

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

Meeting 3

September 13-14, 2012

Bismarck, ND

Meeting Summary

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Secretarial Commission on Indian Trust Administration and Reform

Executive Summary

The third meeting of the Secretarial Commission on Indian Trust Administration and Reform was held September 13 and 14, 2012, in Bismarck, ND at the Best Western Ramkota Hotel. Fawn Sharp, Quinault Indian Nation, chaired the meeting. Sarah Palmer of the U.S. Institute for Environmental Conflict Resolution (US Institute or USIECR) facilitated the meeting.

The Commission had the opportunity to participate in an outreach session on September 12, 2012 to the Fort Berthold Reservation and the Three Affiliated Tribes. The summary of this session may be found in Appendix F.

During the two-day working session the Commissioners heard about the impact to tribes from the development of natural resources in the Bakken Oil Fields; attended to operational activities of the Commission; discussed and made further refinements to draft recommendations; gained insights and knowledge from written responses to outreach provided to-date and from invited speakers and attendees about trust reform including other trust models and the trust relationship; and confirmed future meeting topics.

The Commission came to agreement on several items, including:

- Approval of the June 2012 public meeting summary
- Approval of the August 2012 public webinar summary

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, 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 Commission will meet in-person one additional time in 2012. The final 2012 meeting is scheduled for December 6-7, 2012 in Seattle, WA.

The Commission will hold an administrative conference call October 1 and a webinar open to the public on November 7. The time for the public webinar and agenda will be posted to the Commission website: <http://www.doi.gov/cobell/commission/index.cfm>.

Thursday, September 13, 2012

Chair Sharp opened the meeting at 8:20 am and acknowledged and recognized the location of the Commission meeting in the Great Plains. She noted the outreach session the Commission participated in on Wednesday, September 12 and referenced the Tribal Elder that provided historical information that cannot be found in a book or on a computer. Chair Sharp commented that this is the wisdom and knowledge the Commission was hoping to gain during outreach sessions and that this was the opportunity for Indian Country to provide recommendations and reports the Commission can use in making recommendations. Chair Sharp thanked Commissioner Hall and Three Affiliated Tribes for their hospitality and an unforgettable and memorable outreach session.

Mr. Gillette, Three Affiliated Tribes, provided the invocation.

Chair Sharp welcomed the public and federal agency staff to the third meeting of the Indian Trust Commission and asked for introductions of those in attendance. The attendance record may be found in Appendix B.

Commissioner Tex Hall introduced himself. He noted that the Great Plains tribes have stood strong on treaty rights and that all 17 tribes in the Great Plains Region have treaties. This provides opportunity for Commissioner Hall to reflect and think back to the ancestors who signed the treaty agreements. This is where trust responsibility came from. He noted it is a new day and if you are representing your tribe or are an allottee this is a once in a lifetime chance to provide input.

Commissioner Peterson Zah provided his introduction. Dr. Zah is past Chairman and President of the Navajo nation. He currently works at Arizona State University running Indian programs. He also works with the people on or adjacent to, Navajo that are trying to correct situations such as uranium mining and some chapters that need help. He has also been involved with Ramah Navajo Chapter who recently won a Supreme Court case that was started 42 years ago. He noted that they were so happy because it is one of the very few cases in the last few years that favors Native American tribes and addresses trust responsibility in Native nations. Dr. Zah commented on the outreach trip and noted that he was really taken by all that is happening here in North Dakota. He learned a lot about some of the development that is taking place. The Commission has a lot to talk about to try and make things better for Indian people.

Commissioner Robert Anderson introduced himself. Commissioner Anderson is a Chippewa and teaches at the University of Washington Law School. He is currently a visiting professor at Harvard Law School. He commented that he didn't think there would be a big Indian community in Boston and learned that there is; he will be providing an outreach session in September regarding the Trust Commission. Commissioner Anderson noted that he appreciates the comments, testimony, and written work from Tribes making helpful and constructive comments. He noted that the Commission really needs to hear about the problems that need to be fixed and structural recommendations to address the questions from the Secretary and Deputy Secretary of the Interior. The Commission cannot do their job without assistance from people who are experts in the system.

Commissioner Stacy Leeds joined the meeting via conference call and introduced herself. Commissioner Leeds is a Cherokee and is the Dean of the University of Arkansas Law School. Early on in her teaching

career she spent years in Grand Forks at the University of North Dakota. Commissioner Leeds noted that she is looking forward to hearing as much as the Commission can during their time in North Dakota.

Lizzie Marsters, Chief of Staff for Deputy Secretary of the Department of the Interior and Designated Federal Officer (DFO) for the Commission, provided an introduction. She noted it is her distinct honor and privilege to serve as DFO of the Commission. Deep felt thanks for Commissioner Hall for hosting.

Chair Fawn Sharp provided her introduction. Chair Sharp is the President of Quinault Indian Nation and the Affiliated Tribes of Northwest Indians (ATNI). She noted the composition of the room and that this combination is what the Commission needs to deliver good recommendations to the Secretary. She thanked everyone for attending and for their participation.

Sarah Palmer of the USIECR provided the Commission with an overview of the Udall Foundation and USIECR and let the Commissioners know that the Foundation's Board of Trustees Chair is Mr. Eric Eberhard. Ms. Palmer stated that her and Bridget Radcliff's roles, is to serve as impartial facilitators in support of the Commission. She elaborated that the Udall Foundation maintains a conflict of interest policy between the USIECR program staff and the Board of Trustees to ensure the impartiality.

Status Update on the *Cobell* Settlement

James Ferguson, Chief of Staff for the Division of Indian Affairs DOI Office of the Solicitor, provided an update on the *Cobell* Settlement. The settlement will not be final until all appeals are exhausted or the timeline for appeals has passed. The original date for appeal was August 20, 2012. A few days prior to this deadline counsel for Plaintiff Good Bear filed a request for extension of 60 days and a 30 day extension was granted. September 19, 2012 is new deadline for appeals. Plaintiff Craven did file a writ for certiorari and oppositions to this are due September 21, 2012. Once the opposition briefs are filed the Court meets in conference on that matter and that conference cannot be scheduled any sooner than 10 days after the opposition briefs are filed. The first week of October is the earliest that the Supreme Court would meet in conference on this matter. People must keep in mind that the Good Bear appellant has until September 19, 2012 to file a request for writ. The timeline for appeal would then restart.

Commission Questions Regarding the *Cobell* Settlement

Commissioner Hall: How much can you describe the arguments of these plaintiffs? The elders are calling us as Commissioners and wondering when this will be a reality and how long this process may take. Can you provide more information about the argument and the timeline?

Mr. Ferguson: I cannot answer questions about the arguments; however I would be happy to speak with the Commission directly if requested. I don't know what the court will do. The two options are to deny or grant a request.

Commissioner Hall: Can a member of the class communicate with the Court and let their feelings be known?

Mr. Ferguson: One of the challenges is that we have been prevented from communicating with members of the class.

Commissioner Zah: To reiterate some of the feelings Commissioner Hall is stating. When so many are waiting on the final outcome of the lawsuit, it is devastating, particularly for the elderly. They have a limited time; some are passing on and I think those are the kinds of feelings that are taking place and I think those things should be known. I think the Courts need to be told and understand the people desperately need the help. In other words there are only a few of them in the appeal and I think there are thousands on the other side that need to be heard.

Commission Operations Reports and Decision Making

The Commission reviewed and approved the June 2012 public meeting summary and the August 2012 public webinar summary.

The Commissioners offered reports on outreach activities since August 13, 2012.

Commissioner Anderson: I have had no formal meetings and have engaged in a number of conversations with tribal members and lawyers to regarding complaints about the Department of Justice (DOJ) on particular matters. I hosted the Indian Law Symposium at the University of Washington. Patrice Kunesh, DOI Deputy Solicitor of Indian Affairs, talked about Department and trust responsibility issues. We also talked about Heath Act and long-term leasing and matters involving leases outside that context. I informed the attendees about the meeting in Seattle in December. I also received several comments regarding the trust responsibility statement.

Commissioner Zah: I have had several meetings during the period. I went to Navajo Community College where they have annual meeting on what they call nation building and it is attended by people who want to contribute to the basic infrastructure needs of Navajo. I gave a report on the work of the Commission and the issues we face. It's one of those situations where I thought it was good to give them a report and they were interested in the work of the different agencies.

Another meeting was in Farmington, NM. They were having a Constitutional Convention trying to suggest to the government of Navajo some amendments about things they do. It was heavily attended by 110 Chapter representatives and all the people interested in trying to make the government work better to satisfy the needs of local people and chapters. The Commissioners and others should be mindful that in our situation we use the Navajo land more so than the English land. There is lots of discussion about how the government ought to behave and things they don't do now but should be doing. I was invited as a speaker to talk about role of the federal government and how they can be better approached to improve the lives of local people.

I also went to the DNA People's Legal Services anniversary. These are the people who have worked for legal services all during that period. The highlight of the day was a recent decision in the Ramah case because it started from the Legal Services program that Navajo put together. The case addressed the meaning of self-determination and some of the things the federal government is supposed to do and did not do. It has a lot to do with the contract support clause. Under self-determination tribes have the ability, if they choose, to manage contracts on the reservation. The question always is what kind of monies the federal government will provide for contract support offices. The government gave money

to many of the tribes that covered only 2/3 of the real cost to administer the program. The case was about the missing 1/3. Ramah was member of a class of 322 tribes. The Ramah case is on the heels of *Cobell* and one of largest that Indian people won. The government will now have to go back and determine the value of damages done to Indian people. Since I was one of the speakers, I included some of the things that the Commission is doing to correct some of the things federal government didn't do.

I also visited the three local offices of the Office of the Special Trustee (OST) in Gallup, Farmington, and Crown Point. All of them do real good work. In one office, there is only a few staff. The volume of work they do is astonishing. I don't know of other programs that DOI has with other Indian tribes but many people who are members of the area don't speak English and the office is required to explain the situation in their native language. They get a lot of questions around the appeal and the office has to explain the complexities to the people. There are a lot of cases of whereabouts unknown and there are over 5,000 missing people at Navajo. It is important for the Commission to do a lot of outreach in the community because the people don't normally have conferences to discuss the Commission. The Commissioners have to take advantage of what is happening.

Commissioner Hall: I am a member of the Tribal Budget Advisory Council (TBAC). I provided an update about the Commission to TBAC and described the subcommittees and what they are doing. I went to Billings to speak on economic development and had questions on the Commission. I met with the Crow, Ft. Peck, Blackfeet, and Northern Cheyenne Tribes. The Great Plains Tribal Chairman's Association (GPTCA) met on August 23, 2012 in Lower Brule, SD. We talked a lot about the Commission and drafted a resolution and position from the GPTCA that will be submitted to the record (see Appendix C). It discussed the treaties and the lack of resources needed to uphold and strengthen the treaty agreements. The Presidents of the North Dakota Tribes passed a resolution regarding how Indian lands are combined with public lands and that is not in best interest of tribes when trying to develop natural resources. The National Environmental Policy Act (NEPA) process is part of it but BIA also has responsibilities and multiple agencies are doing the same thing. Does EPA have the same trust responsibility? The responsibility diminishes as it is spreads across agencies. It takes 270 days to approve a lease through the federal government, 49 steps. It takes only 4-10 days in North Dakota. When we are talking about the environmental review that is spread out over several agencies, there is no cut off and the comment period can be quite long. This is where the rubber meets the road.

Commissioner Leeds: On August 27 I attended meeting at the Federal Reserve Bank in Minneapolis to talk about economic development in Indian Country and how to use land as capital and a resource. There will be a follow-up meeting in December in Montana. This meeting was for think-tanks and economists to provide information on their thoughts regarding economic development. I am planning future trips to Alaska in November and an Agriculture Council in Las Vegas in December. I have also been hearing from allottees in Oklahoma.

Chair Sharp: I had a meeting with ATNI on August 27 and 28, 2012. We discussed issues of taxation. I informed tribal leadership about upcoming Commission meetings and reported out work of the subcommittees. I also provided the Commission website and stressed the need of tribes to engage. There were questions regarding the role of treaty rights and how the Commission is reviewing that issue. I noted that we have panels upcoming in Seattle on timber, fish, and other resources. I received several good questions and feedback and information that tribal leadership work is underway.

Commissioner Halls asked if there are any upcoming tribal meetings in the Northwest to get a sense of the position of the tribes in that region prior to the Commission's December meeting in Seattle. Chair

Sharp indicated there is an ATNI meeting at the end of September and there will be regional caucus meetings at NCAI in October and November. The Northwest tribes are hoping to develop a proposal by the December Commission meeting.

Commission Review and Discussion of Preliminary Recommendations

Chair Sharp noted that the Commission began looking at and developing recommendations at the June meeting in Albuquerque. The Commission recognizes there is also opportunity to provide interim recommendations prior to the final report and that it is critical to formulate recommendations and put them out for public review and validation. The Commission has set out to look at a number of items in developing preliminary recommendations regarding trust responsibility and draft protocols on standards of conduct and conflicts of interest. The Commission will also be reviewing trust models. There has been a lot of public input received and the Commission is working to develop criteria to evaluate recommendations. Ultimately, the Commission will need to look at how the recommendations will benefit the beneficiaries and how to improve delivery of services. For example does the recommendation empower tribal self-determination and redefine the relationship between Indian tribes and the U.S.? What are the ultimate goals the Commission is after? The Commission heard yesterday timeliness is an issue, that there are 49 steps to complete one process. Should those be considerations? Yesterday provided a good example to see the disconnect and stack of regulations that ultimately seems to undermine the overall trust obligation and commitment.

Commissioner Hall noted the comments during the Wednesday outreach session regarding the need for timelines and the delays faced by tribes and individuals. There was also a lot of discussion from many tribes as to the Tribal and U.S. relationship and overall responsibility - what role does the land owner have? For a lease to be approved they must have 51% of the signatures, what about 49%? How are they involved? In energy there are things called assignments when a company has a lease and may sell it. There is no input from the owner of the lease regarding best interest. Commissioner Hall remarked he would like to see more teeth in draft – in which the best interest of the Indian always needs to be considered. This relationship is not a guardian/ward but government-to-government. A land owner should be communicated with formally and they should have consent. Fair market value is also an issue. On page three of the trust responsibility statement, top paragraph - talk about the issue of liability. Is there an outside Commission? Like the FDIC and OCC and SEC? If there is this kind of outside Commission to keep the government in line? What authority does the Commission have? What do we have? There needs to be more time spent putting this into the model.

Commissioner Zah added to the discussion. He noted that it seems like the Indian lawyers take the time, commitment, and all that is required to do the job that is necessary; to take these cases as far as they can. Then they try to hold the federal government responsible for the wrong they commit. *Cobell* is one shining example of what could happen. If you look at some of the current issues on resources – minerals and water – the federal government is more concentrated on making sure they don't get sued again in the future. Navajo went through a water rights settlement. Instead of addressing the water that the Navajo could get, the legislation was more geared toward not getting sued by anyone connected with Navajo. The focus of the federal government is shifting that way. If you look at Ramah, that is the same thing. Sometimes you have a situation where people are really, really concerned about certain aspects and when you have something like *Cobell*, it shoots back over to the other way and the federal government is too concerned about liability. Keep in mind the attitude and role of government in these situations.

Commissioner Anderson shared that this draft was developed as a first effort to form the foundation of where the Commission would eventually end up. On the conflict of interest question, there is a conflict of interest protocol that has a mandatory disclosure statement and independent counsel to represent Indian interests on behalf of the US. The Commission needs to get more input on tribes and others on that specific area. The Commission received excellent comments from Navajo on improving the trust responsibility statement. The aim is to keep the trust responsibility statement short and then have a series of papers regarding implementation.

There are cases, like *Pyramid Lake and Nevada v. U.S.*, that illustrate conflicts of interest. There are direct competing claims between the Tribe and the U.S. in water rights claims. There needs to be a guarantee the Tribe will be represented. The conflict of interest protocols will help in dealing with that. The Commission needs to hear from others regarding the conflict of interest protocols between now and the Seattle meeting. Everybody wanted a general statement but the Commission has to have another attachment that is very specific and deals with things like leasing. On one hand it takes 270 days to process a lease. Mr. Swimmer testified that if you have a chance to lease the property you should just do it, even if you can't contact the minority holders. The 51% want the approval don't want more delay so The Commission has to outline that to determine how to balance interests and provide brief recommendations on how to handle the more specific issues. There is need to evaluate the standard of best interest.

Commissioner Hall asked if there was consideration in the trust responsibility draft of Congress' responsibility. He noted that when Congress makes laws and they are contradictory, it creates gaps. He noted that this could also be a tool to help educate Congress when they are creating laws. If there is a regulation or law that contains conflict of interest deference should be given to the Indian. Kind of like the best interest of the Indian – deference should be given to the Tribe; not the State of the U.S.

Commissioner Anderson noted that is where the Commission needs to make recommendations to Congress to change something. The Commission should point out that Congress should be consistent with treaty provisions and has a responsibility to take actions consistent with tribal interests. The Commission needs to be clear and develop short papers that might actually get read. Commissioner Anderson stated the Supreme Court has said that the case for the courts should be the same for agencies. He also commented that DOI gave a categorical exclusion to experimental wells so they didn't have to go through the NEPA process and yet to move land that tribe already has out of trust status, may require NEPA. Under the Hearth Act NEPA won't matter but the tribe will have to have something similar that they undertake. Trust responsibility should inform how NEPA is applied and Congress should change that.

Chair Sharp remarked that the Commission should ensure the recommendations empower and support self-determination. Even though tribes exercise limited amounts of self-determination, there is a lot of work and progress. Tribes are able to exercise a limited amount of authorities. The Commission wants to create a new era and chapter in the U.S. If you look at the historical policies – 1934 Indian Reorganization – tribes have the ability and authority to take land into trust but through assimilation and termination some of that was taken away. These things need to be brought into the 21st century to bring tribes into the present day. When the Commission thinks about tribal authorities in the future there needs to be a solid foundation that will endure through time. The work the Commission does needs to be reflective and modernize DOI policies.

DFO Marsters provided more contexts for the letter from Deputy Secretary Hayes and clarified some of the requests. The letter outlines Secretarial priorities that would benefit from early Commission recommendations. There is a lot of talk about *Cobell* and this Commission was formed on the same date the *Cobell* settlement was signed. There is sincere intent to continue toward improving the relationship with Tribes. DOI is lucky to have an esteemed Commission here to help continue the march to reform. DFO Marsters thanked the Commission for the sacrifices made, the behind-the-scenes work, and the accomplishments to date. It has been five months since the Commission's first meeting. There have been three public meetings, three webinars, and an extensive outreach campaign. There are now draft documents around trust responsibility and conflict of interest protocols. Thank you!

During the July 23, 2012 call between the Commission and Deputy Secretary Hayes, he offered two things: to identify more resources for the Commission and to provide priority issues that the Commission could address in the near term. There is continued progress to hiring a management consultant. The DOI is undergoing a realignment assessment in the Assistant Secretary for Indian Affairs, (ASIA), the Bureau of Indian Affairs (BIA), and the Bureau of Indian Education (BIE). In 2004, there was a perceived need for greater oversight and internal controls and many functions were moved to DC. The consultant completing this assessment was asked to analyze the strength and weaknesses of moving these functions to DC and the Bureaus are now working to move services back to Indian Country and to improve services. There is also an assessment of OST being completed. The Department wants to determine if OST is meeting the trust responsibility and upholding the Department trust responsibility, while ensuring the integrity of the mission, effectively utilizing resources and, increasing efficiencies in these tight budget times. Utilizing a structural analysis allows for sensitivities and ensures an accurate and transparent process. There is still need to get feedback from Indian Country.

DOI has outlined three areas for the Commission to consider: management and oversight, improving coordination and services, and fiduciary and trust administration. Management and oversight in the 1994 Reform Act outlines the duties of the Special Trustee. How does one ensure DOI is holding up trust to the highest standard? Is DOI adequately addressing responsibilities? Is OST the best to do this? What type of compliance and enforcement mechanisms do we have in place? Is there a structural piece, an independent Commission? DOI is asking the Commission to dig down deep and determine if there are pieces that aren't working and where to move pieces to make it work better.

When looking at the intentions of OST look at Section 4041 of the Trust Reform Act. In the Act termination of OST indicates it shall continue until specified reforms are complete. When considering the priorities and the questions regarding the Trust Reform Act, how best are these incorporated into the scope of work for the management consultant? What information does the Commission need from the management consultant and/or DOI to make the best recommendations?

