

## **Broken Trust What Has To Change?**

**Despite widespread agreement that the native fund trust system isn't working, tribal leaders and government officials have yet to decide how to fix it.**

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Tribes have wanted it for decades.

Congress required it in 1994.

Hundreds of thousands of Native landowners are suing for it. And now, perhaps, for the first time in a century, the Interior Department is poised to make a major change in the way it manages trust land and assets in Indian Country.

**No one can really agree on how the Interior Department should change.**

"Dare I say," said Sen. Ben Nighthorse Campbell, R-Colo., "that this level of commitment and focus is really unprecedented in the sad history of Indian trust fund reform."

Trouble is, no one can really agree on how the Interior Department should change.

Some of the options:

- As part of their six-year lawsuit, Native landowners are asking a federal judge to appoint an outside receiver to take over the department's management of the Individual Indian Money trust fund, which collects and distributes lease payments and mineral royalties for tribal citizens who own trust land.
- Interior Secretary Gale Norton announced last year her plan to shake up the Bureau of Indian Affairs by stripping it of its trust fund management duties. She then proposed a new agency to handle trust fund activities.
- Wary of how the landowners' lawsuit could cramp the way they govern -and unhappy with Norton's plan - tribal leaders are engaged in a sometimes-conciliatory, sometimes-contentious "consultation" process with the department to try to forge a new trust management system.
- And finally, Congress is standing by to pass legislation once tribal leaders and the Interior Department reach an agreement.

All of this is more than political posturing. Consider what's at stake:

The Individual Indian Money trust fund encompasses an estimated 230,000 Native landowners, 11 million acres and \$400 million in assets.

And for 310 tribal governments, the department manages 45 million acres and \$2.7 billion in assets.

"The issue of trust fund management is one of the most urgent problems we are faced with in Indian Country," said Sen. Tim Johnson, D-S.D. "I do not think there is anything more complex, more difficult and more shocking than the circumstances surrounding trust fund management."

### **First, the landowners.**

The latest effort to overhaul the system started on the Blackfeet Reservation in northern Montana, the home of Elouise Cobell. The 56-year-old banker sued the Interior Department in June 1996. Her class-action lawsuit, on behalf of an estimated 500,000 to 800,000 past and present landowners, is seeking an accurate accounting of income earned from their trust land for mineral royalties and leases.

The plaintiffs have claimed the government - charged with managing the trust land - either lost or misappropriated an estimated \$100 billion since 1887.

They're also asking for a federal judge to appoint a receiver to correct what they call more than a century of mismanagement.

"All the past reports recommended the problem be fixed and nobody did anything about it," said John Echohawk, executive director of the Colorado-based Native American Rights Fund. "That's why we involved the federal courts."

Said Cobell: "That's why I think asking the judge for a receiver is the perfect way to start."

U.S. District Judge Royce C. Lamberth has indicated in court documents he would appoint a receiver if the government doesn't move toward meaningful reform.

Here's how it would work: A judicial officer would act as the receiver and bring in a team to oversee trust reform. The Interior Department would temporarily lose control of the Individual Indian Money trust fund - and it's possible the responsibility might not be returned.

Cobell and her plan have critics.

"Unless the scope of receivership is very well defined, it has the potential to do more harm than good," said Richard Monette, a citizen of North Dakota's Turtle Mountain Chippewa Tribe and a law professor at the University of Wisconsin.

He sees two potential problems.

First, tribes and the Interior Department question the constitutionality of delegating trust fund management to the judicial branch without congressional authority.

Second, tribes fear their relationship with individual landowners - whose land typically falls within reservation borders - would be diluted if a receiver were appointed.

"To give them a separate place to go is very dangerous for tribal governments," Monette said. "It will circumvent the basic day-to-day needs that we have to govern that property."

### **So what do tribes want?**

Not Norton's Bureau of Indian Trust Assets Management, the proposed result of her shakeup.

