STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, AND ROSS SWIMMER, SPECIAL TRUSTEE FOR AMERICAN INDIANS ON THE COBELL LAWSUIT.

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I am pleased to be here today to discuss the legislation before the Committee that would attempt to resolve the *Cobell v. Norton* litigation. We appreciate the time and effort the Chairman and Ranking Member and their staffs, along with their Senate counterparts, have taken to develop this legislation in an effort to reach a full, fair and final settlement of this case and to clarify individual Indian trust duties, responsibilities, and expectations. The introduction of H.R. 4322 and S. 1439 is the first serious congressional effort we have seen to comprehensively resolve the issues involved in the Cobell lawsuit. While many details remain to be negotiated and clarified, the bill represents an important step towards seeking closure on this matter.

This Administration has appeared before this Committee on this issue numerous times. The landscape for the resolution of this case and the underlying trust challenges changes with each new court decision. We continue to narrow the magnitude and scope of the potential settlement terms as we learn more through our historical accounting work. Today's effort is a critical step in providing statutory guidance. It is important though to understand what the Court of Appeals has done since we testified in July on the Senate bill identical to this one.

On November 15, 2005, the very day this legislation was introduced, the United States Court of Appeals for the District of Columbia Circuit vacated the district court's order reissuing the historical accounting structural injunction.

The Court noted in the opinion that the district court, in issuing a contempt citation against Secretary Norton, disregarded "Interior's affirmative accomplishments on Norton's watch".

The Appeals Court went on to note that while the American Indian Trust Fund Management Reform Act of 1994 (1994 Act) includes an accounting requirement, "its text offers little help in defining the accounting's scope." Even plaintiffs' counsel, the Court notes, conceded some need for practicality when asked hypothetically about spending $1 million in accounting expenses for a $1,000 trust. The Court took note of the fact that in the 1994 Act "Congress was, after all, mandating an activity to be funded entirely at taxpayers' expense." Because the Individual Indian Money (IIM) trust differs from ordinary private trusts in a number of ways, the Court said "the common law of trusts doesn't offer a clear path for resolving statutory ambiguities."

The Court also took note of the fact that for two fiscal years in a row, Congress limited Interior's annual expenditures for historical accounting to $58 million, an amount that includes funding for tribal accounting as well. If that pattern continued with the district court's historical accounting structural injunction in place, it reasoned, the district court's accounting would not be completed for about two hundred years.

More importantly, the Court said that since neither congressional language nor common law trust principles establish "a definitive balance between exactitude and cost," the district court owed substantial deference to Interior's plan. They said that the district court "erroneously displaced Interior" as the body that should work out compliance with the 1994 Act and erred by reinstating its September 2003 injunction in February 2005 without considering the Court of Appeals' 2003 decision and subsequent developments after 2003. The reissuance of the injunction, according to the Court, was "not properly grounded in either fact or law. What is more the district court completely disregarded relevant information about the costs of its injunction." In summary, the Court said the district court acted "on the ill-founded assumption that the 1994 Act gave it the freedom of a private-law chancellor to exercise its discretion."

The Court did say that this opinion was issued without prejudice to the plaintiffs' argument on appeal that execution of the reissued injunction is impossible or to future claims such as challenges to the correctness of specific account balances. It also

addressed the district court's bar on using statistical sampling as part of the accounting. The Court found Interior's decision to use statistical sampling in its proposed plan "especially reasonable" because the cost of accounting for transactions valued under $500 would exceed the average value of those transactions. They found the district court had abused its discretion by barring use of statistical sampling.

So what does this all mean? Interior is no longer obligated to conduct an accounting costing billions of dollars. Interior's more reasonable effort is entitled to substantial deference. Interior has expended more than $100 million to date and has made substantial progress. Today, it is abundantly clear that the plaintiffs' public claim that $176 billion is owed is vastly overstated, to say the least. Such assertions have mislead many individual Indians and created expectations that were false. More recently the plaintiffs' lawyer offered to settle for $27.5 billion. This figure is also based on assumptions that the available evidence simply does not support. What remains to be determined is how much more accounting needs to be done before we can resolve these claims through administrative, judicial or legislative means.

