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Issues of Trust: Resolving Mismanagement of the Indian Trust Fund

*The Indian Money Account Claim Satisfaction Act of 2003*¹

I. INTRODUCTION

Land has been held in trust by the United States government for Native Americans since Congress enacted the General Allotment Act of 1887.² In recent decades the management of the trust accounts has been called into question by the Native American beneficiaries and has resulted in complex litigation. The government has acknowledged that there has been gross mismanagement of the trusts, to the extent that balances in many of the individual accounts are unknown. After lengthy litigation resulting in victory for the Native Americans, Senator Ben Nighthorse Campbell³ has introduced legislation that he claims will resolve the trust fund matter in a fair and reasonable manner for the Native Americans and will save the government millions of dollars. The legislation would establish a task force to determine trust account balances and provide Native Americans with the option of arbitration if they do not accept the initial findings regarding the balance of their trust accounts. This Note addresses whether this legislation is in fact in the best interest of the Native Americans and what, if any, alternatives would better resolve the problem of the government's continuing mismanagement of the trusts.

II. BACKGROUND

A. *The History Leading to the Lawsuit and the Legislation*

In 1830, Congress passed the Indian Removal Act, which authorized the President of the United States to compel a westward migration of Native American tribes that were living east of the Mississippi River.⁴ Over time, America expanded to the west and its citizens again encountered the Native Americans that had been forced to migrate westward by the Indian Removal Act.⁵ Rather than

1. S. 1770, 108th Cong. (2003).

2. Dawes Act, ch. 119, 24 Stat. 388 (1887) (amended 2000). This act is popularly known as the Dawes Act, after a sponsor of the Act, Massachusetts Senator Henry Dawes. *Cobell v. Norton*, 283 F. Supp. 2d 66, 74 (D.D.C. 2003) [hereinafter *Cobell I*].

3. Ben Nighthorse Campbell is a Republican Senator from Colorado and is the Chairman of the Senate's Indian Affairs Committee. For further information on Senator Nighthorse Campbell, refer to his website, at <http://campbell.senate.gov>.

4. See 25 U.S.C. § 174 (2004).

5. *Cobell I*, 283 F. Supp. 2d at 74. The westward migration has been called the "Trail of Tears" because the Indians were forced to leave their lands under extremely harsh conditions. *Id.* at 73 (citing VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 28 (1983)). See also FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 51, 92 (1986).

forcing the tribes further westward to alleviate what the government saw as “the Indian problem,” the government chose to forcefully assimilate the tribes into American society by extinguishing tribal sovereignty and erasing the boundaries of the Native American reservations.⁶ The government’s objective was carried out by executing an allotment process.⁷

In 1887, Congress passed the General Allotment Act (Dawes Act).⁸ The Dawes Act, which was not subject to any objection by the Native American tribes, authorized a division of reservation land into separate plots. These plots were to be assigned to individual tribal members and held in trust for the use and benefit of the Native American to whom it was allotted for twenty-five years, after which full title to the land would be conveyed to the individual Native American.⁹ During the twenty-five year period, the individual to whom the land was allotted would have no authority to sell or lease the land without first obtaining permission from the government.¹⁰ According to a quote by Theodore Roosevelt, the goal of the Dawes Act was that it be “a mighty pulverizing engine to break up the tribal masses.”¹¹

By the early twentieth century, it was apparent that the allotment process failed to meet its goals of absorbing the Native American tribes into American society and making them into the image of the white man.¹² In response to the failure, Congress passed the Indian Reorganization Act of 1934 (IRA).¹³ The IRA ended the allotment of Native American lands and allowed lands not previously allotted to be returned to ownership of the tribes.¹⁴ However, the lands that had been allotted under the Dawes Act prior to 1934 were to be kept in trust with the government as trustee for an indefinite period of time.¹⁵ Consequently, the United States government presently holds approximately eleven million acres of land in trust for the heirs of the Native Americans to whom the land was allotted during the time the Dawes Act was in effect.¹⁶

In April 1992, the House Committee of Government Operations approved a report that outlined problems with the management of the Individual Indian Money (IIM) accounts, entitled *Misplaced Trust: The Bureau of Indian Affairs’ Mismanagement of the Indian Trust Fund*.¹⁷ The report, which was based on several years of investigation and Congressional hearings, noted management problems such as the Bureau of Indian Affairs’ inability to give account balances to account holders, a lack of policies governing how the accounts were to be man-

6. *Cobell I*, 283 F. Supp. 2d at 74; *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

7. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 8 (1983). “Allotment” is a term used in Indian law that refers to land awarded to an individual, where the individual is the beneficiary and the government acts as the trustee. *Cobell I*, 283 F. Supp. 2d at 74 n.1 (quoting *Kicking Woman v. Hodel*, 878 F.2d 1203, 1204 n.1 (9th Cir. 1989)).

