

**DOI Secretarial Commission on
Indian Trust Administration and Reform**

Meeting 6

June 7, 2013

Oklahoma City, OK

Meeting Summary

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Secretarial Commission on Indian Trust Administration and Reform

Executive Summary

The sixth meeting of the Secretarial Commission on Indian Trust Administration and Reform was held June 7, in Oklahoma City, OK. Commissioner Stacy Leeds, Cherokee Nation, chaired the meeting. Sarah Palmer of the U.S. Institute for Environmental Conflict Resolution (U.S. Institute or USIECR) facilitated the meeting.

During the half-day public meeting the Commission heard from national experts and tribal leaders about strategies to improve the trust relationship and recommendations for strengthening self-determination and sovereignty. They also heard about the unique issues facing tribes in Oklahoma. Members of the public encouraged the Commissioner to consider legislative recommendations that would help Oklahoma tribes keep lands in trust.

The day prior to the public meeting the Commission convened a panel session at the Tribal Sovereignty Symposium. Panelists included Commissioner Leeds, DFO Marsters, NCAI President Jefferson Keel and White House Native American Affairs Senior Advisor Jodi Gillette. A summary of the panel sessions is in Appendix E.

Members of the Commission are:

Chair, Fawn R. Sharp is the current President of the Quinault Indian Nation, the current President of the Affiliated Tribes of Northwest Indians, and a former Administrative Law Judge for the State of Washington and Governor of the Washington State Bar Association.

Dr. Peterson Zah is a nationally recognized leader in Native American government and education issues. Dr. Zah served as the last Chairman of the Navajo Tribal Council and the first elected President of the Navajo Nation.

Stacy Leeds, citizen of the Cherokee Nation, is Dean and Professor of Law at the University of Arkansas School of Law and former Director of the Tribal Law and Government Center at the University of Kansas, School of Law.

Tex G. Hall is the current Chairman of the Three Affiliated Tribes and past President of the National Congress of American Indians. Mr. Hall currently serves as Chair of the Inter-Tribal Economic Alliance and is the Chairman of the Great Plains Tribal Chairmen's Association.

Robert Anderson is an enrolled member of Minnesota Chippewa Tribe (Boise Fort Band), currently Professor of Law and Director of the Native American Law Center at

the University of Washington. Mr. Anderson worked as Associate Solicitor for Indian Affairs and as counselor to the Secretary of the Interior on Indian law and natural resources issues from 1995-2001.

Lizzie Marsters, Chief of Staff to the Deputy Secretary – Department of the Interior, serves as the Designated Federal Officer (DFO) for the Commission.

The next public meeting of the Commission is August 19, 2013 in Anchorage Alaska.

The Commission will hold administrative calls on July 16, September 10, and November 20 and a webinar open to the public on October 7. The time for the public webinar and agenda will be posted to the Commission website:

<http://www.doi.gov/cobell/commission/index.cfm>.

Friday, June 7, 2013

Jeff Fife of the Muscogee (Creek) Nation provided the opening prayer.

Commissioner Leeds opened the meeting by welcoming the audience to the sixth meeting of the Trust Commission. Commissioner Leeds asked the audience to offer introductions and reminded attendees that the Trust Commission welcomes comments at any time via the Commission website, <http://www.doi.gov/cobell/commission/index.cfm>. Commissioner Leeds reviewed the agenda and outlined the objectives for the meeting that included:

- Attend to operational activities of the Commission
- Gain insights and knowledge from invited speakers, and attendees about trust reform including other trust models and the trust relationship
- Gain insights and perspectives from members of the public

Opening Remarks

Commissioner Leeds: It is nice to be in my home state and to be among friends. The Commission holds these meetings to hear from you and I thank you for being here today. As the Commission holds these formal listening sessions we develop a record including who has been with us at the meetings. This will be Lizzie Marsters last meeting as DFO and I would like to publicly thank Lizzie for a job well done and for all the support she has offered the Commission. Throughout our public sessions the Commission has gotten a good handle on the general operations of trust assets but we have little information regarding the Five Civilized Tribes and other unique situations like probates in state and district courts. I have visited with the Muscogee Nation in the last few days and Cherokee will establish a team to dive into issues discussed during Commission sessions yesterday.

DFO Marsters: As many know there are several components to the Cobell settlement – disbursements are one component. Pursuant to the settlement the payments are being disbursed by an entity selected by the plaintiffs and they selected Garden City. OST and BIA are here to help beneficiaries to provide information, work through probate orders, and provide up-to-date addresses. DOI staff will not be able to assist with disbursement of payments handled by Garden City. The settlement also provided for an Indian Education Scholarship Fund. The vision of Elouise Cobell and Secretary Salazar was to have something positive from the Cobell litigation. The American Indian College Fund will administer the fund and set up eligibility for scholarships. The board of trustees will have five members - lead plaintiff counsel selected two, the American Indian College Fund has one seat, and two seats will be selected in consultation with tribes. Commissioner Tex Hall and Chair Fawn Sharp will present on the Trust Commission at the upcoming NCAI meeting and the management consultants from Grant Thornton will

be there to continue outreach and discussions with individuals and tribal representatives. Secretary Jewell will also be in attendance.

Marc Hebert: Amber Garib and I support the Commission for Grant Thornton as part of the management consultant team. We will attempt to get as much feedback from beneficiaries from as possible. The team is in the midst of putting together information, and assessing the trust administration system. This involves focus groups and site visits. The Commission has charged us with obtaining beneficiary feedback. As part of this strategy one of the methods will be utilizing media to reach out to individuals. On upcoming IIM account holder statements there will contact information for Grant Thornton and a message encouraging individuals to reach out and provide information for the assessment. If there are places that should be visited please let Grant Thornton know. Representatives will be at NCAI in Reno.

Commissioner Leeds: In late April the Commission released an updated draft of federal trust responsibility statement. The Commission feels it is to share these drafts early on because not only is this a trust document that spells out obligations and duties of the trustees but it is a framework for the Commission. This is the fourth draft and includes comments received through the meeting in Nashville. As the statement evolved the early stages focused on federal Indian law cases and early comments urged us to make sure to include international norms as well as being more aggressive than the first draft. Since the February draft there is has not been a lot of comment and the Commission is getting close to finalizing this as summary for recommendations. The second piece came out of the Albuquerque meeting and several panels suggested that if the trustee is going to act more akin to a trustee in the private sector there should be clear rules/protocols/practices in terms of letting the beneficiary know if there is a conflict of interest and what the duty is to disclose. The protocols include an obligation to record conversations with third parties, mandatory disclosure, and the possibility that where there is a conflict of interest independent counsel outside federal structure may be appointed. This draft does not include the duties to disclose conflicts of interest at the field office level and requirements for non-attorneys. There has been a recommendation to have protocols for the pre-litigation phase with attorneys and how people at lower levels would conduct themselves. This will be incorporated into the next draft.

Audience Feedback on Draft Statements

Trust Responsibility

Audience: There should be a more clear statement on fiduciary trust officer responsibility to Indian individuals.

Audience: The Commission to come up with more summary bullet points that can be easily translated and applied to staff.

Conflict of Interest Protocols

Commissioner Leeds: One thing that came to mind was timely communication on the mandatory disclosure form and notice of conflicts. This should be changed to five business days.

Audience: Conflicts should be discussed, even potential conflicts. I believe you are going to run into statutory issues regarding particular conflicts. The DOI is one huge conflict of interest. It is impossible to do work in the macro without conflicts every day. In 1987/88 I was dealing with water rights at Pyramid Lake in Nevada. We had regular meetings with the Deputy Secretary to bring up issues that were timely and needed to be taken to the Secretary or Deputy Secretary. Pyramid Lake issue existed for 100 years and water was diverted for irrigators. Homesteaders believe they had rights to water. At the same time the tribe believed they had right to water and farmers should be more judicious. The tribe said we must implement a process to stop diversion and start restoring the water. We decided to allocate less to irrigators. At that point the Assistant Secretary at the Bureau of Reclamation said that we were trying to deprive poor farmers who have worked for 75 years to develop farmland to give Indians recreational opportunity in that lake. The response from the Deputy Secretary was that all BOR was doing is sending water to flood fields and grow crops subsidized by the federal government. We ought to have won the argument. Another conflict is when reservations border national parks or BLM land. There are conflicts with literally every agency - between agencies and with Indians. There are not numbers in Congress to create the trust needed in Indian Country to protect the lands and natural resources of Indian tribes especially in water rights, boundaries, environmental issues, fish, and wildlife. There is not a statement in any policy that says in the trust or government-to-government relationship tribes always win. There is a duty owed and tribes need representation at the table. One concern with the trust document is that it has been preached for years to have a statement to have fiduciary duties of trust deed toward individual Indians. As part of the trust document it would be helpful to make a statement on the fiduciary duty and list normal trust duties owed by the fiduciary trustee. I think that the administration and Congress want to lean toward a concept of non-fiduciary trustee.

Audience: It is relative to put something more- we get statutory requirements that are put into trust documents to give more weight to matters. Tribes don't even know about policy and agencies are quick to forget unless there is an ongoing issue. It is important to be reminded that the Department spoke about trust duty. There is an action to be made, not just a government-to-government relationship. It is a fiduciary duty. Policies to nations and government-to-government matter in law however in trust there is need for the federal government to have duty to the individual as well. The Commission should also include the obligation to uphold treaties. Through treaties the priority should be to Indian nations over anything in matters of conflict.

