

STATEMENT OF  
ROBERT M. PEREGOY, NATIVE AMERICAN RIGHTS FUND (NARF)  
PRESENTED TO  
THE SENATE COMMITTEE ON INDIAN AFFAIRS AND  
THE HOUSE COMMITTEE ON RESOURCES  
ON BEHALF OF THE CERTIFIED COBELL CLASS  
IN OPPOSITION TO  
H.R. 3782, THE TRIBAL TRUST FUND SETTLEMENT ACT OF 1998  
JULY 22, 1998

**I. INTRODUCTION**

Mr. Chairmen and Members of the Senate Committee on Indian Affairs and the House Committee on Resources, I appreciate the opportunity to provide testimony in opposition to H.R. 3782-- which is deceptively entitled "The Tribal Trust Fund Settlement Act of 1998." My name is Robert Peregoy. I am a senior staff attorney employed by the Native American Rights Fund. I serve as NARF's lead attorney in the class action litigation filed on June 10, 1996 in the U.S. District Court for the District of Columbia against certain federal officials for a century of mismanagement of the Individual Indian Money (IIM) trust, *in Cobell et al. v. Babbitt et al.*, 1:96CV01285 (RCL) (D.D.C.). In early 1997 Judge Royce Lamberth certified the Cobell class to include of all past and present beneficiaries of IIM accounts. There are at least over 500,000 current IIM trust beneficiaries who belong to this class.

I therefore appear today on behalf of over a half million individual Indians who have been bilked by the federal government for over a hundred years, as a result of the government's century-long mismanagement of the IIM trust. This bill was written by the Departments of the Interior and Treasury, the Secretaries of which are named defendants in the Cobell litigation. As we will demonstrate, H.R. 3782 is a Trojan Horse when considered in light of the fundamental property rights and interests of IIM trust beneficiaries--which the Administration puts at stake in this misguided legislation. We accordingly oppose H.R. 3782 for the following reasons: (1) it seeks to effectuate unconstitutional takings; (2) it purports to impermissibly interfere with the jurisdiction of the U.S. district court to comprehensively and completely adjudicate Cobell; 1 and (3) it

*I Since late 1997, the litigation has taken on a much more acrimonious posture than the early attempts at a "cooperative approach" to resolve the issues. In April 1998, the court denied Plaintiff's request for interim relief, although it stated in part that Plaintiffs were "likely to ultimately prevail" in the action. In May 1998, the court set March 15, 1999 as the date to commence trial on that aspect of the case related to "fixing the system." The court also entered a pre-trial order setting a discovery schedule for the first*

portends unconscionably and unlawfully to retroactively amend the American Indian Trust Fund Reform Act of 1994.

At the outset, I note for the record that our testimony is limited to the impact of H.R. 3782 on the IIM trust and the class action litigation which has been committed to the jurisdiction of the U.S. District Court for over two years. We take no position on H.R. 3782 as it pertains exclusively to settlement of tribal trust fund issues. Rather, as has been our position since the outset of the litigation, we defer to the tribes and their representatives to address tribal trust fund matters. Also, it is important that we reemphasize that the money held in our clients' IIM accounts is the individual Indians' own money which is derived from individual Indian-owned assets, such as revenue earned from the lease of allotted Indian lands. It is not government money, nor did it originate from appropriated funds.

## **II. H.R. 3782 IS A TROJAN HORSE: INTERIOR HAS DECEPTIVELY REPRESENTED THAT ITS TRIBAL TRUST FUND SETTLEMENT LEGISLATION WOULD NOT INCLUDE IIM ISSUES**

The 500,000 plus individual Indian trust beneficiaries who are members of our client class certified in Cobell v. Babbitt **strongly oppose the enactment of H.R. 3782, the deceptively entitled "Tribal Trust Fund Settlement Act of 1998."** H.R. 3782 was drafted by the Departments of the Interior and Treasury, and is the subject of active

*part of the trial, as well as a discovery schedule for determining a trial date for correction and adjustment of the IIM accounts to reflect their proper balances, but for the government's mismanagement. The Plaintiffs are now seeking in extensive discovery, with the government freely and indiscriminately posing questionable objections based on a variety of alleged privileges--a familiar resound of this Administration. Also the parties are currently briefing certain dispositive issues related to the government's boilerplate defenses of lack of jurisdiction, statute of limitations, laches and the like. These issues are likely to be decided sometime this Fall. Finally, it appears that it is not possible to conduct the envisioned economic modeling as an alternative to an accounting of the IIM trust for purposes of accurately restating IIM trust balances, due to the government's loss and destruction of records necessary for a statistically valid sampling resulting in 95 per cent certainty.*

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lobbying by Secretary Babbitt--a named defendant in the IIM class action litigation currently pending in the U.S. district court for the District of Columbia. In this context, it is important for Congress to realize that it is a virtual certainty that the Administration will attempt to use its so-called "Tribal Trust Fund Settlement Act" as a tool to interfere with and undermine the pending IIM class action litigation by seeking to unlawfully compromise and even abrogate the property rights and interests of untold numbers of individual Indian trust beneficiaries. In short, the Secretary's bill is a Trojan Horse.