Commission Reaction to the Letter from DOI

Commissioner Hall: We passed a resolution at our ND tribes and GPTCA to sunset OST and bring back the functions under BIA. We felt it was important as intertribal associations to take this position. We know that for budgeting purposes and overall trust reform it is important to undertake sooner rather than later is better. The budget for OST is \$150-\$160 million. In our view the reform has not been close to what it should have been in 1994. Money was just transferred, not added. What you put on the screen reminded me that we wouldn't be here if it was reformed like it should have been. These are tough deliberations. I was thinking of the National Indian Gaming Commission (NIGC) that has an outside

commission consisting of Tribal, state, and national representatives. NIGC can shut you down if you are not in compliance with the Indian Gaming Regulatory Act (IGRA). Instead of NIGC it would be like the ITC that would have that type of authority and enforcement and include budgeting as well. The budget is adequate in order to carry out trust responsibilities. With limited staffing and budget, the outside commission has to consider the work load broadly and consider where resources are to be distributed. Sometimes when working on something hard to reform you need the outside commission to regulate. This is not just advisory, it is delegated authority to impose fines as well. Maybe that is something when we are talking about standards of conflict of interest or standards of conduct, we establish fines.

Commissioner Anderson: It is good to have guidance on what DOI wants the Commission to look at. In order to have a good evaluation and recommendation, the Commission has to have lots of input from the public and evaluate what has been done. There are the kinds of questions to put to the consultant. Most of the effort in OST has gone to financial management. Have a consultant do an analysis and we can make a determination of what to do with OST based on that. What about improvements and enforcement for management of hard assets? Where should function of OST lie?

Commissioner Zah: There needs to be an evaluation of some of the federal agencies that have to deal with the problems Indian Country forwards to them for resolution. The Department needs to take a hard look at whether they were handled appropriately and be able to convey some of those things done to correct the issue to the local people. We know that the budgeting process is also a necessity. Monies are hard to come by these days and it's something we all have to wrestle with. When we do all these kinds of evaluations on the various agencies I am always reminded that every time you have new Congressional people we have to reeducate the new incoming freshman Congressmen so they know something about trust responsibility. It becomes a big task and is expensive. I'm hoping in the future that can be corrected. When people get into those positions those people need to know about the American Indian situation and be aware. At ASU, knowing the state legislature faces the same situation, we go to the state senate and house level and spend a day on American Indian issues so they would know what their role is. We were so surprised how many non-Indian freshmen didn't know that we have a governmental entity out there that are responsible for their own governance of the local folks. Many of them come in with an idea they can do whatever they want to do. With the advent of Indian gaming they were looking at the proceeds and profits and had an idea the state should be taking a lot more than was agreed to. Had to remind them there are compacts/agreements and government out there with communities and can't come in just because in the state; the jurisdiction must be considered. Hope in some ways they can resolve responsibility to the American Indian peoples.

Commissioner Leeds: The points of clarification from DOI are very helpful. I have a concern with the materials that relate to the last paragraph on the first page – regarding ongoing review. I would like a little bit of information about this review. I thought I heard Ms. Marsters mention gathering of data and survey material; I want to make sure that the Commission is aware if there are documents we can be privy to. I want to make sure we are not gathering the same data on top of each other.

DFO Marsters: We can provide more information on this process. This was meant to demonstrate the current structural analysis DOI is undergoing. The assessment that is being undertaken is just on BIA and AS-IA. This is separate from the OST structural analysis. Some of the hard assets aspects are overlapping.

Chair Sharp: Regarding improving coordination and services - what are those functions that could be better served in other bureaus, agencies, and tribes? We need to take a hard look at that question and bring tribal governance into that spectrum of authority. There is a huge challenge when look at the

budgetary era we are faced with. The Assistant Secretary is talking about \$14 million reduction and a settlement of \$285 million set aside for administrative function – how do you realign for efficiencies? What are functions tribes can best offer to serve their own nations? The other part is with the set aside, that life is 10 years. What is the practicality of doing a comprehensive land acquisition program in 10 years? Will this develop something that goes beyond implementation? Empower the tribes by not creating bureaucracy to implement the largest settlement in the U.S. history. Be prudent and thoughtful by implementing reduction and considering the infusion. Tribes have governing and managing functions and what portion of set aside can support tribal administration? How can we improve services? This presents a challenge and an opportunity. The other political consideration is the dramatic drop in discretionary funding. We are going to cut the agency before cutting services to the tribes. What are implications when cutting bureaus and ensuring services are not cut? What are the criteria for reducing the budget to the Department and what should we be thinking about? It seems there needs to be more deliberation within DOI and ITC. Not only does the Commission have to react but Indian Country does as well. Would like to hear from the Department on the reduction and infusion and how recommendations work into that.

Draft Conflict of Interest Protocols

Commissioner Leeds discussed the draft conflict of interest protocols. This is the first draft of conflict of interest mandates that the Commission put together from one of the subcommittee. There is a requirement for mandatory disclosure and procedures of disclosure. It ensures opportunity for independent counsel if conflict is present. This draft looks at situations where there is formal legal action or proceedings moving forward. These same conflict of interest protocols will also have to be in place for non-legal proceedings. The breadth needs to increase.

Commissioner Anderson asked if the protocols would cover the Navajo/Peabody meeting that resulted in the Supreme Court case? Commissioner Leeds noted that it would be Subcategory B to 1A of the draft, in the first paragraph where it discusses legal proceedings.

Commissioner Hall noted that if there is a conflict, deference should be given to the Indian. He asked if that was included in the draft. Deference should be that if it is an employee, reviews should carry over to best interest and deference to the tribe. Commissioner Leeds responded it was not in this draft as this draft was for personal conflicts, not statutory conflicts. Commissioners Leeds and Anderson indicated they would add this sentiment to both draft documents.

Public Comment on Draft Documents

Charles Murphy, Standing Rock Sioux: Looking at your report you are looking at a consultant group to analyze the money and other assets of the Tribes. Our concerns are fee to trust. For many years we have been submitting requests and the Bureau is having trouble with title companies – we are not getting to first base in terms of getting a public hearing. Sure there are pros/cons and Standing Rock does have tax agreements with North Dakota and South Dakota. We have 2.3 million acres and we have 37,000 acres that we have been trying to get into trust. What we are doing is working with BIA to get a company that will come in and hold title. Uniqueness of Great Plains Tribes is the trust responsibility in the treaty rights. We have rights that the federal government has responsibility to. The importance of getting fee lands into trust is a very important issue to Standing Rock and we pay \$140,000 in taxes on them each

year. The taxes are not a problem; the problem that the government allows fee-to-trust and we are having difficulty getting our lands changed. Our main concern is fee-to-trust. We need to get the meetings going and all the information to DC. This is a long time coming.

Chair Sharp noted that the issue concerning fee-to-trust is very much in line with Commission work and the Commission will ensure the fee-to-trust process is evaluated.

Donovan Archambault, Fort Belknap Tribes: Here we are talking about writing rules and regulations for the government to control us. I think all the work we are doing should be at the tribe. The Bureau already screwed this up once. We have a settlement for them to buy land so we can buy it back. We should change the word to distrust – we don't trust them and they don't trust us. Indians need to be responsible for our own actions – let us screw it up. When we go after something we go to the Bureau and the Bureau says why not invoke self-reliance here and we will get this for you. We go to the central office and get the resource and they are there to say we will manage this for you but we have to do our own process. Instead of writing rules and regulations strengthen the government to government relationship. I was just reelected to the Council and nothing has changed. We have been beating our heads against the wall for all these years. We have changed the color of the people sitting in the chair governing us. Take this thing [the Trust Commission] and go with it. I see no reason to go to a meeting and talk about the Abandoned Mine Reclamation Program (AMRP) and the Bureau is writing up rules and regulations while we are doing the same thing. Put all the resources in one basket and support tribal governments. We [Indian People] have been taking after the governments all these years. All these things the government has screwed up and here we are writing regulations for them to go after us again. I have been watching this the last 50 years. Self-determination what does it mean? It doesn't mean anything. We have to go to lawyers to fight and they go to Congress to get resources. If somebody in the bank did what the federal government did to us, they would be in jail.

Beverly Greybull Huber, President, Crow Nation Enrolled Allottee Association: My name is Beverly Greybull Huber and I am an enrolled member of the Crow Nation. I am an allottee and own tracks of land in the Crow Reservation. In 1999, the Crow Nation Chairwoman and the State of Montana created a water compact of water rights negotiations between the Crow Nation and the State of Montana. I cannot afford not to mention that the Chairwoman, in place from 1999-2000, was indicted at the time of compact. When a new Chairman was elected a resolution was passed and the water compact was disapproved. When several of the allottees became aware it was being ratified we tried to make contact with the Chairman. More than 80% of the reservation is allotted lands and we own most of the water on the reservation.

Susan White Shirt, Secretary/Treasurer, Crow Nation Enrolled Allottee Association: Good morning. I am here representing the Crow Nation Water Rights Allottee Association. What timeline do we have? Here we are as allottees and I have been fighting in the beginning for the life of our children and now the rights of our land. As an allottee I am paying for water being used by the irrigators. I don't use one drop of it and the farmers are charging us to use our land. How long is this going to take? Is this going to go on? If these bills don't get paid, our OST IIM accounts are charged and we are reported to the credit bureau. This goes on until the federal government takes our land because we can't pay these irrigators because we are allottees. In 1986 the BIA had resolved my father's estate without a death certificate. There was over \$100,000 in cash and it is still not settled. There is not a death certificate. In 1988 none of my father's children was a minor and the BIA said that all defendants were minors. I tried to stop it but I couldn't. I am fully supportive of the *Cobell* case because I am a victim. I have gotten no questions resolved regarding my IIM account or that of my father. My rights as an allottee land owner have not

been upheld. We go to the BIA and have questions and these are our own people who do not answer our questions.

Chair Sharp noted that probate is a component that the Commission needs to take up. The Commission has heard several times this has to be part of the recommendations.

Kitcki Carroll, Executive Director, United South and Eastern Tribes (USET): Thank you Commissioners for the opportunity to make a few comments on the draft documents provided. It appears that starting with the federal trust responsibility document it should define who is responsible on the execution side. From our standpoint, it should be Congress. Congress has two responsibilities: to their State constituents and, of equal importance, the fulfillment of the trust responsibility. They do not feel that way. Next to address the administration of the trust responsibility. The whole notion that BIA is solely responsible is antiquated and flawed – applicable to all facets of the Administration. This must be addressed. If we look at cases that have gone to the Supreme Court, we [Indian People] are 1-8. All branches that are responsible for trust responsibility should be held responsible. Flaws that are associated with discovery should be weaved in to responsibility. The whole current model and system for execution is a conflict of interest. That BIA is under the DOI is a conflict of interest. That Congress is passing federal policy that affects Indian policy is a conflict of interest. We fully support a broader statement. The whole system is a conflict of interest. The notion of funding has come up and the fact that Indian Country funding falls under discretionary funding is absurd. Indian Country programs should be the furthest from discretionary. Given where we are with the Tribes in the Great Plains, every treaty outlines Congressional representation. Tribes need a seat at the table as Congress debates. The District of Columbia, Puerto Rico, and American Samoa have delegates at the table. We don't have delegates even though treaties under the United Nations Rights of Indigenous People are included. The conflict of interest issues show the importance that Indian Country deserves direct reporting to the President, not through a filter. We are caught in a trap that denies us complete authority. What rights did we give away? Explain what we gave away and what was promised in exchange. Define trust responsibility. What rights are retained? We have more retained rights than what was given but it is not often couched that way. The relationship with the states is an issue. We have a nation-to-nation relationship. We are sovereign nations. Measurement with and comparison with the states is not correct. We are a nation, not a state. State parity might be the first measurement bar but ultimately it should be nation-to-nation. The biggest challenge is often time states. They are not promoters or defenders of sovereignty. As much as those concepts can be weaved in [to Commission recommendations] that would be encouraged. The system of trust and the execution of the trust is systemically flawed and needs to be rebuilt from the core to reflect the needs of Indian Country.

Donna Salomon, Public Relations Coordinator, Oglala Sioux: This is a very important meeting today. Our President, John Yellow Bird Steele, is on his way. I am here to represent Chief Oliver Red Cloud from Oglala and have a statement from him. I would also like to submit the United Nations Declaration on the Rights of Indigenous Peoples for the record of the Commission. The full statement from Chief Oliver Red Cloud may be found on the Commission website: <http://www.doi.gov/cobell/commission/index.cfm>.

Cris Stainbrook, President, Indian Land Tenure Foundation (ILTF): The ILTF has worked with over 200 tribes over the last 10 years on land issues and with 3,000-4,000 Indian people every year. Previous speakers have covered important topics that will be in my written comments. The trust relationship statement correctly identifies the origins, more or less; it identifies the sovereign to sovereign relationship. It is correct to say that this relationship has changed over time due to various court rulings. The foundation of the trust relationship came from the protection of permanent homelands and the

right to exist as sovereign people. There is a history of violation of these rights: the Indian Removal Act, the General Allotment Act in 1887, and 150 tribes were terminated in the 1950s. To say that the trust relationship is there to safeguard Indian people does not engender much confidence from Indian Country. The allotment process is briefly mentioned in the trust relationship statement. It is important to note that up until the time that there was recognition after the declaration of tribes and dependent domestic nations, did general allotment trust administration enter picture. General allotment administration was about addressing individual allottees. Most people would read that material and suggest it was black letter law trust. Over the years it has not been black letter law trust. In the case of *Cobell* it very clearly states this is not black letter law trust.

Trust responsibility also deals with the individual trusts – beneficiaries and allottees need to be included. This is where the problem described as guardian/ward continues today but doesn't fit in the modern self-determination policy of last 40 years. People and tribes are trying to move land from fee to trust. Not because the DOI is the premier land manager, you are not going to hear that. It is also not about having the land management; rather it is a jurisdictional issue. We have to lose those pieces through this process. We have people able to manage lands who want to have them as permanent homelands of their tribe.

Having the various overarching principles is fine. The very first statement needs to end with what the trust relationship is defined as. Individuals and tribes can say they finally understand that. This needs to be signed off by Congress. There are a number of issues that can be dealt with in this statement. Part of the separation becomes what is the difference between individual allottees and tribes. It was never intended to be a perpetual trust and that has been used as rationale for some mismanagement. Is this perpetual for tribes? As you go forward there needs to be a recommendation that this is sovereign to sovereign. This is not a U.S. government to all of Indian Country basis. Each tribe should have an agreement over what the trust means to them. There should be similar statements for individuals.

The conflict of interest statements need to be broadened to identify and include conflict of interest that exists in representation of the public and the trustee for individual allottee holders but also the conflict of tribe for trustee and individual land holder. There are day-to-day activities where the conflict rears up and those need to be sorted out. If you can establish where those conflicts are and make those clear and tease out on the day-to-day pieces you can address larger issues. I think, and ILTF board agrees, the statement of what trust responsibility and relationship is, is the most critical thing you will do. Developing a clear definition of trust relationship with each individual tribe will be the biggest step forward you can make.

The meeting went into recess for lunch at 12:10 pm and reconvened at 1:45 pm.

Summary of Comments as of August 10, 2012 from Commission Outreach Letter and Survey to DOI Employees

Sarah Palmer, USIECR, provided a summary of the comments received from the outreach letter and an overview of Commission outreach. The questions that the Commission has asked the public to respond to are:

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 full summary of the comments may be found on the Commission website:

<http://www.doi.gov/cobell/commission/index.cfm> and the public statements submitted to the Commission, to date, may be found in Appendix E of this summary.

Ms. Palmer also provided an overview of the survey responses from DOI employees. The response rate from the DOI employees varied from 163 to 234. In response to question one, DOI employee responses related to three key themes: operational, technology, and management suggestions. The common suggestions included improving access to information for tribes, individuals and DOI employees, improving and providing ongoing training, collaboration is critical, and there could be increased efficiency by removing duplicative processes.

DOI employees offered several suggestions to question two regarding trust models. The suggestions included:

- Tribal (Rosebud Sioux Tribe Land Enterprise; Salt River, Yakama, Flathead, Navajo, Osage)
- For-profit (Barclay, Edward Jones)
- Non-profit (Nature Conservancy, Adirondack Park)
- Technology Models (Federal Thrift Savings)
- Government Models:
 - Federal Highways solid minerals reporting
 - State Dept.
 - Co-management - e.g., National Bison Range
 - NRCS toolkit
 - State land models
 - BLM fiduciary trust responsibilities
 - Review Act of August 4 1947 61 Stat 732
 - EPA's tribal program
 - Palm Springs trust admin for Agua Caliente Tribe
 - DOI fiduciary trust model
- Other Models:
 - As Is To Be Model
 - Central States Teamsters Pension Fund
 - Tribal self-sufficiency or self-governance

- Utah Partnership for Conservation and Development
- Alaska Mental Health Trust Authority

In response to question three DOI employees offered evaluative steps to take prior to making recommendations:

- Are reform efforts mandated in Act are completed?
- What are activities, accomplishments, and cost of OST since inception?
- The condition of trust services prior to OST and if sunset what would happen to services provided by OST?
- Impacts positive and negative of sunseting OST.
- What are costs (dollars and time) to sunseting?
- What is the rationale behind sunseting?

They also offered functional, operational, and structural comments:

Functions to keep distinct:

- Appraisals, accounting and disbursement of investments
- Trust review and audit, records, risk mgmt, trust services, trust fund investment

Functions to sunset or merge into other DOI programs or compact/contract

- Field operations and office of appraisal services
- Administrative functions
- OST conduct review and audit functions, BIA process trust transactions

Operational Comments:

- OST considered service oriented, timely, accurate
- Call center and fiduciary trust officers helpful to beneficiaries
- Perceived need for continued services e.g. mineral revenues
- If OST is sunset will expertise and service oriented culture be lost?

Criticisms/Reasons to Change/Sunset

- OST is top heavy in upper, middle mgmt and SES
- OST resourced at expense of other programs that benefit tribes
- High overhead costs
- Operational duties are duplicative

Structural Comments

- Don't assume if OST sunsets that functions go to BIA
- Locate OST in AS-IA with status equivalent to BIA
- Elevate OST for greater enforcement capability
- Evaluate functions that could be compacted/contracted
- Create a new agency to manage all trust resource
- Locate financial arm of OST in Treasury Dept., Inspector General
- Recentralize functions under BIA and/or move administrative functions back to BIA

Finally, in response to questions four and five, DOI employees suggested that there should be more support more PL93-638 opportunities and that there needs to be an emphasis on fulfilling the trust duties.

Questions from the Commission Regarding the Outreach Response Summary

Commissioner Hall: I am looking at some of the information and how it has a theme. Page five of the summary talks about improving access to information for both employees and Indians; they would like to see electronic records. There should be controls that you as an owner, or through the superintendent, to verify if it is ok for oil company to have access to records. This would provide controls while also providing access to the information. This is part of the issue with the whole 49 step thing and represents an ancient way of doing business. I don't see any problem with electronic records becoming a reality. In the operational suggestions there are comments to move all probate functions to the OST. There is a larger question regarding OST before this can be answered. A notion of consolidating the probate is interesting and needs further consideration. It can take 1-4 years to get through probate. BIA collects information and the judge makes a determination. I would like to suggest there is consideration for streamlining the process to one shop. The agency needs to be proactive in the leasing process and there is need to improve that, no question. There needs to be some kind of communication that is utilizing technology. We are not using technology enough with beneficiaries and resource owners. If you were to get approvals online this could speed up the process. There needs to be standardized nationwide fair market value. I hear there is a document at the central office that says every trust transaction requires an appraisal – that needs to be a standard. How the allottee or tribe to know what fair market value is? Otherwise there is conflict and beneficiaries think they are not getting fair market value. In question four on page twelve there is a recommendation for improving the nation-to-nation relationship and for getting consent of the owner. The United Nations Declaration on the Rights of Indigenous People has a provision that for indigenous owners you have to have consent before undertaking development. When talking nation-to-nation you are talking about international law. Consent should be required as statute that the trustee can sign off is antiquated.

Commissioner Anderson: It is important for the consultant to be aware of this information and think about streamlining and co-location. Tribal leaders talk to me about wanting to implement the Indian Land Consolidation part of *Cobell* and are under the impression that they have to have direct access on site to TAAMS and that this would prevent them from implementing the settlement locally. Allottees that have fractionated interests can have someone locally to talk to. Information business is a key thing to look at.