Audience: In 1970 the Nixon Indian policy message was issued. One piece of this was a Trust Council Authority. I was part of a trust reform task force that took hearings to address issues. We issued a report it had 14 volumes and 8,000 pages. There was movement toward implementation because staff were moved into positions to implement. Reform moves slowly because of the pervasive nature of inaction and bureaucracy. When someone in the bureaucracy makes a decision they are making it based on operating policies they grew up on. Statutory change may be needed but care needs to be taken with implementation. Guidelines need to include approach to implementation issues. There has not been a lot of action in moving land into trust. How are we going to implement new policies? Trust reform has been going on for over 40 years and there are still just a few degrees of movement. Multiple efforts are needed through regulation, BIA manuals, and legislation. Be careful of what is in legislation to ensure it doesn't stop tribal protections and continues the overarching trust responsibility.

Commissioner Leeds: You mentioned it will require legislation. One of the things the Commission is trying to come up with is a number of legislative needs, administrative changes, and a broad laundry list of certain things that are needed. What are the top 1-3 pieces of actual legislative recommendations?

Audience: We need a broad statement of responsibility not interpreted as contract; this is a matter of philosophy and policy. The concept of honor has been lost. The U.S. government is very contract oriented and treaties are not treated like contracts. We are not interested in having our contracts broken but we want the broader responsibilities honored as well.

Audience: When I worked at the Department I was aware of all issues that were occurring at the bureaus. There should be equal status for all bureaus. The Assistant Secretary can only argue a case. The Department is arguing water settlement cases and telling the tribe to give up federal water rights in order to get a settlement for what was already agreed to. There needs to be an Assistant Secretary or trust person at a different level in the Department or outside the Department. Somehow if you are going to have special duty owed via treaties and laws regarding Indian lands and resources you must have someone who has more authority somewhere to represent tribal interests. The other solution is to downsize BIA and have a government to government relationship where tribal governments respond directly to Congress and vice versa. If tribes want sovereignty give them sovereignty and let them respond to Congress. I was aware of a situation recently where tribal trust land operates its own mineral division and manages mineral property land owned in trust. The tribe must lease land to the tribe so BIA can determine if it is a fair lease and then allow the tribe develop it. It is their land and why are we talking about it? If the tribe wants to acquire land it should automatically become trust land. If a state buys land they don't ask to put it in trust. If the lands are within the original boundaries let tribes acquire the land. Until that happens we will not see much change. These are the kind of laws that must be enacted.

For the first time in many years tribes have enormous political power with Congress because they have money. If tribes use that politically you might be able to get some legislation passed to give tribes opportunity to be true sovereigns within the scheme of governments in the U.S.

Audience: One of the problems is by moving these things up through the Assistant Secretary it will be impossible to achieve what was outlined in the Nixon policy. Intradepartmental fights exist. If you move anything to the Secretary's level you just move the locus of the fight. Not that it shouldn't be done, but how do we leverage power? We had to go to the government to ask to be sovereign. Now we have other resources through oil and gas, casinos, and contracts. There was a time in the 1970s when you had the farmers and cities pitted against tribes over water issues. Now it is often tribes and cities against farmers to get water. Additional pressures because cities built where there shouldn't be cities. I am skeptical about some of the approaches but that doesn't mean we shouldn't try. Set goals and move out to achieve them. We should use the political power we do have. In Oklahoma tribes are the number one employer in the state. Tribes are a major component in the economy and are keeping rural Oklahoma alive. Tell that story better and bring small communities with us as colleagues because if we go away, they go away. We shape the land, our values shape them, and we still have process to make this known. This is a larger issue to take a couple more centuries. We need independent authority to be independent of the Solicitor, the Department of the Interior, and the Department of Justice. People are bound by their own agency traditions. We need to address these issues too. The Commission should continue to try to develop a statutory framework that is in the tribes' best interests.

Commissioner Leeds: Bill Rice was going to cover a topic that gets to the point about tribes purchasing land and recognizing the power to protect against alienation. Mr. Rice's theory is that the Indian Reorganization Act and the Oklahoma Indian Welfare Act were passed around the same time as the Tennessee Valley Authority (TVA) language and this created the power to acquire land and there is no additional federal review of the purchase. Tribes already have authority. The Secretary took the next step on tribal lands because of administrative caveat. The Commission is exploring the TVA legislation to try to better understand it.

Audience: When legislation was passed to stop treaty making there was nothing that stopped the Senate from making treaties with tribes. This may be a way to get pilot programs and to adopt some of these responsibilities. Give tribes the option to go into that type of process if they are interested to be more independent and have more authority.

Audience: In Oklahoma there is the Stigler Act that affects half of us and allottees. I am happy to hear there will be a listing of trust responsibilities to individuals. If the goal is

to be specific must address legislative fixes if not internal BIA and DOI policies to address conflicts immediately to help correct those things that are existing.

Curtis Zunigha, Delaware Tribe, read a formal tribal statement into the record regarding undistributed trust funds to the Delaware Tribe. The statement describes the background and actions to date on the case – pending since January 2002. The official statement is in Appendix F. The Delaware Tribe respectfully requests the Secretarial Commission give attention to the claims of the Delaware Tribe and ensure action by appropriate staff within Interior to resolve these claims and distribute funds to tribal members who deserve them. We also ask for Secretarial Commission oversight to ensure completion of tribal settlement administrative actions and litigation that will provide funds to the tribal government including payment of damages for previous mismanagement.

Commissioner Leeds closed the audience comment period with the following questions:

- Could a tribe compact to do the functions of OST? Does this require legislation, could it be done now?
- Tribal funds can be drawn out and managed by tribes but is there will to do this among tribes? What would allottees do?

Panel Session 2: Update on Leasing Regulations, HEARTH Act Implementation

Professor Judy Royster, University of Tulsa College of Law will speak about leasing regulations and the following trust questions:

- Do you have any recommendations to improve or streamline delivery of services to trust beneficiaries?
- What are your top three recommendations that you think would improve or strengthen trust management and/or administration for the Commission to consider?
- Do you have any suggestion of other trust administration models the ITC should examine as it looks towards improving the DOI trust administration and management?

Mike Black, Director, Bureau of Indian Affairs will speak about HEARTH Act implementation.

Professor Royster: The statutes involving aspects of land and mineral resources are increasingly coming up with new structure that allow for approval other than that of the Secretary of Interior approving everything. Instead of all individual agreements being approved this HEARTH Act works on a different model. The tribe develops a set of regulations for tribal control on these matters and a regulatory scheme is approved by the Department. The tribe then releases individual agreements. This gives tribes more control to over development of land and resources and streamlines the process.

Congress tried this with the Puget Sound tribes in the 1970s, then with the tribal energy resource agreements with Navajo, and now with the HEARTH Act. All statutes work on that scheme and all are optional with tribes. The HEARTH Act is more than home ownership it is also about the general surface leasing of lands. The amendment to 25 USC 415 provides for non-mineral leasing of tribal lands and the use of HEARTH is optional. It provides that if the tribe chooses this route they will do so by submitting an individual lease for approval or the tribe can take HEARTH options. It permits business or agriculture leases up to 25 years including up to two additional 25 year terms; recreation leases may be up to 75 years.

There are two trust provisions that may or may not affect trust issues. They are the authority of the Secretary to enforce against non-tribal parties and the waiver of federal liability of losses. Not found in this legislation is a general express statement of federal government trust responsibility. In other broad statutes you will find that trust responsibility statement with respect to the subject matter of the statute. In the Indian Mineral Development Act there is a statement that nothing absolves the U.S. of the trust responsibility including those derived from trust. The 2005 Energy Act has express statements that the federal government must act in the best interest of tribes and nothing shall absolve duties including those in trust. Those broad statements are representative. The HEARTH Act doesn't have this but it does have the two provisions, the authority of the Secretary to enforce against non-tribal parties and the waiver of federal liability of losses. The U.S. has a trust obligation but the same language about enforcement against non-tribal parties also appears in the Indian Mineral and Energy Act, the most recent relevant and overarching policy. How much this means, I don't know.

In the case of trust actions tribes want to think this places restrictions because of the lack of broad trust language. It says the Secretary may, at their discretion, enforce. This is not in the other statutes. Enforcement is legally discretionary. Wording could pose problems. It could say discretionary trust responsibility but it is in contrast with similar enforcement language which doesn't offer the discretion. The Indian Mineral Development Act has been around for 31 years and there has been one court case that was settled in 1985. The challenge for the Indian will be to revoke the lease before Secretarial approval. There is no litigation with the Indian Minerals Act. When things work people don't litigate. Some concerns with the language of the HEARTH Act may be not that much of a concern because the language is in the Indian Minerals Act. The difference with Indian Minerals is the Secretary approves every individual lease and minerals agreement. This works on the model of general approvals on long-term leasing. The Secretary may have broader responsibility under the Mineral Act. In deciding to approve minerals agreements there are a number of factors to take into account. The considerations to consent don't take into consideration that there would be potential action for breach of trust. The Secretary has specific obligations in approving instruments. Better in HEARTH is the kind of language not found in the Energy Act. The U.S. shall not be liable to any party for any loss resulting from negotiated terms of lease

and in HEARTH the U.S. is not liable for loss. The language in the Energy Act is more of a compromise.

