Great Plains Tribal Chairman's Association

Position Statement
Recommendations to the Secretarial Commission on Trust Administration and Reform
Regarding the Federal Government's Role as Trustee for Indian Assets

September 13, 2012

Introduction

The sixteen reservations of the Great Plains Tribes include approximately 10 million acres of land. The Great Plains Tribes collectively own a substantial amount of the federally-managed tribally-owned land in the United States. The Great Plains Tribal Chairmen's Association ("GPTCA") is composed of the elected Chairs and Presidents of the federally recognized sovereign Indian Tribes and Nations within the Great Plains Region of the Bureau of Indian Affairs and was formed to promote the common interests of the Sovereign Tribes and Nations who are members of the GPTCA.

The trust responsibility of the United States is founded in the Treaties entered into by the United States and our Tribal Nations. It is not created by, nor can it be defined by the judiciary or by administrative agencies. Recent developments have significantly impacted the manner in which Government implements its trust responsibilities to Native Americans and the Trust Reform Commission's efforts will further impact the Government's role as trustee for Indian assets. We wish to take this opportunity to express our recommendations regarding the (I) Government's trustee role vis-à-vis tribal trust funds and (II) Government's trustee role vis-à-vis non-monetary Tribal assets.

(I) Tribally-owned trust funds

Background

The United States holds several billion dollars in trust for over 250 American Indian and Alaska Native tribes. The primary responsibility for managing Tribal trust accounts is vested with the Department of Interior ("DOI") and the Department of Treasury ("DOT"), which must collect, deposit, invest, disperse, and account for Tribal trust funds.

The Government's historical handling of Tribal trust funds has been characterized by mismanagement, including underinvestment, inaccurate or incomplete accounting, and erroneous transactions. During the last three decades, the Government made numerous efforts to correct and improve its handling of Tribal trust funds and to account for its historical treatment of such funds, but such efforts have not been fully successful.

In the 1980s, two agency reports identified the government's mismanagement of tribal trust accounts.[1] In response to these reports, the Bureau of Indian Affairs ("BIA") attempted to contract-out management of tribal trust accounts, but Congress prohibited such outsourcing until the accounts were reconciled and audited, and the tribes were provided with an accounting of such funds.[2] Further, Congress tolled the statute of limitations for claims concerning the mismanagement of trust funds until such accounting had been furnished to the affected tribe or individual.[3] To produce such an accounting, the BIA contracted Arthur Andersen to reconcile all transactions in tribal and individual Indian trust accounts from their inception. Because BIA records were insufficient for an accurate accounting, Arthur Anderson utilized alternative procedures to review accounts and transactions.

Arthur Anderson sent its reports to 311 tribes in 1996. Congress deemed the tribes to have received the accounting in 2000 and, accordingly, the statute of limitations for claims regarding mismanagement of Tribal trust funds began in 2000. To file within the statute of limitations, many Tribes filed lawsuits to recover damages caused to the Tribe by the Government's mismanagement of Tribal trust funds in 2002. Many of these lawsuits have been, or are in the process of being settled.

In 1998, Individual Indian Money ("IIM") account holders sued the United States in a class-action lawsuit, alleging mismanagement of their trust funds. In a series of cases spanning over a decade, collectively known as the *Cobell* litigation, the Supreme Court held that the Government had breached its fiduciary duties to manage the IIM monies in a prudent manner, and awarded the *Cobell* litigants substantial damages for such mismanagement. The *Cobell* litigation exposed the Government's historical and ongoing mismanagement of Indian trust funds and caused the Government to re-visit and focus on reforming its management of tribal and individual Indian monies. The decades-long litigation resulted in judicial review of what duties the Government has in its role as trustee for Indian monies and [4] what investment standards the Government must satisfy.[5]

In 1994, Congress passed the Trust Reform Act.[6] The Act's focus was to ensure accurate accounting, by requiring periodic reports by the Government to the Tribe regarding Tribal trust account balances and transactions (receipts, disbursements, transfers), and annual audits of all

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[1] U.S. General Accounting Office, *Major Improvements Needed in the Bureau of Indian Affairs' Accounting System* (Sept. 1982); U.S. Dep't of Interior, Office of Inspector Gen., *Bureau of Indian Affairs Accounting Controls Over Tribal Trust Funds Audit Report* (Sept. 1983).
[2] Pub. L. 100-202 (1987).
[3] Pub. L. 101-512 (1990).
[4] *Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003) (listing Government's duties for Individual Indian Money accounts).
[5] *See, e.g.*, *Osage Tribe of Indians of Oklahoma v. United States*, 93 Fed. Cl. 1, 37-38 (Fed. Cl. 2010) (applying the prudent investor standard to the Government's investment of tribal trust funds).
[6] Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended at 25 U.S.C. § 4001 (2004)).

the funds held in trust by the United States for Native Americans.[7] The Act also allows Tribes to access their accounts electronically or request more frequent reports.[8]

The Act also established the Office of Special Trustee ("OST") to ensure the BIA provides accurate and timely accounting of Tribal and individual trust funds, to monitor the reconciliation of Tribal trust accounts, and to standardize trust fund accounting procedures in the BIA.[9] The Office of Trust Fund Management ("OFTM") was established shortly thereafter to manage the investment of Tribal trust monies. The OST and the OFTM have added a top-heavy bureaucratic layer to the management of Tribal trust funds and offices that detract resources and funding from the Government's day-to-day management of non-monetary trust assets.