Commissioner Zah: Most of you know the Navajo, being what they are because the reservation and land base is so large; we also have satellite reservations that have land holdings of maybe 12,000 to 18,000 acres. They are a government and Navajo treats them as a chapter. The BIA treats them as a separate reservation. A question some of the allottees from these satellite reservations threw at me is that under land consolidation if fractionated land is to be purchased by the larger tribe and there is consent by the allottee to do that, who do they give the land to? Is it Navajo Nation? Many allottees are saying I don't know if I trust the people in Window Rock so they want the land to be assigned to the local chapter and governments. I think that needs to be answered. Maybe there could be an opinion from the DOI that can be relayed to the Commissioners or to the Navajo Nation as to what the position will be at the Bureau when the people start to go into the land consolidation program. Many want to sell their fraction but who do they assign that to? The land owners don't want to commit until they know the answer to the second step. Don't know if there are other nations out there that have similar situations. In regards to the appeal of the *Cobell* settlement, why are people appealing a decision that has already been made and decided by Congress? Grandma only has a number of years left and we need a resolution to this issue. The Commission may indicate that we don't have a role in the decision but we can surely make our positions known to the federal agencies as a majority of the claimants, as opposed

to minority groups making appeals. It is also important to the allottees out there and needs to be tended to. I want to add those two situations to the mix for consideration and some kind of decision from DOI.

Chair Sharp: A great deal of thought and work went into the many individuals and organizations that thought about these things and submitted reports for the Commission. Maybe we look at the administrative options and look at this input to see what could be done short term and incorporate it into preliminary recommendations; we can aim for the December session for interim recommendation. It would be good to use this information for preliminary consideration and identify those recommendations that would take legislative action. Ultimately, it is important to receive information but how are we going to use it and incorporate it into our work.

Hard Asset Panel

The panelists were asked to address the following questions for the Commission:

1. What are the three (3) most important functions the Government, as trustee, performs with regard your, or your tribe's, or tribes you work with, non-monetary assets (i.e., oil and gas, coal, water, timber, grazing, easements, other leases, gravel, sand, other minerals)? How would these functions differ for specific natural resources (e.g., water, oil and gas, land, timber, gravel and sand, coal)? You're your perspective what are the pros and cons of a public versus private trustee for your or your tribe's non-monetary assets?
2. What type of involvement should tribes have with the Government's oversight of tribal trust non-monetary assets? What form should such tribal involvement take? (i.e., regional advisory boards, individual tribal advisors for individual tribal assets, a national tribal advisory board?) How should individual allottees be included?
3. What are your top three recommendations that you think would improve or strengthen trust management and/or administration for the Commission to consider?

Thomas Fredericks, lawyer with Fredericks Peebles & Morgan, LLP, provided comment for the Commission regarding trust responsibility and how to strengthen it in regards to hard assets. It is a pleasure to be here with Helen Sanders, I have known her for a long time. It seems like a lot of our trust management is done by crisis. I was at the Native American Rights Fund (NARF) early in my career and won 50% of the fish cases we had and then we had to figure out a way to manage the resources. I then went to Washington and became Associate Solicitor and made an important decision, I would like to start an Intertribal Fish Commission to help manage these issues. As a result of Senator Scoop Jackson funding the Fish Commission, they are the primary fish management group in the Northwest. They don't have lots of problem with trust responsibility because they manage the resource.

Helen Sanders brought the *Mitchell Case* to court and so Congress again funded a bunch of forestry money to manage forests. They put a council together and it has worked pretty well. Now we are harvesting a sustainable yield and it's helped. I always remember the when the *Cobell* case was brought to court and the Congress created OST and the Office of Trust Funds Management with the Trust Reform Act. Congress was under the gun and losing in court so they tried to do something to show they were being responsive. The problem with trust reform act is they didn't put any more money in it and they raided the BIA to fund OST.

In the '70s on Wind River was stealing oil from us. We were trying to figure out how we could police that and created the Minerals Management Service (MMS) to track revenue and better manage the processes. The Office of Natural Resources Revenue (ONRR) was created to address issues that MMS was not able to. The jury still out with ONRR and I see they contract with tribes a lot. It behooves us to look at the Intertribal Fish Commission and how they are managing it. They are well-funded through the Northwest Power Act and Bonneville Power Act. Funding makes a difference.

On to the trust responsibility relationship to hard assets. One of the things we are concerned about is that in the development of the trust we have always tried to litigate cases for breach of trust. We had to go twice in the Mitchell case because initially they said there wasn't a breach because there was not enough control by the Trustee. We showed there was a lot of control on marketing and leasing of timber. We have learned from litigation that you can't leave it to the courts because justice is blind, but it isn't. I am tired of Scalia telling us what trust is or isn't. The U.S. is in a 10-year mode trying to get away from trust responsibility. If you are dealing with them they don't want to put land in trust; they don't want to take the fiduciary trust on.

The beauty of the Indian Trust Commission is that it is at a time when the playing field is leveled. Tribes have settled claims and we are at a point where we should be able to communicate and negotiate a good trust responsibility going forward. A regulatory definition of trust should be developed. If you look at any trust, you will find a trust document that is the bible. The trustee does nothing except what is in the document. Here, we don't have that. Justice Scalia has said there is not enough language to create a trust. It is hit or miss with the trust responsibility. In the Navajo case it was thought to be a slam dunk but they lost because the tribe did not have enough control of leasing. The facts were horrendous and we tried to negotiate a rate and instead of approving a tribal royalty rate he increased for the rate for companies. Those are the kinds of things that make it difficult for tribes – what is the trust relationship?

We want everything to be a trust responsibility – we want education, social programs, etc. because they are mentioned in treaties. The Utes had a water settlement with funds and one of damages of the lawsuit was under-investment. We had and experts show that BIA, OST, OFTM, and MMS did not invest assets properly. We had one fund that was \$45 million and another \$24 million held for 20 years – that was \$100-\$150 million in under investment damages. The bill language for the settlement required the Secretary to hold the funds and build irrigation for benefit of the Ute Tribe. So these settlement funds were classified as Secretarial funds even though they were for the benefit of the tribe and should have been considered trust funds. That is the kind of mode at the Department and it is difficult to get anyone to recognize trust responsibility.

I want to talk about parameters of trust responsibility that have been developed through legislation, statutes, and Supreme Court opinions. The current trend is to diminish the scope of the U.S. responsibility and require duress to be expressly articulated and prescribed by statute. Changing parameters make it difficult to know what the U.S. trust duties are. I don't know how many remember but account holders would go to the Bureau and there was a clerk that managed IIM accounts and, like the bankers, they indicated the withdrawals and there was a bank/note card that was tracking funds in these IIM accounts. Then they stored these in the shed and the mice eat it and there is no record of it. Individual Indians used it like a bank and so when it got to litigation there was no record and the Bureau wasn't able to account for it. That's why Congress passed this Reform Act. They react to crisis and create a Band-Aid to react and not fix the problem. They did it for the hard assets. Hard assets make money for trust accounts.

There are three overarching issues with the U.S. as trustee. The first is that the standards of accountability and duties encompassed in the Government's trustee role are ambiguous and fluctuating. Tribes must prove an asset is a trust asset; tribes must prove a particular duty is encompassed by the Government's trustee role; and tribes must establish a standard of care for the Government's performance of its trustee duties and show that such standard of care was not met. That's how the courts pulled back the trust because most of the laws passed on the leasing statutes don't have all the management issues and controls. Tribes have more of a role and that causes a lot of problems for showing BIA has control. As far as holding trustee accountable this is difficult because they can't show trustee control.

The second is that DOI's management of Indian trust assets is dispersed among multiple agencies. This creates an unwieldy, multiple-agency bureaucracy; diverts resources to multiple agencies instead of focusing resources on daily management personnel; and prevents one agency from creating expertise and training personnel in Indian asset management. That's a problem because if you look at oil and gas revenue management it is in ONRR, BIA, BLM, and the tribe. BLM is playing the role of approving all applications for permit to drill (APDs). There has to be environmental clearance on all those things. The drilling is stalled until the permit is issued. At the Ute Tribe we had determined that every permit not received and well not drilled there was a loss of \$5 million a year. It adds up over time. Oil is \$100 a barrel and that's when you want to drill. The problem is not in issuing permits, it is in the environmental review process. This is a public process and there are periods of review.

At the Ute Tribe it has taken 440 days for a permit. Oil companies are scared because they can't get a permit. Create a one-stop-shop like at Fort Berthold. Put all the managers in charge with issuing the permit in one shop to work together. Indian land is not public land. The Environmental Protection Agency (EPA), the Department of Environmental Quality (DEQ) and the National Environmental Policy Act (NEPA) treat Indian land as public land. Anyone in the U.S. can comment but shouldn't be able to because this is not public land. In NEPA every comment must be responded to. We are not making much headway on changing this. We are trying to get authority for Indian lands in BIA. It seems like BIA always moves the problem out of the agency instead of fixing it. There needs to be balance and a way to get tribes involved in the management of these processes. The Navajo Nation has done well with leasing management over last 10 years.

The third issue is that the federal government has conflict of interest in certain circumstances: where the Government is litigating with a tribe and is both Defendant and Plaintiff and when a Government agency must act in the best interest of the Government it may conflict with best interest of a tribe. In these trust cases they are trustee so they should be helping but they are also working on behalf of the U.S. They can't be helpful because the Department of Justice (DOJ) is telling them they can't be because they are defending the U.S. One example is Pick-Sloan to manage the Missouri River and deal with the impacts. We are owed substantial money where the government has paid just compensation. If you look at the Fort Berthold oil boom, we have the tribe that didn't have a lot of money. Instead of developing a resource management plan to get the best value out of land, they got about \$50 an acre for that land. At the time allottees were getting more. If it was better managed the tribe could have gotten better prices. At Ute they didn't lease all of the land and created their own Ute energy company with investors. Tribes can develop their own leases and get 100% of the funds earned. This creates jobs and hopefully we will understand that and keep 100%.

In the development of grazing lands the biggest issue seems to be valuation and appraisals. There are lots of complaints about OST taking all the appraisers from BIA. One complaint is that lots of appraisers from BIA and is taking over appraisals from other agencies. There has to be accountability for the agencies and get back to trying to develop a definition of the trust and to put all the hard asset management into a central location. We also need to be able to monitor the performance of the lease. MMS, and now ONRR, is supposed to. It is very difficult to monitor a lease from far away. At Ute they had to hire compliance officers. Monitoring of all the pumping services need to be on the ground. Grazing is a very difficult area because allottees want to get everything they can. There is concern of how to develop comparables for appraisals. If a non-Indian farmer that has a fence, trees, and a spring it is very inviting for livestock with a great big grazing unit for 4,000-5,000 acres it makes it difficult to compare with allottees that may not have the same resources. A lot of people say we should never give rights of way because the Supreme Court says the jurisdiction then goes to the state. They say we should just grant easements. There needs to be a policy to ensure there is compliance with terms of rights of way. Once the companies get there and start doing things they don't tell you about you may not know because the lease compliance people at the Bureau are understaffed and have no capability to enforce.

Tribal governments have a lot of capability. As their capability through statute has increased, so has the tribal role in allotted areas. There hasn't been a large role in the leasing of minerals, only surface leasing. The Department's primary role is in minerals leasing. BIA has a role in forestry leasing. One of the things tribes are considering is creating a Section 17 Corporation that can lease land for 25 years without BIA approval. With the Hearsh Act there will be opportunity to lease surface land for grazing for 75 years. Under Section 17, the land needs to be transferred into Section 17 by the tribe to have the right to manage the land.

Mr. Fredericks concluded his presentation with three recommendations.

- 1) Allow OST to sunset and reconsolidate the management for non-monetary assets into one agency. Having multiple agencies manage is a problem because the management obligation is different in each agency. BIA should manage Indian lands and BLM should manage public lands. Put all resources back into BIA and consolidate. Accountants and auditors have been hired but not they are not hiring petroleum engineers, geologists, etc. and these are important when approving leases. When you can review drill logs and know a well is productive, you can demand more.
- 2) The tribe should take a more active role in management of resources. It behooves the Commission to look at the Intertribal Fish Commission salmon management model. It is a good model because it has a lot of money.
- 3) The other thing that is important is defining the trust by regulation or statute. This would lay out the parameters of responsibility, the rights of the tribe, and how to hold the trustee accountable. If you leave this to the courts there will not be a straight answer and there will be various interpretations.

Helen Sanders, an allottee, presented to the Commission on the allottee perspective of hard asset management. I thank the Commission for allowing me to present today. I'm here as an allottee representing myself. I also serve as the Vice-Chair of the Indian Land Working Group, the only group working specifically with individually owned property. The organization is struggling and has no money.

There is an upcoming conference and hopefully people will attend. We operate on the money from attendees and contributions. Last year we had three tribes that contributed from the northwest; there is no contribution from the southwest this year.

I have been asked to speak on non-monetary assets. My friend and colleague, Ernie Werlus, provided some suggestions for the Commission that have been submitted. One of her suggestions on agriculture was interesting. Allottees get money from leased land from farmers and then farmers get subsidies from this land. Timber is a renewable resource where I live. When I was a child the hillside was totally slash and the hills to the south, it was the same thing. Berries grew in the slash fields. They are both green today and the north side has been harvested, planted, and is green again. The riparian management zone (RMZ) requires a 200 foot buffer zone anywhere there is water. Whether a lake, or anything. Several years ago we took a boat to an island in Puget Sound and there was an allotment area that was harvested and the RMZ zone was evident as the trees blew down. The allottee lost money from the trees and the RMZ didn't do anything for the environment. They should be able to log these trees so they aren't toppling over and then replant a tree; that would serve better than blown down trees. In the State of Washington we have a land trust to pay the land owner for areas not harvested. It would be a good policy for the Department to come forward and pay allottees for land they don't put into production.

I would oppose a private trustee or anyone else. *Mitchell v. U.S.* states that current agreements and legislation "clearly give the Federal Government full responsibility to manage Indian resources and land for the Indians' benefit. Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian Allottees), and a trust corpus (Indian timber, lands, and funds.). Because the statutes and regulations at issue clearly establish a fiduciary obligation of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Government for damages sustained." This spells out what should be done for allottees and what can be brought by allottees, not tribes. Our oversight of the tribal trust probably should be a separation between allotments and tribes.

Our three recommendations would be: 1) The Secretary's office deals with allottees and the tribes on different planes. That's not to say a real separation but they must deal with allottees straight on. A separate Secretarial Order should be clear for allottees and tribes. 2) We would appreciate open and transparent processes. 3) Oversight review of the bureaucracy of the Secretary and the Commission every five years.

Please review the Albuquerque School Act. There are dangerous things in it that put technical amendments to the Indian Consolidation Act. They talk about the permanent improvements being non-trust. This should be taken out. Permanent improvements were not taxable. We believe that clear language for allotted lands should be considered for the proposed regulation and that it say it is for leased lands of tribes and where lessee is not an Indian and under trust responsibility. They should not be subject to any fee or charge without regard to ownership of improvements. We request clearly that that be put in there because there are cases in the Portland Regional Office where this permanent improvement part is being implemented.

Part of the probate is being handled by the state – that is out of reason. Where did this come from so we can get rid of it? The Office of Historical Accounting and the Office of the Solicitor didn't want to deal

with these permanent improvements and ILWG position is that the Bureau doesn't have to have an inventory of permanent improvements and OHA doesn't have to keep track. If there is a probate then we feel that should be handled by the tribe. The tribe is the closest to the people involved and can understand this situation. This could relieve BIA from having to deal with this. The practice is clear that any attachment to trust property assumes the same status as trust property. All of us have to be on the lookout for action such as this in attempt to weaken trust.

Ms. Sanders presented a chart that provided an example of how lands could be consolidated within families. It illustrates how much could be lost if fractionated lands are sold without a plan. A plan to prevent this from occurring could be implemented and nobody is trying to resolve it. Ms. Sanders then used the illustrations to explain how family fractionated lands might be consolidated to increase lands for individuals instead of continually fractionating lands. Through trades each family would own a majority interest in allotments. This was an illustration from her family. She explained that if the family agrees on the trade, you don't have to wait for an appraisal. We have battled the Bureau and others to do the things we did on our properties and I refused to let my grandchildren go through the same for the next 40 years. So the lands were sold and they were given their due. The lands I owned on the reservation I deeded directly to family. This should be told to our people that this is an option.

Ms. Sanders addressed some of the considerations in the letter from the Deputy Secretary. She believes that allocating the administrative functions to regional offices is a good idea. Personnel are needed in the regional office to handle the work load and deliver trust related services to individuals and tribes. Individual account holders need to stay in OST. I think the accounting, as far as IIM funds goes, is doing a good job. Hate to see it go elsewhere. The Reform Act established OST and that accounting remains there. As far as reform it belongs to a group such as the Commission; not ONRR, BIA, Treasury, or OST. IT belongs strictly with a group that can talk through things reasonably and get public input. Fiduciary management must be kept – not OST, ONRR, tribes, or Treasury. Tribes are sovereign and can't be sued and if responsibility was with the tribes, the Mitchell case would have never happened. Trust responsibility lies with the federal government and it must stay there. In *Cobell*, I am wondering what the outcome will ever be. There is a rumble going on that the settlement would say that you could never bring another lawsuit against the DOI. In the future you should have a right to ensure that what is proper and right is upheld. What is the alternative? If you kill the case you've got nothing. You have to have a dedicated attorney that will stick with it to the end. We spent 21 years on the Mitchell case. Thank you for the opportunity.

Public Comment

Chairman John Yellow Bird Steele, Oglala Sioux: Thank you for allowing me. There are a lot of people interested in your work and I see it as a very important and big task that the Department of the Interior assigned to you. Your product is going to impact trust responsibility for our children in the future. How will it be accepted and interpreted? I like the way you are operating. The task is such that it is very, very large in the different areas where trust is. I haven't heard any yet on trust responsibility to tribal governments being protected and their different functions, which are enormous. The trust the government holds to the tribal governments. I like your statement that one size doesn't fit all. I mentioned the different functions that need protection. We have testimony against the IRS intruding and taxing trust revenues and tribes giving 1099s to our own people for things we have done throughout history. We testified that we have a special relationship established by treaty that we need the federal government to consider. At Pine Ridge we have been given the environmental regulations

associated with airwaves and we own all the taxes. How does the federal government, in that one little area, how are you going to word that to protect us owning and regulating airwaves? State troopers patrol on reservations except South Dakota. If a state trooper is doing business on Pine Ridge we will arrest them; they call if they want to come into Tribal jurisdiction. The U.S. government trust responsibility - how will you word it to protect tribes from the IRS and other federal agencies? We are a sovereign within a sovereign. The U.S. has a legal obligation to us because of treaty. This falls under Article 6 of the Constitution and says it is supreme law of land – it is law. How do you differentiate in this case between the authorities we practice and that of others? How do we get the federal government to live up to legal obligations? We have self-governance and direct service tribes. We have a fear of jeopardizing our treaty if we move to self-governance. How to do the one size doesn't fit all? This sounds good but we want to see the product and the different areas that are going to be addressed. I understand some of the testimony you are getting are good examples but you have got to put them into policy or into legislation in some cases. We are independently sovereign – Article 14 states that Indians not taxed. Education to us is a trust responsibility. There is trust responsibility to higher education. It was a long hard fight because in treaty the responsibility was on up to age 16; we got legislation to increase the age. How are you going to address all of the issues facing you in the different areas? We would like to help you in some ways. Have you identified all the different areas to yourselves, the ones you will be addressing in trust responsibility and reform or are you just taking up the tangible assets? And what about the trust responsibility to tribes v. trust responsibility to individuals? Thank you. I'm waiting to see what you come out with.

Chair Sharp: Thank you Chairman. The process begins with the questions that you raised. It begins with Commission partnership with allottees and tribes. All of those are questions that should govern and guide the Commission direction.

Commissioner Reflection on Day 1 of Meeting 3

Commissioner Hall: I have a couple of observations from throughout today when talking about trust responsibility and trust models. We heard from testimony what they saw was wrong with the diminishment of trust responsibility through court cases and the spread across two agencies and we saw the Deputy Secretary's letter. It makes sense and we need to spend time identifying and getting comments to zero in on the theme of all the comments. At this hearing tomorrow we will hear more about water rights. The USACE or BOR have different sets of trust principles – how do we bring that in to the realm of trust responsibility for those agencies that are outside of DOI? It has overarching/overreaching authorities that affect the overall trust responsibility. Start looking at the common themes of diminishment and how we put back together the responsibility to consolidate and have something by for the Seattle meeting. There is a \$14 million reduction coming to the budget and there must be a recommendation for cuts or otherwise they have to move on with the Department reduction without tribal input. There is always discussion about elimination of smaller programs – home improvement, road maintenance. Mike Black asked TBAC to be prepared for the next meeting in December to make these recommendations. Action can't be pushed back.

