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### TO ENCOURAGE THE NEGOTIATED SETTLEMENT OF TRIBAL CLAIMS

FEBRUARY 15, 2002.—Ordered to be printed

Mr. INOUE, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

[To accompany S. 1857]

The Committee on Indian Affairs, to which was referred the bill, S. 1857, to encourage the negotiated settlement of tribal claims, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

#### PURPOSE

The purpose of S. 1857, as amended, is to address the possibility that the statute of limitations is running or has run on legal claims that Indian tribal governments may assert against the United States related to the management of tribal funds that are held in trust by the United States, as a result of reconciliation reports provided to the tribes by the Department of Interior in response to § 304 of the American Indian Trust Fund Management Reform Act of 1994, P.L. 103-412 (October 25, 1994) (“AITFMRA”). The bill does not address issues relating to Individual Indian Money (“IIM”) accounts.

#### BACKGROUND

As a function of treaties and the course of dealings between the United States and Indian tribes, the United States holds legal title to lands held in trust for individual Indians as well as Indian tribal governments. The revenues derived from trust lands are also held in trust by the United States for the benefit of individual Indians and tribal governments.

In August of 2001, the U.S. General Accounting Office reported to the Committee that an independent public accounting firm audit

of Indian trust funds for fiscal year 2000 showed that the Department of the Interior was maintaining approximately 1,400 accounts for 315 Indian tribes with assets in excess of \$2.6 billion, and over 260,000 individual Indian money (IIM) trust fund accounts with a balance of \$400 million as of September 30, 2000.

Receipts are deposited to these accounts primarily from land use agreements, royalties on natural resource depletion, enterprises related to trust resources, judgment awards, settlement of Indian claims, and investment income. However, the audit report noted that reliance cannot be placed on the balances reflected in the trust funds accounts until many tribal accounts are reconciled and/or resolved through negotiation and settlement and class action litigation on behalf of the individual Indian money account holders is resolved (*Cobell v. Babbitt*, retitled *Cobell v. Norton*).

The Congress first established an Indian trust fund account reconciliation requirement in the Supplemental Appropriations Act of 1987 (P.L. 100–202) in response to tribal concerns that the Interior Department had not consistently provided them with statements on their account balances, that their trust fund accounts had never been reconciled, and that the Department planned to contract with a third party for the management of trust fund accounts. The original provision required that the accounts be audited and reconciled before the Department transferred the responsibility for managing the trust funds to a third party. From 1990 to 1995, provisions in the appropriations acts for the Department of the Interior added a requirement that the accounts be reconciled to the earliest possible date and that the Department obtain an independent certification of the reconciliation work.<sup>1</sup>

Meanwhile, recognizing that it would be unfair to allow the statute of limitations to run on claims until each account holder was provided with an accounting, in 1991, the Department of the Interior Appropriations Act, P.L. 101–512, included a provision stating that: “the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with the accounting of such funds.” In the appropriations act for the following year, through the present, the provision was altered to refer to “an accounting of such funds from which the beneficiary can determine whether there has been a loss.”

To address these requirements, the Department contracted with two independent public accounting firms, one to reconcile the trust accounts and the other to conduct an independent certification that the reconciliation resulted in the most complete reconciliation possible. Following a preliminary assessment in March of 1992 by the Department’s reconciliation contractor, the Department decided to have the contractor reconcile the tribal accounts for fiscal years 1973 through 1992 and to omit accounts for individual Indians from the reconciliation project due to the potential lack of supporting documents and the cost and level of effort that would be needed to include them in the project. Later, the Department

<sup>1</sup> P.L. 101–121 (Department of the Interior and Related Agencies Appropriations Act 1990), P.L. 101–512 (Department of the Interior and Related Agencies Appropriations Act 1991), P.L. 102–154 (Department of the Interior and Related Agencies Appropriations Act 1992), P.L. 102–381 (Department of the Interior and Related Agencies Appropriations Act 1993), P.L. 103–138 (Department of the Interior and Related Agencies Appropriations Act 1994), P.L. 103–332 (Department of the Interior and Related Agencies Appropriations Act 1995).

charged the Bureau of Indian Affairs with reconciling the tribal accounts for fiscal year 1993 through 1995 to comply with the American Indian Trust Fund Management Reform Act's requirement that the Department provide Indian tribes with reconciled account statements as of September 30, 1995.