8. 24 Stat. 388 (1887).

9. *Id.*

10. *Id.*

11. *Cobell I*, 283 F. Supp. 2d at 75.

12. *Id.* (citing DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 96 (4th ed. 1998)).

13. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (amended 2000).

14. *Id.*

15. *Cobell I*, 283 F. Supp. 2d at 75.

16. *Id.* at 75-76.

17. H.R. REP. NO. 102-499 (1992).

aged, a failure to prudently invest the funds and pay interest to IIM account holders, and inadequate staffing and training of those handling the accounts.¹⁸

In 1994, Congress enacted the American Indian Trust Fund Management Reform Act,¹⁹ which was intended to remedy problems such as those outlined in the "Misplaced Trust" report. This Act required the government to provide adequate accounting systems and provide IIM account holders with accurate accounting of all money held in trust. This included providing periodic statements of IIM accounts to the individual holders and establishing consistent, written policies for managing the accounts.²⁰

B. The Lawsuit

In 1996, a class action lawsuit was filed against the Secretary of the Interior and other government officials by beneficiaries of the IIM trust accounts.²¹ The beneficiary plaintiffs claimed that the officials breached their fiduciary duty by mismanaging the accounts.²² The plaintiffs sought a full and accurate accounting of all funds held in trust by the government on behalf of the individual Native Americans.²³ In 1999, the court held the then-Secretaries of the Interior and the Treasury in civil contempt for their departments' delays in producing documents to the court.²⁴ In the judge's opinion regarding the findings of contempt and the government's refusal to follow the court-ordered discovery, he stated "I have never seen more egregious misconduct by the federal government."²⁵ In the second phase of the trial, the court issued a declaratory judgment stating that the 1994 Indian Trust Fund Management Reform Act required that the government provide the plaintiffs with accurate account balances, and that the government acquire and retain all information that was necessary to obtain an accurate accounting of the IIMs.²⁶

In 2002, the court found the Interior Secretary and the Assistant Interior Secretary of Indian Affairs to be in civil contempt of court again.²⁷ This time the contempt was based on a failure to comply with the 1999 court order to implement an accounting program for the IIM accounts.²⁸ The contempt charge included a charge of fraud on the court based on the Interior Department's concealment of its actions regarding the accounting project and the filing of false status reports.²⁹ In the court's opinion, the government was no closer to discharging its fiduciary duty

18. *Id.* at 10.

19. American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended in scattered sections of 25 U.S.C.).

20. *Id.* § 101.

21. *See Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) [hereinafter *Cobell II*].

22. *Id.*

23. *Cobell I*, 283 F. Supp. 2d at 75-76.

24. *Cobell II*, 37 F. Supp. 2d at 9.

25. *Id.* at 38.

26. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999) [hereinafter *Cobell III*].

27. *Cobell I*, 283 F. Supp. 2d at 83.

28. *Id.*

29. *Id.*

to IIM account holders than it was when the first phase of the trial took place in 1999.³⁰

A new phase of the trial began in May 2003 and lasted forty-four days.³¹ The court held that the Department of the Interior must provide an accounting of all the IIM accounts by 2007 and set certain requirements that the government must follow in providing the proper accounting.³²

C. The Proposed Legislation

Following the court's ruling, Senator Ben Nighthorse Campbell, chairman of the Senate Indian Affairs Committee, introduced the Indian Money Account Satisfaction Act of 2003 (Act).³³ The Act would establish a task force, to be appointed by the majority and minority leader of the Senate and the Speaker and minority leader of the House of Representatives, which would analyze all accounting records submitted by the parties to the class action and determine the balance of all IIM accounts.³⁴ If the IIM account holder accepts the task force's finding, then the individual will receive full payment of the balance of the account and will be dismissed from the class action.³⁵ If the account holder rejects the task force's finding, then the individual may choose to either have the amount of the balance determined through arbitration or to remain a member of the class action.³⁶ The Act would also establish the Indian Money Claims Tribunal that will make determinations if the individual chooses arbitration.³⁷ The Tribunal will consist of five arbitrators chosen from the list of arbitrators maintained by the United States Attorney General.³⁸ After the Tribunal determines the amount of the individual's account, full payment will be made to the individual and the account will be closed with the individual dismissed from the class action.³⁹