Commissioner Zah: In trying to think about all these presentations today and looking at the problems of Navajo problems back home, it dawned on me that years ago when the U.S. Congress, through various agencies, heard these same kinds of discussion and presentations they thought, hey, Indian people are having trouble with their own governments. Somewhere along the line in 1968 the U.S. Senate decided to include the American Indian Civil Rights Act so the Indian people enjoy the same relationship with

their own tribal governments. The intention of that Act and the spirit of the legislation was that people improve and they won't deny certain rights to members of tribes, groups, or agencies on the reservation. 44 years went by and we still hear the same thing. What was present from Crow Nation with land owners and allottees and what happened in concert with that tribe and with Montana, to me that is a bothersome area. Maybe it has a lot to do with the leadership we have on the reservation, where we get the habit to look for somebody else for answers to develop other things. Maybe we have people in this room who believe that if the Commission does its job every problem is gone – that is not the case. The Commission can provide an opportunity and mechanisms to make things better.

When I was young and looked at things around me and Indian people complaints about BIA and DOI, I decided at a young age I am going to do exactly the opposite of what the federal government wants me to do. You need to develop an attitude to succeed. People need to be seeking self-sufficiency and do their own things in their own way using their own culture and background and lifestyle. My mother never went to school and many of our people were cut in the same way. The result was that maybe it's better to do things like the way you see fit. And that way you got nobody else to blame. Instead of looking at somebody else to resolve these issues have to look at own souls, at your heart, have to analyze yourself as a group and do those things that are the right thing to do. In the U.S. because Indian people were denied voting, Congress offered to pass the voting rights act so Indian people could vote.

Despite all the work we did, now we have a situation where we a lot of people who don't participate in their own government. In many tribes a lot of people complain about something being denied. When you look at the facts it shows we didn't participate when discussions were taking place. It boils down to opportunities and taking advantage of them when they are given. If we take advantage we will hear different stories. So much apathy among the Indian people and we seem to spend more time complaining about what somebody else isn't doing to advance you. I won't complain in that way and I will do things in my own way using my own background and culture. I will take my own responsibility for succeeding. There are a lot of young people out of school that don't see any reason for education. As parents we need to put those students in school to let them see what that brings in terms of advancing people. The testimonies provided are helpful in learning about what is going on in Indian Country. Yesterday's learning at Fort Berthold was helpful and I learned a lot and it reminded me of the development taking place and years ago how the Navajo looked at the uranium mines. Oil and coal development looked at as an opportunity. 50 years went by and what we didn't know was that we were also being damaged. If you don't have adequate leadership, that is bound to happen and that is inevitable. Sometimes you have to put laws and rules aside and have your own sense and ethics to control your own behavior instead of looking at someone else's law and saying we should use that law to our advantage.

Commissioner Anderson: I appreciate the testimony from today. There are things we can do on an interim basis regarding recommendations and wrote down some of things regarding streamlining, discretion of NEPA review for leasing, and Section 17 Corporations. The Commission can't do everything across the board to please everyone but there are options that can assist in developing knowledge and providing options. The regulations are so complicated no one wants to spend time dealing with that. Last time somebody brought up the lien issue and the Department came out with an SOL opinion saying, "No, that is not going to happen." I know folks are a little frustrated because the Commission was slow getting started but the momentum is gaining. I'm glad Commissioner Zah said we are not going to be able to do a lot – the issues are overwhelming.

Chair Sharp: I think I feel best about the observation that we have a unity of thought in the Commission, allottees, and the audience that we are not having two different conversations. This validates the makeup of the Commission. We have tribal leaders and allottees and it is reflective of the group we are trying to represent. I see ways of incorporating comments into what we are doing. It did seem like a monstrous task in the beginning while also trying to get a sense of issues on the ground. This Commission has been able to do that in a way that we were able to open public comment period and deal with administrative things on the phone and keep the Commission robust. It gives me hope that we have everything we need when we come together. There is a heightened sense of urgency to deliver interim recommendations and give a comprehensive scoping of overall evaluation and give investment of time to scope out comprehensively the work to be done. Thanks for providing insights and perspectives. Hearing from you this is how we will get to the end product. We are in sync and have unity of thought and are responsive. This is very sacred work and those that are meant to be here will be there and each time I leave thinking the right people were in the room, the right words were spoken, and the right people are at the table. I look forward to working together and partnering.

The meeting adjourned for the day at 5:06 pm.

The Commission held a youth outreach session at the United Tribal Technical College the evening of September 13. The summary from this meeting may be found in Appendix G.

Friday, September 14, 2012

Tom Wells offered the invocation. A drum circle from United Tribes Technical College (UTTC) offered a song for the Commission. Dr. David Gipp presented the Commission with sweetgrass in recognition of their work and commitment.

Chair Sharp thanked the Mr. Wells, the UTTC drum circle, and Dr. Gipp for the blessing and honoring. The Chair opened the meeting and welcomed everyone to day two. Introductions were made and the agenda was reviewed.

Reflections from Day 1

Chair Sharp: Last night the Commission convened in the Healing Room at the UTTC to meet with youth. It was very appropriate as the Commission is about bringing healing from decades of hurt. We had about 20 students in business, health, and tribal government in attendance. They had heard of the Commission and were excited that there was an opportunity for them to engage. The students raised some thoughtful question and one of the instructors helped coordinate the USDA Keepseagle settlement across the country. I also want to tank Dr. Gipp. He is working with some students on drafting recommendations for the Commission. We invited the students to participate in the public webinars and we will accept their challenge to expand social media efforts.

DFO Marsters: I was impressed with the caliber of questions from the students. You are connecting the work of the Commission to future generations. It is significant to hear from the youth and there were some very thoughtful questions to incorporate into recommendations. Dr. Gipp suggested expanding the idea of reaching out to youth across the country. I look forward to the continued outreach work.

Chairman Hall: Budget. I wanted to mention that as I was talking to tribal members in the audience there was discussion regarding the automatic sequestration cuts on January 1, 2013. Mike Black, BIA, said that there will have to be key decisions. We have asked Tommy Thompson to speak at the Seattle meeting to gain a better understanding of the Congressional budget process. The Commission will probably have to look within the budget. We really need to look at the central office, regional office, and the agency level. In the Great Plains the agency level is prioritized. Sequestration will be an automatic across the board cut with deep impacts to some areas. I would like to enter into the record the United Nations Declaration on the Rights of Indigenous Peoples. These articles include the right to an education, the right to practice your culture, and prior informed consent on your land prior to development. 40% of the budget for the trust is in the Bureau of Indian Education. The Commission should consider using some of the language in the Declaration in draft recommendations.

Commissioner Anderson: I received overnight more specifics and comments to revise the trust responsibility statement. Thanks for the comments, they have been very helpful.

Commissioner Zah: My own assessment is that we went through several months debating issues important to our people and have looked at various positions and interests and we are almost on the home stretch learning about the issues. It is our responsibility to make sure we continue to hold those together, that we agree on, and are able to come up with a decision, maybe at the end of the year, on some of these issues. The outreach we are doing is a necessity because that is where we get the input. In looking at what is meant by trust responsibility, we have a tendency to look at what the courts say; at

what lawyers and professors say about trust responsibility and what it means. I am always interested in knowing what the elderly, the ancestors, what was their understanding of what trust responsibility means? You can't go to a law library to figure out what they meant about trust responsibility back then. We have to revisit that issue and be able to put it on the table and look at it. Not interested in what a federal judge said about the interpretation of trust responsibility. I know what Navajo people think because they have a word about what it really means and what the understanding was way back then. Still to this day, despite courts, they still hold that apart and work in such a way that they use that definition. I don't know who was passing the UN Declaration around yesterday, but it should be everywhere where people meet and should be in every school, college, and university. These should be handed out to the students in community colleges and I really like the work of the Indian people that pursued their goals in making these things happen at the United Nations. This is a great instrument to use. Sad that we don't have the same kind of brochures and action from our own federal government for our people.

Trust Reform and Trust Models Panel – Janie Hipp

Speakers were invited to address the following questions with the Commission:

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

Janie Hipp, Senior Advisor for Tribal Relations at the U.S. Department of Agriculture (USDA) in the Office of Tribal Relations, presented to the Commission on information regarding USDA grants and the Keepseagle settlement; USDA approach to trust responsibility; and the USDA appraisal approach. Thank you for having me and welcome. It is important work you are involved in and I am here on behalf of USDA. I hope we can continue our dialogue after today and determine how the work we are doing at USDA can dovetail with the work of the ITC. Thank you to the Chairmen in the audience and for allowing me to speak here today. I spent many years at a university and in private practice. I am an agricultural lawyer by training and agriculture and food is my passion. How it works in Indian country is also my passion.

It is important for what food can be in Indian Country and what our natural resources can be for Indian people. The focus on food from youth is high in the country. This year is the 150th anniversary of USDA. It was created by President Lincoln and includes 17 agencies with locations in embassies because we do food aid programs and exports/imports to ensure disease doesn't enter into the country. We have a few key focus areas: revitalizing rural economies and improving the nutrition of children. When Secretary Vilsack assumed responsibilities he called every living Secretary of Agriculture to see what the primary focus of his work should be. Each one said the first thing would be to resolve all the pending civil rights cases against the USDA but that can't be done without paying attention to transforming the work of USDA. The focus is on rebuilding our civil rights infrastructure and creating a better culture within the USDA for providing services and building programs.

Ms. Hipp then reviewed all the agencies and their primary mission areas. This information may be found on the Commission website: <http://www.doi.gov/cobell/commission/index.cfm>. The Economic Research Service(ERS) is an area that may be able to enhance the work in Indian Country. When Jodi Gillette was at AS-IA we discussed the need for good economists in Indian Country. We need to reconnect on these issues and determine how ERS can aid work. The Agricultural Resource Service (ARS) conducts the annual agriculture census. It is critical that we know how many native farmers and ranchers we have. The census is important for understanding the costs of running farms and ranches and dissecting down to the farm and farm unit level. We cannot properly plan for food supply without this information and our programs are calibrated based on this information. The Navajo Nation was calculated as one farm in this census. It masked the high numbers that were engaged in food production of some kind. Farm can be classified as anyone that engages in food production for \$1,000 a year. We've got to do better. USDA is hiring enumerators to properly capture farmers in Indian Country. We have a few more cycles with the enumerators to get the numbers. As long as we had Keepseagle in the courts no one trusted us to do an agricultural census with them. Now that Keepseagle is settled it is time to increase the participation in the agriculture census. We utilize tribal and BIA staff to help to get this information. I meet with tribal leaders and ask how many farmers on reservations. Many don't know how many. We all need to be working closely together to improve that.

Rural development Services is used by many tribal governments. That is where the USDA infrastructure capacities are. The infrastructure is housed in utility service. Food and nutrition service is its own mission area. In 2012, the USDA's budget authority was \$145 billion dollars and almost 70% is in mandatory feeding programs (SNAP, WIC) in food and nutrition service. There is a food distribution on Indian reservation program. I have gotten to know food distribution program managers who are tribal employees and have done so much to up the nutrition components within nutrition packages. If you do nutrition calculations of a basic package, it measures an 80-85 in terms of nutrition value. The average nutrition value for a SNAP participant is 50 and the average citizen is 55. Everyone likes to talk badly about the commodities package but the program managers have been working so hard to increase the nutrition in those packages and their work is not highlighted enough. All feeding programs are mandatory but food packages are discretionary. There needs to be a lot of work to get more traditional foods into package. USDA has done bison buys and we are getting nutritional information ready to incorporate wild rice and blue cornmeal. We are working to incorporate more. In 2008 we first got permission to add traditional foods to food packages and there is critical need for supply. If the federal government buys wild rice it could increase the price point. Our purpose is to feed a lot of people and we have to consider the economics. We have to determine how to build a native foods supply line to feed lowest income of people and build supply to take advantage of new market opportunities. Food safety is its own mission area. We get a lot of questions about slaughter capacity in Indian Country. Animal diseases, plant protection, and quarantine are in the Animal and Plant Health Inspection Service (APHIS).

Secretary Vilsack established a senior advisor to him on tribal affairs, the position held by Ms. Hipp. Ms. Hipp then established an Office of Tribal Relations. There were tribal affairs folks in USDA for some time but they were never on the organizational chart next to the Secretary. Ms. Hipp meets with the Secretary weekly as one of his senior advisors. The Secretary seeks advice on tribal relations every week. The Office of Tribal Relations is the contact for USDA consultations and collaboration with tribes. The USDA has grants available throughout the department. The USDA also has the ability to enter into cooperative agreements in wildlife services and the Forest Service has lots of cooperative agreement authorities. Loan portfolios rest in two agencies – Rural Development and the Farm Service Agency. They are banks. Rural Development is different than some of the other departments in the federal

government in that they service their own loans. The loan default rate is below 2%. With folks in the field in counties and states, USDA can service loan portfolios well. Infrastructure is found in Rural Development. There is language in the pending farm bill that would address changes in the rural definition. Areas with a population of 50,000 and below or 10,000 below is defined as rural in various legislations and authorities. Some of our evolving suburban areas are not qualifying. In the last three years Rural Development has put \$1.3 billion in direct and guaranteed loans and grants into infrastructure. That is with new tribal set asides and with regular authorities. There are issues that we are working to resolve.

Secretary Vilsack is undertaking a huge Six Sigma charge for the USDA. They are working to deliver services quicker. We are streamlining services, integrating systems, and working toward more efficiencies and better delivery of services. Rural Development has general field agents that go to tribal headquarters to work with engineers and offer improvements and guide the process. Once in the project cue an entity stays with Rural Development until a project is finished. We don't put money toward a project and then not finish. There are two set asides we have in Rural Development and this is one of things folks don't readily understand. All these different authorities come on their trajectory from Congress. There is not any 638 authority in any of the agencies; this is a huge issue. Community facilities set asides can be used to build gyms, administration buildings, and community kitchens – there is lots of work in Indian Country. Water grants are a huge issue – tribes and rural areas must have better water and sewer capacities. Substantially Underused Trust Authority (SUTA) is a new authority given in the 2008 Farm Bill. This affects only Rural Utilities Services (RUS) programs. Projects must be financially feasible.

USDA has undertaken multiple consultations over a 1.5 year time period. Only two agencies had consultation policies when President Obama was sworn in. In the USDA Action Plan we lay claim that we would have new departmental regulation regarding consultation; this will be signed off on this month and has already been consulted on. Agencies have been studying and putting in programs to be in alignment with the new departmental regulation. This is a platform for accountability. The Natural Resources Conservation Service (NRCS) and Forest Service are in the lead on this and are pervasively land management agencies. We just lost through retirements 8,000 employees and there is another round of retirements coming up. It is not unusual to meet people who have worked at USDA for 30 years. We have been busy reconstituting internal and external groups. NRCS has just seeded three regional tribal advisory bodies and they just started to meet. We also know that Keepseagle calls for the creation of a Native American Farming and Ranching Council. The first meeting of the Council was in August. The USDA is pretty maxed out on FACA committees. Keepseagle created an agreement to seat a FACA committee on these issues.

USDA participated in over 2,000 consultation venues. I'm not sure anyone wants us to be fully deployed. 2,000 is a lot of tribal leaders meeting with us. We are hitting our stride in working with tribal leaders to address issues as they come up. We have to be creative about how we can continue to be fully engaged. The Secretary, having been a former governor, did not have strong understanding of consultation and was in the room when we reached out to the National Governors' Chair to increase the state relationships with tribes. The Secretary offered to train on consultation when needed. He sees the importance of it because so many USDA authorities are delivered at the state level. We are working on conflict resolution services to resolve issues quickly. We are still waiting on the Farm Bill. It is passed every five years. We also have a Disaster Bill that we rely on for funds to help with infrastructure repairs from disasters. Many of the disaster authorities expired. We are doing our best to fully utilize our discretionary funds to bring disaster relief and have personally led a drought call every 10 days-2 weeks

to keep tribal governments apprised of where we are. Farm groups asked Congress to take action on the Farm Bill. There is already internal planning among field agencies that the minute we get a Farm Bill we will deploy explanations with tribal governments on what is in the Bill.

I am proud of what we have been doing and we know we still have a lot to do. I tell tribal leaders all the time, our heart is there. We are not going to be perfect but we will do our best to work through problems and be in a consultative focus. USDA has so many tools to help Indian Country to build strong rural economies and develop resources. We just need to continue developing relationships. The Keepseagle case had languished in courts for over decade. In 2010 the case was settled and the claims period was in the latter part of 2011. There were two tracks in the case for compensation: Track A was a settlement of \$50,000 plus tax and debt relief and Track B had stronger evidentiary case and received \$250,000. Track A settlements were sent out as quickly as possible because of the drought. Folks denied in claim are going through a different round of servicing to resolve debt. What is left after the funds are dispersed will go into a fund and what happens is between the court and the Keepseagle legal team. All of the claimants who were successful will have all debt written off. Tax relief payments will be paid directly to the IRS. We are so happy the programmatic relief has been built in. The Council has been seated and will be in place for 6 years. There 11 representative leaders from all across Indian Country. An easier to understand guide to loans was created and an ombudsman position is close to being in place. If you don't have technical assistance on the ground, it is so difficult to make your way through the myriad program eligibility, programs to get services. USDA has a cooperative agreement with the Tribal Agricultural Council to make connections with tribal governments and staff to provide on-the-ground assistance.

Ms. Hipp completed her presentation with next steps for the Commission to consider in terms of increasing the relationship with USDA and the Indian Agricultural Council. Ms. Hipp offered to share information from the Council so the Commission is aware of considerations they are making that may overlap or complement recommendations from the Commission. Ms. Hipp noted that the Council is currently developing recommendations for the Secretary now. She noted that the USDA trust responsibilities are still evolving. The USDA recognizes them and wants this work to continue to be part of how the USDA works to build rural communities. Ms. Hipp commented on the need for the Congressional subcommittees on Agriculture and Indian Affairs to get together and talk about the trust responsibility. She noted that the only way to address some issues is to plod through authority by authority and regulation by regulation to see what the needs are. The USDA now has two new memorandums of understanding with the BIA – with Rural Development and the NRCS. There also needs to be consideration given to the issue of data sharing and information sharing and the importance of technology and getting the data right. That has come up here at this Commission meeting and that is very much at the heart of both MOUs. If you are a farmer and you come to get loan, you have to come in with two different maps in some areas and maybe three if the tribe has done pervasive GIS work. Those maps don't conform – BIA works in range units and USDA works in farm units. This brings into question both agency borders and makes an already difficult job even more difficult for the farmer. Can't we do this better? We have to figure out how we do this to ease the burden. The Secretary believes that if farmers and ranchers can stand up every day and make a difference in lives than surely we can do that. That is the work we have to do – we have to change for the better, join at the hip, and talk to each other all the time to deliver better services. USDA is very willing to sit with other agencies.

Ms. Hipp noted that she thinks there is need for more joint consultation around subject areas. Why not do it all together? Agencies have got to do better at strategizing. How do we strategize tribe by tribe about what their goals are and how do we work regionally? She has been working in the last six months

with intertribal organizations to work together better. Appraisals are difficult and USDA has different appraisal standards from other agencies. How do agencies comply with mandates in a way that doesn't overburden the public? There is need to review the cost and time in the process – where do we have redundancy and duplication and how do we recognize one another's appraisals? There is need for more trusted advisors. There need to be more agricultural economists in Indian Country. They are going to be coming out of tribal colleges. How can we put in a support system around these young people – we need them and we need them quickly. One of the things that makes me happiest is the national Future Farmers of America (FFA) and 4-H organization long-standing relationships with USDA. I am working closely with the FFA organization. At a recent national workshop there were 20 Indian Nation flags being recognized in a group of 55,000 young people. There are 12,000 Native FFA students in 200 chapters. They need to be worked with – they are the ones learning the best new decision support tools and they need to get to college to deploy them in Indian country so we can build food. Look at the agriculture sector – it is doing well and our exports are doing well, we are feeding people. Agriculture speaks to traditions and people. 4-H has 60,000 Native students. We need 100,000 new farmers and ranchers in this country every year. Who are our young people, how can we support them? How do we create a new future and a new picture? USDA is pledged to be with you as a Commission.

