Secretary of the Interior (Secretary). The Under Secretary for Indian Affairs would replace the Assistant Secretary for Indian Affairs and the Special Trustee and would assume overall management of the federal trust responsibility with regard to Indian tribes. The ATNI supports the creation of the Under Secretary for Indian Affairs position within the Department along with the duties requiring management and accountability for the trust responsibility in consultation with Indian tribes. The ATNI also supports Section 505 of the legislation, which would terminate the Office of Special Trustee for American Indians by December 31, 2008.

Title VI of *S. 1439* would require the Government Accountability Office to contract with an independent entity to prepare and report to the Committee the status of individual Indian, Indian tribal, and other Indian trust accounts based upon generally accepted accounting principles of the Federal government. The ATNI supports this provision since it would require the Department to account for the management of the trust assets through an independent review and it would allow the Committee to provide oversight with regard to how the Department is performing its trust responsibility. At the heart of the *Cobell* litigation is accountability for management of trust assets by the Department and Title VI of *S. 1439* would set the audit and report requirements that could be a measure for how the Department is progressing in its fiduciary duty as trustee.

The ATNI also sought the codification of the standards of the administration of trust duties that were adopted by Secretary Babbitt in the year 2000. The ATNI understands that these standards have not been included as a provision of *S. 1439*, but it does not believe that this will be ultimately fatal to the legislation. Under Section 503(a) of the *S. 1439*, there is an Under Secretary for Indian Affairs that will be required to implement and account for the fulfillment of the trust responsibility to Indian tribes. The legislation also describes the duties that the Under Secretary for Indian Affairs will be required to fulfill under Section 503(c). Section 503(c)(1) would require the Under Secretary to carry out any activity related to both trust fund accounts and trust resource management of the Bureau of Indian Affairs in accordance with the *American Indian Trust Fund Management Reform Act of 1994*. There are also other duties identified that would require the Under Secretary to account for trust assets and resources; supervise activities carried out by agencies that relate to Indian affairs; consult regularly with

Indian tribes to fulfill the trust responsibility; and manage the Indian trust resources in accordance with applicable Federal law. The ATNI believes that if this section is holistically integrated with other provisions of the legislation, the Under Secretary has some guidance from Congress defining actions and responsibilities that will be required to fulfill the trust responsibility. The specific trust standards can be finalized at a later date and in subsequent legislation based on the recommendations from the Commission that is authorized in Title II of *S. 1439*.

The third provision that the ATNI sought was the settlement of the *Cobell* litigation by the authorization of a mediator that would submit recommendations to the Court on settlement issues and allow the Court the ability to implement the recommendations without having to submit to a drawn out trial process. The ATNI has reviewed *S. 1439* and is in agreement with the congressional findings contained within Section 101. The ATNI realizes that in many cases, it is impossible for the Federal government to provide a total historical accounting of funds held in Individual Indian Money (IIM) accounts due to any number of factors including destruction of records; length of time to complete a historical accounting; the cost of completing a historical accounting; and the need of those who hold IIM accounts to access the funds now after many years of being put on hold because of delays to sort out the aftermath of a court declaration in the *Cobell* litigation.

The ATNI supports the proposition that the settlement of the *Cobell* litigation must provide a fair and appropriate calculation of the IIM accounts in lieu of actually performing an accounting of the IIM accounts. The ATNI lends its support for the creation of an "Individual Indian Accounting Claim Settlement Fund" contemplated in

Section 103(a) so that there can be closure for the plaintiffs in the *Cobell* litigation and other aggrieved parties. The settlement amount will obviously need to be debated and agreed upon after intense consultation with all the affected parties. The animosity that has guided previous attempts at settlement should not deter actual and honest agreement over a final settlement amount.

The ATNI supports the proposition that a Special Master should be appointed to administer the settlement fund. However, Section 103(b) allows the Secretary the unilateral ability to appoint a Special Master to administer the fund without allowing any tribal input in the determination of appointing the Special Master. Since the settlement fund is a result of litigation between two adversarial parties, there should be the opportunity for the representatives of both parties to come to agreement on the appointment of a Special Master to administer the settlement fund. Otherwise, the legislation will create a situation where only one of the litigants will have the ability to appoint the person charged with administering a settlement fund that was the result of two litigants engaged in adversarial proceedings. In order to preserve the interest of the two litigants in protecting their respective clients' interests, the Committee should allow for both parties to be able to agree to the appointment of the Special Master.

The ATNI supports the ability of the claimants to have judicial review of the constitutionality of their claims under the settlement fund by a neutral and detached judge sitting in the United States District Court for the District of Columbia. The claimants will have to waive their rights to litigate further if they accept distribution of a claim under the settlement fund. The ATNI supports this waiver of liability for the Federal government with regard to individual claimants if administration of the settlement fund is carried out

by the Special Master in a responsible and accountable manner consistent with fiduciary standards. It is important to emphasize that mere appointment of a Special Master to administer the settlement fund does not relieve the Secretarial trust responsibility to ensure that the Special Master acts in a manner designed to fulfill the Secretary's trust responsibility to Indians. The ATNI supports Section 106 of the bill, which allows any IIM account holder to reject the payments from the Special Master and to file a separate claim in the Court of Claims.

The ATNI strongly supports Section 110(d). In that section, tribal government claims against the United States would not be discharged as a part of the settlement of litigation claims identified in Section 102(2). The government-to-government process of settlement of disputes between the tribal and Federal governments should continue until there is full settlement. The tribal governments have the unique responsibility to ensure that they provide for the welfare of all tribal members even if those tribal members hold IIM accounts that are covered under the settlement provisions of *S. 1439*. The tribal trust resource is separate from the individual interest contained with the IIM account system and should therefore be separated from the settlement provisions of the bill regarding the IIM accounts.

The fourth provision sought by the ATNI was the creation of an independent legal authority that would have some oversight power over administration of the federal trust responsibility. Title II of *S. 1439* creates a commission known as the "Indian Trust Asset Management Policy Review Commission" (Commission) that would be charged with the review of trust asset management laws and the review of the Department's practices with regard to individual Indian and Indian tribal trust assets. The Commission would then

have the ability to make recommendations to the Secretary and to the Committee for improvement over the Department's laws, practices, and management of the trust assets. The ATNI supports the Commission, as it would be created by Title II of the bill since it would allow for an independent review of the Department's practices and would possibly lead to recommendations that would assist the Department in adopting a "best practices" approach to fulfillment of the trust responsibility. Indian country has shown in the past that it is willing and able to participate in crafting recommendations that would lead to an improved Department as it continues to administer its trust duties.

The Affiliated Tribes of Northwest Indians stands ready to proceed in the process of enacting legislation that will improve the administration of the trust responsibility and settle the *Cobell* litigation so that each subsequent generation does not inherit the problems of the past. I thank the Committee for the time and opportunity to submit comments on the ATNI position with regard to *S. 1439, the Indian Trust Reform Act of 2005*.

I will be pleased to answer any questions the Committee may have.