D. Arbitration

Arbitration decisions have the same enforceability as adjudications.⁴⁰ The party who receives a positive judgment in arbitration petitions the court for an order to enforce the arbitration award and the court then adopts the arbitration ruling and enforces it as its own.⁴¹ The Federal Arbitration Act establishes very limited circumstances under which an arbitration award may be set aside.⁴² A court can only set aside an award given by an arbitrator under circumstances in-

30. *Id.* at 84.

31. *Id.* at 85.

32. *Id.* at 292.

33. S. 1770, 108th Cong. (2003).

34. *Id.* § 4.

35. *Id.*

36. *Id.*

37. *Id.* § 5.

38. *Id.*

39. *Id.*

40. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 708 (1999).

41. *Id.*

42. *See* 9 U.S.C. § 10 (2000).

cluding fraud, corruption, partiality on the part of the arbitrator, certain arbitrator misconduct or where the arbitrator exceeded her powers.⁴³ Arbitrators do not have to give the court a detailed reason explaining the award.⁴⁴ Further, the Supreme Court has stated that, "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity."⁴⁵

III. COMMENT

A. IIM Account Holder Concerns

Campbell contends that his proposed bill will put an end to the lawsuit in a way that will provide justice to IIM account holders and avoid the \$10 billion or more that the Department of Interior estimates it would cost to comply with the accounting ordered by the court.⁴⁶

Advocates for the Native Americans are in agreement that it is in the best interest of the IIM account holders to have a voluntary alternative method of settling the dispute.⁴⁷ They have, in fact, engaged in discussions with the government about settling the matter.⁴⁸ However, according to John Echohawk, the Executive Director of the Native American Rights Fund, each time the *Cobell* plaintiffs spoke with government officials about possible methods of settlement, the government rejected settlement and had never made a good faith offer to settle the matter of accounting of the funds.⁴⁹ Further, advocates for the IIM account holders have expressed concern over the fairness of the Act.⁵⁰ One such concern is that if the account holder should choose the arbitration route, the end of the arbitration would bring about a closing of the IIM account.⁵¹ The President of the National Congress of Native Americans argues that while the damage claims for past accounting problems should be closed following arbitration, the IIM accounts themselves should not be closed because future payments are still due to those accounts.⁵²

43. *Id.*

44. *United Steelworkers of Am. v. Ent. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

45. *Burchell v. Marsh*, 58 U.S. 344, 349 (1855). *See also* *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2407 (2003); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927, 931 (1983).

46. Letter from Campbell, Chairman & Inouye, Vice Chairman, Senate Indian Affairs Committee, to Keith Harper (April 8, 2003), available at <http://indian.senate.gov/CobellTribalLeaders.PDF>.

47. *Indian Money Account Claims Satisfaction Act of 2003: Hearing on S. 1770 Before the Senate Comm. on Indian Affairs*, 108th Cong. 52-68 (2003) [hereinafter *Hearing S. 1770*] (statements of Chief Jim Gray, Chief, Osage Tribe; Tex G. Hall, President, National Congress of American Indians; John E. Echohawk, Executive Director, Native American Rights Fund).

48. *Cobell Versus Norton Lawsuit: Hearing on Possible Mechanisms to Settle the Cobell Versus Norton Lawsuit*, 108th Cong. 62-66, (2003) [hereinafter *Hearing on Possible Mechanisms to Settle*] (statement of John E. Echohawk, Executive Director, Native American Rights Fund).

49. *Id.*

50. *Hearing S. 1770*, *supra* note 47.

51. *Id.* at 65 (statement of Tex G. Hall, President, National Congress of American Indians).

52. *Id.* at 65-66.