Interior has deceptively represented to both Indian Country and Congress that its "Tribal Trust Fund Settlement" legislation would be limited to settling tribal trust fund matters. The Department has further publicly represented that it is taking a "hands-off" approach to a legislative settlement of the IIM dispute, since it is a matter committed to the jurisdiction of the federal district court.

Specifically, in a report to Congress and Indian Country issued on November 13, 1997, Interior represented that IIM trust funds would not covered by legislative proposal to settle tribal trust fund issues:

There are two broad categories of trust fund accounts held by the government for Indians. One type comprises some 300,000 [sic] Individual Indian Money (IIM) accounts, each held for a single individual, or in some cases a Tribe, or as a holding account for certain "special deposits." **The IIM accounts are currently the subject of a class action lawsuit brought by IIM account holders against the United States, Cobell v. Babbitt, 1:96CV01285 RCL (D.D.C.), and are not covered by the proposal in this report.** (Emphasis added). 2

Also, in a November 13, 1997 press release, the Assistant Secretary for Indian Affairs acknowledged that IIM "claims" would be resolved by the court in Cobell v. Babbitt. Not so, according to the express terms of the so-called "Tribal Trust Fund Settlement Act of 1998."

It is significant to note that on March 31, 1998, Judge Royce Lamberth ruled that it is "likely" that the Plaintiff class "will ultimately prevail" in the litigation. Less than one month later, on April 23, 1998, the Secretary of the Interior and Assistant Secretary for Indian Affairs presented to Congress the Administration's draft bill to settle the tribal trust fund dispute(s). Again, they represented that the proposed legislation was limited to settling tribal trust fund issues only. In a letter to the President of the Senate, Interior

2 See "*Recommendations of the Secretary of the Interior for Settlement of Disputed Tribal Trust Fund Accounts*," sent to Congress on November 13, 1997, and which serves as the basis for H.R. 3782, at 4.

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made no mention of the fact that the Administration's bill in fact purported to resolve some IIM trust issues. 3

3 Interior also sought to amend the 1994 Trust Fund Reform Act pursuant to a legislative rider it surreptitiously succeeded in tacking onto the FY 99 Interior appropriations bill at the 11th hour without any prior notice or hearing:

*Provided further, That hereafter the Secretary shall not be required to provide a periodic statement of performance pursuant to 25 U. S.C. 401 I)b), nor to invest pursuant to 25 U. S.C. 161 a, any Indian trust account managed by the Secretary that has not had activity for at least eighteen months and has a balance of \$1.00 or less: Provided further, That hereafter the Secretary shall maintain a record of any such accounts and amounts in such accounts will remain available upon request to the account holder.*

*As drafted by Interior, the rider would have amended the 1994 Act by exempting the Secretary from the Act's requirement to issue quarterly statements to trust beneficiaries of certain small IIM accounts. The rider would further have abrogated the Secretary's statutory duty to invest over*

*\$5,000 principal held in these small accounts, as required by 25 U.S.C. Section 161a(b). Like H.R. 3782, neither the IIM trust beneficiaries nor their representatives had any prior notice of Interior's intent to seek these substantive amendments, either through appropriations legislation or otherwise. This appropriations rider threatened to adversely affect the property rights and interests of at least 17,000 current individual Indian trust beneficiaries, who are unidentified. Moreover, it could have adversely affected the entire Cobell class since all the money in the current 500,000 plus Individual Indian Money (IIM) accounts is pooled and invested in a co-mingled trust with interest required to be allocated to the individual accounts on a pro rata basis. Further, the IIM legislative riders posed serious questions on the alleged "merits" alone, which require a full airing in a public hearing process cloaked with the protections of due process in order to correctly and fully determine the actual impact of the riders on the IIM trust and account holders.*

*We opposed this legislation on the following grounds: (1) Interior's legislative riders may interfere with the Cobell litigation--in which Interior officials are named defendants--and which has been committed to the jurisdiction of the U.S. District Court for the District of Columbia for over two years; (2) the alleged merits of the legislative riders are unsupported, and raise more questions and would create more problems than solutions; and (3) substantive legislation which threatens to adversely affect the fundamental property rights and interests of thousands of individual Indian trust beneficiaries is simply inappropriate for inclusion in appropriations legislation, particularly where the riders were surreptitiously added at Interior's urging in the absence of the any*

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Notwithstanding Interior's repeated representations to Congress, Indian Country and the public to the contrary, **H.R. 3782 purports to go far beyond settling tribal trust fund matters, based on our analysis to date which was undertaken in conjunction with Price Waterhouse Coopers.** On its face, including the definition section, H.R. 3782 is rife with express references and provisions which portend to adversely affect the property rights and interests of over a half million IIM trust beneficiaries. See, ea., Section 4, subsections (7), (18), (19), (20), (21), (22); Section 5(b)(3) and (c); Section 15; and Section 16.