HISTORICAL ACCOUNTING: WHAT DO WE KNOW TO DATE?

As we have stated to this Committee repeatedly, as part of the Cobell litigation, Interior collected over 165,000 documents for the historical analysis of IIM trust fund activity through December 31, 2000, for the named plaintiffs and agreed-upon predecessors. Of these documents, about 21,000 documents were used to support the transactional histories, which dated back as far as 1914, and which included a total of about 12,500 transactions.

Pursuant to the requirement in Section 131 of the FY 2003 Appropriations Act, on March 25, 2003, the Department of the Interior provided Congress with a summary of the expert opinion of Mr. Joseph Rosenbaum, a partner in Ernst & Young, LLP, regarding the five named plaintiffs in Cobell v. Norton. This report describes the process the contractor went through and also contains a summary of his opinions. These conclusions included:

- The historical IIM ledgers were sufficient to allow DOI to create virtual ledgers that were substantially complete for the selected accounts.

- The documents gathered by DOI supported substantially all of the dollar value of the transactions in the analyzed accounts.

- The documents gathered by the Department of the Interior do not reveal any collection transactions not included in the selected accounts, with a single exception in the amount of $60.94 that was paid to another account holder, due to a transposed account number entered in the recording process.

- An analysis of relevant contracted payments, evidenced primarily by lease agreements, showed that substantially all expected collection amounts were properly recorded and reflected in the IIM accounts.

- There was no indication that the accounts are not substantially accurate, nor that the transactions were not substantially supported by contemporaneous documentation.

This analysis, including the named plaintiffs and the selected predecessors in interest, found both non-interest transaction overpayments to class members (37 instances totaling $3,462) and underpayments (14 instances totaling $244).

As of September 30, 2005, Interior's Office of Historical Trust Accounting (OHTA) had reconciled more than 22,900 Individual Indian Money (IIM) judgment accounts with balances totaling more than $57.6 million and 25,551 additional judgment accounts with no balance as of December 31, 2000. This accounting effort found non-interest overpayments (2 instances totaling $2,205) and underpayments (21 instances totaling $52).

As of September 30, 2005, OHTA had also reconciled 5,708 IIM per capita accounts with balances of over $43.9 million and an additional approximately 6,214 accounts with no balance as of December 31, 2000. In this per capita accounting effort, only one individual on a tribal roll did not receive a payment of $100.

Interest recalculations identified a particular set of IIM judgment transactions (786 instances totaling $25,000) where principal had been distributed without associated interest amounts (an underpayment). More broadly, interest amounts for judgment and per capita accounts appear to have been overpaid (a net amount approximating $365,000 on about 13,800 accounts).

Based upon the historical accounting results so far, Interior suggests that Congress consider exempting Judgment and Per Capita funds from any proposed legislation.

The National Opinion Research Center (NORC) at the University of Chicago, a national organization for research and statistics, was contracted in 2001 to assist Interior with interpreting historical accounting data and results. On September 30, 2005, the NORC issued a progress report entitled "Reconciliation of the High Dollar and National Sample Transactions from Land-Based IIM Accounts," looking at land-based IIM accounts that were open on or after October 25, 1994. The goal of the project is to assess the accuracy of the land-based IIM account transactions contained in the two IIM Trust electronic systems (Integrated Records Management System and Trust Funds Accounting Systems) for the electronic era 1985-2000. Accuracy is being tested by reconciling all transactions of $100,000 or more and a large statistically representative random sample of non-interest transactions under $100,000. That historical accounting initiative ended in August 2005. The NORC has found:

- Over 99% of the sampled transactions needed for preliminary estimates have been reconciled for all twelve BIA regions as have 99% of all the transactions greater than or equal to $100,000.