Across the country, tribes overwhelmingly rejected the plan, largely because they had not been consulted about possible changes. With tribes and the Interior Department both wary of receivership, they've joined forces for a series of so-called consultation meetings. The goal: agree on a better system for the management of Native trust funds.

Since late last year, the two sides have met more than a dozen times in large consultation meetings and smaller task force gatherings. The task force leading the meetings consists of 24 tribal representatives from throughout the country, in addition to Interior Department officials.

Neal McCaleb, head of the BIA and one of four task force co-chairs, said tribes and the Interior Department have come a long way since Norton announced her reorganization plan. At one point, task force members had reached a tentative agreement. The plan called for an undersecretary to manage Native trust funds and an independent commission to oversee the work. But tribal leaders and Interior Department officials couldn't agree on who would control the commission.

And progress came to a halt last month. Tribal leaders on the task force announced an impasse, saying the two sides could not agree on how to define the government's trust fund responsibilities.

"A reorganization at Interior will do no good if we do not clearly define the duties and responsibilities of the department in managing Indian trust funds," said task force co-

chair Tex Hall, president of the National Congress of American Indians and chairman of the Mandan, Hidatsa and Arikara Nation of North Dakota. "It would be just window dressing."

Said Susan Masten, chairwoman of the Yurok Tribe of California and a task force co-chair: "It should be clear that the secretary has a fundamental set of standards to adhere to in her role as our trustee. Indians should be compensated by the federal government if their funds or resources are mismanaged - just as any private account holder would be if their funds were placed in jeopardy."

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**-- Dan Dubray**

Dan Dubray, a spokesman for the Interior Department, said the amount of time his department's officials have spent working and meeting with tribal leaders is unprecedented.

"It's not for lack of participation that we reached this impasse," he said. "We hope to fix the fundamental management issues for the benefit of Indians, of tribes and of the taxpayers."

After decades of trying to fix the broken system, some tribal leaders have expressed doubt that true reform will occur.

"I find it very difficult after all these years I've been involved to say we can really develop something that has a true tribal complexion, that has a true tribal ideal," said task force member Michael Jandreau, who has served as chairman of South Dakota's Lower Brule Sioux Tribe for 23 years.

Congress will likely have to approve any meaningful change. It's tried - and some say failed - in the past.

In 1992, a House subcommittee produced "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund." The watershed report prompted the passage of the American Indian Trust Fund Management Reform Act of 1994, which was supposed to force the Interior Department officials to fix its trust fund system.

But critics say a key provision was flawed. When lawmakers created an oversight position - the Office of the Special Trustee for American Indians - it also required that position to report directly to the Interior secretary.

"Everyone knew the act was a compromise," said Dan Press, a Washington attorney who helped draft the legislation. "It will work if the secretary wants it to work."

In a court opinion, Judge Lamberth said Congress created an oversight position without power.

"If Congress truly wanted a completely independent trustee to oversee trust management, entirely independent from the well-documented recalcitrance of Interior, then Congress surely would have explicitly restricted the secretary's power over the special trustee and his office," he wrote.

Now, Congress is poised to amend the 1994 act, and it's been waiting for the Interior Department and tribal leaders to reach an agreement.

Earlier this year, Sens. Tom Daschle, D-S.D., and John McCain, R-Ariz., introduced what McCain called a placeholder bill, something that can be modified with the groups' recommendations.

But tribal leaders are urging lawmakers not to wait for consensus on the task force.

They want amendments that call for clear trust standards - defining the Interior Department's responsibilities for Native trust fund management. And they want an independent oversight commission to monitor the department.

"The bureaucracy on the administration is stronger than both Republicans and Democrats on this issue," said Masten of the Yurok Tribe. "That is why we need Congress to act."

Key players on the Senate Committee on Indian Affairs, however, said legislation likely wouldn't be passed this session.

Said Campbell of Colorado: "I'm more interested in doing things right rather than doing it fast."