### **III. THERE IS NO RATIONAL BASIS FOR INCLUDING SETTLEMENT OF IIM ISSUES IN H.R. 3782, AND ANY SUCH INCLUSION COULD IMPERMISSIBLY RESULT IN UNCONSTITUTIONAL TAKINGS**

H.R. 3782 is not limited to the settlement of tribal trust fund issues, as the title of the bill expressly states, and as Interior has held out to Congress, Indian Country and the public. Although most of the provisions of H.R. 3782 pertain specifically to tribal trust fund matters, the provisions relating to the IIM trust could adversely and unlawfully affect the fundamental property rights and interests individual Indian trust beneficiaries by directly impacting IIM accounts, as outlined in sections 15 and 16 of H.R. 3782. There

*hearing, notice or opportunity to comment vis-a-vis those 17,000 unidentified individuals who would have been directly affected thereby. See Exhibit A, July 10, 1998 letter from Robert M. Perego to Chairman Ralph Regula of the House Interior Subcommittee on Appropriations, and accompanying*

*exhibits. However, at a last minute meeting with Cobell Plaintiffs' attorneys on July 14, 1998, Interior offered to redraft its IIM legislative rider in order to resolve the concerns of the Cobell class. The following language was subsequently agreed upon and, according to Interior, submitted in place of the original rider:*

*Notwithstanding any other provision of law, for the fiscal year ending September 30, 1999, the Secretary shall not be required to provide a quarterly statement of performance for any Indian trust account that has not had activity for at least eighteen months and has a balance of \$1.00 or less; Provided further, that the Secretary shall issue an annual account statement and maintain a record of any such accounts and shall permit the balance in each such account to be withdrawn upon the express written request of the account holder.*

were over 500,000 such individual trust beneficiaries on the Office of Trust Funds Management (OTFM) IIM database between 1985 and 1996. To gain a better appreciation of the arbitrary and capricious nature of the IIM provisions of H.R. 3782, it is instructive to first briefly describe Interior's dismal accounting and recordkeeping system, particularly in light of recent evidence elicited in the Cobell litigation.

**A. Interior's IIM Trust Accounting and Recordkeeping "Systems" Are Notoriously Inadequate and the Basic Cause of the Federal Trustee's Inability to Verify the Accuracy of IIM Account Balances**

Interior does not have an accounts receivable system to track revenue due from the underlying trust assets beneficially owned by IIM trust beneficiaries. Therefore, particularly in fractionated heirship situations, the Department has no ability to determine when and how much revenue is due, or if any has been collected at all, on time, or in the proper amount; whether, when or what penalties are due, owed or collected; or whether the correct amounts of income or interest have been distributed to the proper trust beneficiaries. The Assistant Secretary for Indian Affairs recently agreed, according to an article published in the July 9, 1998 issue of the *Wall Street Journal*, which quoted Mr. Kevin Gover stating, with respect to the IIM trust:

The real question at this point is, are we able to say that the money going into the banking system is the right amount? Can we demonstrate through our records that the right amount has been paid in over time? The answer is no. See John J. Fialka, *Indians Demand Money in U.S. Trust-Fund Labyrinth*, *Wall St. J.*, July 9, 1998, at A20.

Further, by its own admission, Interior over the years has lost or destroyed countless records relevant to trust land transactions which ultimately affect the accuracy of IIM account balances. According to the July 9 *Wall Street Journal* article, the Special Trustee labeled the BIA's trust accounting and management system as:

"an obsolete and ineffective" system that has lost track of 47,000 account holders. [The Special Trustee] says [the BIA] has lost a "vast majority" of leases of Indian-owned land--the major source of Indian income--and stored records in places, such as salt mines, where there is "no retrieval capacity." *Id.*

The Special Trustee aptly summarized the problem with a descriptive one-liner: "There are no books." Id. In this context, Interior personnel have admitted under oath that the "tracking and control of income is difficult for IIM trust funds management." Further, the Department has admitted that its recordkeeping system is backlogged several years,

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including four (4) years or longer regarding land title and ownership records alone. Interior has conceded, again under oath, that a "successful billing system or income tracking system which meets the standards in place in the private sector would require us to complete our current efforts to bring information up to date."<sup>4</sup> It must be emphasized that such current efforts will not be completed for several years, if ever, due to lost and destroyed records.

Equally disturbing is the fact that Interior currently is confronted with 9,000 backlogged probates, which have a direct bearing on the balances of IIM accounts, both current and "closed." Such backlogged probates extend at least as far back in time as 1973--a quarter of a century ago. One IIM accountholder recently informed us that the BIA in June 1998 had requested a copy of the death certificate of her uncle, an IIM accountholder who died ten years ago. The BIA also asked this particular person for copies of her birth certificate and those of her eight siblings--including one who died 39 years ago and another who died 11 years ago. Another potential IIM account beneficiary informed us that the BIA has just begun to probate the estate of her grandmother, an IIM accountholder who died twenty (20) years ago. Such backlogged probates are integral to Interior's belated "efforts to bring information up to date," and therefore directly impact the Department's ability (or inability) to accurately "track and control income" and to develop a "successful billing or income tracking system." In short, it would be unconscionable for Congress to turn its back on more than 500,000 current IIM accountholders whose account balances are or stand to be materially affected by lost or destroyed records, backlogs of records which Interior somehow has managed to retain, and the disastrous probate backlog. To arbitrarily manipulate account balances or ledgers in this context, as the Administration seeks to do pursuant to H.R. 3782, would be absurd and unlawful, as set forth below.