Commission Questions regarding USDA

Commissioner Hall: I don't understand allotments either. Janie, there was a tremendous amount of information and really some positive things happening at USDA which we never saw before. There is a ways to go with defining trust responsibility so that someday when you are not there, there are policies in place about trust responsibility for tribes. The appraisal process needs to be figured out; it will be an issue until that is worked out. Regarding the Agriculture Advisory Committee, my thought is there has got to be some sense of a permanent commission type thing in the USDA. Some place for the tribal operations and affairs office to reach out to. I don't know how to do this at the local level – there are a small number of Indians serving on farm boards. Native farmers are still going back to the same people denying those loans in the first place.

Ms. Hipp: The Secretary did pass new county committee regulations in the last few months. In Montana there are some committees that the entire membership is native. If you are a land owner in the county, and you think about this in the reservation context, you by definition can be put on the committee – voted on or self-nominated. There is high native involvement and the tribal governments have been very involved in the nomination and selection process. We still need strong coordination in tribal governments to distribute ballots to their voters. If you don't do it together then things fall through the cracks. We also need lists of people willing to serve. We have tried to improve the numbers but we need lists of people willing to serve. The Secretary carved out a million dollar budget for our office. In 2011 the House took that down to zero and then back to \$500,000. At the end of the day I have seen the value of having the Office of Tribal Affairs in Office of the Secretary.

Commissioner Anderson: How do you do appraisals? Is there one office?

Ms. Hipp: No. We have some offices that have appraisers as full blown federal employees for a long period of time, some that are in our ranks, and in some cases contractors. We would love for it to be all one way but because of the budget, the staffing is different. It's so important to have folks who are part of the expertise pool upon which BIA and USDA rely. The history in USDA is that for a long time there was a Federal Extension Service. The federal government deployed extension people in every

reservation and county in the country. In the '50s this ended and there was a move to fund extension folks locally – through federal, state, and county/local funding. I remember when federal extension people existed in the counties in Southeast Oklahoma where I grew up. They would sit down with the farmer and help you run the numbers. We have been trying to fill that gap through tribal colleges and other avenues. They don't exist anymore. Think about that in the context of keeping up with agriculture, who is going to tell us about it? We need as many trusted advisors as we can possibly get to help farmers and ranchers to help them keep up in changes in programs. I don't know how we get there but I know it's a need. Crop share v. cash rent leases can mean the difference between long-term success and failure. If we don't understand this and have trusted advisors then everyone will be sailing in the dark. Commissioner Leeds and I have talked at length about this.

Commissioner Zah: There are lots of questions about Keepseagle – do you have some kind of information about the settlement and what it entails and how many people are affected by the settlement? Listening to the presentation it seems the USDA has made a lot of progress and I could remember 50 years ago much of what you present was not at the Department of Agriculture. It is a good feeling to see the progress being made. You have a huge responsibility in trying to educate the employees and personnel of USDA so they at least know something about what we do and where we live so they know something about trust responsibility and reservation people and all of that. This is something you have to keep on doing. On Navajo we have 80,000 children of school age. These are all young people and we have in excess of 150 schools. Some are federal schools, some are state schools, and the USDA is in the business of producing the good food that human beings need. When you go to those schools I see all of these trucks bringing in junk food. They are pouring sugar down the mouth of those kids and then by the time they reach 20 or 30 they are diabetic. In the southwest the tribes are trying to do something about that. We are attacking that issue. We are fighting with free enterprise people over a choice that the students make to have school lunch programs and all of that. Because you are in the business of making food you should make your presence known. Do the things necessary to improve the situation. I think what the tribes really need is some help in this area. We are all concerned about health and particularly the Indian people and the people that are diabetic. We need to pull together as a group. The damage is being done with the innocent children. The free enterprise people are damaging children. As a food program there is need to be cognizant of all of it and help tribes deal with those issues. I think we need to pool resources to try to do something about it.

Ms. Hipp: We are concerned about it as well. The Healthy Kids Act was passed and regulations have been released on improvement with more local control and the substitution of fruits and vegetables. We also have food policy councils - we are in it. The Secretary and Deputy Secretary of Agriculture have an initiative to have more local, regional food production. To increase community food gardens. You have to know your farmer to see what is happening with local and regional foods and the USDA is supporting a different way of looking at how we eat. There is Lots of space for Native farmers and ranchers to supply those foods locally. There is lots of training at schools and at USDA we need to encourage efforts and provide some tools. If you were to take what is happening on tribal college campuses alone, the signs alone, we must keep nourishing that. We have got to have as much good food supply as possible in this country. I'm hopeful and our administration supports the concern you have.

Commissioner Zah: I know we need more money and there are budget crunches, but there is one other program that I want to encourage you to continue - extending modern technology to those rural areas. In Arizona and New Mexico you have people living out there that don't have access to modern technology. The Havasupai, who live at the bottom of Grand Canyon, they can't use cell phones and they want as much opportunity to use technology as we do. I think it was with USDA they partnered with to

engage a project with a private company and now they have a balloon that has all the instruments and beams to bottom so the people can use a cell phone to call out. Even on the Navajo I can't have access to technology. Still in the US you have those digital voids and there is need for the kind of services you provide.

Ms. Hipp: Give us the money and we will deploy it. We are so committed to that. We got a significant bump in stimulus funds. We also need to tell a better story. Navajo has the largest continuous farm in the U.S. We have tribes that export all over the world. We need to be better able to tell the story of Indian agriculture - it is diverse, dynamic, and age-old. We want to get it out of the shadows and share the role of traditional foods and feed people.

Commissioner Hall noted that Indians were growing native foods in no-till before the USDA thought it was cool.

Public Comment

Denise Mesteth, Oglala Sioux: This is an opportunity for all tribes to display what they would like to happen on our lands and in the future for our people. Some of the things people have reiterated here. I have some stories; I am the Land Office Director on Pine Ridge and work with tribal members one on one. We do land exchanges to allow them to consolidate lands and exchange tribal lands where they can be utilized. In the Great Plains we still have that problem in getting appraisals completed in a timely way. It is also difficult to get a correct appraisal without error. Maybe the appraisal process can be contracted or something else not under the OST umbrella. Money that is allotted to that area is wasted. We have 39 applications of land exchanges. We are doing well, but we are not. Not familiar with appraisal jargon but I know when something is wrong on appraisals. Sometimes we see something wrong and we call and then see nothing happen. The Federal Trust Officers provide services – would hate to see them go because BIA doesn't have the ethical codes written prohibiting mistreatment of allottees. I am the one that hears these stories. I would like to see Federal Trust Officers stay because of the open door policy that exists. The Oglala Sioux have the largest land base in Region 8. We would like to see something done that gives us more weight because we have more people to service. We have *Cobell* money coming to buy fractionated lands. We will be plugged up when this begins at the OST office. I would also like to see appraisals include improvements on lands. If we are promoting to make improvement for conservation we shouldn't have those taxed because it is federal funds. They put a cost share on that and I don't understand how that can be taxable improvements. Oglala Sioux tribe is 85-90% agriculture. We are dealing with drought and had a big fire; ranchers need funds. The money isn't there. I say sunset OST and give the money back to BIA so they can continue trust services to the tribes.

Commissioner Anderson asked a clarifying question regarding the placement of Federal Trust Officers – are they in OST or BIA? Ms. Mesteth responded that they are at the level of providing services to the people in OST. She also noted that in any accountability system you are supposed to have checks and balances in collecting and distributing money.

Commissioner Hall asked if Ms. Mesteth was familiar with letter from Sharon Blackwell in the 1990s that requires every trust transaction to have an appraisal and that if the Great Plains Region requires appraisal of every agency. Ms. Mesteth replied that she is familiar and that BIA does this. She noted that BIA is supposed to provide counsel to allottees and ensure they understand the appraisal and if they are

losing money if selling lands. Commissioner Hall noted that this is inconsistently applied. Ms. Mesteth confirmed she has heard stories and allottees are sometimes told not to get the appraisal.

Chair Sharp asked what makes the process slow? Ms. Mesteth responded that it was the staff. They have a lot of staff but there is an inability to follow through on duties. The staff is unsupervised and there is not management to oversee what is going on. There is need for stability. They are also producing appraisals with errors. There is a lot of money being put into OST. With the land consolidations if they can't pull through with appraisals, 10 years will have passed and not have spent the funding.

Chris Lindblad, Standing Rock Sioux In-house Attorney: I would like to discuss briefly some of the things Mr. Fredericks spoke about yesterday. Legislation or regulation about federal trust responsibility is a good idea. The more recent Supreme Court decisions for carrying out fiduciary duties have narrowed the responsibility. I encourage the Commission to draft proposed legislation with input from the tribes and fully clarify trust duties and meet or exceed common law principles. Conflict of interest – in cases in which DOJ is involved and working on behalf of the tribes and the federal government outside of litigation, DOI needs to protect the tribe trust rights. The USACE surplus water proposal will impact tribes if put into effect. The USACE is proposing to charge water storage fees for water from the Missouri River. There are reserved water rights for tribes to meet present and future needs. There are active efforts to protect tribal rights against another federal agency. Mr. Lindblad also had a prepared statement for the Commission that he will submit for the official record.

Donovan Archambault, Fort Belknap Tribes: Thank you again. I'd like the Commission to consider putting some strength or teeth into the word "sovereignty". We are supposedly sovereign but we have no authority. We go to the area office to request something but a tribe has to go to the central office to invoke sovereignty. Our tribe has gone to Washington, D.C. to invoke our sovereign right. I think we need to get rid of the area offices. Money needs to be spent at the local level. Our tribe would love to have the agencies and the staff back. The engineers back to work on our roads. BIA completes appraisal for \$40 or \$50 and now BLM will be charging \$4,000 or \$5,000 to do a line survey. I thought this was a required Congressional authority under trust responsibility. Get rid of the area office to interact on a government-to-government basis and stop spending money at the area level. I don't know if the tribes at the Great Plains agree.

Wilbur Wilkinson, Spotted Tail and Associates: Good morning Commission members. A special good morning to my Chairman and to my older brother, President Zah. I commend President Obama and Eric Holder for two historic settlements – the *Cobell* and tribal settlements. As result of the war between our forefathers and the U.S. we elected certain leaders to sign peace treaties to exchange land. From this trust administration was born. Through the years we have had to use litigation to fight to maintain the trust responsibility. Now you as Commissioners have been selected to be our voice and with this comes the duty of ensuring the U.S. will not aggregate the duties of the individual. The first meaning of policy is determined by the Indian nations working with the U.S. You lay the groundwork for how. Second, what it means to us beneficiaries for the trust of an individual Indian. Trust duty is administered by the lowest to highest BIA employee. It is the duty of each and every one regardless of position, to follow the trust duty. What's wrong and why is reform needed? To see how federal agencies protect and advocate for Indian people look at what's happening on Fort Berthold. Oil development came and as individuals we were vulnerable. There were no jobs, no oil leases, nothing. Oil companies preyed on the tribe and individual members and took our good will and took our weaknesses and used that against us. It was a situation pitting Indians v. Indians, tribes v. individuals, and BIA v. tribe. People would say BIA is

incompetent so don't go there; others would go to BIA and say the tribe messed up; others still would talk to Senators and say the tribe and BIA were incompetent and make deals in D.C. Did you notice on the tour there is only one office door with a window? Indians have been receiving bonuses and royalties and the Federal Trust Officer took it upon himself to collect bonus monies out of IIM accounts to pay non-Indian creditors. Allowing oil companies to prepare official documents for BIA to sign is to the detriment of Indians, individuals, and the tribe as a whole. BIA is allowing oil companies to mortgage Indian trust land and minerals without consent. Our land, my land, is mortgaged. There are 44 allotments and we are responsible for the debt and we receive no benefit from the transaction. They recorded that mortgage on each and every allotment. They are taking away our Fifth Amendment rights. The approving official on these transactions is not the Assistant Secretary, not the Regional Director, and not the Superintendent. It is a low-level employee of agency. The oil company drafts the document and the employee signs it. All of this is done because BIA officials say it is in the best interest of the mineral owner. This is why trust reform is needed. The task before you is daunting and monumental; you have a very short time to achieve a product. What I'm asking you to remember is you must define trust as a duty to the best interest of Indian individuals and tribes, consistent with Mitchell 2. The first round of the Mitchell case, the Supreme Court stood for trust and there were no damages. In Mitchell 2 it was determined that there is trust and damages should be paid when breached. How do you address this nation-wide? You cannot do all of it so you must do it at the top, defining trust and trust duty, defining best interests, and creating penalty for breach of trust. Do this by statute; do this by Presidential declaration or by a Presidential policy statement. Whatever you do, no matter how much you advocate for the individual or tribes, you have enemies out there. People will fight you and don't want anything changed. You have people who want termination. There is a difference between all of us and the rest of America. We fought and no one lost. That is why there are peace treaties because our forefathers looked out for our land and resources. Remember, believe in your heart and mind you did the best thing and worked the hardest for the Indian people and tribes.

Phil Baird, Vice President United Tribal Technical College: My Indian name is Eagleman. I am a Rosebud Sioux in South Dakota. As an individual my connection with Mother Earth came on the back of a Shetland pony with a chokecherry stick as a whip. Dr. Zah and Tex Hall support education. The missing piece of this trust reform is education. What you have in hand is a paper to put together the pieces of the puzzle about tribal lands and colleges. Tribal colleges are land grant institutions. Take care of people – the most important resources are land and people. There is need to deal with the land resource side. There is a lack of human resources development and lack of expertise. What dismays me is something I do with college students. I work with 16-20 year olds to plant the seed of exploring Indian land management. I always start out acknowledging them and ask how many are tribal land owners? How many are members of a tribe? And then I ask again, how many are land owners? As tribal citizens you are land owners. This is a litmus test for how far to go with our people. There is little incentive understand the responsibilities and rights as Indian land owners. There are already 37 tribal colleges in place as a mechanism to do what we need to do – the training and technical assistance is in place. Indian Country is very diverse. You can tailor regional institutes and mobilize resources. Haskell attempted to offer real estate training but it died because there was no interest. UTTC does short courses and training in realty. We are trying to educate people and young people to understand the bigger picture. There are important spiritual and culturally significant components that come with this. We are dealing with invasive species, the piracy of native plants that are going to drug companies (growing and increasing problem), and the issues of sacred sites. What are we doing with sacred sites? Pretty broad agenda and how do we wade through these things? Education is key. President Bush called for the first White House Conference on Education and one piece of the mission included land and natural resources. We committed and signed off on the resolution that by 2000 all age levels would begin discussing land

issues. We have a large task in front of us and the resources are out there. We have students doing research affecting climate change. These young people are doing their research and developing critical capacity in a culturally relevant way. The talent and potential are there – they just need a push. We need incentives to bring fractionated lands together. We need incentive for conservancy. Create incentives to bring the lands together to enhance the quality and character of Grandmother Earth. WE can't talk about this without discussing water. As soon as they usurp the Governor's authority in North Dakota to negotiate water rights, this is the next civil war. We have to take that interest in mind. Collaboration and land use planning needs to be involved. Grab those little guys on ponies and cultivate them as the next leaders of land management.

Trust Reform and Trust Models Panel – Mario Gonzalez

Speakers were invited to address the following questions with the Commission:

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

Mario Gonzalez, Oglala Sioux attorney, was asked to address with the Commission treaty rights and an approach to trust responsibility. When I started thinking about the trust responsibility of government to tribes I asked myself where trust responsibility comes from. Some say it comes from the doctrine of conquest; others say it comes from treaties. Nobody seems to have an answer as to where this comes from. Joseph Story, former Supreme Court Justice, wrote a paper called, "Commentaries on the Constitution of the U.S. in 1833." In the commentaries he writes that England claimed the territory that is now the U.S. This is a doctrine of discovery, not conquest. Trust responsibility is developed from a doctrine of discovery. Most people know what the doctrine is – European nations when they discover new territories extend dominion over that territory. I talked to Alaska natives and Alaska only had a few acres – it is dominion, not ownership, in land that is important. If you put claim to a certain area, that gives you the right to that area; the right to extend the dominion over the area. Part of domination includes the ability to extend laws and sovereignty.

There can only be one land tenure system – not two. The only land tenure system that exists is the European system. The Indian rights to use and position of land is not a legal title, just a right of possession. European power extinguished Native title. What happened is that England, under the doctrine of discovery, got control of area in the U.S. and extended dominion adopting the English land tenure system and common laws. They kept the legal principles in place that they would hold legal title and extinguish title of the Natives. They acquired this title of the Native people under the doctrine discovery, mainly through treaties. The U.S. ratified over 375 treaties with tribes. There are seven treaties missing. When the U.S. negotiated treaties they started negotiating power. In the Cherokee Nation v. Georgia, John Marshall and the Supreme Court did not hear the case and commented that tribes are domestic dependent nations that retain sovereignty until the U.S. extinguishes those rights. In treaties the trust responsibly is defined. It is quid pro quo. If the U.S. is taking all this land, something has to be given in return. If you take land and hunting rights, you must provide resources to return subsistence; for land must provide other aid to make tribes to be self-sufficient – clothing, housing,

subsistence rations. It is always *quid pro quo* in treaties. Part of *quid pro quo* is part of government's responsibility to ensure benefits are provided. The treaties are not appropriation vehicles, more like authorizing statutes. Over the years there were always appropriate acts from Congress and they went on and on listing benefits for each tribe. These were cumbersome and long acts. Over time Congress decided there had to be a better way and enacted the Snyder Act. There was a lump sum give to BIA and the agency was to dole out the funds to the tribe. The Snyder Act is the point of delineation where you can see that prior to the Act tribes were getting actual benefits based on treaties. After that all BIA determines how to distribute funding to tribes. In a way, it may be short-changing treaty tribes from what they should be getting. Treaties are tied to trust responsibility.

In the Black Hills Act of 1877 there is clear *quid pro quo*. In consideration for territory and rights, the U.S. will provide all aid necessary for civilizations to live. For hunting rights they were given subsistence rations. In exchange for land, the U.S. will provide Sioux tribes the right to protect personal property and life. Trust responsibility laws hold. How do you implement that? Implementation can come through appropriation acts. One of the things we asserted in the Water Act was the need for aid of the civilization due to the Black Hills Act. The Allotment Act is a specific trust created in laws and through other allotment acts. Sioux was allotted under the 1889 Sioux Act and doubled acres and adopted Section 6 of the General Allotment Act. This created a special trust responsibility to oversee the land on the reservations. There were some things that happened that was a breach of trust. Section 9 of the 1889 Act states that no allotments would be authorized. There never was a vote and 700 people filed petitions against allotments at Sioux. Charlie Bates was sent to allot the reservation and certain lands were reserved for the government. Today, we refer to that as agency reserved land. These agency reserved lands should be returned when the government no longer needs them. These lands should be held in trust and there should be monies paid to the tribe from the agency reserved lands – currently this is not done. There are a lot of lands on the Pine Ridge Reservation.

Any ambiguity in treaties or legal mandates should be in favor of the tribe. Everything the U.S. gets is from the Indians and what the U.S. gets is retained. Sovereignty is a reserved right. Governmental powers are a reserved right that is trust responsibility to protect. We need a statue to freeze boundaries. It is ridiculous that we can't live in our lands and homelands without fear of seizure. I think that especially in regards to oil and gas, the Native people are left out there on their own and the Bureau isn't meeting its responsibilities and should be providing expertise. The oil companies understand everything and know the worth. The land owner doesn't understand what a lease is and what the regulations say. They rely on the trustee to make sure they are protected and to explain rights. The land owners are left to deal with leases on their own. People need advice to make intelligent decisions. One concern we really have is the OST. Not only are they handling accounting and finances for the tribe; they're doing things they are not capable of doing, like appraisals. It takes a long time to get the paperwork done. How will OST implement the land consolidation settlement? I can foresee right now that is not going to happen and OST is not capable of appraisals on that many tracts of land in a 10 year period. OST is assuming responsibilities that they can't handle. OST should be moved back to BIA. BIA is our trustee. The Secretary of the Interior should be in charge of Indian affairs.

Commissioner Questions for Mr. Gonzalez

Commissioner Hall: In trust reform, no matter how strong it is or becomes after this reform is done, there will probably still be future claims of breach of trust responsibility. Is there anything we need to consider when talking about strengthening and putting more teeth in trust reform?

Mr. Gonzalez: *Cobell* extinguishes all claims prior to September 2009 so it doesn't affect claims after the date of the settlement agreement. A lot of claims will arise if we keep the same system. That is a hard question to answer. I don't know if outsourcing is the answer.

Commissioner Hall: I talked about the Sharon Blackwell memo that requires all trust transactions to have appraisals. What about estimated values?