Now is an opportune time to re-visit the Government's management of Tribal trust funds. The statute of limitations to file a lawsuit for the mismanagement of Tribal trust funds has run; many of the Tribes that filed lawsuits for such mismanagement have settled and waived claims regarding any past mismanagement of Tribal trust funds; the BIA has become accustomed to providing trust fund accounting reports; technology enables trust fund managers to electronically perform many of the duties involved in trust account management, including investment, reporting, monitoring transactions, and accounting; both the Act and two decades of litigation over trust fund mismanagement have produced guidelines regarding what duties the Government has as trustee for Indian monies and what investment standards the Government must meet as trustee for Indian monies; and the OST is approaching its legislatively-set sunset date.

Goal 1: Create a comprehensive document that clarifies the Government's role as trustee for Indian monies.

The parameters of the Government's trustee duties regarding Tribal trust monies have fluctuated with legislation, regulations, changed administrations, and Supreme Court opinions.[10] For example, some courts interpret that the Government has the same implied fiduciary duties as a private trustee[11]; however, a recent judicial trend is to narrow the scope of the United States' trust responsibility vis-à-vis Indian assets to only those duties expressly articulated by statute or

[7] 25 U.S.C. §§ 4011 (a)-(c).
[8] 25 C.F.R. § 115.802 (b)-(c).
[9] 25 U.S.C. § 4043.
[10] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 B.Y.U. J. Pub. L. 1, 19 (2004) (discussing history of legislative and judicial influence on Government's trustee duties for Indian assets). *See also United States v. Jicarilla Apache Nation*, 131 S.Ct. 2312, 2343 (2011)(Sotomayor, J., dissenting)(expressing concern regarding the recent trend to narrow the scope of the Government trustee responsibility for Indian assets).
[11] *See*, *e.g.*, *Cobell v. Norton*, 283 F.Supp. 2d 66, 267-72 (D.C. 2003) (listing common-law trustee duties of Government for Individual Indian Money accounts); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003); *United States v. Mason*, 412, U.S. 391, 398 (1973).

regulation.[12] That is, courts are requiring tribes to point to duties *expressly articulated in and prescribed* by statute to find that the United States' trustee obligations include such duties.[13]

The federal trust responsibility has become ambiguous such that Tribes must go through several steps before securing damages for mismanagement of both monetary and non-monetary trust assets. First, tribes must prove that particular funds are characterized as "trust funds" or a particular asset is a "trust asset" by identifying a treaty, statute, or regulation that imposes "comprehensive management duties" on the United States for the asset[14], or the Government must exercise control over the tribal trust asset.[15] Courts have different interpretations of what "comprehensive management duties" consist of and sometimes differ on which assets are Tribal trust assets.[16]

Second, once an asset is categorized as a trust asset, a tribe must establish that the Government has a specific duty as trustee of the asset. This is a difficult task because courts differ on what specific duties are included in the Government's trustee role.[17] Some courts find that the Government has common-law trustee duties in addition to duties expressly articulated in relevant regulations and statutes,[18] and some courts find that the Government is only obligated to perform the duties expressly articulated in statute or regulation.[19]

Third, once the Government's trustee duties are articulated, a tribe must establish that the Government did not perform its duties to the standard of care that the Government must exercise. Most courts articulate that the Government is subject to a higher standard of care than a private

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[12] *E.g.*, *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2312, 2318, 2323 (2011). *See also United States v. Navajo Nation*, 537 U.S.488, 501 (2003).
[13] *E.g.*, *Jicarilla*, 131 S.Ct. at 2318, 2323.
[14] *See*, *e.g., Jicarilla*, 131 S.Ct. at 2323; *United States v. Navajo Nation*, 556 U.S. 287, 129 S.Ct. 1547 (2009); *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001)(quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*)).
[15] *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).
[16] *Compare Mitchell II*, 463 U.S. at 206 (finding daily supervision of an asset is sufficient to establish a trustee obligation over such asset) *with Navajo Nation*, 129 S.Ct. at 1552-54 (finding that regulations must guide or limit a federal agency's decision-making about a resource to create comprehensive management duties for the asset and therefore trustee responsibilities).
[17] *See*, *e.g., Shoshone Indian Tribe of the Wind River Reservation*, 672 F.3d at 1039-40 (remanding case to lower court to determine whether specific act is included in Government's trustee duties for managing Indian oil and gas leases).
[18] *See*, *e.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Mason* 412, U.S. 391, 398 (1973).
[19] *E.g.*, *Jicarilla*, 131 S.Ct. at 2323; *Navajo Nation*, 129 S.C.t. at 1552.

trustee.[20] However, in practice, courts seem to hold the Government to a standard of care equivalent to that of a private trustee.[21]

The Government's fiduciary responsibility for Indian assets arises from treaties and should not be subject to such change via judicial interpretation. Further, the differing judicial interpretation makes it difficult for tribes to know what duties the Government must fulfill in its role as trustee.