## **B. Section-by-Section Analysis of H.R. 3782 as Impacting the IIM Trust**

IIM accounts are not included or referred to in Section 2 of H.R. 3782, "FINDINGS." The bill is based in significant part on the Department of the Interior's reconciliation of tribal trust fund accounts, as required by the American Indian Trust Fund Management Act of 1994. However, IIM accounts were not included in this reconciliation and have not been reconciled to date. In fact, Arthur Anderson LLP determined that it would cost the government at least between \$108 and \$281 million just to attempt to

<sup>4</sup> See Cobell v. Babbitt Declaration of James H. McDivitt, Acting Director of Management and Administration, and Deputy Chief Financial Officer, Bureau of Indian Affairs (June 30, 1997), TT 28-30 at 8-9 (16 page document available from NARF upon request).

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reconcile the IIM accounts, and only for a twenty year period (1972-1992). Even then, concluded Arthur Anderson LLP, any such reconciliation of IIM accounts would be virtually meaningless, given the fact that the government has lost or destroyed countless IIM records necessary for a reconciliation or accounting. Accordingly, Interior has refused to comply with Congress' statutory directives to audit and reconcile IIM accounts.

**IN THIS LIGHT, THERE IS NO RATIONAL BASIS FOR INCLUDING IIM ACCOUNTS IN ANY TRIBAL TRUST FUND SETTLEMENT LEGISLATION. TO DO SO WOULD BE ARBITRARY, CAPRICIOUS, AND NOT IN ACCORDANCE WITH LAW. MOREOVER, SUCH COULD IMPERMISSIBLY INTERFERE WITH THE COURT'S JURISDICTION TO RESOLVE THIS CASE, AND COULD FURTHER RESULT IN UNCONSTITUTIONAL TAKINGS.**

In Section 3, "PURPOSES" of the bill, H.R. 3782 does not propose any settlement of IIM claims, compensation of known errors which may have resulted in losses to IIM accountholders, or any means for settling such claims through an informal dispute resolution process. Although Section 3 does not purport to correct IIM accounts or compensate IIM beneficiaries for known errors, this bill would confer upon the Secretary of the Interior broad discretionary powers, "to eliminate accounting discrepancies occurring prior to the date of enactment of this Act 5," and to "make routine administrative adjustments to tribal trust fund accounts and *individual Indian money accounts* ... occurring after the date of enactment of this act." 6 (Italics added).

### **1. Overdrafts**

Sections 15 and 16 appear to be afterthoughts to H.R. 3782, slipped in at the 11th hour under the cover of darkness. Section 15, subsection (a)(1) ("OVERDRAFTS"), authorizes the Secretary of the Interior to pay a one time cash infusion into the Individual Indian Money account pool not to exceed \$400,000 to replenish any deficiencies which occurred as a result of overdrafts. This amount is a mere fraction of the actual overdrafts which have occurred historically in the IIM accounts. In the Office of the Special Trustee For American Indian's Strategic Plan To Implement The Reforms Required By The American Indian Trust Fund Management Reform Act Of 1994, dated April 1997 [Special Trustee's Strategic Plan], the Special Trustee noted that there are currently \$42.2 million in Overdraft Interest Clearing Accounts resulting from interest mis-postings prior to 1993 7. These non-earning assets deprive current IIM accountholders of more than \$2

*5 H.R. 3782, 105th Cong., 2nd Sess., 1998, Section 15 (b), at 26.*

*6 Ibid., Section 16 (a), page 27.*

*7 Special Trustee For American Indians, Strategic Plan To Imolement The Reforms*

*(continued... )*

million per year in interest income. These figures do not include overdrafts which have occurred subsequent to 1993. Simply put, \$400,000 will not resolve the recurring loss of millions of dollars in investment income each year owed to IIM accountholders, much less the \$42.2 million deficiency which still exists in the IIM account pool.

Section 15, subsection (a)(2) ("OVERDRAFTS"), provides that, "Any overdrafts recovered subsequent to replenishment under paragraph (1) shall be deposited in the miscellaneous receipts of the Treasury." Recovered funds deposited in the general Treasury may not, without specific Congressional authorization, be used for the benefit of the IIM trust beneficiaries. The IIM trust, unlike the general treasury fund, is a permanently and indefinitely appropriated fund which is administered solely for the benefit of the IIM trust beneficiaries. The recovered funds referred to in this subsection are the result of overdrafts to the IIM Trust account at the Department of Treasury which have been reclaimed. As such, they represent deficiencies to the IIM Trust account at the Department which have been recovered and should be applied toward the \$42.2 million in overdrafts currently outstanding in the IIM trust fund itself. Failure to deposit such reclaimed monies in the IIM trust would effectively amount to another breach of trust.

## 2. Accounting Discrepancies

Section 15, subsection (b) ("ACCOUNTING DISCREPANCIES") requires the Secretary of the Interior to eliminate accounting discrepancies occurring prior to the date of enactment of this act, provided that "in his sole discretion," the cost of further research is likely to exceed any cost of clearing such accounting discrepancy. Accounting discrepancy has been defined to include: (1) the variance between general ledger control accounts and the aggregate of the balances in Individual Indian Money accounts; (2) balances in Interest Clearing Accounts; (3) balances in United States Treasury Suspense Accounts 8; and (4) variances between account balances pursuant to United States Treasury records for various accounts 9 and account balances pursuant to general ledger accounts.

7( ... continued)

Required By The American Indian Trust Fund Management Reform Act of 1994, dated 4/97.

Addendum One, pages 1-2.