Mr. Gonzalez: That could be an alternative. Another is to put it back in the hands of tribes. Provide the funds and put it back in the hands of the tribes. Put more authority in the hands of the tribes. The relationship is still so paternalistic. Tribes can assume responsibility. We don't need BIA to stamp everything. Ridiculous that we complete appraisals on one piece of land and establish a value; and then the appraisal for the piece of land next to it takes forever. Part of the solution may be to appraise track. We don't appraise mineral rights. My grandmother sold land and retained mineral rights on half but doesn't get any money for it. There was an auction that got \$500 an acre at auction but appraisal was coming in at \$200 or \$250. Appraisals will be important. Tribes can take more responsibility for appraisals on lands. There is leeway in regulations to allow this.

Commissioner Zah: What advice do you give for a situation where you have allottees v. the tribal council on their own reservation and they both have an interest but there is a conflict? Are there resources that are available to allottees in terms of giving some type of help to meet their needs? Tribal government has lawyers and resources, but not so sure about allottees.

Mr. Gonzalez: Do they own land together in common or is it separate tracks? I haven't come across too many of these issues. I know of one member who went to fee and then found out about the taxes to be paid and wanted to go back to trust. Oglala put a moratorium on selling trust lands because they wanted to stabilize land use on the reservations. The Bureau took the position that the tribe had no right to trust allotments. Eventually it went to the courts and they upheld the Bureau position. Tribes don't have the control over allotments that they think they do. How much authority does the tribe have from stopping an individual from leasing land?

Commissioner Hall: The tribe has none.

Mr. Gonzalez: How do you have orderly government if the tribe has no control over allotted land? We can zone and require permits but we can't control an allottee if he wants to lease. Another thing that concerns me is the ruling on the Jicarilla Apache case. In my mind the state should never be able to tax tribal resources. The Supreme Court says the state has the right to tax oil and gas via a service tax. In the past the Indian Welfare Act was allowed. In the most recent case the court says that the state can impose a service tax as long as it doesn't infringe on the tribal government. In the 1998 Crow case they allowed the State of Montana to impose a tax on coal on the reservation. It was deemed a service tax. Now we are stuck with these types of decisions and I assume that is why the Three Affiliated Tribes entered into an agreement with the state. The tax area is concerning. All of these issues are court created and the solution is that we have to create some legislation to create new paradigms and new ideas.

Public Comment

Phyllis Young, Standing Rock Lakota: I thought this was a critical meeting I had to come to. The trust is a farce. There is no statutory law that creates trust. There is nothing statutory about it. If there is proposed legislation for anything the trust has to be redefined. In international law there are three parties in a trust. This creates a protectorate status. Sitting Bull fled to Canada and sought refuge of the Queen. That is why you have eight communities of Lakota in Canada, because the predecessors had the international principles of trust. There has to be a definition for trust that no one sole party is responsible for beneficiaries; there has to be three parties. We had a settlement filed 10 years ago for leases not paid to the tribe. We did preserve the rights for water, the Black Hills in the treaty of the Owyhee Act from 1958. We would continue to insist and demand our rights are recognized from these acts. Claims are not part of the makeup. We are learning fast. We're being taught by the Fort Berthold what bonus and royalty is. It is incumbent up on you as an allottee to understand bonus, lease right, and royalty. I don't understand what it means to see the oil come up. I feel that at Standing Rock there are violations. We have been trying to put land into trust for 40 years. We are targeted because of who we are. Two employees of BIA are the only ones to have lands that have been put into trust. In the treaty we have met all provisions of residency and occupancy. Yet, we have 40,000 acres that they will not put into trust. It is time to challenge the government. If they will not put in trust we create our own trust according to the principles of international law so there are three parties. There was a Congressional hearing on surplus water on the Missouri River. On that front we are the senior rights holders on that last virgin river, the Missouri River. We don't understand surplus water to be sold when you have not come to my table to agree that we will sell. We own our spectrum under Sprint and we own all of the spectrum. The spectrum is ours, the water is ours, and the land is ours. 33 years of dialogue and debate at the international level to do with customary law. Those definitions and breakouts of customary law were created by Indian people. There has been a prohibition on customary law for 70 years. Thank you to the people in the underground who have preserved the languages, views, and practiced customary laws. In partnership with the ITC we would like to seek legislation to create a statute that creates trust with greater principles than are present today and then have been used in past and abused. It is incumbent on us to create customary law and put it on the books. The formula to budget for social impact assessment is not regarded in American law. That is the formula that you use to determine my social impact assessment in terms of what you have taken from me and put a dollar amount to that. That is not in American law. We struggle to create a new methodology for budgeting. Start paying the rent to the landlady.

Commissioner Zah: In a few words, what should the definition of trust responsibility be?

Ms. Young: It is a three-party system. There has to be a third party – not just BIA and Indian nations.

Allene Cottier, Indigenous World Association: I am an Oglala Sioux. Work has been going on since the 1960s to develop the UN Declaration on the Rights of Indigenous People. The people involved in this go beyond the American context and yet look how many times it has been referred to in this meeting. The Commission only has two years to get through what took us 24 years to get through. We need a definition of trust. So much of what has been presented here has to do with the management of money and systems. That really is not enough. That is like a detail what your life is about? You need to look at principles outside of the U.S. and relations between third world countries and dominant countries and the monies and laws the U.S. puts into those countries. The U.S. brings those people into our universities to build capacity to be governed. Trust to me, as an individual, means two things: we gave up too much of our life and culture in exchange for them protecting us and we gave up fighting and we

didn't have to. They haven't fulfilled the trust obligation no matter where you say it originates. They have not fulfilled that. They must repay but not through the court system or perceptions of the political way. Our own dysfunction is not our own fault. How do they enable us like they said they would? How do we build for our future? If we don't take that in our trust responsibility in terms of developing a notion of trust, we have failed. It gets down to semantics. In international law sovereignty means one thing, in contemporary law another, and in Indian Country another. There has been years of struggle to get a document that defined collective sovereignty. We utilize divide and conquer on our own lands. What does sovereignty mean? Give us access to education, technology, and protecting the right to do that. We live in a global society. If we want to develop we have to be able to operate outside our borders. The concept of nation in international law has other definitions. Nation is a common lifestyle, language, and culture. A nation state has specific borders with specific responsibilities to its citizens. Are we dual citizens? Citizens of the world? Citizens of nations? If we are citizens of nations, what about the disenfranchised who are not able to enroll in the tribe, not able to live without a job, and not able to provide for people on our own lands? What about the kids and how do we get them back? We need to build up our nations and the responsibility to our citizens. So much is shout and response to what they have done to us – it is defensive, not assertive. We have the opportunity to turn around. It is no longer just a response but an opportunity to make a difference because we are thinking of the future generations.

Trust Reform and Trust Models Panel - Jeanne Whiteing

Jeanne Whiteing, lawyer with Whiteing and Smith, spoke about tribal water rights issues. Thank you for giving me the opportunity for providing my perspective on non-monetary aspects. Thank you for redoing your schedule for allowing me to come today. I'm an attorney in private practice in Boulder. I have provided representation for tribes in protecting tribal water rights. I want to focus on Indian water rights issues. There are two issues to highlight. Conflicts of interest of the federal government in Indian water rights matters and waivers and releases part of all Indian water rights settlements. Tribes have significant quantities of water under the Winters Doctrine of 1908. Under Winters when reservations set aside sufficient water there was a priority date of establishment. Unlike state water rights tribal water rights are not lost by non-use. A significant component is future water rights. Water rights are reserved whether in the treaty, statute, or other document. They exist as matter of federal law, not state law. Water rights are assets and property held in trust by the U.S. They are subject to the trust responsibility of the U.S. The Winters Doctrine established foundational rights but did not define the purpose for which water can be claimed or the quantity required to fulfill the defined purposes. The right to water is firmly established but the exact amount is not necessarily known.

During this time non-Indian use was allowed to expand under state water rights without regard for Indian water rights. Subsidies were given through the BOR for water projects and there were no Indian water rights. Some developments have fully appropriated available water resources without regard to Indian water rights. The federal government has breached trust responsibility from 1908 forward. There are some exceptions but it has been a long period of time between the Winters Doctrine and the actual establishment of specific quantities for tribes. There have been only a handful of affirmative cases – most significant is the Arizona v. California case in 1963. Between 1908 and 1963 we have a few decrees of Indian water rights but almost nothing. In 1963, the U.S. intervened between the two states and did not bring the rights of tribes and other federal entities to the court. The quantification methodologies are based on agricultural purposes of the Colorado River reservations. It is based on the number of agricultural acres those tribes established at the time and for future purposes as well. That methodology

is known as the practicably irrigable acre (PIA) methodology developed in the courts. *AZ v. CA* is the most modern adjudication of Indian water rights. Up to that point Indian water rights largely ignored and largely unused. This allowed for significant non-Indian development.

A greater focus is brought in the 1970s and not necessarily in a good way. In 1976 the Supreme Court determined the U.S. could be brought to state court adjudication and Indian water rights can be determined. In 1983 *AZ v. San Carlos Apache Tribe* argued that McCarran waived U.S. immunity and that it does not waive immunity of tribes. McCarran doesn't waive immunity and that doesn't matter because with the U.S. as trustee that was enough to change Indian water rights in state court proceedings. The 1983 decision really was the turning point for many tribes from a litigation path to a settlement path. Since 1983, 27 Indian water rights settlements have been completed, most approved by Congress. The most recent in 2010 was the Crow, White Mountain Apache, Taos, and Aamodt adjudication (four pueblos). This illustrates the conflict of interest issue and the waiver and lease issue. Since 1983, there have been only two litigation decrees – Wind River and Mescalero Apache. There have also been a number of issues that have been litigated in relation to reservation purposes. Those decisions have also spurred settlements from other side. Those cases have been favorable to tribes. Beginning with *CA v. AZ* and in the aftermath of *AZ v. San Carlos Apache* I think that is one area where DOJ and DOI have played an important and significant role in protection of tribal non-monetary trust assets. The U.S. did make Indian water rights a priority in the DOJ and DOI. They were, and have been, an important partner with tribes in the litigation process.

Tribes and the U.S. have not always agreed and, in fact, there was a breach of trust suit brought in conjunction with the *CA v. AZ* because the cases were not brought forward when they should have been. This is one area in litigation where the U.S. has attempted to fulfill the trust responsibility to tribes. The same cannot be said with the advent of settlement and the relationship between tribes and state. The relationship has moved from one of trust to one of adversary. Since 1939 the U.S. has preferred settlement over litigation. In 1990 they published criteria and guidelines for the settlement process. The U.S. engages in settlement in federal negotiation teams. Various federal agencies in the DOI and other departments team together. That federal negotiation process is how they engage in the settlement process. That process has evolved into a very strange process. For decades they never took a position on settlement until the very end and most often it was not until a bill was introduced in Congress for approval. We have a process where the U.S. has been involved but at the very end raises their own concerns and issues. This essentially requires a whole new negotiation over the issues between tribes and the federal government. Many settlements take decades to resolve and are approved by state legislatures and other state parties and then the U.S. raises issues, as noted previously. The issues that are the most difficult to resolve most often trace back to U.S. failures or their actions that have brought about the conflicts between non-Indian development and tribal water rights. We have a situation where under the criteria and procedures the U.S. requires that the claims against them must be resolved in the context of the settlement. The federal contribution the U.S. is willing to make is tied directly to the resolution of those claims.

The criteria and procedures are the calculable legal exposure of the U.S. I refer back to the earlier comments that we have a government-to-government relationship based on claims. At that point it is a full blown adversarial relationship. In getting a settlement through Congress it is almost a requirement that you get administration support of the settlement and enter into the process with the DOI to resolve the issue and obtain the support to go to Congress. That is not always the case. For many years, tribes went to Congress with settlements. With a democratic administration and senate the requirement of support has become very critical. Getting settlement is both a legal and political process. Conflicting

claims of the U.S. have been allowed to enter into process. Part of process is resolving conflicting water rights issues between tribes and federal agencies. These are processes where the U.S. owns the water rights and have entered into negotiations with tribes. In some sense, the U.S. holds the cards in whether support is given or not. In some ways tribes are forced to compromise in ways they might more than otherwise. Due to the negotiating on claims the process of waivers and leases has become an exceedingly important issue. I looked at an early settlement from 1992 and compared it to waivers and releases in more recent cases, as well as some waivers and releases that some tribes have been asked to consider. The 1992 settlement had no waiver and release in the act. In the compact there is a tribal relinquishment of water claims. This is the kind of waiver we expect if there is settlement. As part of settlement all that is required. When I look at waivers and releases in the most recent White Mountain Apache case it covers anything you can think of in terms of water rights or water related claims against anyone. It is five pages. The other releases are not quite as extensive but close – Crow is three pages of waivers and releases. Some of things being required include a waiver of all claims against the U.S. and all agencies and employees, waiver of any asserted or could have been asserted claims, waiver of damages and injuries due to losses of water rights, etc. These waivers relate to negotiation. All claims related to monetary damages are related to litigation. With these settlements the U.S. is not fostering a trust relationship; it is developing a pure adversarial relationship between tribes and the U.S. in these settlements. Using these settlements the U.S. is wiping out liability in connection to water or water related claims. This is something that occurred gradually over time but it is exactly the position we are in now. Settlement is no longer different from litigation. It seems to me the process has been hijacked from protection and establishment to comprehensive waivers of claims against the U.S.

Questions from the Commisison

Commissioner Hall: Thank you for your protection and knowledge on water rights. Our tribe is starting to formulate a water team. It is a troublesome situation and I agree with you that it has changed from a principle of protection to one of adversary. Do you have any language for the Commission to consider in terms of a recommendation regarding this principle?

Ms. Whiteing: I'm not sure I could capture a recommendation in one principle or something like that. I think what we need to reexamine is the role DOI has as federal trustee and the responsibility it purports to exercise in this manner and how this plays out in the context of settlement. I understand the interest in wanting to ensure no future claims. What I don't understand is the interest of the waiver of claims when it is the responsibility of the U.S. to begin with. The federal government has a responsibility to provide clean drinking water to tribes. This goes to the criteria and procedures for settlements and requiring the resolution of water related claims. This ties the federal contribution to the waiver of legal claims. Part of what has occurred is that in some of the early settlement Congress funded trust funds for economic development and other things like that. The process then moved to one of designating funds tied to a specific project. Congress will no longer approve trust funds because they want to specify what the funds will be used for. They want to fund specific water and water related projects. That is why in the Crow settlement there are specific projects. This is one of the problems with the current process, the funds are tied to a specific project whether you want it or not. Preference at this point is projects like municipal water systems and irrigations projects.

Commissioner Zah: On a reservation water rights are owned by a tribe and tribal members who own allotments. Yet when cases are settled the water rights go in the name of the tribe in the settlement and not allottees. Does BIA have trust responsibility to protect land owners in settlement and should allottees retain water rights?

Ms. Whiteing: This is a sensitive topic between tribes and allottees. Under the General Allotment Act allottees have the right to an equitable share of water rights. The way that some courts have interpreted that is that the water right is the right of the tribe. The allottees have the right to use a portion of it. Tribes have an obligation to ensure allottees are provided that share. The U.S. does have trust responsibility to the allottee and it is acknowledged in the settlement process.

Commissioner Anderson: A few people testified about USACE projects and their plans to charge tribal members for the use of water. There is no quantification of these water rights. There is a U.S. obligation to consult with tribes and not create an administrative divide between Indian and non-Indian projects. Should DOI weigh in and when?

Ms. Whiteing: DOI should be weighing in on those issues. Those issues directly impact Indian water rights. This is more reason to ensure rights are protected. The fact that there are unquantified water rights has set principle to not use water in some cases.

Commission Working Session to Continue Development of Preliminary Recommendations

Chair Sharp noted that the Commission started this discussion yesterday and hopefully with the additional information from the panels and the summary of comments since mid-August, the Commission can continue discussing these recommendations. The Commission should determine whether recommendations, independent of the management consultant review, should be developed.

Sarah Palmer, USIECR, shared that based on discussion yesterday the Commission considers the draft trust responsibility statement as a foundational document. There was a lot of rich discussion about how to make the right description. Building from the statement there is the idea of policy statements developed by the Commission; this includes the conflict of interest/code of conduct. The Commission can consider administrative recommendations for DOI. Some considerations for the Commission include the fundamental concepts that build the trust responsibility statement, the conflict of interest protocols, the administrative recommendations, and longer term needs that need to be addressed. How does the Commission want to move forward?

Chair Sharp suggested reviewing the letter from the Deputy Secretary and mapping out the next steps from the requests in the letter. She noted it is also important to provide a singular definition for trust and trust responsibility. There is also need to think of trust in terms of other agencies. This rises about DOI and requires legislative action. This goes beyond the scope of the Commission.

Commissioner Anderson noted that there is a lot that needs to go on simultaneously. The Commission can continuously refine the foundational documents. It is clear that appraisals are an important aspect that may need to be addressed early on due to the needs that will stem from the *Cobell* settlement.

Commissioner Hall commented that there is need for local control and that contracting doesn't have to be a function of BIA. There is potential conflict and a tight timeline. The Commission could consider policy statements on liability and settlement issues.

Commissioner Zah recognized that the Commission is talking about the DOI. He acknowledged that DOI interacts with so many federal agencies and some agencies are diametrically opposed to ideas coming from different agencies and there has to be coordination of efforts among agencies. Agencies have to be

in concert with one another and headed in the same direction - like the USDA model that involves other agencies.

Ms. Palmer noted that the Commission had heard over the last few days about accountability in different ways at different levels – what does accountability look like? What does it mean? It has been suggested it means being on the ground and being timely and responsive in processes.

Chair Sharp commented that accountability is needed to ensure trust commitments are upheld; that if there is a conflict between tribal interest and another entity interest, the U.S. upholds the trust interests.

Commissioner Hall asked what if there is a lack of accountability. There is a need for more staffing at the local level. Fulfilling trust responsibility will require more staffing. What happens if someone is not doing their job? What happens? Are these folks evaluated? That is a stovepipe. The management personnel for the Great Plains region is in Oklahoma. Not having someone at the local level creates a lack of accountability.

DFO Marsters noted that to hold people accountable there needs to be enforcement.

Chair Sharp commented that consideration needs to be given not only to personnel not discharging duty but the Commission heard there is need to remedy situations when the trust obligation is not fulfilled that do not require litigation. This could be an opportunity for third-party independent arbitration. If there is a situation where an individual employee may not be performing, litigation may not be the answer.

Commissioner Hall noted the issues around allottees and tribes not having access to records. They are put at a disadvantage by not having information on oil reserves. If somebody else has that data then you are at a disadvantage when negotiating.

The Commission agreed to put the U.N. Declaration on the Rights of Indigenous Peoples as an appendix to the trust responsibility statement.

Commissioner Anderson stated the importance of reinforcing that rights to property are not taken away without due process and land returned where possible.

Chair Sharp noted the role and value of customary law is important. It is up to us as tribal leaders to develop customary law but it is not mentioned that agencies are responsible for implementing customary law. There is a great deal of legal weight and value to customary law but no point of entry for the standard to be brought into functions. How can we create points of entry? The Commission has heard from the public that local control is important. Tribal self-determination is recognized and decision making has place in overall agency responsibility.

Commissioner Hall stressed that tribes have a bigger role. Mr. Gonzalez talked about it in appraisals – tribes should be doing their and considering this when making estimated values. There should be a great role for tribes in trust responsibility. Commissioner Anderson noted this had been discussed by Ross Swimmer at the first Commission meeting as well.

The Commission discussed the subcommittees and agreed that they would consider how to address these topics of consideration moving forward.

Chair Sharp noted that the Commission opened the meeting with a visit to Fort Berthold and would end the meeting with a message from the Great Plains Tribal Chairman's Association.

Public Comment

Chairman Tex Hall of the Great Plains Tribal Chairman's Association reviewed the written statement submitted to the Commission. The full statement may be found on the Commission website: <http://www.doi.gov/cobell/commission/index.cfm>

I would like to publically thank Gay Kingman for putting all this into one document. The Great Plains Region includes 16 tribes with 10 million acres of trust land. 40% of all trust allotments occur in the Great Plains Region. Treaties are really important to these tribes. I would like to see us incorporate into the trust responsibility statement the third paragraph of the letter from the Oglala Lakota. Chairman Hall then read the statement.

Administrative Wrap-Up

The next administrative call of the Commission will be Monday, October 1, 2012. The Commission will hold a public webinar on Wednesday, November 7. The Commission will hold its next public meeting December 6 and 7 in Seattle, Washington.