B. Possibility of Mediation

Prior to the introduction of the Act which calls for arbitration of the IIM account claims, the parties had discussed the possibility of mediation as an alternative to litigation. A letter sent from the Chairman and Vice-Chairman of the Committee on Indian Affairs to the *Cobell* plaintiffs in April 2003 urged the parties to pursue a *mediated resolution* to the case.⁵³ According to Echohawk, while there were concerns about the government's readiness to proceed in good faith because of its past conduct, he agreed to participate in the mediation process.⁵⁴ In his July 2003 testimony before the Indian Affairs Committee, the President of the National Congress of American Indians set guidelines that any settlement process between the *Cobell* plaintiffs and the government must follow.⁵⁵ Included in the guidelines was the requirement that the settlement process be accepted by the *Cobell* plaintiffs and "provide for judicial review and fairness."⁵⁶ Echohawk contends that the government did not accept mediation as an alternative to litigation.⁵⁷ In his testimony before the Senate Committee, he repeatedly pointed out a very important fact: the government was on the losing side of the *Cobell* litigation.⁵⁸ Echohawk emphasizes the fact that the tribal leaders believe in mediation, but that the government, despite urging by the appropriations committee, has for no good reason failed to "come to the table."⁵⁹

According to Senator Campbell, in resolving the *Cobell* case, a goal is to "resolve the *Cobell* case fairly and honorably for all parties."⁶⁰ With that goal in mind, mediation would be a good way to resolve the dispute between the *Cobell* plaintiffs and the government. In analyzing the best method to resolve the dispute, it is important to remember who the participants in *Cobell* are. On the side of the plaintiffs are Native Americans, who, as history has shown, have been abused and neglected by the United States government. On the other side is the government itself.

A comparison of mediation and arbitration sheds light on what would be in the best interest of the Native Americans and the possible reasons the government is trying to push, through the Act, arbitration instead of mediation. Mediation is solution-focused, rather than an adversary process such as litigation or arbitration.⁶¹ Mediation often results in a positive experience for participants, with the parties left feeling that the results were fair.⁶² In mediation, a goal of the mediator is to facilitate ongoing dialogue between the participants, hopefully leading to a

53. Letter from Campbell, Chairman & Inouye, Vice Chairman, Senate Indian Affairs Committee, to Secretary Gale A. Norton, John Echohawk, et al. (April 8, 2003) [hereinafter *Echohawk Letter I*], available at <http://indian.senate.gov>.

54. *Hearing S. 1770*, supra note 47, at 52. See Letter from John Echohawk, Executive Director Native American Rights Fund, to Chairman Campbell & Vice Chairman Inouye, Senate Indian Affairs Committee (May 23, 2003) [hereinafter *Echohawk Letter II*].

55. *Hearing on Possible Mechanisms to Settle*, supra note 48, at 95 (Testimony of Tex G. Hall, President, National Congress of American Indians).

56. *Id.* at 96.

57. *Hearing S. 1770*, supra note 47, at 53.

58. *Id.* at 54.

59. *Id.*

60. *Echohawk Letter I*, supra note 53.

61. Ann Begler, *Mediation Sessions: Philosophy and Structure*, 3 LAW. J. 4, 4 (2001).

62. *Id.*

mutually beneficial, voluntary outcome.⁶³ Conversely, arbitration gives control over to a third party who issues a binding decision that is nearly free from judicial review.⁶⁴ In mediation, even if the parties do not reach a mutually beneficial outcome, there is no third party to force a less-than-adequate result on the parties.

If the government is genuinely concerned about the well-being of the Native Americans, and if it wants to put years of mistreatment of Native Americans behind, then why does the Act call for arbitration, rather than mediation? Mediation had been discussed at length in the past as an alternative the Native Americans were willing to pursue. Perhaps the government is afraid that the Native Americans will demand “too much” in mediation and will not agree to settle for amounts that the government feels is appropriate. If the dispute goes to arbitration, however, the matter will result in a binding decision passed down by arbitrators chosen from a list maintained by the government itself.⁶⁵

IV. CONCLUSION

There is agreement that because the IIM accounts have been grossly mismanaged for many years—to the detriment of the Native American beneficiaries of the trusts—a fair resolution to the problem is well overdue. Senator Campbell’s proposed legislation is an effort by the government to finally close this chapter in United States history. It is unclear, however, whether the legislation is truly in the best interests of the Native Americans or whether the government is attempting to avoid complying with the *Cobell* court’s order and take further advantage of the trust beneficiaries.

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63. *Id.*

64. See Lisa B. Bingham, *Why Suppose? Let’s Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (2002).

65. Recall that the arbitrators will be chosen from a list maintained by the Attorney General. See discussion *infra* Part II.C.