Is this a problem with trust doctrine? The critics say the HEARTH Act is the worst of all possible worlds because it preserves too much federal control over the leasing process but none of the risk. This is a valid criticism but I don't agree. It is unrealistic to expect the federal government to bow out altogether and this is the half measure step in the right direction. The HEARTH Act is entirely optional with tribes and no tribe is forced to choose the route of the act. Tribes shouldn't move forward under HEARTH unless they are comfortable in making the decision. Tribes can develop tribal regulations for certain types of leases. The Sandia Pueblo is only doing business leases at this point; may take on authority of other leases at later date. Tribes may take all, part, or none of the leasing authorities. HEARTH is offering some control but not all control. The tradeoff is very clear – the U.S. is not a guarantor of losses.

Director Black: The BIA developed a national policy memorandum for staff regarding how to review, analyze, and implement the HEARTH Act. This is a good guidance document for tribes. The Act allows tribes to process leases on tribal lands. There are many things BIA has been beat up about and one of those is how long it takes to get things done. There are strict timeframes to make and take actions under HEARTH. BIA is given 120 days to review and approve the lease. Consistency is the important word. And staff should apply consistency in deference to the tribe. Don't meet or exceed NEPA but be consistent. The Act doesn't say what the consequences are for not reviewing the leasing regulations in 120 days. The agency is working on processes for review within 120 days. Technical assistance is provided to tribes for the environmental assessment review. BIA has received six plans so far. Three have been approved and three are pending approval. The memo makes the role of staff clear and does not allow misinterpretation to ensure there is consistency in review and application of standards and review.

Audience Questions Regarding the HEARTH Act

Audience: Is there a reason why individual allotted land owners were not included?

Director Black: I can't speak for the people who wrote the Act but in general tribes don't have authority to lease allotted lands.

Audience: As a small business owner we have a lot of these types of issues where leasing comes into play and they have things they want to do and the regulations don't allow them to do their own leasing. How is this going to help individual land owners? What can we do to get with this process?

Director Black: HEARTH doesn't allow for allottees to go into this process. The 162 changes would hopefully provide the flexibility you are looking for.

Fee-to –Trust Powers and Restrictions on Alienation and TN Valley Authority 1933 Land Acquisition into Trust Model

G. William Rice, Associate Professor of Law, University of Tulsa College of Law provided an example of tribal authority to take land into trust.

Professor Rice: I applaud work that is going into making the HEARTH Act a reality but I think that in some ways it does not go far enough and in some ways it is irrelevant. We need to remember some history and remind ourselves that prior to 1887 tribes managed and took control of lands for their own purposes without assistance. It took 100 years to remove laws, enforcement, and planning that tribes already had in place. The U.S. likes to say that Indian lands are held in common and that there is no individual interest. Indians didn't hold any right in land individually. Property law and management define who gets to use what property, for what purpose, for what period of time, and who holds the responsibility. In areas not subjected to allotment some tribes still function in their own ways. For instance, if the tribal council held a position that every single tribal member should be able to afford a place to live houses would sell for \$300 not \$500 because there was need to maintain affordability for tribal citizens.

Policy has been developed over the years as the U.S. tried to allot tribes. In Oklahoma it became a transfer of right to occupy land and the law applied to the occupancy of land moved from tribal to federal law. Think in terms of we had these systems. They were taken away. By 1930 real estate was such a failure BIA was trying to get out of it. In the 1930s the Collier administration under Roosevelt said that on average 40% of the BIA budget was being used to maintain a real estate office. Realty services and probate has been a large part of budget. How much of the DOI budget is used to manage Indian land? One of the highlights on the BIA website is that the agency manages 57 million acres of tribal land. Tribal lands should be protected. DOI assumes more control over day to day uses of property. How do we get out of this?

Consider that the U.S. endorsed the U.N. Declaration. That does not make it law except to the extent it reiterates what is already binding international law. Large parts of the U.N Declaration exist in treaties with the U.S. The endorsement of the declaration means it is now official policy of the U.S. and trust responsibility needs to be rethought in terms of this new policy development. What is trust responsibility? It is not the responsibility to manage except in limited circumstances. When there are undetermined heirs management is called for and the management of tribal forest lands will need to remain consistent with requirements as they exist. Trust responsibility is for the protection of the ultimate dominion of tribes over their reservations, people, and property within the reservation. We look at history because it anticipated the UN Declaration.

There were a number of things that the HEARTH Act can and should do including revitalizing tribal governments. Recognized tribes are organized under the Indian

Reorganization Act. When it is a matter of policy tribes learn to be governments. They are organized, provide for land acquisition, and engage in tribal management. I would posit that right now those tribes with charters under the Oklahoma Indian Welfare Act or Reorganization Act already have the right to lease tribal land. They have the right to do housing leases, business leases, and mineral leases. These are valid. I admit it took me four years to read the legislation in different ways. We have been taught that the Secretary puts land in trust for Indians and that authority is given in the Reorganization Act. It doesn't say that. It says that the Secretary has discretion and may get land for Indians. All land or rights taken into trust will not have to pay taxes. Lands taken by whom? When Congress amends language they generally intend to change meaning. When you look at the section of the Reorganization Act regarding the authority to acquire lands, it states the Secretary may convey title to tribes and may convey by putting land into trust.

One of things the Reorganization Act anticipated was that the tribe would buy land in the name of the U.S. and swap for shares of allotments through land consolidation. In Section 5 it states the Secretary has the authority to secure lands. Section 16 offers a provision that forces the Secretary to recognize that tribes are organized and can write their Constitution in the tribal language and use traditional government. Section 17 authorized tribes to acquire property. There is a provision that authorizes 10 or more Indians to develop a cooperative for land management. It is intended to allow heirs to transfer trust title to the cooperative association and manage the land taking BIA out of loop. The legal authority is there. What does the chartered corporation allow us? It is an opportunity to manage land as we see fit. If a tribe has a charter they already have authority. The tribe may not sell any of the land within the reservation and the title can be held in trust, there cannot be mortgage on the property, and the lease cannot be longer than 25 years. The charter defines terms of the leasing period. This was honored until the termination era in the 1950s.

There are existing mechanisms by which the Department can make sure Cobell doesn't happen again. Cobell occurred because the government was managing tribal lands. If management is turned back to the tribes Cobell will not happen again. Tribes that want to manage property and acquire property on their own land in reservations extinguish American title. Lands outside the reservation are taken under U.S. trust and cannot be taxed. The Supreme Court says tribes cannot acquire non-reservation lands without paying taxes. This was a unanimous decision. Section 5 paragraph 4 of the Indian Reorganization Act states that lands purchased and attached to lands are not subject to taxation. All tribal property is non-taxable even off reservation lands. The state can tax activities - land is protected against involuntary alienation but activities are regular business activities. That is trust protection. There needs to be an administrative process to have DOI recede from the vision developed in the Termination Era that only the Secretary can approve land transactions. We need to return to the Roosevelt/Collier vision for tribes that are consistent with the UN Declaration – tribes should seek and

control their political development and have a right to control their social, political, and cultural development.

We need to be able to acquire lands in the reservation and it shouldn't take approvals to get the lands. Deeds are written to the U.S. in trust for the particular tribe. When the deed is accepted the transaction is complete. Trust responsibly should focus on trust protection. Indians have the authority to acquire lands for Indians.

Questions for Mr. Rice

Audience: I always felt that under the Reorganization Act the tribe could purchase property and move it into trust status. I think we can and should be doing this. If you go into the reservation boundary and purchase land that was fee and move it to trust by tribal purchase does that stop taxation by entities or do you have to go to the entities and get the taxes taken off?

Mr. Rice: Section 5 states that land is held in the name of U.S. in trust for an individual. In this circumstance you are your own trustee. Section 5 says land shall be taken in the name of the U.S. and shall be exempt from state and local taxation. This does not require secretarial action. In my view when you acquire property it comes off the tax rolls. Federal law is supreme to state law so if exempt should be exempt.

Audience: Of local jurisdictions feel they have the right to object.

Mr. Rice: That right is not in the statute. The Secretary can't make tribe do that if the authority is not in the charter. In issuing a charter the Secretary could require it but it would be unlikely since it is not in the statute.

Audience: When nations assume and have the authority to proceed they have tribal members to address and members can take the nation to task. It is important for the nation to be smart with membership.

Mr. Rice: Tribal governments should work properly for tribal members. It is a responsibility we all have. Problem is that each tribe has that right of self-determination and that means governments are structured and enforced by the tribe. There will always be objections, no matter who is in charge. This should not get in the way of attempting to get a better life for our grandchildren.