The Commission discussed the topics and speakers for the December meeting.

Commissioner Zah closed the meeting with a final thought. He shared that the Commission has been talking about interim decisions. Whatever that is, I'm not promoting one over another, but whatever it is has to be a good one otherwise the perception is that we are just rehashing things over and over. It has to be something that's effective. Something that will make people believe that makes people think this is something better.

Chair Sharp adjourned the meeting.

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)
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)
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
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

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 3 Attendees

Name	Affiliation	Thursday September 13	Friday September 14
Commission			
Robert Anderson	Commissioner	X	X
Tex Hall	Commissioner	X	X
Stacy Leeds	Commissioner	X	
Lizzie Marsters	DFO	X	X
Fawn Sharp	Chair	X	X
Peterson Zah	Commissioner	X	X
Commission Support Staff			
James Ferguson	DOI Solicitor	X	X
Mark Davis	OST	X	X
Regina Gilbert	RACA	X	X
Sarah Palmer	USIECR Facilitator	X	X
Bridget Radcliff	USIECR Facilitator	X	X
Bryan Rice	BIA	X	X
Helen Riggs	OST	X	X
Annette Romero	RACA	X	X
Michele Singer	OST	X	X
Tiffany Taylor	BIA	X	X
Public Attendees			
A. Gay Kingman	Great Plains Tribal Chairman's Association	X	X
Allene Cottier	Indigenous World Association	X	X
Austin Gillette	OST	X	
Ben Harrison	Standing Rock Sioux	X	
Beverly Grey Bull Huber	Crow Nation Enrolled Allottee Association	X	
Bill Patrie	Common Enterprise Development Corporation		X
Charles Murphy	Standing Rock Sioux	X	
Chris Lindblad	Standing Rock Sioux	X	X
Cris Stainbrook	Indian Land Tenure Foundation	X	X
Dana Yellow Fat	Standing Rock Sioux	X	
David Gipp	UTTC	X	X
Delvin Rabbit Head, Sr	Three Affiliated Tribes	X	
Denise Mesteth	OST	X	X
Donna Salomon	Oglala Sioux	X	X
Donovan Archambault	Fort Belknap Tribes	X	X
Ed Hall			X
Everett J. Iron Eyes, Sr	Standing Rock Sioux	X	
Frank White Bull	Standing Rock Sioux	X	

Helen Sanders	Indian Land Working Group	X	X
James Serfoss	CNI-Aberdeen	X	X
Jamie Thorton	Three Affiliated Tribes		X
Janet Thomas	UTTC	X	X
Janie Hipp	USDA	X	X
Jeff Hunt	BIA	X	X
Jeremy Brave-Heart	Hobbs Strauss Dean and Walker, LLP	X	X
Jessica Beheler	UTTC	X	
Jim Geffre	BIA	X	X
John Yellow Bird Steele	Oglala Sioux	X	
Karen Rabbithead	Three Affiliated Tribes		X
Katherine Martinez	ONRR	X	X
Kitcki Carroll	USET	X	X
Loren Lewis			X
Lydale Yazzie	UTTC		X
Mario Gonzalez	Oglala Sioux Tribe		X
Melvin Burch	OST	X	X
Merle F. Botone	State of North Dakota	X	X
Mike Faith	Standing Rock Sioux	X	
Phil Baird	UTTC		X
Philip Good Crow	Oglala Sioux	X	
Phyllis Howard	State of North Dakota	X	
Phyllis Young	Standing Rock Sioux	X	X
Roger Yankton, Sr	Spirit Lake		X
Scott Sucher		X	X
Sharon Two Bears	Standing Rock Sioux	X	X
Susan White Shirt		X	
Thomas W. Fredericks	Fredericks Peebles & Morgan, LLP	X	X
Tom Wells	BIA	X	X
Wilbur Wilkinson	Spotted Tail & Associates	X	X

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

- Agenda
- June Meeting Summary
- August Webinar Summary
- Draft Trust Responsibility Statement
- Draft Conflict of Interest Protocols
- Priorities Letter from the Deputy Secretary Hayes
- Great Plains Tribal Chairman's Association Resolution and statements
- Trust Models Chart
- Commission Outreach Letter Summary
- Speaker Biographies
- Youth Outreach Event Flier

Appendix D. Summary of Commission Meeting Action Items

TASKS	LEADS	COMPLETE BY
Trust responsibility statement <ul style="list-style-type: none"> Revise based on comments at Bismarck meeting and circulate to Commissioners Commissioner feedback on subcmt call. 	Commissioner Anderson	October xx October 16
Revise and broaden draft conflict of interest protocol and circulate to Commissioners. <ul style="list-style-type: none"> Protocols need to apply short of lawsuits, legal proceedings Add subcat (d) to I-A Add a section to address statutory or regulatory conflicts (Comm Anderson will add in Federal Trust statement) with consideration of the interest of the tribe or individual Commissioner feedback on subcmt call.	Commissioner Leeds	October xx October 16
Prepare outreach letter to tribes for feedback about protocols and federal trust statement.	Sarah – draft, Commission, DOI review	October 11
Develop standards of conduct (see subcmt tasks). Share on Oct 16 subcommittee call.	Commissioner Leeds?	October 16
Review letter from DOI. Assign to Commissioners to take next steps through subcmt.	Commission, DOI	Oct 1 and 16
Review compilation of comments received as of mid-August. What additional discussion should take place?	Commission, DOI	Now November 7 webinar
Prepare draft meeting summary, circulate to Commission and DOI	Bridget	October 12
Commission and DOI comments to Bridget	Commissioners and DOI	October 26
Other items		
Management consultant selection process – discuss with Commission and updates	Lizzie, Mark	October 1
November Webinar Prep		

TASKS	LEADS	COMPLETE BY
Discuss proposed agenda topics	Commissioners, DOI	October 1 call
Draft agenda, circulate for Commission review	Sarah,	October 5
Commission review, Chair and DFO sign-off	Commission; DOI;	October 9
Prepare FR notice	Regina	October 9-10
<i>December Meeting Preparations</i>		
Reach out to points of contact identified by Chair Sharp for youth outreach.	Pat Gerard, Helen Riggs	October/November
Planning for December meeting A. Prepare list of agenda topics B. Commission and DFO review, comment C. Revise draft agenda, confirm speakers etc	A. Sarah B. Commissioners, DFO C. Lizzie, Chair Sharp, Sarah	Oct 1 call Oct 1 call Oct 19
Secure meeting space, prepare FR notice	Regina	Underway

Appendix E. 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
- 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
- 16) Karen Rabbithead
- 17) Navajo Nation
- 18) Oglala Lakota Nation

Appendix F. Summary from the Commission Outreach Session to the Three Affiliated Tribes - Wednesday, September 12, 2012

The Commission participated in an outreach session at the Three Affiliated Tribes hosted by Commissioner Hall. The Commission had the opportunity to tour and hear from the staff at Fort Berthold Agency office regarding the processes they undertake to fulfill the trust responsibility. The Commission then toured an oil well and learned about the process of harvesting the oil. Finally, the Commission met with the Council of the Three Affiliated Tribes and heard from individuals of the tribe regarding the issues they are facing with the development of natural resources on their lands.

Chairman Tex Hall welcomed Commission Chair Fawn Sharp, Commissioner Peterson Zah, Commission Designated Federal Officer Lizzie Marsters, and members of the public to the meeting. Chairman Hall reviewed the agenda and noted that this meeting was an opportunity to hear the Tribal perspectives on trust responsibility.

Commission Chair Fawn Sharp gave an introduction of the Commission and thanked the Chairman and the Tribe for hosting and the hospitality shown the Commission. Chair Sharp noted that Commissioners Robert Anderson and Stacey Leeds were unable to attend the session with the Tribe and that they would be participating in the public meeting on September 13 and 14.

Commissioner Zah introduced himself as the past Chairman and President of the Navajo Nation. He currently works at ASU as Director of American Indian Programs. Dr. Zah thanked the Tribe for hosting the Commission and noted that the Tribe has huge development on their lands and that the experience that is happening on the land is great.

Chairman Hall opened the meeting and noted that the council members appreciated having the Indian Trust Commission see first-hand the staff and agencies involved in processes impacting the lands. He shared that the group toured the agency offices and reviewed the leases, right-away, and other processes involved with the natural resources development and trust management. The group also toured a well rig site from Petro-Hunt.

Chairman Hall shared with the Commission a statement drafted by the Three Affiliated Tribes. He noted that in the first paragraph the Tribe wanted to lay out the magnitude of the Bakken development. [The Tribe] now see this is a big development and this development has made the Tribe the number one oil producing Tribal entity in the U.S. Chairman Hall noted that with this type of boom there is a consequence. There has been damage to roads and the environment. The Tribe has tried to address this by developing an environmental code for intentional and accidental dumping and for traffic safety. There is a greater need now as the Tribe is only about 25% through development of the oil resource. There will continue to be need for regulation and the Tribe will need to rely on federal partnerships to continue development; one entity cannot get this done alone. The Chairman commented that it takes a team effort and everyone working hard to get this done, to work in partnership.

Currently there are 49 steps and over 200 days to get a permit [from the federal government] to drill; in contrast, the State of North Dakota this permit process is 10 days. This applies to all minerals development, including coal, sand, and gas. The Tribe has been blessed with a lot of minerals. There is great need for gravel to crush and sand because workers need gravel, sand, and clay to bind the road materials. There are currently 507 wells in production and the Tribe is servicing water to these locations

because the number of water permits available does not meet the needs of the development. There is now a moratorium on water permits and many permits have expired. The Tribal water office is now in the business of trying to provide water and install water meters and depots on location at these oil wells. The need is greatest at Shell Creek and Mandaree.

The U.S. Army Corps of Engineers (USACE) is trying to consult to charge the Tribe for their water from Lake Sacagawea. The USACE is not an owner, but a manager, and cannot dictate to the owner how much will be charged. Anything within the Tribal lands should be under Tribal water jurisdiction. The ownership is there whether it is quantified or not. Three Affiliated is assembling a Tribal team to quantify water rights. The river bed of the river is in question. The Tribe believes they own the riverbed and there is a 1936 Office of the Solicitor opinion that states this. The Tribe is undergoing negotiations with USACE and DOI to settle ownership. This is not a fee-to-trust matter as it never left trust status. This is strictly a managerial function that was never recorded. The Tribe is concerned that the State will give water leases below the river bed.

Chairman Hall continued to review the statement and noted that page six continues the discussion regarding protecting the water rights reserved for the Mandan, Hidatsa and Arikara (MHA) nation. The Chairman noted that water rights are a trust asset or resource and that the Tribe is aware the consultation is a lengthy process. There is an infamous picture that shows Chairman Gillette Grime at the installation of the dam and the flooding of the homelands. We don't know how long Assistant Secretary Darcy (Army) will take in terms of making a decision on the water surplus but the Tribe needs access to the water now. The Bureau of Reclamation (BOR) has 1.2 million acre feet in their intakes and they don't use all of it so the Tribe, under BOR trust responsibility, can use this for purposes of the Tribe or they can get it through USACE. Without a response from the federal agencies it puts more traffic on roads because the permits for water have expired.

Chairman Hall commented that the time has come for the Executive Branch to be consistent with the trust obligation. Tribes need to exercise the right to protect Tribal sovereignty. Three Affiliated Tribes hope that with the Commission, the trust responsibility will be strengthened.

Fred Fox, Director of Energy and Oil and Gas Office for Three Affiliated Tribes, presented on the issue of royalties monitoring for the Tribe. One of the responsibilities that the Energy and Oil and Gas Office provide is monitoring for leasing, permitting, production, and federal regulations pertaining to trust minerals. They also monitor compliance to oil and gas spill response. Another important aspect for the Tribes is monitoring royalties for production. Steve Gundersen is a consultant hired by the Tribe to reconcile Tribal royalties and monitor production and reconcile both of them. The Tribe has found the reporting from the operators to the federal agencies is not as consistent as it should be. Mr. Fox provided a sample of the Tribal reconciliation report that they receive from their consultant, Tallsalt Advisors.

Steve Gundersen, Tallsalt Advisors, provided the Commission an overview of the Three Affiliated Tribes royalties. Tallsalt is an independent firm specializing in investment advice and consulting. Tallsalt works through the year auditing royalties. It is easy to center on contractual rights and trust responsibilities of the federal government. We work to ensure that trust responsibility is followed. The first Bakken production began in 2008. Mr. Gundersen noted that this is now the time, early in the process, to work in a collaborative manner to make sure processes are efficient and effective. The example Mr. Gundersen provided the Commission was a limited scope review (not a full audit) that is nimble and quick and focuses on areas of high risk; the overall findings include:

- 1) Operators do not follow federal reporting regulations and guidelines for a meaningful number of wells and/or leases.
- 2) The limitations in the ONRR reporting system limit the ability of the Tribe (and ONRR) to reconcile the Tribe's production and royalty information on a timely basis. (This is primarily an IT systems issue.)
- 3) Federal agencies appear to be understaffed to verify and enforce compliance with reporting regulations and guidelines.

Mr. Gundersen then described some of the issues associated with each of the three overall findings categories and provided some suggestions on improvements. Some of the comments included:

- a) The ONRR reporting system gets information on a well by well basis rather than by a lease basis.
- b) The system architecture structure does not allow certain data to be input that would assist with auditing.
- c) Bakken data pushes the capability of the existing ONRR reporting processes and systems beyond its limit. When information is reported by lease there are hundreds of wells reporting and there is no way to do reconciliation. There are a large number of wells in communitization agreements.
 - i. Ideal solution is to reconstruct the database structure to include API well number filed on Form 2014 and lease number on Form 4054 – this would allow manual cross-reference. This would increase the burden on well operators but this is tracked already because they use it for tax calculations.
- d) The National Indian Oil & Gas Evaluation & Management System (NIOGEMS) not kept up to date which is important for Tribe to keep up on information.

Mark Fox, Tax Director for Three Affiliated Tribes, provided an overview of the tax structure for the Tribe. Tax revenue is the primary source of revenue for the Tribe. \$80 million in tax revenues is anticipated in 2012. The Tribe has a motor fuels tax agreement with the State of North Dakota. This is not a significant source of revenue but it has grown exponentially. Currently the tax at the pumps is split 70/30 (tribe/state). The crucial area is oil and gas on Fort Berthold.

The Tribe has an agreement with the State that is not real favorable to the Tribe but was passed and moved forward. In that the Tribe has a split of production taxes and extraction taxes. The Tribe is getting \$80 million in drilling fees, production, and extraction. In 2008 the tax was 1.2% for the Tribe and 1.6% for the State, approximately \$6 or \$7 million dollars. The Tribe is now looking at a \$200 million tax base. The Tribe has an unfortunate circumstance where the state is getting the lion share of tax revenue. 60% of the tax base from Tribal lands goes to the State. The job of the Tribal Tax Office is to ensure compliance with the agreement between the Tribe and the State. The Office reconciles every well and ensures the Tribe gets the correct tax from the State.

The Tribe relies almost primarily on State data – they keep pretty accurate dollars – and the State wants the splits. When trust acreage is under production, it is split 50/50 between the Tribe and the State. On extraction the Tribe gets nothing from non-Tribal fee lands; 80/20 (tribe/state) on all other lands. The Tribe uses this information to reconcile. ONRR could help promote more comprehensive and accurate systems that would enable the Tribe to ensure the proper tax revenue is obtained. If the Tribe has a difference with the State, the Tribe would like to have back up data to demonstrate the differences. Under the agreement when we drill the well and the majority of land is trust, there is a \$100,000 drilling fee. Historically there are 400 wells under this agreement. If there is a disagreement over the majority land being trust or not, the BIA is the final determiner. If the Commission can propose ways to improve this process that would be beneficial. We are talking billions in the next 20-30 years that the Tribe can

account for accurately. Minor oversights can cost the Tribe millions of dollars. In the last 6 months the Tribe has reconciled close to \$4 million that the Tribe was owed.

Tom Wells and Renita Howling Wolf, BIA, reviewed a map of lands and minerals. Reservation map is mineral acres – yellow is fee acreage, light green is allotted; purple/pink is the minerals owned by Tribes. There are 436,000 fee acres, 463,000 allotted acres, and 190,000 Tribal mineral acres. 507,000 of those trust acres are under lease. 281,000 are receiving oil and gas royalties. We also administer leases for farm pasture and grazing units. 327 farm pasture leases – 101,000 acres of farm and pasture land. 93 range units that encompass Fort Berthold and 173,000 acres are in leases. This provides \$550,000 in farming lease revenue and \$432,000 in grazing lease revenue.

These activities are part of the agency mission. Probate is a branch of realty. 60 Tribal members deceased this year; 16 of those estates have not completed the probate process and been scheduled for hearing. Main focus for the agency is oil and gas. There are seven staff people that address real estate. 6 of them work primarily with oil and gas. There are also staffs that work in acquisitions and disposal and farm pasture. One thing to stress is that BIA couldn't get this work accomplished without staff going beyond the 40 hour work week. BIA has to spend a lot of overtime to meet needs of industry for permits processing. There has been regional staff support. There has also been staff from other agencies to pitch in and help. There has been a big effort on the federal side to accomplish all that has been done.

The speakers shared a sample of preliminary communization agreement. This process was started at Fort Berthold and allows ONRR to set up production for leases in spacing areas. It indicates how the leases will share the royalties. This is important because if the agreements are not processed they royalties are hung up. This communization process has not been done at other reservations though some are considering this method to disburse in a more timely way. The whole process (49 steps total) must be completed before the drill hits the ground. BIA must also inspect for compliance – environmental staff fulfills many of these duties. This year 3,216 onsite inspections were completed. On a weekly basis compliance averages 50-75 inspections. As trustee, BIA issues notices of non-compliance. The environmental section instrumental in this area to find discrepancies that must be addressed via a letter to well operators. BIA establishes bond values and collects as needed. There is a requirement to hold the lease based on regulations. Compliance must be in line with the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), American Indian Religious Freedom Act (AIRFA), and the Endangered Species Act (ESA). Requirements met through Aberdeen, SD office and permits are needed to conduct assessments; an assessment is required before approval of any action.

The lease process was then reviewed. In the advertised sale, BIA, BLM, and the Office of Indian Energy determine what would be most beneficial for Tribe and the allottees in regard to bonus amounts. Rental rates range from 18%-21% on allotted lands and there are some that the Tribe has agreed to at 22.5%. BIA feels the rates are very decent and are slowly getting increased. There was a question from the audience regarding why there was not a standard for royalty rates for allottees and why the BIA was not assisting in the negotiations for allottee leases. The speakers noted that in 2007, the royalty rate was 16 and 2/3%. In 2007, 18% seemed to be standard. In 2008 it still wasn't proven that Bakken was here. The BIA has slowly been increasing the royalty rate. Currently a 20% rate is being considered standard. This is the rate that BIA negotiates with the oil company and the BIA tries to include mineral owners when possible.

Earl Silk, BIA Superintendent at Fort Berthold, commented on the question from the audience. The BIA knows when leases are expiring and so does the producer; the producers are knocking on the doors of

the land owners. BIA often becomes aware of this after an agreement has already been signed. Sometimes there are multiple owners and it is difficult to get them to agree. Land owners need the money; the BIA is aware of this and is trying to do everything possible to assist them. The BIA can only give advice and encourage the land owner to slow the negotiation process down. An often time the money is put on the table and the land owner takes it.

There was a final comment from the audience. BIA is talking to the oil companies and doing the best you can. Relative to your relationship with me and others on the reservation, there is a critical area when you sign up. Now we know better. We are the guys who need help. In that respect if I bring this form to you I will cross out the percentage and put in a higher rate. We read the news and get information from people – we need to hear about these things. The help I need is from yourself and the agency people.

Donna Crows Fly Morgan addressed the Commission. All the oil companies and other places are getting our land information and everything. I had the opportunity to go with Chairman Hall almost 8 years ago and addressed the Commission on the one-stop-shop and this has not materialized. Some of the employees working with BLM for many years went into the oil company. We are not aware of these things and we have to start informing our people. In 1970, I briefly worked with the realty office and we manually did everything. Then we had to have 100% signature for all transactions and today it is 51% and there is still difficulty. Who is responsible? There are many problems and we have to face all of this. We are in a dilemma here. Some of the forms are obsolete. Years ago when working with Bureau we would get directives from Washington. Those forms used to be updated and that was our bible. Are those updated? All those changes used to go in there. The company referred to the CFR and I said times have changed. Are those kept up, those BIA manuals? All those changes should be in those BIA manuals. Those are our instructions that we had to follow and we abided by those laws and that was the manual. I would like to see the updates. A lot of us have complained about the right-of-way and after I updated this over several months, a committee overruled me. I was concerned about those directives. 49 steps – that hasn't changed today. Still hear from allottees and something needs to be done. We need to move forward now.