In late 1995, the Department of Interior terminated the certification contract with Coopers & Lybrand. According to the General Accounting Office, however, even completing the process, as modified, may not have provided the assurances that Congress intended.

The certification requirement was imposed to obtain independent assurance of the accuracy and reliability of the reconciled balances. After the certification contract was awarded in September, 1993, BIA limited the scope of certification contract to ensure only that the reconciliation effort was performed in accordance with the reconciliation contract. Therefore the certification effort as designed did not address whether the reconciliation provided as complete an accounting as possible, and it would not, in our view, have provided the additional assurance originally contemplated.<sup>2</sup>

In January of 1996, the Department provided a report package to each tribe containing the tribes' reconciliation results, including unreconciled account statements with schedules of proposed adjustments based on reconciliation project results for each year covered by the reconciliation, and a transmittal letter that described the information provided. During a February 1996 meeting at which Interior officials and the reconciliation contractor summarized the reconciliation results, tribes raised questions about the adequacy and reliability of the reconciliation results. The U.S. General Accounting Office also reported shortcomings in the Interior Department's reconciliation project. [Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results (GAO/AIMD-96-63, May 3, 1996)]

Many Indian tribes believe the Department has mismanaged their tribal trust fund accounts or have suffered losses to their underlying trust lands and resources, and are accordingly contemplating the initiation of law suits against the United States seeking a full accounting of the funds held by the United States on their behalf.

Although it is not at all clear that the reconciliation reports at issue did in fact provide tribes with notice sufficient to commence the running of the statute of limitations, tribal governments would not want to take the chance that their claims would be held to be time-barred, and would thus feel compelled to initiate legal action in time to prevent the statute of limitations from being applied. These legal actions initiated to preserve tribal claims will be filed and have been filed in Federal courts across the country, thereby holding the potential for multiple adjudications with varying and inconsistent results, as well as potentially exposing the United States to liability.

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<sup>2</sup> GAO, Responses to Questions From June 11, 1996 Hearing, B-272352 (June 24, 1996).

The Committee is concerned that filing of such claims could interfere with the opportunity for the United States and tribal governments to pursue negotiations for the settlement of tribal accounting or resource management claims. During the 105th Congress, the Committee held a joint hearing with the House Committee on Resources to consider H.R. 3782, which would have established a process for settling disputes regarding tribal trust fund accounts.

Since that joint hearing in July of 1998, the United States District Court for the District of Columbia issued a ruling in *Cobell v. Babbitt*, which was affirmed by the Court of Appeals as *Cobell v. Norton* in February 2001. The appellate ruling explicitly recognizes the United States' responsibility to provide an accounting for all funds deposited pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a). The court's ruling reaffirms the principle that the United States' responsibilities as trustee are not merely constrained to those established in statutes. In addition, the court concluded that "the 1994 Act [AITFMRA] reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust fund assets."

The Committee looks forward to working with the Administration to develop a settlement process that is grounded in the *Cobell* court's sound reasoning.

#### SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Under the amendment approved by the Committee, the reconciliation reports provided to Indian tribes beginning in January of 1996 will be deemed to have been received no earlier than December 31, 1999. As a result, even if the United States were to assert that a reconciliation report commenced the running of the statute of limitations, it would take until December 31, 2005 for a six-year statute of limitations to run from the date the day the tribe was deemed to have received the report. The Committee is aware that in some cases an Indian tribe may have received a report more than six years before this bill is enacted into law, namely between January 1996 and a date six years before the effective date of this legislation. Even where this may have occurred, the Committee has received assurances that the United States will not assert a defense that the statute of limitations has commenced to run at a date other than the date the tribe is deemed by this legislation to have received the report.

Both in testimony before the Committee by the Department's Associate Solicitor for the Division of Indian Law and in discussions with other Departmental Officials, the Committee and Committee staff, respectively, were assured that the Departments of Justice and Interior were aware that asserting such a defense would frustrate the objectives of this legislation. Were such a defense to be asserted by the United States, it would compel an Indian tribe to file its claims immediately. Even if such an argument were to be made, the committee is convinced that it has sufficiently addressed this question to satisfy even the most exacting standard for demonstrating Congressional intent to effect what is arguably a retroactive application of this bill as it applies to tribes that received reconciliation reports six years or more before the effective date of this legislation.