Public Comment

Katherine Ware-Perosi, Indian land owner with the Kiowa Tribe of Oklahoma. I am the small business owner of Indian Country Land Services. I love working with Indian people. They are here in my heart. As a public servant in the government for 16 years and a tribal employee for 11 years I see myself as a servant. I work at the grassroots level with land owners with issues and complaints they may have. In western Oklahoma I went to land training and was surprised with their concept of western tribes. At this training I was told in eastern Oklahoma there are the Five Civilized Tribes and in western Oklahoma are the 'wild' tribes. I was kind of offended as I am from the west. This

mindset creates a limitation that trickles down through agencies. I was concerned about an older land owner that had a right of way trespass for close to 13 years. There was a 21 inch gas pipeline through the property and much of the throughput to main lines of large companies. She was told that from the secretary at Anadarko that nothing could be done and that they were going to refer the case up to office of the field solicitor and this was never done. They approved the right away without land owner consent. The review was done at the regional office level. Land owners are fending for themselves and having to find the right attorneys and counsel to fight. State attorneys don't want to take on the cases because of time and expense. We have landlocked lands in western Oklahoma. Remember we have vested rights in these properties. There is an umbrella of protection we should have under BIA. The Indian land owners could manage more of their own lands. I think that because of the tribal politics that we have in western Oklahoma limits individual owners to go out there to ask tribes for more assistance. Individuals are left alone to manage tribal lands. Whenever we as individuals do have an issue with our properties the tribes get preference before us. We understand that but we need help also. Article 16 of the Oklahoma State Constitution states that if an Indian individual has landlocked lands the BIA can without prejudice allow the tribe to have first preference for access to those lands before BIA will take into consideration highways and roads. There are laws in place that we can grab a hold of and bring to the Bureau's attention. We have to defend ourselves on the western front of Oklahoma.

Leslie Standing, Wichita Tribe of Oklahoma: My cousins have a land lock issue. They have land that is surrounded by leased lands. This land does not go on the lease bidding process because it is a fixed price. The lessee will not allow anyone else to have a right away to their land. The superintendent is the holding hand of the lessee not the allottee. Monies can be obtained for purchasing right of way. It would cost \$100,000 for this particular allotment. It is 10 acres and the right-of-way was given to my aunt because her dad had an existing allotment that the town now sits on. The land was leased to the church and now the church wants the right-of-way removed. There was an existing right-of-way before town existed. The land this sits on belonged to my grandfather. Now they want to shut off right-of-way to existing land. The city can pull up all the water and utility lines leaving us without service. We are the allottees and have so many issues on the table and land is so fractionated. Somehow this consolidation of property has got to come to head to be fair and equal with everyone.

Western Oklahoma individual heir: We really do need and BIA should offer education for individual land owners. I am not educated and every time I get a letter that an oil and gas company wants to lease land I think we should be able to get more money than we do. I have never signed the letters. Leases are executed but we don't get lease conditions and terms and both parties have responsibility. BIA is not being responsible for individual lands owners. They don't give complete leases, notify of completion, or explain the lease. There is a note that I should be getting 20% of royalties from other products. How do you account for that? How does BIA protect us? There is a pre and post training that needs to be done on how individuals should work with BIA. How do

you make oil companies accountable for what they have developed and the income they earn? Education should be given. We need to start somewhere.

Ted Isham, Muscogee Creek Nation: I want to talk about blood quantum and notice of actions. Traditionally Muscogee Creek people count lineage according to matrilineal blood line. If they are born from that member they are a full member of the group. I am considered a half blood. The traditional form of operating on the matrilineal made people part of the group they were born into. The idea of blood quantum is dehumanizing. Three months ago I received a copy of a letter to an oil company that BIA was terminating my inherited restricted property. There were no communications about what was going on - this was inherited property. The concern is that there was no education or communication about what our options are. Whatever happens in the judgment is of no consequence. Many people are in the same boat when restrictions are lifted without due diligence. There is too much arbitrariness. The U.S. government is in the business of getting out of Indian business. Moving as many restrictions as they can is how land was taken in the allotment period. This is still going on, over 100 years later. We are still losing lands. People are arbitrarily making this happen. My IIM account was terminated and a check was sent to me. I didn't know what to do with it. I went to OST and reinstated my account. Having guidelines to give options on what to and how to handle situations would be of benefit. It would also be good to have standard guidelines for bureaucrats to follow to reduce errors.

Carla Knife Chief, Pawnee Nation: I serve on the board of Land into Trust for the tribe and we are working on fractionated land purchasing. We have a situation unique that may be applicable to others as well. There are friends in Nebraska that have donated property to the tribe for the benefit of a culturally significant ancestral location. There are four properties we need to put into trust. The lands were given by good people that want to be friends and encompass friendship and we feel honored to do that. We don't want people like them to be penalized and we have to endure processes to do that. We are going to plant ancestral corn, have cultural activities on lands where our ancestors put their feet and hands in the dirt. I don't think that they care what we use it for and don't care if we sell but we want to keep the land and put it in trust to give tribal members a place to go. We feel like the process to put land into trust is so complicated. If there are other properties that are donated to tribes it should be a simple transaction that puts land into trust.

Colleen Keeley, Oklahoma Indian Legal Services: There are a lot of time resources put forth to complete the Five Civilized Tribes probates. There are of many whereabouts unknown and with the Cobell notices it is a good time to find many of these because people are interested in lands they may have. One of the onerous laws that apply to the Five Civilized Tribes is the full blood approval statute of a will. If an individual is 7/8 they don't have to have a will approved. The Solicitor is not helping with easement. Deed approval statutes for the Five Civilized Tribes must go to district court to have deed approved even if it is to split. I often hear people say who is BIA working for? The agency

goes to great lengths for non-Indian. Merge OST back into BIA. Staff in OST seem to help cut through red tape and staff in BIA seem to create it.

Marsha Halterman: Why can't tribes have access to the BIA fee- to-trust tracking system?

Mr. Rice: The Reorganization Act property acquisition applies to the Five Civilized Tribes. If land is out of the restricted process and there are half-blood/full-blood dichotomies, it should be simple for tribes or DOI to convert to trust property but it takes it into the mainstream and removes stuff about restricted lands including the statute of limitations. In my view when property is acquired from allottees and held in trust the tribal trust and responsibility are associated. If you acquire property under a charter these properties you want to exercise jurisdiction over, you would have to apply to the Secretary of the Interior to proclaim the property is now part of Section 7 of the Reorganization Act. This is how to convert lands outside the reservation to Indian Country status - secretarial action is required.

Commissioner Leeds: There is an administrative webinar in July and then a Commission meeting in Alaska in August. Please send your written comments on recommendations if you have them. The Commission needs any recommendations by Labor Day if they are to be helpful.

DFO Marsters: I want to thank everyone for being here and appreciate the individual allottees for being here today. It has been a pleasure to work with all of you. This is an exciting time with the administration. There is a real desire to get this done and move forward strengthening the relationship with tribes and individuals. Thank you to all those providing comment.

Commissioner Leeds closed the meeting thanking everyone for attending and for the allottees sharing their thoughts. The Commission will ensure the concerns of allottees will be in the final recommendations.

Appendix A. List of Acronyms

ArcGIS	GIS Mapping Software
ASIA	Assistant Secretary for Indian Affairs (DOI)
ATNI	Affiliated Tribes of Northwest Indians
BIA	Bureau of Indian Affairs
BOR	Bureau of Reclamation
CADR	Office of Collaborative Action and Dispute Resolution (DOI)
COLT	Coalition of Large Land Based Tribes
CTMP	Comprehensive Trust Management Plan
DFO	Designated Federal Officer
DOI	Department of the Interior
DOJ	Department of Justice
EOP	Explanation of Payment
ESRI	Technology Company Developing GIS Tools
FACA	Federal Advisory Committee Act
FOIA	Freedom of Information Act
FTM	Fiduciary Trust Model
GIS	Geographic Information System
GPTCA	Great Plains Tribal Chairman's Association
HLIP	High-level Implementation Plan
IA	Indian Affairs (DOI)
IFMAT	Indian Forest Management Assessment Team
IIM	Individual Indian Money
ILWG	Indian Land Working Group
ITMA	Intertribal Monitoring Association on Indian Trust Funds
ITT	Information Technology Trust
LCC	Landscape Conservation Cooperative
LTRO	Land Titles and Records Office
MOU	Memorandum of Understanding
NARF	Native American Rights Fund
NCAI	National Congress of American Indians
NCLB	No Child Left Behind
NEPA	National Environmental Policy Act
NIFRMA	National Indian Forest Resource Management Act
NMFS	National Marine Fisheries Service
NRCS	Natural Resources Conservation Service
NRDAR	Natural Resource Damage and Assessment Restoration
OEA	Office of External Affairs (OST)
OHTA	Office of Historical Trust Accounting
OITT	Office of Indian Trust Transition
OMB	Office of Management and Budget
ONRR	Office of Natural Resources Revenue
OST	Office of the Special Trustee for American Indians

OTRA	Office of Trust Review and Audit
PSA	Public Service Announcement
RACA	Office of Regulatory Affairs and Collaborative Action (IA)
SOL	Office of the Solicitor
TAAMS	Trust Asset Accounting Management System
TEK	Traditional Ecological Knowledge
TFAS	Trust Fund Accounting System
TIBC	Tribal/Interior Budget Council
USET	United South and Eastern Tribes Incorporated
USIECR	U.S. Institute for Environmental Conflict Resolution
USGS	U.S. Geological Survey