Karen Rabbit Head addressed the Commission. I am an enrolled member of Three Affiliated Tribes, a land and mineral owner, and the Chairman's Chief of Staff. Trust responsibility, fiduciary duty, trustee, are only words and meaningless to the BIA officials on the Fort Berthold Indian Reservation. Conflicts of interest run rampant. BIA officials are mineral/surface owners who put their interests ahead of the Indian People they are here to serve. The BIA Energy Office's "one stop shop" has abrogated their responsibilities to the Indian people and is a disaster and has become nothing more than an advocacy office for oil companies. The issues are many and all to the detriment of Indian people. The issues include:

- Elder abuse and the IIM accounts
- Allowing oil companies to draft letters for BIA to sign
- Allowing oil companies to mortgage Indian trust land – without consent or benefit to Indian people (referring to IMDAs)
- Approving lease assignments without Indian consent
- Allowing communization agreements to increase from 320-640-1280 without drill commitment resulting in land being held by production without further development

There needs to be an advocacy office for complaints. Oil companies have made billions at the detriment of the Indian people. We were given no choice, nothing else was happening and we have lots of concerns.

Pete Hill, President of the Fort Berthold Allottee Land and Mineral Association (FBALMOA) addressed the Commission. The FBALMOA was formed in the summer of 2008 by Chairman Tex Hall and founding other Tribal members. Our Association traveled to Washington, DC and requested the one-stop-shop. Allottees have a 49 step process from lease to production of a well versus non-natives with a 4-step process of the reservation. FBALMOA promotes and protects the value of our land as we felt the Tribe and the Fort Berthold agency and oil companies were not. As a result of FBALMOA we obtained the highest leases for minerals at \$1,000 an acre and 21% royalty when the Tribe was only getting \$50 to \$100 per acre and 18% royalty. We held numerous meetings in Mandaree where our office is located, right in the heart of the Bakken where 2.3 of the oil wells will be produced. Of course this also is where the greatest oil impact will be including damage to our roads, dust, oil spills, etc. Many allottees were frustrated with the Fort Berthold BIA. The agency had inadequate responses and they did not provide adequate answers to us, the allottees. The Fort Berthold agency was signing off on leases for allottees at \$100 an acre and not seeking or demanding higher paid leases, or at least fair market value. The FBALMOA also heard from its members that oil companies and their subcontractors were dumping hazardous materials on allottee and tribal lands and again our local Fort Berthold agency did nothing. However, we are very grateful that the Hall Administration passed an environmental code that fines \$1,000,000 for the third offense on intentionally dumping on allottee and Tribal lands.

The members of the public then had an opportunity to ask questions of the federal agency representatives present.

Audience: The whole communization agreement (CA) situation. I have had elders that are concerned about how CAs are being applied. We do not want to diminish the value of our own resources. The oil is under my land and shouldn't be split with others. The notice requirements – everybody agrees to notice after the fact. They are required to tell about the CA and that is no good because we would like to have an opportunity to respond and ask for a reject if there are concerns. What are you doing to help counter this? When you have CAs about to be applied, it's about money and the bottom line. We have what appears to be a 6 month to year lease that is going to expire and become involved as held by production status, leaving no negotiation power. We don't have to do anything with that because we are now part of a CA. This is affecting the ability as individuals to maximize the value of our resources. The agency needs to explain things before you sign off the CA.

Earl Silk: I appreciate the concerns with the CA but when you have multiple owners on the lateral you have to do the best you can. I own property too. When you have 458 on the tract, how do you segregate? We can't. I'm not unique, it's like this in many cases and mineral owners are abundant. There are very few leases where there is one owner getting everything.

Audience: Maybe there are certain situations where there are red flags and that require better diligence.

Commissioner Zah: Going back to the fair market value for commodities. When we were renegotiating the lease on our [Navajo Nation] coal we were told that we have to start with 6.25% and that all federal lands are leasing and contracting for 12.5%. The federal government told us you should negotiate X%. The company said to negotiate higher. The Supreme Court said that Navajo is wrong. Three Affiliated Tribes is setting precedence for all other Tribes and needs to consider that. If they [oil companies] convince you to enter at lower prices, that is setting precedence for others.

Audience: CAs. We were hurt by that pretty bad and stand to lose a number of acres. They want to change these things and wait at least a year.

Jeff Hunt, BIA Petroleum Engineer: We have been working with Kodiak, BLM, and Twin Buttes. We won't go ahead with the CA and we have decided to stay with the unit agreement as is right now and make the system work more efficiently. Kodiak not drilling enough wells, they need to drill more. They have not done a good job of paying in a timely manner and we have had meetings with BLM and Kodiak to work on a solution – expect royalties on this to almost double in this one instance.

Audience: Would like to address the ONRR IT issues and the mapping issues with forms being different.

Kathy Martinez, ONRR Senior Staff Accountant: We went through an update 10 years ago. There are a number of conversations and the agency is doing analysis so we are taking a look to review findings. Not production reporting expert so I can't speak to that. I'm having a difficult time understanding how our audit process has been able to use the data obtained from the producers if there is that much difficulty in analyzing. We are doing field audits right now. Audits take time and it will be at least 3 years before findings will come out. It is moving way beyond what is on the system – it is looking at the source documents and comparing that to what is on the system. There is an in depth analysis of valuation as well.

Chair Sharp: Part of the role and function of the Commission is to evaluate the trust function of the Department of the Interior. I would like an initial reaction from those on the front line. What would you recommend? We are in the process of scoping out a scope of work for a management consultant and if you could conduct an overall evaluation of trust management functions, what would you consider?

Superintendent Silk: Look at the 49 steps driven by regulations. North Dakota issues permits in 10 days. The federal government takes 200 days. There needs to be a serious examination of regulation to see what has been changed.

Jeff Hunt: You saw the size of the staff trying to pass through this amount of work. Think about what could be done to streamline and decrease the amount things that need to be given an environmental assessment (EA). Streamlining occurs by environmental staff being in the field and decreasing the number of items that must be reviewed through EA and NEPA.

Austin Gillette, OST Fiduciary Trust Officer: Many agencies in DOI maintain trust responsibility. In our instance we have a federal partner's quarterly meeting that addresses issues of oil development. Come together to express concerns and try to shorten steps via regulations that may have been overlooked. Consider something along that line nationwide, not just Ft. Berthold.

Audience: I thought it was important for you to learn about our history from us. I have prepared for you the history of the reservation. It is the relationship with the Tribe and individual that is equal.

Jamie Connell, BLM Montana State Director: There is a group of regional managers from federal agencies that meets to focus on the Bakken and the issues we face. Some of the things we have come up with is the ability to recruit and retain employees. One of those is tied to per diem rate. We have to bring in teams to help with work and now they can pay for hotel rates with the increase in per diem. The living pay in this area should be higher for federal employees to be competitive with private industry. The BLM is also working on housing issues and building partnership with Tribes. The BLM has a pilot office in Miles City (Energy Policy Act of 2005) that doesn't apply to the ND area. It deserves some

consideration whether that type of office is appropriate here or not, or if the Miles City office can work this side of the ND border.

Audience: Governments are supposed to regulate by CFR 25. How we can relieve tensions between roads and what's happening to us. What constitutes an emergency or disaster and/or external forces – that is the current situation. If you have any strings to pull take that up the ladder.

Audience: When wells being drilled into minerals, owners are not notified. Is there a way to make the companies notify the owners? Unitization in Twin Buttes – many negatives – as it is only benefitting certain individuals right outside the drilling area. If they were in a CA they would get income and if in a unitization they don't get income. There are draw backs in unitization and you need to notify people of the negative effects.

Jeff Hunt: We are consolidating units in a quicker fashion and using a broader grid than we have in the past. It was 10 acres and is now 40 acres. We have improved what we did in the past.

Chairman Hall thanked the Commission for visiting Three Affiliated Tribes and Fort Berthold Agency.

Appendix G. Summary from Evening Youth Outreach Event – Thursday, September 13, 2012

Thursday, September 13, 2012

Evening Session – Youth Outreach Event
United Tribes Technical College
Wellness Center—Healing Room
3315 University Dr., Bismarck ND

The Commission held an evening reception at the United Tribes Technical College to meet with local youth and provide an opportunity for public comment regarding youth outreach.

Austin Gillette opened the meeting with an invocation.

Dr. David Gipp began the meeting and asked for introductions from the attendees.

Dr. David Gipp is the Executive Director and President of United Tribes Technical College (UTTC) and has been for 36 years. The College was founded in the late '60s. The UTTC campus is an old military fort that was abandoned in the mid-'60s. It was a job corps camp and a Peace Corps camp prior to becoming a college. It became a community college in 1969 and offered trainings that year. The average education of tribal leaders at the time was of the 8th grade level. They had good traditional knowledge and foresight. They knew that defending rights of Indian people would take a place like to provide training and education. UTTC now has three four-year degree programs. Six tribal colleges were established in the early '70s and now there are 33,000 full time and 68,000 part-time students across the nation. There is a UTTC Board that has representatives from five different tribes and the Board meets every other month to discuss policy. Welcome.

Chair Sharp expressed her thanks for those in attendance. It is impressive to come to a college like this and see a room of young people like yourselves. You are looking forward to the future, not knowing what it might hold, and are committed to serving your tribal community and nations. To think you are in that place now. I want to express gratitude for being able to have this conversation. Ultimately the Commission defined youth as a key audience. It is going to be your generation that continues to build for future generations on the work of the Commission. One year ago Secretary Salazar signed the Secretarial Order creating this Commission based on breach of trust cases. It is time to get the Commission together to provide recommendations for a good foundation for a new era of trust and trust administration. The Commission is holding field hearings across the country. We know that the work of the U.S. and DOI affects individuals, families, and future generations. The input you provide to us will be part of our minutes and incorporated in the work submitted to Secretary Salazar, Congress, and President Obama.

Chair Sharp provided the questions from the outreach letter for the group to respond to. She noted that Felix Cowen created the Federal Indian Law Handbook and he recognized the relationship tribes have is not of individuals to government but of nation to nation. These outreach questions were sent to tribal representative across the U.S. These are the types of issues the Commission is examining. Really from your generation many of you probably have families involved in tribal politics, friends of families that are involved in politics. We all have this vision of a fully empowered, healthy, well represented nations and hope tribal voices we will be heard. There are ideals about how we want our governments to respond to

us as individuals and governments. If you were part of a commission and your job was to look at all the problems, what would your thoughts be?

Audience: Where is my *Cobell* money?

Chair Sharp: That is an example of a piece of litigation started years and years ago and we don't want to go back to that place. So what are those things we can do to improve the relationship and safeguard against issues like this happening again?

Audience: I'm taking tribal management and our instructor provided some of the recommendations presented. One of the recommendations that I'm in favor of is the recentralized management. What it is saying is that they have crated seven agencies in one reservation to take care of minerals and it has created more problems. With this recommendation to recentralize management and recommend the tribes create an organization or panel to ensure that people have our say. An advisory panel is important.

Chair Sharp: The Bureau has been going all over the country to get input regarding streamlining. The Deputy Secretary has asked the Commission to consider issues of structure and examine how services are delivered. Another part of the Commission charge is to look at the definition of trust and trusteeship. The Supreme Court has defined trusteeship. The Commission wants to bring this definition into the new century and highlight the capability of Indian people to manage our own affairs. We should be part of making decisions and being able to provide input where services are delivered.

Audience: After the findings, over the course of time, are they getting information out to tribes?

Chair Sharp: It is forethought not an afterthought of communicating to the public. The question is how to get to the grassroots level. How do we effectively reach and serve those? The benchmark of effectiveness and success is getting this information from the public. The Commission developed a communication plan with that in mind. We are using different technologies to reach out.

Audience: How do you communicate that the information is available and what the ITC is doing? I just became aware of this.

Chair Sharp: Maybe we need to have a press release that provides periodic updates to tribal newspapers. An Elder mentioned utilizing tribal newspapers. This Elder came to the council chambers thinking he was testifying. He had two questions: would the work of the Commission reach the grassroots level and would the information provided go to the Secretary. He knew that by coming to the session he would have access to the Commission. How do we get out to the grassroots? Maybe we do need to get periodic press releases in tribal newspapers.

Audience: What if there are no newspapers? Radio is a good option. Have a Facebook link. At our college we have a Facebook page and this would be a way to link to students. Indian Health Service clinics they have the TV screens that post information – even in some high schools. YouTube is another way to get the information out.

Chair Sharp: Commissioner Zah and I attended the UNITY conference earlier this year. There is an active Native student body at the University of Washington where our next meeting will be held. If there were students that wanted to work with the Commission on formulating recommendations from the

perspective of young people the Commission would welcome that. If we can get a core group of young people that are interested in working with the Commission we can put together a set of recommendations from the youth perspective. Great ideas, that's what we want to hear. How many of you or your parents/grandparents are allottees?

(There were a few audience members present that raised their hands.)

Chair Sharp: Helen Sanders was on one of our panels and heads up an allottee association and this is another segment we are reaching out to. In the 1970s Ms. Sanders worked on a case called Mitchell for management of forestry and timber harvesting in the State of Washington. She has spent a life time working on championing allottee issues. When looking at the trust obligation there are tribal and individual obligations.

Audience: This is a little idea of what it is like on my tribe. One of my relatives has land that leases non-monetary assets. He has a high school diploma. He doesn't go to the internet for information. In his case he doesn't know where to go, who to talk to. At some point it becomes too difficult for him and is very intimidating. He is getting notices threatening to take his livelihood. Is there assistance for him? Where does he go? Is there a non-profit that can provide some type of services that can help him take care of lands? Are there any agencies or non-profits that can do one-on-ones? This is in the state of South Dakota.

Chair Sharp: Some of the colleges have resources through the law schools. There is Dakota Plains Legal Services. Trainings are scheduled to talk with beneficiaries one on one and discuss options for managing trust lands. Is that information readily available?

Audience: This is the perfect example of what trust officers can assist with.

Chair Sharp: Commissioner Zah is an elder on our Commission and served as President of the Navajo Nation and always asks about getting help to individual beneficiaries. This brings to light the need for effective delivery of services. Another question is about coordination of services. Just knowing information and having help can make a difference. How many are familiar with *Cobell*? That case had a settlement that is being appealed and is in front of the Supreme Court. If they deny review it will be over; if they grant review there will be a new phase of the law suit. At the last Commission session we talked about historical accounting issues. Just about every tribe across the country has potential to file lawsuits. Congress wants to bring finality to law suits. There are many occasions where there are breaches of trust. What about other remedies that do not include going to court? Litigation is expensive and individuals are left without remedy. There should be some way to resolve disputes. How do you overcome that? What are other potential remedies to avert lawsuits? We have an open line on the Commission website. If you want to take the time to consider recommendations and submit those you may do so online.

Audience: One of the stories about *Cobell* is that since the successful filling of *Cobell* once the payments are made, the tribes and allottees, may have to give up the right to further claims.

Audience: There are arguments on both sides of that.

Chair Sharp: It may be part of the appeal but I'm not sure. My understanding is that it covers from 1994 to the date of the settlement – it is settlement for that period of time. You can communicate with the plaintiff counsel for more information.

Audience: The reason I'm asking these question is because I had to come up with questions so I want to ask them. I looked over the recommendations and it's pretty good. It took me two days to understand all the jargon. Everybody is aware of the recommendations. On the recommendations the number one is recentralizing to one agency rather than seven. What is the timeframe for an operational agency? Section 17 corporations can form their own regional advisory panels. Who makes that decision? If the government does not agree to this recommendation what are the pros/cons of government creating a document articulating certain things they are responsible for in regards to fiduciary duties? What funding sources could be focused on establishing expertise?

Chair Sharp: Looking at those different agencies I can tell you it is an issue the Commission is taking a hard look at. Should we not have one process in Interior? Sometimes agencies have different positions. When? The Commission is evaluating this and we are about to bring on board a management consultant to help evaluate the system. The Commission wants to be deliberative in the process. We want to make sure we have a solution, not just a complaint. We will have some recommendations about changes to the systems. The Commission is definitely taking a hard look at and it is a necessary thing to do.

Janet Thomas: I work at UTTC and am proud to say I am his teacher. This is so important. I got an opportunity through Keepseagle to speak at a conference with Chair Sharp when she was elected President of Quinault. I was telling someone how this relates to Keepseagle and everything comes down to land. I think our youth has to see how important this is and how important these recommendations are. It affects your aunties, your grandmas, your children, and your grandchildren. I was the national logistics coordinator for the claims process in Keepseagle. My background is that my dad was one of five original plaintiffs for Keepseagle. Native farmers and ranchers got together and decided to sue the USDA for discrimination. My dad was a rancher. I was in the military in Iceland and I get a call from dad and he says, guess where I'm at. I'm in Washington DC and we marched today down Pennsylvania Avenue and your mom made me buy new boots and I got blisters on my feet. We are going to sue the U.S. government. It came down to land. It came down to this little piece of land. In the '70s they were ranching and farming and many got foreclosed on because they couldn't make payments. Some of us don't have a lot of credit and our most valuable thing is land. The farmers and ranchers use land as collateral for a lot of different things. That is what is at stake for Keepseagle. If we don't win this case there are thousands of acres that is going to be taken from the people and we have been losing it all the time because it goes up for auction and if our people can't buy it back, it goes out for auction to someone else. Stay engaged and understand what this is about.

Dr. Gipp: The only other comment about the trust issues is that it's good you have a communications plan and will be creating more information. One of the recommendations I would make is that I would hope you can use resources like the tribal colleges and educate more of our people about our rights to trust and minerals. Many young people don't know about those issues or don't have access to the information. Community based organizations are the best way to get information out. Tribal colleges have a close connection to the communities they serve. We can also help develop products to get information the Commission is developing out to the communities. Young Council members need to understand the rights of trust responsibility and their responsibility to that. This is about our lives – the past and the future. How do you protect those rights? Our relationship to this country is based on the trust relationship. We need to do a better job educating tribal America about their rights and

responsibilities. Tribal leadership needs to know this and understand the importance of the covenant to tribes and allottees. *Cobell* is because of allottees. Individuals had to go to the forefront to protect rights. *Cobell* very much a martyr and worked hard to get money. Tribal governments also have a responsibility to protect the rights of individual allottees. You want to make sure tribal leadership will protect lands to benefit all. Tribal colleges and curriculum in high schools are important to develop so young people know and understand these responsibilities. Land, minerals, water – how we protect those things is very important. I don't know of one standard model; it needs to include better tribal policy and education.

Chair Sharp: Thank you for all of those comments. There is a part of the settlement that is a scholarship fund for education. Commissioner Zah talks about that. He feels very strongly that education is so important. In the State of Washington the state legislature requires tribal history be taught. If you aspire to tribal politics/leadership you will be at the forefront designing those. We need to have everyone talking about those issues. Years from now this will be the point in time when things did change and the foundation was rebuilt and the relationship restored – that could be your generation. You may not create the future; you will be able to help shape it. Thank you for the opportunity. The Commission has a work plan and it will be available on the Commission website. It is a document we check into as we set agendas and ensure pieces of the work plan are being moved forward. The Commission would like to have preliminary recommendations by December. We are looking to determine what can be done in the short-term.

Audience: There is a meeting of the American Higher Education Association in March that may be a good opportunity for Commission outreach. There is also a winter conference of the group in February.

The Fiduciary Trust Officers (FTOs) in attendance were introduced. It was explained they are there to answer questions of beneficiaries. The FTOs are there to help get answers beneficiaries are looking for and are afraid to ask government officials. The FTOs are there to answer those questions for them and for you. A lot of you may inherit property in the future so keep the FTOs in mind. There are nine FTOs in the Great Plains Region. If there are concerns you need to contact the FTO.

Chair Sharp: I want to remind everyone that the Commission has webinars and the public is welcome to participate. It is an interactive online meeting and the public can engage via chat and documents are shared. You do have to dial in by phone to hear the voice portion.

Audience: Most of North Dakota and South Dakota tribal colleges have access to interactive video. Sometimes we have classes and conferences that way.

Chair Sharp: Please keep the Commission in mind and follow us online. This is real time change of something very significant. Pass the word on to families and friends about the work of the Commission. Thank you for your time and for taking time this evening to join us.