8 *United States Treasury Suspense accounts have been defined by H.R. 3782 to include the following accounts held by the United States Treasury: 14F3875.21, 14F3878.21, 14F3879.21, and 14F3880.21.*

9*Various accounts include those defined in Section 4. DEFINITIONS, Subsection (1 8)(D), 14X5166, 14X5197, 14X8060, 14X8176, 14X8327, 14X8365, 14X8366, 14X8368, 14X8563, 14X6039, 14X6140, and 14X6703.*

Section 15, subsection (b) ACCOUNTING DISCREPANCIES, provides that accounting discrepancies shall be eliminated in the following manner:

- (1) United States Treasury account balances for accounts 14X5166, 14X5197... 14X6039 [Individual Indian Money, Bureau of Indian Affairs] 10... shall be adjusted to be equal to the account balances pursuant to the corresponding General Ledger accounts.
- (2) United States Treasury suspense accounts shall be adjusted to zero.
- (3) Negative balance interest-clearing accounts shall be adjusted to zero.

- (4) The General Ledger control account for the individual Indian money accounts shall be adjusted to agree to the aggregate balance of the individual Indian money accounts.
- (5) Amounts necessary to make the adjustments required by this subsection are hereby appropriated to the Secretary from funds in the Treasury not otherwise appropriated and shall remain available until expended.

Subsection (b)(1) represents the difference between the Department of Treasury's balance of funds held in trust for the IIM accountholders in Treasury account number 14X6039, and the Department of Interior's record of funds and trust monies held by Treasury on behalf of accountholders. Subsection (b)(1) would arbitrarily adjust Treasury's IIM account [14X6039] to the balance per IIM trust fund records maintained by the Department of the Interior. **Significantly, the director Interior's Office of Trust Fund Management (OTFM) recently admitted under oath in deposition testimony in the Cobell case that the government cannot verify the accuracy of the balance of a single IIM account, much less the accuracy of the pooled IIM trust, due to the fact that Interior has lost or destroyed countless IIM records over the years.** To adjust Treasury's IIM pooled account balance to the admitted inaccurate balance carried on Interior's IIM general ledger would be arbitrary and capricious, and repugnant to the sound and fair formulation of public policy." Moreover, it could amount to another

*10"Federal Account Symbols and Titles: Supplement to Volume I Treasury Financial Manual." March 1998. Pg. A48.*

*11 In any event, in the absence of information regarding Treasury account balances and Department of Interior general ledger account balances, it is not possible to determine if Treasury is contributing or withdrawing funds by adjusting account 14X6039 to the (continued... )*

unconstitutional taking.

Subsection (b)(2) mandates that Treasury suspense accounts shall be adjusted to zero. The purpose of Treasury's suspense accounts is not known. If these accounts are or were used in the administration, management or supervision of IIM trust funds, they should not be adjusted to zero. They are a record of the Department of Interior's and the Department of Treasury's management of IIM trust funds as trustee. To manipulate such trust accounts (and records) would stand trust law on its head, and could constitute further serious breaches of trust.

Subsection (b)(3) also requires the Secretary to adjust negative balances in interest clearing accounts to zero. These negative balance interest-clearing accounts represent at least two issues with respect to IIM trust beneficiaries. First, these accounts represent interest overpayments. These interest clearing accounts are a record of the Secretary of the Interior's interest overpayments and should not be cleared until trust beneficiaries have been determined and made whole--which is a precise prong pending in the Cobell class action case. Second, these interest clearing accounts could be considered a vehicle for determining the funds missing from Treasury's IIM account [14X6039].

Further detailed analysis and information will be required before a determination can be made as to whether the balances in interest clearing accounts represent a full or partial measure of missing trust funds.

The Administration in H.R. 3782 has defined Interest Clearing Accounts 12 as control accounts in the IIM trust fund system utilized to distribute interest and investment income to IIM accounts. Special Deposit Accounts are control accounts used by the Office of Trust Funds Management to distribute interest and investment income to distribute interest and investment income to Individual Indian Monies trust beneficiaries. Per the Special Trustee's Strategic Plan 13 , aggregate balances in Special Deposit Accounts amount to \$141,723,524 in undistributed

*11( ... continued)*

*Department of Interior general ledger. On June 25, 1998, Chairman Young of the House Committee on Resources wrote to Robert E. Rubin, Secretary of the Treasury, asking for certain information regarding account balances in the 12 Treasury accounts proposed for such adjustment in Section 15(b)(1) of H.R. 3782 at 26. Although Chairman Young asked Secretary Rubin to submit the information within ten (10) days, no such information has been furnished to our knowledge.*

*12 Section 4. DEFINITIONS, Subsection (21).*

*13Special Trustee For American Indians, Strategic Plan To Implement The Reforms Required By The American Indian Trust Fund Management Reform Act of 1994, dated 4/97. Addendum One, page 6.*

income, interest and money. H.R. 3782 is unclear as to the nature of the authority bestowed upon the Secretary of the Interior regarding the disposition of Special Deposit Accounts.

Subsection (b)(4) further requires the Secretary of the Interior to adjust the IIM general ledger control account to agree with the aggregate balances of the Individual Indian Money accounts. Per the Special Trustee's Strategic Plan, the general ledger carries a balance approximately \$30 million greater than the total of the balances per the IIM subsidiary ledger detail 14 as of September 30, 1995. Since a reconciliation of the general ledger control account with the IIM accounts has not been completed, it is not possible to determine which is the more accurate reflection of trust activity, or whether, in fact, either balance is accurately stated.