Appendix B. Trust Commission Meeting Attendees

Name	Affiliation	Friday, June 7
Commission		
Stacy Leeds	Commissioner	X
Lizzie Marsters	DFO	X
Commission Support Staff		
Bridget Radcliff	USIECR Facilitator	X
Genevieve Giaccardo	OST	X
Mark Davis	OST	X
Regina Gilbert	BIA	X
Sarah Palmer	USIECR Facilitator	X
Tiffany Taylor	OST	X
Public Attendees		
Ayanna Najuma		X
Betty Tippeconne	Comanche	X
Brenda Gabbart	Choctaw Nation	X
Brent Harjo-Moffer		X
Brian Ross	OST	X
Charles Meloy	Citizen Potawatomi Nation	X
Chet Brooks	Delaware Tribe of Indians	X
Chris Redman	Chickasaw Nation	X
Curtis Zunigha	Delaware Tribe of Indians	X
Dan Rey-Bear	Nordhaus Law Firm, LLP	X
Darneel Day	OST	X
Deidre Bigheart	Osage	X
Donna Loper	Choctaw Nation	X
Eddie LaGrone	Muscogee Creek Nation	X
G. William Rice	University of Tulsa	X
Gail Jackson	Muscogee Creek Nation	X
GS Cusler	Absentee Shawnee Tribe	X
Helen Sanders	Allottee	X
Henry Ware	OST	X
Janel Perry	Cherokee Nation	X
Jeff Fife	Muscogee Creek Nation	X
John Berry	Quapaw Tribe	X
Judy Royster	University of Tulsa	X

Karla Knife Chief	Pawnee Nation	X
Kathy Perosi	ICLS	X
Kirke Kickingbird	Hobbs Strauss	X
Lenzy Krehbiel- Burton	Native Times	X
Leslie Standing	Wichita Tribe	X
Lisa Impson	Chickasaw Nation	X
Loretta Carter	OST	X
Louetta Partridge	Wichita Tribe	X
Marcella Giles		X
Marshea Halterman	Cherokee Nation	X
Michael Black	BIA	X
Mitchell	OST	X
Stephenson		X
Patricia Appl	OST	X
Randy Henning	Chickasaw Nation	X
Raymond Campbell	Hobbs Strauss Dean & Walker	X
Raymond Perosi	ICLS	X
Robert Tippeconne	Comanche	X
Ron Graham	OST	X
Ron Harp	Upper Mohawk Inc.	X
Ross Swimmer	Swimmer Group, LLC	X
Sonya Lytch	Muscogee Creek Nation	X
Stephen Colt	OST	X
Ted Isham	Muscogee Creek Nation	X
Thomas L. John	Chickasaw Nation	X
Todd York	Indianz.com	X
Traci Umsted	Choctaw Nation	X
Vanessa Vance		X
Verna Crawford	Delaware Tribe of Indians	X
Warren Austin	OST	X
William Norman	Hobbs Strauss	X
Yolanda Reyna	Apache	X
Zach Scribner	Chickasaw Nation	X

Appendix C. List of Documents Distributed and/or Presented at Commission Meeting

- Agenda
- Draft Trust Responsibility Statement
- Draft Conflict of Interest Protocols

Appendix D. Public Comments Submitted to Commission

All statements submitted to the Commission may be viewed on the Commission website at: <http://www.doi.gov/cobell/commission/index.cfm>. The list below is a running total of comments submitted.

- 1) Cheyenne and Arapaho Tribes
- 2) Navajo Nation – June 2012
- 3) Indian Land Tenure Working Group
- 4) Forrest Gerard
- 5) Ute Indian Tribe
- 6) Oglala Sioux Tribe
- 7) The Confederated Salish and Kootenai Tribes of the Flathead Nation
- 8) Kaw Nation
- 9) Intertribal Timber Council
- 10) Affiliated Tribes of the NW Indians
- 11) Inter Tribal Monitoring Association
- 12) Beverly Grey Bull Huber
- 13) Charlene Ramirez
- 14) The Great Plains Tribal Chairman’s Association
- 15) Helen Sanders – September 2012
- 16) Karen Rabbithead
- 17) Navajo Nation – September 2012
- 18) Oglala Lakota Nation
- 19) Makah Tribe
- 20) Hoopa Tribe
- 21) Helen Sanders – February 2013
- 22) Navajo Nation – February 2013
- 23) Navajo Nation Recommendations for Trust Reform Legislation to Improve Trust Management
- 24) Joe Membrino
- 25) Mississippi Band of Choctaw Indians
- 26) Koko Hufford
- 27) Chairman John Berry, Quapaw Tribe of Oklahoma

Appendix E. Commission Panel Session at Tribal Sovereignty Symposium

Trust Commission Sovereignty Symposium Session
June 6, 2013
Oklahoma City, Oklahoma

Commissioner Leeds welcomed the audience, reviewed the agenda, and set expectations for the session. She made the audience aware that remarks, testimony, and presentations would be part of the Commission's formal record. Commissioner Leeds then provided an outline of the Commission's work and structure.

DFO Marsters: I have the distinct honor and privilege to serve as the DFO of the Trust Commission. The biggest thing the Commission can achieve is to get your feedback. When President Obama was elected there was a push to make a new mark on the federal trust and to start a new era of the trust relationship. Part of that included settling Cobell and a concentration on consultation. Since the Cobell settlement 71 other cases have also been settled. The emphasis of moving forward on new era of trust relationship has been implemented. Part of the Cobell settlement was the establishment of the Trust Commission. The Department does not want to have another Cobell litigation and is doing everything possible to institute reforms. The Commission is a two year advisory committee and looks to have recommendations in 2013. The Commission is one important avenue for a new trust relationship. The five Commissioners bring expertise of trust management and experience in the trust relationship.

The Department of the Interior is responsible for managing Indian trust land and resources on behalf of Tribes and individual Indians, totaling approximately 56 million surface acres and 57 million acres of subsurface mineral estates. Interior is responsible for managing 387,000 Individual Indian Money (IIM) accounts and about 3,000 tribal accounts (for more than 250 federally recognized tribes). Assets held in trust for the benefit of Indian tribes and individuals include for example, land, timber, oil, gas, and mineral resources. The trust is a complex system to review and provide recommendations for reform. The Commission has been asked to do a comprehensive evaluation of the Trust Asset System and of the services to trust beneficiaries. The Commission has held regional listening sessions across the country and the next meeting is in Alaska in August. The Commission will work with the management consultant to consider the nature and scope of necessary audits and to consider provisions of the 1994 Reform Act that mention the termination of OST. I want to reiterate that the Commission wants to hear from individuals and has offered the following questions for consideration:

1. Do you have any recommendations to improve or streamline delivery of services to trust beneficiaries? This includes matters related to financial management and accounting functions, as well as natural resource management functions.

2. Are there any other trust administration models the ITC should examine as it looks towards improving the Department of the Interior's trust administration and management?
3. Given that the sunset provision in the American Indian Trust Fund Management Reform Act of 1994 was predicated on OST's oversight and reform responsibilities, and that OST now has additional operational duties, should the Commission recommend sunseting the OST?
4. Do you have any recommendations and/or suggestions that would improve the nation-to-nation relationship between DOI and Tribes with respect to trust administration?
5. Do you have any recommendations to improve or strengthen trust management and/or administration based on information gathered in the course of litigation and settlement of the recent tribal breach of trust cases announced in early April of this year?

The Cobell settlement included four components:

- land buyback,
- the Indian Trust Commission,
- disbursement of payments, and
- an education fund.

We are aware there have been lots of questions regarding disbursement of payments and all these questions should be directed to the Garden City Group. OST and BIA are collecting addresses to provide up-to-date information to Garden City Group and fielding calls for requested documents needed for settlement payments.

The opportunity for higher education was a vision of Elouise Cobell and Secretary Salazar. An Indian Education Scholarship Fund has been established. Before Secretary Salazar resigned he nominated the American Indian College Fund to manage the scholarships. They, along with a board of trustees, will determine eligibility of scholarships and make investment decisions. The board of trustees will include Alex Pearl and Turk Cobell selected by the plaintiff's counsel, the American Indian College Fund gets a nomination, and Secretary Jewell will nominate two members to the board. These nominations went out for consultation via two written sessions and tribal leaders were asked to submit nominations and encourage candidates to submit letters of intent. There will be a 5% pass through to the American Indian Graduate Center to provide scholarships as well. There is a formula associated with the buyback that contributes some % of funding to the education fund and is meant as an incentive for participation in the buyback program.

Commissioner Leeds: The Commission was appointed in late November 2011 and started work in March 2012, two years ago, and one of challenges is that the Commissioners are five people with full-time jobs doing this pro bono and we did not have time to get the level of information we need to proceed. Part of the Secretarial Order designated the Commission to have access to a management consultant. With the Cobell appeals process complete and funding freed up, the management consultant could be hired last fall. The contract was awarded to Grant Thornton in partnership with Cherokee Services Group and Moss Adams. The consultant has been able to fill gaps for us as we were getting lots of federal employee perspectives but lacked information from individual allottees. Marc Hebert from Grant Thornton will provide an overview of their work.