The Government should draft a document that (i) clarifies how to identify and categorize non-monetary Indian assets as trust assets, (ii) articulates what specific trustee duties the Government has vis-à-vis Indian assets, (iii) setting-forth a non-judicial procedure for clarifying any ambiguities regarding the characterization of trust assets or the Government's responsibilities for such assets, and (iii) reaffirming that the Government is subject to the highest standard of care in its role as trustee for Indian assets.

Goal 2: Allow OST to sunset, re-consolidate management functions in the BIA and focus resources on needed personnel.

The OST and the OFTM have diverted resources from management of tribal trust assets[22] The salaries now dedicated to OST could be used to hire personnel involved in the day-to-day management of both monetary and non-monetary tribal trust assets. The OST is due to sunset and the management of trust funds can be accomplished largely through electronic means. The Government should: allow OST to sunset, re-consolidate management of Tribal trust funds in BIA, convert management of Tribal trust funds to electronic or automatic means where feasible and efficient, and focus resources on hiring personnel needed for daily, hands-on management functions, such as auditors, investment analysts, and financial advisors. **Finally, restore as Indian preference positions all positions that were BIA-Indian preference positions that were transferred to the Department of Interior and/or other agencies within Interior and the positions were no longer Indian preference positions.**

(II) Non-monetary Tribal assets

Background

Tribes own substantial non-monetary assets, including land, oil and gas, coal, gold and other metalliferous minerals and non-metalliferous commercial minerals, water rights, timber, and

[20] *See, e.g., Mitchell II,* 463 U.S. at 226*; Seminole Nation*, 316 U.S. at 297; *Loudner,* 108 F.3d 896*; Rogers,* 697 F.2d at 890.
[21] *Osage Tribe of Indians of Oklahoma v. United States*, 93 Fed. Cl. 1, 37-38 (Fed. Cl. 2010) (applying the prudent investor standard to the Government's investment of tribal trust funds).
[22] *Views of the Administration and Indian Country of How the System of Indian Trust Management, Management of the Funds and Natural Resources, Might be Reformed*, *Before the Sen. Comm. on Indian Affairs*, 109th Cong., 11 (2005) (statement of Tex Hall, president of the National Congress of American Indians and chairman of the Mandan, Hidatsa and Arikara Nation in Fort Berthold, N.D.).

rangeland for grazing. The Government holds many of these assets in trust for Tribes and, therefore, is involved in the management of such assets. Tribes and/or the Government may lease such assets to third parties for development or use, and the royalties collected therefrom are deposited into trust accounts.

Tribally-owned assets are subject to many different statutes and regulations regarding their use and, often, multiple agencies are involved in the management of non-monetary tribal assets. The Tribes of the Great Plains region have substantial rangeland holdings, and will focus on the Government's role in managing rangeland and grazing permits issuance for purposes of this comment.

Federal statutory authority to regulate grazing activity stems from the Taylor Grazing Act of 1934[23] (authorizing the DOI to allocate grazing privileges by a preference permit system) and the Indian Reorganization Act of 1934[24]. The Federal Land Policy Management Act (FLPMA) of 1976[25] applies to grazing on federal lands managed by the BLM and the Forest Service, but not to Indian rangeland. Because of the divergent grazing regulations applying to federal and Indian rangeland, Indian rangeland is often at a competitive disadvantage to federal rangeland. Most notably, FLPMA offers far more protections for the individual permittee[26] which makes federal rangeland more competitive and economically beneficial to the permittee than Indian rangeland.

For example, FLPMA clarifies that federal rangeland permittees only have a revocable license to use federal rangeland and must be compensated for the value of any permanent improvements they make to the rangeland.[27] However, when a permittee of Indian rangeland makes improvements to the land, the value of such improvements passes to the landowner after the permit expires.[28]

In addition, because permits and not leases are used for on-reservation grazing, permittees are required to pay their annual grazing fee in full in advance of the grazing season, while off-reservation permittees usually have more flexible payment options. To satisfy this pay-in-advance policy, many Indian rangeland permittees secure private loans which carry finance charges as high as 11%.