Subsection (b) of the amendment clarifies the Committee's intent in approving the amendment. Because of the Committee's acute concern that Indian tribes will be forced to immediately file claims to prevent the United States from asserting that the statute of limitations has or will run on their claims for losses to or mismanagement of their trust funds, the Committee has approved a bill which addresses only this discrete issue. By including a "statement of purpose," the Committee memorializes this limited purpose within the language of the provision itself. Because the purpose of S. 1857 is so limited, neither the bill nor Congress' action in approving this bill should be construed to favor any one of the competing interpretations of the provisions of appropriations acts which preclude the statute of limitations from commencing to run until an Indian tribe has received an "accounting" and/or "an accounting of such funds from which the beneficiary can determine where there has been a loss."

The Committee takes no position on whether the receipt of reconciliation reports does in fact commence the running of a statute of limitations on tribal claims against the United States related to the United States' management of tribal trust funds.

#### LEGISLATIVE HISTORY

S. 1857 was introduced on December 19, 2001, by Senator Ben Nighthorse Campbell, for himself and Senator Daniel K. Inouye, and was referred to the Committee on Indian Affairs. On February 7, 2002, the Committee held an hearing on S. 1857. At an open business meeting on February 13, 2002, the Committee approved an amendment to S. 1857 in the nature of a substitute.

#### COMMITTEE RECOMMENDATION AND TABULATION OF THE VOTE

In an open business session on February 13, 2002, the Committee on Indian Affairs, by a voice vote, adopted the amendment in the nature of a substitute and ordered the bill favorably reported to the Senate, with the recommendation that the Senate do pass S. 1857 as reported.

#### COST AND BUDGETARY CONSIDERATIONS

At the time of filing this report, the cost estimate of the Congressional Budget Office on S. 1857 has not yet been received. Compliance with Senate Rule XXVI, paragraph 11(a) is therefore impracticable at this time.

#### SECTION-BY-SECTION ANALYSIS OF AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO S. 1857

##### *Section (1). Settlement of tribal claims*

Under the provisions of the American Indian Trust Fund Management Reform Act, the Department of the Interior was required to provide Indian tribes with reconciliation reports and to report to Congress on the status of its efforts.

Subsection (a) provides that notwithstanding any other provision of law, the date an Indian tribe received a reconciliation report is deemed to be on December 31, 1999.

Subsection (b) is a statement of purpose for the bill, which indicates that S. 1857, as amended, is intended to facilitate the vol-

untary settlement of tribal claims and to enable Indian tribes to forgo the filing of claims against the United States for losses to or mismanagement of tribal trust funds.

#### REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1857 will have minimal regulatory or paperwork impact.

#### EXECUTIVE COMMUNICATIONS

The testimony of the Associate Solicitor for Indian Affairs for the Department of the Interior on S. 1857 is set forth below:

#### STATEMENT OF PHIL HOGEN, ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning, Mr. Chairman, and members of the Committee. My name is Phil Hogen. I am the Associate Solicitor for Indian Affairs at the Department of the Interior. Thank you for the opportunity to present the Department of the Interior's views on S. 1857, and act "To Encourage the Settlement of Tribal Claims."

The Department supports the intent of S. 1857, although we suggest clarifying changes in order to make the language of the bill consistent with the intent. S. 1857 attempts to establish a date certain on which the statute of limitations would commence to run on claims concerning alleged losses to or mismanagement of tribal trust funds. The bill seeks to provide the Tribes and the Government with additional time to address and determine a process to encourage and facilitate the resolution of tribal trust fund mismanagement claims based on the results of the Arthur Andersen reconciliation reports that were provided to the Tribes in 1996. The proposed legislation would also provide Tribes that have already filed litigation with a sufficient basis to obtain a stay of their pending claims, until the Tribes and the Department have had further opportunity to engage in attempts to resolve those claims, before resorting to what will almost certainly be expensive and burdensome litigation for both sides. We support this approach, but recommended the following changes:

With respect to subsection (a), we recommend that the language be amended to state as follows:

(a) IN GENERAL.—Solely for purposes of providing an opportunity to explore the settlement of tribal claims, the statute of limitations shall be tolled through September 30, 2003, for any claim not already time-barred concerning losses to or mismanagement of tribal trust funds.

This recommended change would obviate the need for the language currently found in subsection (b) of the bill. As such, we recommend that subsection (b) be deleted.

Once again, I would like to thank you for the opportunity to testify on this legislation. I would be pleased to answer any questions you may have.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that the amendment in the nature of a substitute to S. 1857 will not effect any changes in existing law.