Marc Hebert: I am a senior manager with Grant Thornton and have been there for 13 years. I have spent most of my career supporting OST and BIA. My colleague, Amber Garib, has worked with BIA for five years. Grant Thornton is the 4th largest accounting firm in the country. Cherokee Services Group and Moss Adams (accounting firm) have partnered with us to meet the needs of the Commission. We are currently in the process of interviewing and soliciting information from as many beneficiaries as possible to assess the as-is state of systems and processes. We want to ensure we interview many more beneficiaries.

Commissioner Leeds: In the materials for today's session you have been given two documents, the Commission charter and an updated report from May of the Commission activities. On the Commission website we have been posting relevant documents and would like you to review the trust responsibility statement as written from the perspective of the Commission. Part of the recommendations will be definitions and minimum standards. We are developing protocols and standards of conduct for dealing with conflicts of interest. At what point as trustee is there a need to document actual conflicts of interest or potential conflicts of interest? There will be draft recommendations in the fall to get more dialogue and responses from tribes and allottees.

We have met across the country to get geographic diversity and various tribal perspectives. The Commission chose to meet in Oklahoma because of the variety of issues within the state. In Eastern Oklahoma tribes have restricted lands rather than trust lands and in Western Oklahoma tribes are more analogous to the rest of Indian Country. There is also a healthy mix of tribes that have their own realty office to address allottee needs vs. those that are going to BIA for services like probate. There are very few tribes that have taken on all trust services themselves and there are limited success stories from those tribes that have taken on services. The Commission understands there is survey fatigue and feel the in-person meetings are a great opportunity to provide feedback. We need to hear from more allottees regarding what they would like to see and that is why we have asked Grant Thornton to reach out to more individual allottees. People in tribal realty offices or BIA local services need to help identify

individuals that can provide testimony to the Commission. The Commission has received a lot of testimony and written comments with problems but we need recommendations for change and solutions to fix the problems being identified. One thing the Commission is committed to doing is looking at the federal trust more broadly than what is specified in the charter. We want to look broadly at trust functions and for the Commission recommendations to be meaningful we need to make recommendations beyond those previously given in the current institutional structure.

Jodi Gillette, White House Senior Policy Advisor for Native American Affairs, and Jefferson Keel, NCAI President, provided an update on government-to-government consultation.

Ms. Gillette: The President has committed to bolster the government-to-government relationship and forge a new path for the relationship. The biggest thing he did was making sure that tribes have a voice at the table. Each year during the Annual Tribal Leaders Conference the President meets with tribal leaders to discuss priorities and needs. A report is generated from this conference and highlights the accomplishments of agencies and offices. Each year there is a great showing from cabinet members. The President believes that some of the issues that have been noted by tribes did not happen in a bad intentioned way but happened by not paying attention. The creation of my position was to help ensure this no longer happened. There is also an intergovernmental affairs office public liaison group to work with tribes and other elected officials to ensure a positive relationship - Charles Galbraith serves in this role. The Trust Commission that comes from the Secretarial Order is part of the larger effort to make sure we are making positive changes in Indian Country.

How does the Obama administration use consultation for defining what consultation does? We have tremendous opportunity where the government is trying to reach out to Indian Country to improve the management of trust assets and resources and make sure that we are trying to reflect realities. In 2009 President Obama issues a memo regarding conducting consultation in a government-to-government manner. The memo gives a plan and an executive order defines that government-to-government consultation applies to all government agencies and offices except those that have regulatory duties. The National Indian Gaming Commission has chosen to develop a consultation policy even though they are not required to. The White House has heard that agencies are consulting and there is lots of positive feedback that agencies understand the obligation and are undertaking consultation. Coordinating outreach to tribes could be better. The President is committed to upholding treaty obligations and the trust responsibility. There is a long history of treaties and they are contracts among nations that are recognized and establish a unique set of rights in exchange for tribes giving up millions of acres of land. We understand the original responsibility has a legal foundation rooted in treaties and the Constitution and make a point to reference the special legal relationship in Article 1 Section 8.

There are judicial decisions that guide courts and administrative law as well. Throughout the Obama administration staff is encouraged to strengthen the government-to-government and reminded to look to the past to not repeat mistakes. There is history between the U.S. and tribes and some chapters have created great mistrust. If the U.S. government doesn't admit and acknowledge the past it will be difficult to move forward. Part of rebuilding and restoring the relationship is to restore the trust in and to be a partner we will have to take a hard look at our systems and the way that agencies manifest an understanding of what the U.S. government is here for. Existing services and programs come from a long line of authorities and statutes. These are being reviewed to determine where there are opportunities for self-governance and self-determination. Tribes talk about how to be more mindful of always being in a strong trustee stature. The trust obligations we have to Indian Country are important and the most important thing to do is to listen and figure out how we can, through tribal consultation, make changes within the existing structure or develop new structures.

There has been a lot of progress in areas that tribes are not taking advantage of. Indian Country has the authority to do more self-governance with respect to protecting communities that the President has signed into law. There is the Tribal Law and Order Act that enhances sentencing and provides greater authority for tribes to try cases. It also creates special domestic violence jurisdictions for crimes of domestic violence on reservations. This recognizes the inherent sovereign right to protect Indian women and restores powers that have been slowly whittled away from Indian governments. With that there is responsibility in terms of what kind of special due process has to be provided to defendants and things need to be in place to utilize this power. The Department of Justice is helping develop a pilot program. In the second Hurricane Sandy Bill there is authorization for tribal governments to ask for disaster declarations and emergency funds and services directly from the President. FEMA is completing a rulemaking regarding process for this new authority. The HEARTH Act and the Affordable Care Act are two more examples of legislation that is aggressive in restoring tribal rights. The leasing regulations are similar to DOI when it comes to homes and allows tribes to create and enforce their own regulations. These are the first revised leasing regulations in 50 years and they establish strict timelines that BIA must meet. It also provides a categorical exclusion for housing - single Indian homes are not required to complete NEPA or an environmental assessment to make improvements. Fee-to-trust has been expedited and allows tribes to put land into trust at a quicker rate.

This is an exciting time because tribes suggest new ideas and goals with the understanding that the existing structure needs reform and revising. Work is being done to resolve old cases to live up to original agreements with tribes. With each effort there is a preventative look at why these things go to the point of big legal battles and what can be done differently. The work of the Commission is extremely important. The Department of the Interior takes seriously the role tribal leaders and individuals play in the efforts moving forward. This is an era where we do want to be reflective of what tribes have been telling us. The U.S. has a legal trust obligation with tribes and there is a

legal balance. In DC we are not going to be able to tell what is happening unless we are out talking with the people. There is a need to balance between the trust responsibility and tribe's self-governance – we need to hear from you. There is an understanding we have long way to go and we are not able to get there unless there is meaningful input and consultation with tribes.

Mr. Keel: The Trust Commission has been charged with a tremendous role and responsibility. I served on the Tribal Law and Order Commission and it was one of those things where we didn't understand what the scope would be until we came together and discussed all that needed to be covered. We couldn't meet officially the first year because there was no budget. So we got together informally to begin moving forward. These folks come from places where they have other lives. The Trust Commissioners are not just serving on the Commission; this is in addition to normal duties. How the Commission was developed is a difficult story. The Cobell case was the driving force behind the Commission as it exists today. When thinking about the federal trust responsibility it calls to mind a statement from Andrew Jackson regarding a Supreme Court decision on removal of Indians from lands that he would now have to enforce. This has to do with sovereignty and what does it really mean.

What is status of tribal nations in the U.S.? Does it pre-exist colonial rule and all those things? In some documents of summary this is an inherent sovereign right. It is recognized in the Constitution that tribes have a sovereign right to exist and tribes are responsible for certain things. At a 2000 meeting in Albuquerque tribal leaders recommended we needed a task force or commission or somebody that would come together to develop reform efforts. Two representatives from the BIA regions were selected - 24 total with alternates and others. The group was charged with developing their top three recommendations. There were 36 recommendations in the first round and after one year there were nine and it could not be refined anymore. By then OST had been established and was moving forward. No action was taken with the group's recommendations. The reason it fell apart is not because of disagreement, but because there was so much to consider to refine to two or three areas of responsibility. With Cobell it was estimated there were 60 or 70 billion dollars of liability. There were a number of issues about federal trust responsibility and how tribes interact with the U.S. Treaties are written contracts with the U.S. Prior to 1900 virtually every tribe in existence had a treaty or document contract with the U.S. that guaranteed certain rights. Virtually every treaty was ignored. I state this as a matter of fact. This is not a point of accusation. The treatment of tribes by the U.S. has not always been one of friendliness.

Recent history, beginning with Nixon, begins a time of change. The Self-Determination Act changed the course of history as it is seen today. You can't paint every tribe with the same brush. The worst unemployment rates in the country are on tribal lands. Detestable economic conditions exist on tribal lands and in tribal communities. How do tribes interact with the government? In 1991 or 1992 it was established there were

certain things the U.S. government would do. Every agency must consult on any circumstance that would affect tribal communities or governments. The Office of Management and Budget does not consult with tribal governments. We need to consult here. All other agencies within the past year have established or developed a consultation policy. States consult with tribal governments on policies and regulations that affect tribal governments. It is all well and good and easy to say but in reality the consultation policy is to announce and defend. Historically BIA was the agency that primarily deals with tribes on a myriad of issues. The Assistant Secretary for Indian Affairs is trusted with responsibility but policies are not always developed in line with consultation. Historically tribal governments and leaders have gone to the Assistant Secretary for Indian Affairs to rectify problems. Consultation should occur before an action is taken and a decision is made or finalized. Tribes do not always get their way but at least they are included in the conversation as policies are being developed. Tribal leaders are closer to the people and their needs, economic conditions, natural resources, and other assets included when we start to commit resources and develop resources.