The primary problem associated with Indian rangeland permits is the perception that the interests of the permit-holder are eclipsed by the interests of the landowners. This stems from the perception that the DOI must maximize the income for allottees, even if it comes at the expense of Indian ranchers, by securing high grazing rates for Indian rangeland. Accordingly, it is estimated the Indian ranchers pay the highest grazing rate in each of their respective regional

[23] 43 U.S.C. § 315.
[24] 25 U.S.C. § 466.
[25] 42 U.S.C. § 1752.
[26] See 43 C.F.R. §§ 4110-4170.
[27] *See* 43 U.S.C. § 1752.
[28] See 25 C.F.R. § 166.317.

areas, a rate that is higher than the average grazing fee associated with BLM and Forest Service land, state-owned land, or privately held land.

The OST appraises land held by allottees, including rangeland. The OST does not use a standard formula or process to appraise rangeland, and regulations do not explain how appraisal data is used or require a specific valuation method. The result is that the BIA does not set on-reservation grazing rates commensurate with the produce received by the Indian rangeland permittee. For example, the cost of fences, watering ponds, and other cattle costs are incurred by the landowner and these expenses are factored into the final rental rate for private rangeland. However, for Indian rangeland, the landowner does not provide such infrastructure and the permittee incurs the cost of fences, watering ponds, and other required infrastructure. Yet, the BIA sets the rental rate for Indian rangeland using surrounding private rangeland rental rates as a standard. Thus, the Indian rangeland rental rate is inflated whereby the private permittee pays a rental rate and does not pay for infrastructure while the Indian permittee pays the same rental rate and pays for infrastructure.

Another issue with BIA's grazing permit rates is that BIA often estimates specific rates based on average reservation rates, instead of setting the rate on the range quality of each tract of land. This method is not reflective of the fair market value of each tract of land. Within one reservation, rangeland tracts can vary in quality – some tracts being in poor condition and some in good condition. The BIA should conduct detailed field studies to consider the economic inputs and quality of rangeland tracts when setting grazing rates; instead, the BIA uses an aggregate value of a large regional grazing unit to establish individual grazing rates. This does not account for the difference in infrastructure and forage capacity for different grazing tract and does not accurately reflect the value of the land.

BIA periodically and potentially arbitrarily readjusts grazing rates. Past federal grazing regulations limited BIA's ability to adjust grazing rates during the term of a grazing permit[29]; but newer regulations allow the BIA to review the grazing rental rate prior to each anniversary date of the permit or as allowed by the permit[30] which results in some permits allowing the BIA to adjust the grazing rate more frequently during the term of the permit. This has led to a situation whereby the rate that is set for a same parcel of land has changed by as much as 68%in a single year, with no significant change to the grazing tract.

Fluctuating and inaccurate grazing rates put both Indian permittees and Indian landowners at a disadvantage. Indian permittees must pay more than their competitors using federal, private, and state rangeland which drives up their cost of business and Indian rangeland is thereby uncompetitive with its federal, state, and private counterparts.

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[29] *See*, *e.g.*, *Long Turkey v. Great Plains Regional Director,* 35 IBIA 279 (2000) (Secretary has no authority to increase grazing rates during the grazing period).
[30] *See* 25 C.F.R. § 166.408.

Goal 1: Dedicate more resources for management of non-monetary resources.

The multiplicity of agencies and statutes that are involved in the management of Indian assets creates an unwieldy bureaucracy, a confusing number of regulations, and sometimes creates a conflict of interest for federal agencies involved in managing Indian assets. Further, funneling monies intended for Indian assets to agencies who are not solely focused on managing Indian assets can result in Indian funding being used to manage non-Indian assets. Numerous developments have shifted the DOI's focus away from managing non-monetary tribal trust assets and diluted federal resources devoted to such management, including the *Cobell* litigation, the formation of OST and OFTM, and the Trust Reform Act of 1994.[31]

Salaries now dedicated to OST and OFTM could be used to hire personnel involved in the day-to-day management of non-monetary tribal trust assets, such as personnel necessary to review and approve grazing permits, including: rangeland specialists, hydrologists, soil conservationists, appraisers, and environmental engineers. The Government should allow OST to sunset and consolidate its functions into BIA, thereby dedicating more resources to BIA's management of non-monetary tribal assets such as rangeland.

Further, the Government should consolidate into BIA many of the management functions for Indian assets which are now dispersed to non-Indian-related government agencies, such as BLM. Like the consolidation OST into BIA, consolidating these functions into one agency focused on management of Indian assets will: (i) ensure that funding dedicated to management of Indian assets is used to manage Indian, and not non-Indian, assets; (ii) allow more funds to be dedicated to on-the-ground personnel, such as appraisers; and (iii) allow the BIA to build expertise in Indian asset management.

Goal 2: Conduct accurate appraisals to ensure Indian assets are efficiently used and competitive on the relevant market.