However, the accuracy--or more descriptively, the inaccuracy-- of IIM accounting information is a matter of public record. The Griffin report dated September 30, 1995 states, "Many individual Tribal and IIM accounts still need to be reconciled and/ or resolved through negotiation and settlement before reliance can be placed on the balances reflected in the Trust Fund accounts. 15 The Special Trustee's Strategic Plan dated April, 1997 provides:

There is a difference between the general ledger summary account of IIM on OMNI and the total of the balances per the IIM subsidiary ledger detail. The difference was approximately \$30 million at September 30, 1995, with the general ledger carrying the higher balance. There are also negative

cash balances on the ITM subsidiary system aggregating approximately \$46 million. *The effect of the above items is to further substantiate the unreliability of the trust fund balances as reflected by OTFM (Italics added).* 16

Under the 1995 scenario, and we have no reason to believe the numbers are any better today, the arbitrary adjustment mandated by Section 15(b)(4) of H.R. 3782 would cost the IIM trust beneficiaries tens of millions of dollars via a simple bookkeeping entry.

14 *Ibid.* pg. 13

15 Griffin & Associates, P.C., "US Department of the Interior-Bureau of Indian Affairs-Tribal, Individual Indian Monies and Other Special Appropriation Funds Managed By The Office of Trust Funds Management." September 30, 1995. Pg. 17.

16 *Special Trustee For American Indians, Strategic Plan To Implement The Reforms Required By The American Indian Trust Fund Management Reform Act of 1994, dated 4/97. Addendum One, page 13.*

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In short, this section too constitutes an unlawful taking. Moreover, it would be absurd to adjust the IIM general ledger control account to reflect the aggregate balance of over 500,000 IIM accounts where, as Interior has admitted here, it cannot verify the accuracy of a single IIM account balance due to records it has lost or destroyed over the years.

Section 16 of H.R. 3782 ("ROUTINE ADJUSTMENTS"), authorizes the Secretary of the Interior to make routine administrative adjustments to IIM accounts attributable to transactions after the date of enactment of this Act. This authority is primarily limited to a monetary ceiling of \$50,000, as set forth in H.R. 3782. Although limited to \$50,000, the breadth of power bestowed appears far reaching. H.R. 3782 has not defined routine administrative adjustments, which could be interpreted to address a broad range of problems including, mismanagement and malfeasance. Furthermore, the monetary ceiling represents the extent to which the Secretary of the Interior could correct misstated IIM account balances, and does not satisfactorily address the possibility of understatements that could easily exceed \$50,000.

**B. H.R. 3782 Would Confer Upon the Secretary Unlawfully Broad Discretionary Powers to Eliminate Any Accounting Discrepancy Based on His Sole Determination That It Would Cost Too Much to Research the Reason for the Discrepancy**

As set forth above, Section 15(b)(1-4) of H.R. 3782 requires the Secretary to adjust "accounting discrepancies" pertaining to certain IIM accounts/ledgers. However, the bill does not limit the definition of "accounting discrepancies" to the precise accounts identified therein. Rather, the language is all-inclusive ("the term 'accounting discrepancies' include..."). In everyday accounting parlance, the ten-n "accounting discrepancy" includes any account transaction which lacks adequate documentation to support the transaction. While H.R. 3782 mandates the Secretary to take certain action regarding the accounts identified in subsection (b)(1-4), it further authorizes him "to eliminate

accounting discrepancies occurring prior to the date of this Act," if he "has determined in his sole discretion, that the cost of further research to determine the cause of any such accounting discrepancy is likely to exceed the cost of clearing such accounting discrepancy." Section 15(b).

Such "accounting discrepancies," whether they are associated with single or aggregate IIM accounts and related ledgers, are a direct result of both Interior's and Treasury's failure to prudently discharge their trust duties to ensure that adequate documentation is available to demonstrate that all trust revenues are collected promptly in the correct amounts, that the trust funds are invested in a timely manner, and that they are timely distributed to the proper beneficiaries. Thus, such "accounting discrepancies" are not minor deficiencies that can be corrected by a unilateral decision of

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the Secretary to restate the trust accounts with a mere stroke of the pen as he sees fit, or if he decides the cost of research, document retrieval and reconciliation is too expensive. Rather, the "accounting discrepancies" reflect serious concerns about a possible taking of property beneficially owned by individual Indians without due compensation.

For example, a \$100 million dollar "discrepancy" in supporting documentation for disbursements from the IIM pool does not merely mean that a mathematical error has occurred; it means that the trustee does not know and cannot ensure that the proper trust beneficiaries received their correct share of their trust money as required by the Constitution and statutory and common law. Under such circumstances, governing law presumes that the trust beneficiaries never received their trust money--and for good reason. When large amounts of money are managed in trust, it would be too easy to simply destroy the trust documents to evade accountability for the loss of funds by negligence, incompetence or theft. Accordingly, any proposal which permits the Secretary as trustee to magically erase "accounting discrepancies" would turn trust law on its head and materially and irreparably harm each and every trust beneficiary.