Historically tribal leaders have been left out. Last year NCAI passed a resolution that, "Whereas not all agencies have developed government-to-government policies required under the executive order from November 2009, we resolve that NCAI continue to support strong government-to-government relationships and urges all agencies without formal policies to establish them immediately in a manner consistent with treaties and the UN Declaration..." President Obama is committed to strengthening the nation to nation relationship and has appointed people in his administration to do just that. Ms. Gillette was the first native appointment in the President's administration. We want to focus on the future and how to make things better in communities today, what actions are required of us to do that? Tribes in Oklahoma are contributing to the welfare of all citizens and to the economy. Each tribe has a Constitution and rules they follow for the betterment of their own community. Let us help you help us. We have to do that in a meaningful way.

Audience Question and Comment

Audience - Thanks for bringing folks to Oklahoma to learn more about our unique situation. I just came from the ONRR Negotiated Rulemaking on Indian oil valuation. Among allottees in Oklahoma there are 1,200 leases from ONRR that are departmental leases. There are two types of leases - district court and departmental leases - ONRR only tracks departmental leases. One-half of all leases are in Oklahoma. What we have are undocumented district court leases not tracked by anyone. If an allottee has a district court lease they have difficulty getting assistance from BIA. For example if there is an oil spill the state will not come on restricted lands but BIA will not show up because it is a district lease. How do we get consultation and fill voids where there is really a need? This is not only with the management of IIM accounts but other issues as well.

Ms. Gillette: There is an obligation to allottees however consultation policy is focused on tribal governments. Agencies focus on the government-to-government relationship. We can look at this in a couple of ways and anticipate that when we are doing anything around trust and trust responsibility there will be more parties included. Land consolidation consultations focused on tribes and then would open in the afternoon to others, including individuals. Working with specific individuals to make issues known is helpful. The federal government is here to not put restrictions but honor government-to-government first and foremost.

Commissioner Leeds: Earlier this afternoon we heard from folks dealing with probate issues in the eastern part of Oklahoma. It is almost analogous to the Violence Against Women Act that identifies holes in jurisdiction that need to be filled. We all know it would be an uphill battle but that being said we stand in a better situation to make change now. Let's assume that recommendation is made to repeal the 1947 Act, who then approves the leases? If there is no district court approving the lease who approves it? We haven't heard from the allottees perspective about the next steps if the 1947 Act went away. It is the same issue with probates. When looking at eastern Oklahoma probates go through state court and get through in 6-12 months because packages are put together by the tribe or individual. Nuts and bolts recommendations are helpful for the Commission to consider.

Audience: For every tribal consultation you are suggesting that there is time for individual owners at every consultation?

Ms. Gillette: I'm not saying that is a mandate but for things that pertain to allottees I would find out how to get at the table to ask respectfully if there will be time for allottees. Having a trust responsibility steps for allottees is needed.

DFO Marsters: As part of the new era this is one of the things we are struggling with. Employees are talking to individual allottees which is new because of the communication ban under Cobell. Is there a mechanism that is different from government-to-government and nation-to-nation that would be appropriate for allottees? It is time to really engage and formulate new ways to communicate and receive input on initiatives.

Audience: One of the things we didn't bring up is that whenever there is a probate or any action for the Five Civilized Tribes the court is a federal instrument and issues a federal order. Somewhere some entity has said these are district actions and the federal government is hands off. We must keep sight that state courts are a borrowed forum and do not fall under AIPRA.

Audience: Cobell denial letters shut down our tribal office phones. We were prepared because the OST office gave us forewarning. My understanding is that Cobell is not ready for the Five Civilized Tribes and the way the title is established. Our tribe and my office has staff that come in at 5:00 AM and are working to get title ready; they have

being doing this since October 2011. They are handwriting titles that are then hand delivered to the regional office to encode. We have three TAAMS computers in our office but we are not trained to scan in the code. We work very closely with the OST office in Tulsa. We do have problems with Cobell. Some problems have been mentioned today - full land owners got settlement but other family didn't and it is the same with estates. These are important issues for our tribes. We have 56 district court probate reports pending distribution and 17 trust probates we are currently waiting for. We have 297 district probate inventories and 178 inventories for notice of insert. There is two staff to do inventories. Our tribe has fully compacted all functions except oil and gas. We were promised five TAAMS computers and just got three four weeks ago. Background clearances are an issue. We can put information in the lockbox but we have to print at the agency office.

Audience: We have a similar gap with estate accounts, J accounts, that don't contain real property just funds for folks don't have 1/2 blood [meet blood quantum]. We have difficulty getting funds dispersed to the family. The tribe has spoken with the Solicitor's Office and BIA and since the lands are not restricted fee there is not a trust responsibility there. If they are not going to assist in the distribution how do we assist these citizens? Cobell has shed light on accounts sitting there and family members ask how to get the funds distributed and we are in a difficult situation because we are willing to help but we are not getting assistance in these matters. Don't like the district court suggestions by some that the family go and name a personal representative - all court costs have been paid why not finish probate? If we start the probate we have a responsibility to finish unless the client no longer wants representation. If funds are not unrestricted it is not worthwhile to get through district court. Tribal court may be an option.

Appendix F. Statement from the Delaware Tribe



Delaware Tribe of Indians

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DELAWARE TRIBE OF INDIANS MEMORANDUM ON TRUST FUND LITIGATION REGARDING TRUST FUND ADMINISTRATION. PRESENTED TO THE SECRETARIAL COMMISSION FOR CONSIDERATION AND ACTION IN SUPPORT OF THE DELAWARE TRIBE.

Submitted to Commissioner Stacy Leeds at the Consultation Meeting in Oklahoma City, OK on June 7, 2013

Trust Fund Background

- The management of trust funds and assets held by the United States on behalf of Indian tribes has been a longstanding concern, dating back to the early 1800s. In the 1980s, Congress began to pay particular attention and ordered the Department of the Interior to conduct an accounting of each trust fund.
- In 1996, Interior and its contractor, Arthur Andersen LLP, issued reports to each tribe. These reports were deficient in a number of serious respects. The Tribe retained the Nordhaus Law Firm to assess its claims, which led to the filing of a lawsuit in the federal court in New Mexico only to get the documentation necessary to assess those claims.
- That assessment, conducted by and with the Archambo accounting firm, showed conclusively that the Tribe had valid claims. The Tribal Council authorized filing the current case in the United States Court of Federal Claims in Washington DC, the only court that can award money damages against the United States.
- This case was filed on January 8, 2002.

The Tribe's Court of Federal Claims Case—Claims and Early History

- The Tribe's claims arise from three acts of Congress. Pursuant to the 1946 Indian Claims Commission Act, the Tribe filed suit against the United States for violations of the many treaties signed with the Tribe as Delawares were forced relentlessly westward. The Tribe won a number of its cases, or "dockets", sometimes in combination with one or more other Delaware entities.
- Those different awards were combined in three judgment fund acts passed by Congress, one each in 1968, 1972, and 1980.
- Without going into too much detail, the United States failed to:
 - distribute all of the funds to individual tribal members
 - to follow statutory requirements to distribute residual funds to the Tribe; and
 - to properly invest funds while held in trust by the United States
- After initial briefing of issues by the parties to Settlement Judge Eric Bruggink, the United States acknowledged its failures early in the litigation. A settlement in principle followed quickly, and by November 2003, the United States agreed to sponsor legislation that would settle the case by:
 - Distributing all funds owing to the Tribe (and to the Delaware Nation and Idaho and Kansas Delawares)
 - Awarding \$437,165 to the Tribe for damages relating to mismanagement of the trust funds while held by the United States
- By the fall of 2004, draft legislation implementing the settlement agreement was ready for consideration by Congress.

The Period of Recognition Through the Cherokee Nation

- On November 16, 2004, the Tenth Circuit issued its opinion stating that the Delaware Tribe had been merged into the Cherokee Nation.
- The Tenth Circuit's decision cast doubt on the Tribe's legal standing to continue the trust fund litigation and effectively left the legislation on hold.
- The Supreme Court denied the Tribe's request to hear an appeal in October 2005, and the Tribe was effectively removed from the list of recognized tribes.
- The Tribal Council elected to try to include congressional recognition of the Delaware Tribe in the trust legislation.
- Initially, the United States, through Jim Cason, agreed to sponsor such legislation but then did an abrupt about face, saying that any legislation restoring the separate recognition of the Tribe had to have the approval of the Cherokee Nation. The Oklahoma congressional delegation stated the same requirement.