Generally, the Government appraises Indian rangeland and sets grazing rates accordingly. As part of its duties to appraise rangeland and set grazing rates, the Government should ensure accurate, fair and competitive grazing rates by conducting appraisals that assess the actual economic inputs and forage quality associated with a particular permit or groups of permits in specific areas with similar characteristics. This can be accomplished by ensuring that appraisals contain site-specific information about infrastructure, that the costs for such infrastructure are properly allocated between permittee and landowner, that appraisals account for differences in forage quality and quantity, and that a uniform valuation methodology be applied.

To assist BIA in formulating uniform appraisal and grazing rate setting standards, and to address other Indian rangeland management issues, "Indian Rangeland Management Working Groups" ("Working Groups") should be established as informal advisory groups to BIA. The

[31] Both discussed *supra*.

Working Groups should be comprised of representatives from the Office of the Assistant Secretary of Indian Affairs, the BIA, and tribal, rancher, and allottee representatives from the Great Plains and Rocky Mountain BIA Regional Service Areas – the areas with the most significant amount of Indian rangeland. The Working Groups could recommend and propose standards and grazing permit regulations that would address the above-mentioned issues, and each Tribe could adopt the desired standards and regulations by executing a Memorandum of Understanding between the BIA, the Tribe, and the individual ranchers and allottees.

Goal 3: Ensure proper implementation of the ICCA provisions of the *Cobell* Settlement to protect the Tribes' interests.

The Great Plains Region has more than 32% of the fractionated land interests in the entire Bureau of Indian Affairs land management system. The sixteen reservations of the Great Plains Tribes include approximately 10 million acres of land. There are over 1,500,000 separate individual trust land interests in this region. Our Tribal Nations see the Cobell Land Consolidation Fund as a tremendous opportunity to continue the painful process of reversing the negative effects of the General Allotment Act of 1887 (more commonly known as the "Dawes Act") and the allotments that were created under tribal specific allotment acts, both for individuals and our Tribal Nations. Reversing the negative effects of the Dawes Act was a fundamental purpose of the original Land Consolidation Act. The trust responsibility of the United States is founded in the Treaties entered into by the United States and our Tribal Nations. It is not created by, nor can it be defined by administrative regulations.

The Allotment Acts that impacted our Nations and our citizens created far more problems than simply the specific trust land income accounting and management problem addressed, in part, in the Cobell settlement. The Allotment Acts were carried out without permission, damaged our Tribal economies and our tribal governments, and often pitted Tribal members against one another. Similarly, the Cobell settlement, for various reasons, was not negotiated with input or appropriate consultation with the Tribal Nations most affected. Therefore, through the consultation offered regarding the land consolidation section of the settlement, we are offering to the Department of Interior, as our Trustee, solutions for implementation of the settlement that will provide the Great Plains Tribes the opportunity to establish priorities for how the Great Plain Region's share of the Cobell funds will be spent.

It is essential that the DOI consolidate land in the order of preference as determined by the Tribes on a reservation by reservation basis for each of the 16 reservations in the Great Plains Region:

a) that will restore the Reservation land base;
b) reverse the negative effects of allotment;
c) result in Tribal ownership of sizeable tracts that will allow Tribal beneficial use (as opposed to the Tribe owning multiple fractionated interests); and
d) Prioritize for purchase lands that will enhance economic or energy development for Tribes.

If the goal is to utilize the settlement funds to reduce fractionation, to alleviate the negative effects on the Tribal economy of the Dawes Act and its progeny, and to provide opportunity to for sustaining programs that reduce fractionation, then a concerted effort between the federal government and the Tribe to build the capacity of tribal programs is a critical and necessary step. Reducing and eliminating fractionation on tracts that provide the highest economic benefit to the Tribe and its individual landowners to ensure that the land is more productive, even where there are less than 20 owners on the tract, provides an opportunity for the generation of additional income on the Reservation, and additional revenue to the Tribe so that there are additional funds available for land consolidation efforts. Given that $1.6 billion dollars[32] does not provide even 50% of the funding that would be required to purchase all fractionated interests in the Great Plains, prioritizing the purchase of lands that the tribes and their citizens have determined are a priority for their economy and culture would provide the greatest benefits to the Tribes in the long term.

Tribes must be intimately involved in the implementation of this program from design of the process through prioritizing acquisitions. There is no other entity or party that is better positioned to decide which parcels would provide the most benefit to tribal communities. The relationship between the Tribe and its members is an intimate relationship that no one else has.

One of the flaws of the Indian Land Consolidation Program was the prioritization of less than 2% fractionated interests. Even on those reservations where a Pilot project was done, Tribes ended up with large numbers of highly fractionated interests that did not provide the Tribe with even a controlling interest in the tract and provided a marginal, even intangible, impact upon the land's productivity or the local economy. Further, effective land consolidation requires more than simply acquiring fractionated interests from individuals through direct purchase. Many individual landowners have significant land holdings and substantial interests in fractionated tracts. In order to acquire or consolidate interests in particular tracts prioritized by the Tribe often requires land exchanges with the owners, and often requires transactions involving numerous parties in addition to the Tribe. The Tribe could purchase all of the 2% or less fractionated interests and still achieve no substantial economic benefit for the Reservation.