- A completion rate of 99% is extremely high in a sample such as this. The report states: "This very high completion rate for searching and locating documentation should put to rest concerns about the impact that the 1% remaining unreconciled transactions might have on results."

- The reconciliation identified both overpayments (63 instances totaling $53,797) and underpayments (48 instances totaling $62,250).

- Reconciliation shows the debit difference rate to be 0.4%.

- Reconciliation results show the credit difference rate to be 1.3%.

As of September 30, 2005, OHTA also resolved residual balances in 9,452 special deposit accounts, identifying the proper ownership of more than $47 million belonging to individual Indians, Tribes, and private entities.

H.R. 4322, THE INDIAN TRUST REFORM ACT OF 2005

We appreciate the fact that legislation has been introduced to attempt to address the issues in Cobell. We are pleased to see the bill focuses on consolidation of fractionated Indian lands and supports a more aggressive land acquisition program than the one currently under way. We do, however, have some serious concerns with the bill as currently drafted.

Title I. H.R. 4322 would provide a yet undetermined number of dollars to resolve the historical accounting claims of the class members of the Cobell litigation. However, it does not provide for settlement of all of the elements of the Cobell litigation. In addition, in determining what is a reasonable amount, Congress should be aware that the $27.487 billion requested by the plaintiffs as settlement does not include money to resolve damage claims for potential mismanagement of trust assets that could be filed in the future. Such a future claim may begin by plaintiffs demanding an historical accounting.

The legislation therefore should resolve or restrict any claims that might permit the reinstatement of historical accounting litigation comparable to the Cobell case. We also believe that Congress should look carefully at the distribution system provided in legislation for the settlement funds. It would be far better to provide clear guidance as to the amounts to which individuals are entitled, rather than leaving the decision of what individuals receive to a formula developed by the Secretary. Congress should craft a distribution method with as much clarity and direction as possible. Congress should also be aware that 25 tribal trust cases involving similar issues have also been filed.

Indian Trust Asset Management Demonstration Project Act. H.R. 4322 includes provisions allowing for a pilot project for 30 tribes to take over management of Indian trust assets. Many Indian trust assets are already managed by the tribes through PL 93-638 compacts and contracts. In the legislation, it is critical to transfer the responsibility for results along with authority and funding. We do not believe the United States should remain liable for any losses resulting from a Tribe's management of its trust assets under the demonstration project. This is particularly true because the bill would allow Tribes to develop and carry out trust asset management systems, practices, and procedures that are different and potentially incompatible with those used by Interior in managing trust assets. In a normal trust, this action would be considered a merger of Trustee and beneficiary and thus end the Trust relationship. Of course this would have no impact on the government-to-government relationship.

We look forward to discussing further the following key aspects of this provision. For example, if program reassumption became necessary, how would Interior take back program responsibilities and integrate information back into our trust asset management environment when it has been collected and processed in different systems? What kind of monitoring of tribal activities will Interior have to do to ensure the tribe is living up to the standards in the bill? What performance standard would apply: the imminent jeopardy standard associated with PL 93-638 or the "highest and most exacting fiduciary" standard being required of Interior? Under the 1994 Act, Tribes are permitted to withdraw and manage their trust funds and the Secretary is held harmless for losses or mismanagement

that may occur. A similar provision related to other trust assets would be a logical extension of self-governance.

Fractional Interest Purchase and Consolidation Program. The bill also places a priority on developing an aggressive program for the purchase of interests in individual Indian land. The President's FY 2005 budget request included an unprecedented $70 million request for Indian land consolidation. Congress chose to appropriate $34.5 million for the program in FY 2005. In light of this, we requested and received $34.5 million for FY 2006.

As structured, the program in H.R. 4322 provides incentives where a parcel of land is held by 20 or more individuals and where an individual sells all interests in trust land. In cases where a parcel of land of land is held by over 200 individuals, the bill provides procedures for noticing interest holders and moving ahead with consolidation of the interests. These provisions will greatly help consolidate interests and reduce the costs of management of the individual Indian trust.