- The Tribe negotiated legislation with the Cherokee Nation that, although it contained a number of very unfair limitations on the Tribe similar to those imposed on Shawnee, would have restored separate recognition.
- It proved impossible to move recognition legislation in Congress. Other tribes were seeking similar legislation, and none of the bills were moving.
- With the assistance of Senator Coburn's office and friends within the Department of the Interior, we were able to convince the Department to recognize the Tribe separately through the Oklahoma Indian Welfare Act, a method that had not been used for 30 years. Again, however, the department stated that Cherokee would have to state that it was not opposed.
 - During 2008, the MOA with the Cherokee Nation was negotiated, again including unfair restrictions on the Tribe, some of which were actually added during the final Cherokee Council meeting.
 - We also worked with Congressman Sullivan's office to have him introduce the legislation. Interior wanted the legislation introduced as a sign of congressional support for its efforts to move forward under the OIWA, but everyone knew that the legislation would not be enacted. In fact, Senator Coburn stated his express opposition to certain provisions that would have given the Tribe preferential treatment in trust land acquisition outside the Fourteen Counties.
- In late May 2009, the Tribe held its OIWA election, and the Tribe's membership voted overwhelmingly to reorganize under the OIWA, restoring its separate federal recognition.
- On August 11, 2009, the Tribe again appeared on the list of federally recognized tribes. The preamble to the *Federal Register* notice made it clear that the recognition was subject to the MOA with Cherokee, as Cherokee had required.

Efforts in Congress on the Trust Litigation after Restoration of Separate Recognition

- After separate recognition was restored, we worked with Interior to again prepare legislation that would resolve the Court of Federal Claims litigation.
- Congressman Sullivan and Senator Coburn both worked with us to have that legislation introduced.
- However, the intense budget battles in the House of Representatives affected the Tribe's efforts. The Republican majority in the House declared that the legislation was an "earmark" because it directed that funds be paid to the Tribe (and other Delaware entities). They maintained this position even after we (and our local Congressman's office) explained that it could not be an earmark because

the funds are already held in trust. Congressional authorization was only necessary to release the funds pursuant to earlier acts of Congress, but this was not an expenditure of appropriated funds. The matter went all the way to Speaker John Boehner's office, but the House Republicans would not budge.

Current Efforts to Resolve the Litigation

- Given that there was no practical way to resolve the litigation through Congress as originally insisted upon by, and agreed upon with, the Departments of Justice and Interior, we developed an alternative strategy to resolve as much of the case as possible through administrative means.
- That strategy involved dividing the transfer of funds to the Tribe into four categories:
 - Category 1: Funds that could be transferred to the Tribe (or paid to Tribal members) administratively.
 - Category 2: Funds that could be transferred to the Tribe under a statute that allows Interior to transfer unclaimed per capita payments to a Tribe if six years have elapsed from when the payment should have been made and certain other conditions are met, including submission of notice to Congress. The statute is 25 U.S.C. §§ 164-165, and so these funds have been called "Section 164 Funds".
 - Category 3: Settlement funds to be paid through the Court of Federal Claims to compensate the Tribe for mismanagement of the Tribe's trust funds.
 - Category 4: Funds to be paid as per capita payments to Tribal members (and other Delaware entities) pursuant to the 1980 Delaware Judgment Act, Pub. L. 96-318. Note that, as discussed below, legislation is still preferred for these payments.
- Category 1 funds have now been completely resolved. These payments involved funds that had been set aside for per capita payments to individuals who later have been determined to be ineligible for payments. The Office of the Special Trustee transferred roughly \$448,000 to the Tribe in June and July 2010. OST transferred another roughly \$50,000 to the Tribe in March 2012.
- The Section 164 Funds, or Category 2, are now almost complete. OST and the BIA Regional Office tried to contact Tribal members who should have received payments in the early 1980s but did not. Where a Tribal member was located, payment was made. The remainder (with a current value of a little more than \$300,000) is now the subject of a report to Congress. Unless we intervene successfully, that request must sit for 60 "congressional days" before the money can be disbursed to the Tribe.

- **Current Status**
- The Tribe is quite confident that it can resolve the remaining trust claims that do not involve per capita payments on an honorable basis with Justice and Interior.
- Legislation will still be necessary to deal with the per capita payments.
 - For example, because 30 years have passed, many of the intended payees will have died. The United States does not want to have to probate thousands of estates to distribute payments of less than \$100.
 - The Tribe and its members should not have to wait for the BIA to do so.
 - Having already waited for 30 years, the Tribe should not have to wait another six years under 25 U.S.C. § 164 for the restoration of funds to the Tribe of any payments that cannot be made.
- Because of the “lobbying” rules, the United States is insisting that the Tribe has to carry the legislation despite the fact that the United States, not the Tribe, will be the major beneficiary of the legislation because of the avoidance of the administrative burden of probating estates of deceased per capita recipients. (The legislation will provide that such funds go directly to the Tribe under the 1980 Act rather than to the heirs.)

Pending Actions

1. Section 164 Funds

Currently, the package necessary to release roughly \$300,000 to the Tribe under 25 U.S.C. § 164 is before two congressional committees (Senate Indian Affairs and House Resources). The statute requires that Congress have “sixty calendar days (exclusive of days on which either the Senate or the House of Representatives is not in session because of an adjournment of more than three days to a day certain)” to take action on the proposal. If Congress expressly approves the proposal or does nothing, then Interior may distribute the funds to the Tribe.

Given the current congressional calendar and depending on the interpretation given the statute and whether Congress sticks to its schedule, the funds will be released to the Tribe sometime between late June and late July. There is some minimal danger that a combination of an unfavorable interpretation of the statutory language and unscheduled congressional breaks could push the release of funds to the Tribe passed the August recess and into September. **We want to make sure that Interior and the two committees agree on a calendar calculation method under the statute that would allow distribution near the end of June or early July.** This involves making sure that everyone counts the weekend days when Congress breaks for two or three (but not four or more days).

2. Settlement in Court of Federal Claims

With the Section 164 Funds in the process of being released, we are now in a position to settle the mismanagement claims through the Court of Federal Claims. Ten years ago, we agreed on a settlement figure of \$437,165. Much has changed since then, including another ten years of lost interest and a significant amount of effort by the Tribe (which means attorney's fees) to implement the agreed-upon settlement.

The "line" attorneys at the Departments of Interior and Justice recognize that the settlement figure must be "updated". Within the Departments, however, "updating" likely means applying a relatively low interest rate to adjust that figure to present. Such a calculation likely would lead to a revised settlement amount in the \$550,000 to \$600,000 range.

3. Preparation of Legislation

The final phase of the trust fund litigation in the Court of Federal Claims involves per capita distributions of a little less than \$1 million to all Tribal members on the roll in 1980 (as well an additional amount to Kansas Delaware members and a distribution under the 1980 Act to the Delaware Nation). The United States has insisted on legislation for this part of the case for two reasons:

- (1) funds of multiple tribal entities are involved, and
- (2) the passage of time means that many Tribal members will have passed away. The anticipated per capita payments are less than \$100. Interior would rather have the money for those payments go to the Tribe rather than probating the estates of deceased members, which would delay the process considerably.

Legislation will also benefit the Tribe. The Tribe will likely receive at least several hundred thousand dollars that otherwise would go out in very small per capita payments to Tribal members and only after several years. Legislation will also (we would propose) shorten the time for turning over returned per capita amounts to the Tribe (from six years to one). Finally, Interior has been willing to consider including at least limited language that would help the Tribe with ongoing legal obstacles (obtaining trust land; the Supreme Court's *Carciere* decision, etc.). We might be able to include language helpful to the Tribe, even in

the pared down legislation intended to avoid the “earmark” barrier we ran into in 2010.

Broader Issues for Commission Consideration

4. Undistributed Per Capita Funds

The Tribe has reason to believe that other tribes have undistributed per capita funds dating back to the Indian Claims Commission era. If that is in fact the case, the Commission should consider supporting a broader legislative fix, similar to the legislation the Tribe intends to advance, to streamline the process of distribution to individuals and tribes. A process should be established to set a minimum amount that must be distributed per capita, rather than directly to the tribe. Time periods should be imposed for Interior first to identify such funds and then to finish distribution. Tribes should be allowed, at their discretion, to 638 the task of locating members and/or distributing the funds to individuals.

5. Section 164 Funds

On a related matter, OST engaged in a more thorough search for per capita payees than the Tribe believes is required of Interior under 25 U.S.C. § 164. This both delayed the restoration of significant funds to the Tribe and decreased the amount restored. If this is happening to other tribes, clarification of the due diligence required of Interior under the statute is important.

6. Loss of Funding During Period of “Non-Recognition”

While the Tribe’s situation is unusual, there should be a mechanism for the restoration of funding lost during a period of “non-recognition.” The Tribe cannot afford to litigate the matter and would likely lose under existing law. Is there anything the Commission can do?

In summary, The Delaware Tribe respectfully requests the Secretarial Commission give attention to the claims of the Delaware Tribe and ensure action by appropriate staff within Interior to resolve these claims and distribute funds to tribal members who deserve them. We also ask for Secretarial Commission oversight to ensure completion of tribal settlement administrative actions and litigation that will provide funds to the tribal government including payment of damages for previous mismanagement.

We thank Commissioner Stacy Leeds for the privilege of presenting our issues to the Secretary of the Interior for resolution.

Respectfully,

Paula Pechonick, Chief
Delaware Tribe of Indians
Bartlesville, Oklahoma