It is a virtual certainty that the Secretary would conclude that there are "accounting discrepancies" between the Treasury general ledger and large accounts in the IIM trust pool and that the cost to research or reconcile them would be far more expensive than "clearing" or erasing them, given the fact that Interior and Treasury, by their own admissions, have destroyed or lost countless records which directly affect IIM account balances--to the point where the Director of OTFM admitted under oath in Cobell deposition testimony that Interior cannot verify the accuracy of a single IIM account, much less the aggregate balance thereof. Also as pointed out, the cost of researching and locating missing records is astronomical, according to Interior and its experts. Arthur Anderson LLP, the government's expert in the Cobell class action litigation and for the tribal trust fund reconciliation, determined over two years ago that it will cost the government at least between \$108 and \$281 million just to attempt to reconcile the IIM accounts for a twenty-year period only (1972-92), and that such an effort would be virtually meaningless due to missing or destroyed records. Moreover, in the Cobell litigation, another senior official of Interior's OTFM testified under oath that it would cost approximately \$2 million just to research and obtain necessary IIM account documents, including transaction records, for the five (5) named Cobell plaintiffs alone! That translates to

\$400,000 per account holder. With respect to the 500,000 plus IIM accounts on the automated system between 1985-96, that amounts to over \$20 billion just to obtain the records to reconcile IIM accounts. Under this scenario, it is an understatement to say that it wouldn't be rational to allow the Secretary sole discretionary authority to "eliminate accounting discrepancies." In short, such a provision would put the fox in charge of the chicken coop.

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#### **IV. H.R. 3782 WOULD INTERFERE WITH THE JURISDICTION OF THE DISTRICT COURT TO COMPREHENSIVELY AND COMPLETELY RESOLVE THE IIM TRUST FUND DISPUTE WHICH HAS BEEN IN LITIGATION FOR OVER TWO YEARS**

The matters set forth in Sections 15 and 16 and other parts of the of H.R. 3782, including "accounting discrepancies," lie at the heart of the Cobell class action litigation, which has been committed to the jurisdiction of the U. S. district court for over two years. The Administration's bill therefore portends to impermissibly interfere with and usurp the district court's plenary jurisdiction to comprehensively and completely adjudicate Cobell. This is particularly egregious, given that the Secretary of the Interior, the Assistant Secretary for Indian Affairs and the Secretary of the Treasury are the named government defendants in this case.

A primary goal of the Cobell lawsuit is to establish reasonably accurate trust balances and to accurately restate all IIM trust account balances. That task may now only be accomplished by a reasonable alternative to an accounting of over 500,000 IIM accounts, since Interior has lost or destroyed most of the documents which both statutory and common law require the Department to maintain in order to complete an accounting for any and all IIM trust fund accounts. Because Interior cannot complete an accounting for even a single IIM account, the certified class of individual Indian trust beneficiaries is, by necessity, spending literally millions of dollars on experts to attempt to craft a reliable alternative to approximate correct account balances. Significantly, all accounts are interrelated, since IIM trust monies are required to be deposited into Treasury, pooled, and administered by the Department of the Interior. Any proposed adjustment of Treasury and Interior accounts will affect the entire pool and, therefore, all individual Indian trust beneficiaries participating in the pool.

Because of its complete and utter failure to prudently discharge its fiduciary responsibilities, the government has admitted that no one should rely on the accuracy of any stated IIM trust balances or the account balances included therein. Since the government is responsible for creating this accounting nightmare due in large part to its loss and destruction of mandatory trust records, and therefore cannot reconcile, provide an accounting, or even now guarantee the accuracy of a single IIM account balance, it would be unconscionable to allow the Secretary to escape accountability by using incorrect account balances as a standard to adversely adjust, zero-out or wipe accounts off the books. 17 In this light, the Administration's bill would be bad public policy and amount

*17 As noted, IIM trust monies are commingled and managed in a common trust fund.*

*(continued...)*

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to an unconstitutional taking without just compensation. 18

It should be abundantly clear that the Cobell class action case is extremely complex and detailed, involving quite literally hundreds of thousands of IIM accounts, hundreds of millions of transactions, and several million records. Each side, by necessity, is spending several million dollars on experts to help ferret out this government-created mess. The evidentiary aspects alone in this case are monumental and mind-boggling. The only way the IIM dispute can be fairly, fully and finally decided is through a thorough examination of the evidence in a forum cloaked with the Constitutional guarantees of notice and due process, where all witnesses must testify under oath and are subject to cross-examination. The judiciary is the appropriate branch of government to resolve these complex issues. If the government wishes to raise issues related to the IIM trust, the proper place is the courtroom, not the hallowed halls of Congress. Certainly, Interior and Treasury are adequately represented in Cobell. In short, the Administration should not be wasting Congress' precious time and resources to resolve a dispute that has been committed to the judiciary for over two years.