The Department must also prioritize those tracts of land that can be consolidated most quickly and efficiently. With $1.6 billion dollars in funding for land purchases, the Department will have to expend an average of $190 million a year on land acquisitions. Therefore, land acquisitions should begin immediately. History shows that the Indian Land Consolidation Program is not capable of disbursing this amount of funds in a timely manner – the ILCP has never expended more than $34 million in funds in any given year. Many Tribes in the Great Plains have already developed priority tracts for acquisition and simply lack the funds to complete acquisitions. Many Tribes have been engaged in the process of land acquisitions

[32] This figure excludes 15% of the $1.9 billion dollar settlement allowable for administrative expenses and $60 million for scholarship funds.

involving fractionated interests for years, whether funded through FmHA or USDA Loans, the Indian Land Consolidation Program, with Tribal funds, or through other means. Tribes in the Great Plains are truly in the best position to provide information on priority tracts that can be consolidated most quickly and efficiently.

The Great Plains Tribal Chairman's Association does not agree with the Department of Interior's (DOI) first goal of prioritizing tracts with less than 2% ownership interest, prioritizing tracts based upon accessibility of all of an individual landowners interest in land, or prioritizing tracts with more than 20 owners. This serves no purpose in alleviating the negative effects of the Allotment Act. According to 2008 TAAMS data, of the 1,582,228 separate fractionated interests in land in the Great Plains, there are 1,080,147 separate interests with less than 2% interest in land tracts. If the priority of DOI was to focus on less than 2% interests, the Department could spend all $1.6 billion on the less than 2% interests and not achieve any substantial land consolidation. Because the American Indian Probate Reform Act (AIPRA) single heir rule will reduce the potential for fractionation of lands with less than 5% interests, a goal of prioritizing acquisition of 2% and less interests does nothing but reduce the administrative burden of DOI.

The focus, rather, should be on attaining reduction in or elimination of fractionated tracts of land. This will require land exchanges between individual owners, land exchanges with the Tribe where permissible, and land purchases.

Based upon the identified steps in the process of land acquisition under Section VI of this Paper, the goal of DOI in implementing this settlement fund must be to provide the most latitude to the Tribes that are affected the most by land fractionation and allotment policies of the United States. This section includes both policy concerns and specific issue concerns which may require changes in law, regulations, or policies. DOI needs to provide Tribes with feedback on what is possible under existing authority, what will require legal changes, and what is not permissible under the Settlement.

- It is imperative the DOI provide tribal nations and regions with detailed information in a timely manner so that government-to-government consultation is meaningful and effective. The GPTCA and individual Tribes have requested to no avail such detailed information. This information must include:
    - The number of individual landowners;
    - The number of individual interests;
    - The average number of individual owners per tract; and
    - The total number of fractionated acres per reservation in the Great Plains.

- With approximately 1/3 of the fractionated interests, more than 30% of the IIM accounts, and more than 30% of the tracts with less than 2% fractionated interest in the Great Plains, and with our large land base of over 10 million acres, it is imperative that the percentage of funds of the $1.9 billion that the Great Plains should receive be

commensurate with the percentage of land interests involved in the Great Plains. The Great Plains percentage of funds for administration and for land acquisitions should not be used for national level contracts, for staffing any national level offices, or for national level programming. The funds should remain within the Region, and the details of how to utilize the funds should be determined in direct government-to-government consultation with the Tribes in this Region.

- The program should be implemented on the Reservations, not nationally.
    - Previous attempts by DOI to nationalize programs have squandered time and resources to create meta-structures that are inefficient and ineffective. Time and time again, experience has demonstrated that expenditure of funds to create a national center in Albuquerque or Washington D.C. with a separate chain of command from the BIA Agency structure is not an efficient or effective method of addressing Great Plains tribal issues. The Bureau of Indian Education reorganized to create an Albuquerque center of DCMA which hires national level contractors to implement the No Child Left Behind Act, which has failed to produce significant educational achievement gains in the Great Plains. Law Enforcement within BIA created a meta-structure with a chain of command not involving local agency level BIA offices at great cost, which has not resulted in significant gains in community safety on the Reservation. The Federal government must learn from its mistakes in order not to repeat them.
    - As much power as possible should be delegated to agency offices in order to streamline the system and create efficiencies.
    - Claims Resolution Act (CRA) monies should be apportioned regionally as well, with regions having the most fractionation and acreage receiving the most money.

- Tribes in the Great Plains should be permitted to enter into Memoranda of Understanding for any portions of the implementation of the Cobell Land Consolidation program as the Tribe determines is in its best interests to ensure efficient expenditure of funds consistent with the Tribe's capacity to implement the Program. Rather than creating another national level program or new agency within DOI, Tribes which work with the Agency Level Realty Office and Superintendent, and with the Regional Title Plant that does the recording of land documents, have the best understanding of what will work. This authority should include authority under the MOUs for the Tribe to enter into independent contracts for appraisal of lands to speed up the process.