Care must be given, however, to ensure that this bill does not work as an incentive to further fractionate land so that individuals can become eligible for the bill's incentives. So far, there has been no lack of willing sellers. In addition, we would like to work with you further on the criteria, thresholds and amounts included in this title. We have some serious concerns as to the cost of the significant premiums provided in the bill. In addition, we would like to explore the possibilities for consolidation sale authority to reduce the associated public financing burden of addressing the fractionation issue. We need to analyze the costs of the new incentives, the mechanisms for funding land acquisitions and the impact of the American Indian Probate Reform Act on the rate of fractionation as a part of our implementation plan.

Restructuring the Bureau of Indian Affairs and the Office of the Special Trustee for American Indians. H.R. 4322 includes a number of concepts that were discussed by the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform in 2002.

This task force was formed during the period when the Department was examining ways to restructure the trust functions of the Department in response to the trust reform elements of the Cobell court. The task force ended in an impasse with regard to implementing legislation on matters that were not related to organizational alignment. In the face of no legislation, the Department implemented a reorganization plan that could be achieved administratively.

This title of the bill also extends the Indian preference hiring policy to the new Office of Trust Reform Implementation and Oversight created by the bill and abolishes the Office of the Special Trustee for American Indians. Interior would appreciate the opportunity to discuss these policy choices in some detail.

While Interior is receptive to the concepts of establishing an Undersecretary position and merging Indian programs under new leadership, we would like to discuss the objectives of such a proposal. In Interior's view, such an initiative is unlikely to materially alter Indian trust performance due to the presence of other, more pressing, structural concerns about the trust, such as the lack of a clear trust agreement to guide responsibilities and expectations, appropriations that do not track with all program trust responsibilities, the lack of an operative cost-benefit paradigm to guide decision-making priorities, the challenges of incorporating PL 93-638 compacting and contracting, and the requirements associated with Indian preference hiring policies. These issues have frustrated the beneficiaries, the administrators, and a various times Congress throughout the lifespan of this trust. We encourage Congress to speak clearly in whatever legislative direction it chooses to write, and carefully consider the impacts the language will have in allowing us to meet the objectives of your constituents.

It is clear that moving from today's organization into a beneficiary services-oriented organization of excellence will demand the highest of financial, information technology and managerial skills. American Indians make up less than one percent of the American public. When we restrict hiring to this small fraction of potential employees, instead of reaching out to whomever may be most qualified, we deprive ourselves of 99% of the

available talent pool. While the Indian preference hiring policy does permit the hiring of non-Indians, it serves as a significant disincentive for non-Indian applicants. To improve Indian program performance and results, we would like the opportunity to serve Indian Country by including a broader range of applicants so as to create an applicant pool large enough to ensure we are hiring well qualified employees.

Audit of Indian Funds. The last title of H.R. 4322 requires the Secretary to prepare financial statements for Indian trust accounts in accordance with generally accepted accounting principles of the Federal Government. The Comptroller General of the United States is then required to contract with an independent external auditor to audit the financial statements and provide a public report on the audit. The Secretary is required to transfer funding for this audit to the Comptroller General from "administrative expenses of the Department of the Interior" to be credited to the account established for salaries and expenses of the GAO. For the last ten years, the trust funds have been audited by independent public accounting firms. In addition, Interior encourages additional discussion to ensure that accounting is accomplished under proper fiduciary accounting standards to avoid any conflicts with standard fiduciary accounting practices.

In closing, I want to make it clear that we believe the November 2005 Court of Appeals decision was an extremely important one. As Congress assesses what is a reasonable amount to provide for settlement of the plaintiffs' claims, Congress must consider that we are no longer looking at a $13 billion accounting cost nor are we looking at an accounting in which statistical sampling cannot be used. Further, Congress should also take into consideration what we have learned so far from the more than $100 million we have spent looking at IIM accounts to date.

Thank you. I'd be happy to answer any questions you might have at this point.