*17( ... continued)*

*Accordingly, any off-set against the IIM pool for any reason constitutes an unconstitutional taking with respect to hundreds of thousands of individual Indian trust beneficiaries who did not benefit from an overdraft or an overpayment of funds. The Comptroller General has confirmed the application of trust law to the IIM Trust and determined that off-sets against trust accounts are generally unlawful. The Special Trustee has testified that illegal off-sets to the IIM Trust continue to cost individual Indian trust beneficiaries more than \$2.4 million per year.*

*18 See, e.g., Babbitt v. Youpee, 519 U.S. 234, 117 S.Ct 727, 733, 136 L.Ed. 2d 696 (1997) (suggesting unconstitutionality of statutory provision that "trains on income generated from the [allotted] land"); see also, Phillips v. Washington Legal Foundation, (1998 WL 309070 at 6-8 (U.S. Tex.)) (while interest income of numerous clients' funds pooled in one account may have no economically realizable value to the individual owner due to small amounts of individual's principal, possession, control and disposition are nevertheless valuable rights that inhere in the property, and interest income generated by funds in pooled accounts constitutes "private property" of the owner of the principal for takings analysis purposes, and the State's having mandated the accrual of interest does not mean the State is entitled to assume ownership of the interest).*

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## **V. H.R. 3782 WOULD RETROACTIVELY AMEND THE AMERICAN INDIAN TRUST FUND REFORM ACT OF 1994 AS TO THE IIM TRUST**

The Administration's bill may effectively repeal the American Indian Trust Fund Reform Act of 1994--a long overdue remedial statute which Congress carefully crafted to expressly confirm the

historical solemn trust obligation of the United States and ensure compliance with its trust duties and responsibilities. Perhaps this should not be a surprise since the current Administration went to great lengths to vigorously oppose the 1994 trust fund reform legislation, although it was ultimately ushered into law by a Democratically controlled Congress. By seeking sole Secretarial discretion to "eliminate accounting discrepancies" and "make routine administrative adjustments" to the IIM trust, the Secretary in effect now asks Congress to excuse the Administration from complying with the mandates of the 1994 Trust Fund Reform Act, and to validate his failure to carry out his fiduciary duty to individual Indian trust beneficiaries. In short, the Administration, by slight-of-hand, asks Congress to let it off the hook for all past (as well as future) breaches of trust and mismanagement of individual Indian trust monies. Congress simply should not do so.

## **VI. AMENDMENTS TO H.R. 3782 WHICH ARE NECESSARY TO PROTECT THE BENEFICIARIES OF THE IIM TRUST**

We note that our analysis of H.R. 3782 is not complete, given that the Department of the Treasury has not yet released critical information regarding Treasury accounts affected by the proposed legislation. In the event that Congress should decide to go forward with this bill, however, we view as necessary the following deletions from and additions to H.R. 3782 in order to protect the rights and interests of individual Indian trust beneficiaries and the class certified in Cobell:

- (1) all provisions and references, express or otherwise, to IIM accounts or IIM accountholders must be **deleted** from H.R. 3782, including but not limited to Section 4, subsections (7), (18), (19), (20), (21), (22) and (23); Section 5(b)(3) and (c); and Sections 15 and 16;
- (2) any legislation to settle tribal trust fund disputes must be strictly and expressly limited to settling tribal trust funds only; and
- (3) the following language must be included in any tribal trust fund settlement legislation to protect the rights and interests of individual Indian trust beneficiaries and the class we represent

in Cobell:

**This Act shall not be construed, interpreted or applied to limit, diminish, preclude, extinguish or otherwise affect recovery by any past or present individual Indian trust beneficiary for breach of trust or mismanagement of trust assets; nor shall this Act be construed, interpreted or applied in any way to limit, diminish, preclude, extinguish or otherwise affect the rights or interests of individual Indian trust beneficiaries or present and former beneficiaries of Individual Indian Money (IIM) accounts certified as a class in the action filed in the United States District Court for the District of Columbia entitled Cobellet al., v. Babbitt, et al., No. 1:96CV01285 (RCL); provided further that nothing in this Act shall be construed to diminish the Federal trust responsibility to**

**individual Indians, or Indians with trust allotments or other trust assets.**

## **VII. CONCLUSION**

In closing, it should be clear that the Executive Branch has failed miserably over the years to carry out the United States' trust responsibility to individual Indian trust beneficiaries. The Legislative Branch enacted the American Indian Trust Fund Reform Act of 1994 in large part to hold the Executive Branch accountable and thereby remedy this shameful mistreatment of the First Americans--who by all socioeconomic indicators are the poorest of our Nations's poor. Notwithstanding, in order to enforce the 1994 Act and the Trustee/Secretary's fiduciary duties and responsibilities to individual Indian trust beneficiaries, the plaintiff class in Cobell was compelled to petition the Judicial Branch for relief and justice. Now comes the Secretary--who opposed the 1994 Reform Act--and with hat in hand surreptitiously asks Congress to expeditiously pardon the Administration for its breaches of trust and failure to obey this remedial law, while at the same time the Secretary asks Congress to grant him sole discretionary authority to adjust the balances in the IIM trust and cloak him with the authority to divest the district court's jurisdiction to protect the rights and interests of the class certified in Cobell. Congress simply should never countenance the Administration's attempt to seek exculpatory legislation to let it off the hook for a century of abuse of trust and continuing wrongdoing. At most, all the Secretary can expect if H.R. 3782 is enacted into law in its current form is another lawsuit based on unconstitutional takings, which puts us precisely where we are now--in federal district court. And the beat goes on.

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Thank you for the opportunity to testify. on H.R. 3782, as it purports to affect the fundamental property rights and interests of over a half million individual Indians and Alaska Natives. I will be glad to respond to any questions.