- We recognize and respect that effective implementation of this Land Consolidation Program will require additional staffing at the Aberdeen Area Title Plant, the agency level realty offices, and perhaps even the Regional office. But, decisions regarding allocations of funds should be made in consultation within this region between the DOI

Personnel at the Agency level, the Regional office, the Title Plant, and the Tribes from this Region. It is very important that the workload created does not hinder other vital land functions including recordation and approval of leases, grazing permits, mineral development, and fee-to-trust acquisitions. The best way to ensure this is through direct consultation in this region.

- Cobell Settlement funds should be available to extinguish liens on existing land acquisitions of fractionated interests funded by USDA, FmHA, or tribal funds.

- The Tribes should be able to use funds to prevent land from going out of trust. For instance, settlement funds should be able to be utilized to purchase tracts where there is a pending fee patent application.

- **Funds under the Cobell settlement should be available to Tribes to provide no interest loans to tribal members to consolidate their individual land holdings**. This could be permitted as a lien on the property acquired to repay the sale value if required under the law. The existing Indian Land Consolidation Program (ILCP) does provide some authority for this – at least it did until the **DOI issued a new policy on October 13, 2011 that does not permit a lien on the property acquired as a permissible form of payment for the acquisition when acquired by an individual co-owner**.

- If BIA is going to utilize contractors for any portion of this work, BIA should hire Small Business Administration 8(a) contractors/ Indian-owned contractors from this Region to handle the process in this Region.
    - This would avoid the federal procurement process, which could take years and then be challenged, causing more delay on a very short timeframe.
    - This would avoid hiring more federal employees, creating efficiencies in start-up because the federal hiring process would not need to be followed.
    - This would allow the contractor to subcontract with each tribe in the region. Each tribe could work out the subcontract details to their specific needs (such as a desire for family members to be offered a right of first refusal or a tribal constitution forbidding a tribe from exchanging trust land for other trust land).
    - This would allow for local jobs by people who are familiar with tribal processes and needs in this Region.
    - This would also allow tribes to self-evaluate their capacity to take on certain aspects of the process and create sub-contracts taking on only the aspects that they feel are essential to sovereignty or are consistent with their current capabilities.
    - One contractor handling all affected reservations nationwide would create a logjam and would moreover homogenize differing sovereign entities and their needs. Each tribe is unique and should be treated as such.

- DOI must engage in pre-decisional government-to-government consultation with tribes before implementing a program.
    - Rather than holding a meeting after making decisions, DOI must attempt to creatively brainstorm solutions through engaging in pre-decisional government to government consultation with tribal governments and individuals who will be affected by these programs and who have years of experience with their on-the-ground successes and failures within this Region.

- DOI should focus on Obtaining the Most for Each Dollar Spent, Not on Reducing Severely Fractionated Interests.
    - Under the American Indian Probate Reform Act (AIPRA), very small fractionated interests will take care of themselves under the single heir rule. Focusing on this may close IIM accounts faster, but AIPRA ensures the problem will not be repeated on any significant scale. In addition, it will not address the underlying problem and the situation would recur again in a few years.
    - Focusing on the "easy picking" lands that can be returned entirely to Tribal control would be more in line with Interior's trust responsibilities because this would enhance tribal jurisdiction and sovereignty, foster economic development, and allow tribes to address critical needs.

- Work with Tribes to Develop Methods of Effective Approaches to Trust Lands with Mineral Interests
    - Many Great Plains tribes have lands with valuable mineral development potential. Individuals may need to retain some rights in profits from the mineral estates before they are willing to participate in land consolidation.

- Liens are Unnecessary for Lands Purchased with Claims Resolution Act Funds.
    - Under the Indian Land Consolidation Act (ILCA), the federal government places a lien on each acquired parcel and manages the property until the lien is removed. This is to recoup costs. Funds for this program derive from settlement of a lawsuit and this requirement is inapplicable and unnecessary for their use.
    - Liens restrict tribal sovereignty because the properties are managed by the federal government.
    - Liens increase tribal debt load on balance sheets and will restrict the ability of tribes to obtain good credit or financing.
    - Liens to recoup costs would be inappropriate for sacred sites or parks.

- Respect Tribal Ability to Determine Land Acquisition Priorities.

- Tribes can conduct their own needs assessments and determine whether they want to focus on economic development, reduce checkerboarding, etc.
- Tribes are unwilling to share with the federal government the location of sacred sites that they wish to protect and should be able to direct funds for land repurchase without revealing this information.

- Work with Tribes to Find a Way to Cover Indirect Costs.
  - Although P.L. 93-638 contracts may not be used under the CRA for this program, any regional contractors selected by the federal government, and tribal sub-contractors should be able to be reimbursed for indirect costs.

- Have an Entity other than Interior Purchase the Land.
  - Because Interior will benefit from obtaining lands (for example, by having IIM accounts closed), there may be a conflict of interest in the federal government being involved in the purchase of lands. Interior's interests might interfere with its trust obligation to look after tribal interests.

- Create a Policy Laying Out what DOI will accept for an "Estimate of Value" Rather than an Appraisal.
  - There are only ten years to distribute and use the CRA funds, which does not leave time for regulations. The most ILCA has ever spent in any given year was about $34 million a year. Therefore**, Interior should create a policy memo specifying what it will accept for an Estimate of Value** (EV).
  - The EV should take into account structures and fixtures on the property.
  - The process for obtaining an EV should be simple and streamlined, and should not be subject to months-long review by the Office of Trust Services appraisers. If the local agency believes the EV is in line with local property values, this should be sufficient.
  - If OTS appraisers have not finished their review in a predetermined period of time, the EV should be deemed approved.
  - Negotiated exchanges of trust land should be considered to have an acceptable estimated value. If the purchase price is acceptable to both parties, this should be sufficient. The federal government does not have the capacity to assess the value of religious sites, a non-checkerboarded reservation, or tribal program needs for location of services. There is a limited pot of money available under the CRA, it has already been appropriated, and federal money will not be squandered. The individuals and tribe can sign waivers regarding the government's trust duties to each for the sale.

- Create **a Policy Defining a Family Trust Under AIPRA**.

- The CRA should allow for reducing land fractionation by creating consolidated family trusts. **Until this term is defined, this provision cannot be used**.
- While **a technical amendment to the legislation would be preferable, Interior can create a policy allowing for family trusts**.

- Allow the CRA to be Implemented as Soon as a Tribe is Ready to Proceed under a MOU.
  - Interior should focus on implementing the terms of the CRA as soon as possible. Once a regional general contractor is selected, sub-contracts with tribal entities should begin immediately. No tribe should be stopped from implementing land consolidation merely because other tribes are not yet ready to begin acquisitions.

- Create **a Policy Allowing Land Exchanges Across Reservations**.
  - Many individuals hold trust land interests on several reservations. Help set up an exchange to reduce fractionation and increase individual interests through trading of fractionated interests.

(III) Conclusion & Recommendations

The Commission is in the unique position to effectuate the above-mentioned goals for the Government's administration and management of monetary trust assets, as follows:

Goal 1: Create a comprehensive document that clarifies the Government's role as trustee for Indian monies which (i) clarifies how to identify and categorize non-monetary Indian assets as trust assets, (ii) articulates what specific trustee duties the Government has vis-à-vis Indian assets, (iii) setting-forth a non-judicial procedure for clarifying any ambiguities regarding the characterization of trust assets or the Government's responsibilities for such assets, and (iii) reaffirming that the Government is subject to the highest standard of care in its role as trustee for Indian assets.

Goal 2: Allow OST to sunset, re-consolidate management functions in the BIA and focus resources on needed personnel such as investment analysis, financial advisors, and auditors. To facilitate this effort, the Commission should request and make part of its official administrative record the *Efficiency Study* released on June 8, 2012 that shows OST to be a top-heavy organization. Further, the Commission should request that the United States Office of Inspector General ("OIG") conduct an in-depth study of OST's performance and costs, similar to the OIG study on OST's internal controls conducted in December of 2011.[33]

The Commission is in the unique position to effectuate the above-mentioned goals for the Government's administration and management of non-monetary trust asset, as follows:

[33] Office of Inspector General, United States Department of Interior, *Selected Internal Controls in the Office of Special Trustee for American Indians*, Rep. No.: ZZ-EV-OST-0001-2012 (Dec. 2011).

Goal 1: Dedicate more resources for management of non-monetary resources by (i) ensuring that funding dedicated to management of Indian assets is used to manage Indian, and not non-Indian, assets; (ii) allowing more funds to be dedicated to on-the-ground personnel, such as appraisers, environmental engineers, hydrologists, and rangeland specialists; and (iii) encourage the BIA to build expertise in Indian asset management by moving management of Indian assets into the BIA's purview and out of other federal agencies.

Goal 2: Conduct accurate appraisals to ensure Indian assets are efficiently used and competitive on the relevant market and convene Working Groups who can recommend and propose standards and grazing permit regulations that would address the BIA's current rangeland management issues, and allow each Tribe to adopt the desired standards and regulations by executing a Memorandum of Understanding between the BIA, the Tribe, and the individual ranchers and allottees.

Goal 3: Ensure proper implementation of the ICCA provisions of the *Cobell* Settlement to protect the Tribes' interests utilizing the above-mentioned implementation guidelines and steps.

The GPTCA looks forward to continuing to work with the Commission in its review of the Government's management of Tribal trust assets and in implementing reforms and changes to such management.

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