TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

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Good morning Mr. Chairman and members of the Committee. Thank you for the opportunity to offer testimony at this oversight hearing on Indian trust litigation. I am pleased to assist the Committee in understanding this litigation and in exploring the role of Congress in resolving the litigation.

The Native American Rights Fund (NARF) serves as legal counsel to the plaintiffs in the *Cobell* litigation, which involves the trust claims of individual Indians. NARF also serves as legal counsel to Indian tribes in three separate cases: 1) *Chippewa Cree Tribe of the Rocky Boy's Reservation, Little Shell Band of Chippewa Indians, Turtle Mountain Band of Chippewa Indians, and White Earth Band of Minnesota Chippewa Indians v. United States,* No. 92-675L in the U.S. Court of Federal Claims (filed Sept. 30, 1992); 2) *Chippewa Cree Tribe v. Kempthorne,* No. 02-00276-JR in the U.S. District Court for the District of Columbia (filed Feb. 11, 2002); and, 3) *Nez Perce Tribe, et al. v. Kempthorne, et al.,* No. 06-02239 in the U.S. District Court for the District of Columbia (filed Dec. 28, 2006). *Nez Perce Tribe, et al. v. Kempthorne, et al.,* was filed by eleven named tribal plaintiffs as a class action on behalf of about 220 tribes that have not filed their own trust accounting lawsuits. I am here today only on behalf of NARF's trust claim client tribes; not the *Cobell* plaintiffs.

My testimony today makes three points: 1) there are now over 100 trust claim lawsuits against the United States in federal courts on behalf of over 285 federally-recognized tribes. The Committee needs to understand these tribal trust claims and the

potential accountability and liability of the United States; 2) at least with respect to a legislative settlement of the trust claims of Indian tribes, the Administration's letter proposal to this Committee of March 1, 2007 is unacceptable; and, 3) at least some tribes are willing to explore legislative efforts to settle their trust claims that respect the rights, claims, and options of each tribe. I now will discuss these three points in more detail.

1. **There now are pending against the government 108 tribal trust claim lawsuits**

"Tribal trust accounts" and "tribal trust funds" generally include: 1) monetary payments required by treaty or in satisfaction of judgments against the United States, such as Indian Claims Commission awards; and, 2) income or proceeds earned by tribes from land and natural resources that the government holds in trust and manages for tribes. Tribal trust accounts and trust funds also include income earned on interest earnings and investments by the government of the funds themselves. The point here is that tribal trust accounts and trust funds are not taxpayer dollars and they are not appropriated federal program funds. They are the tribes' own money secured through treaties, court cases, statutes, and other federal law. The government's misaccounting and mismanagement of tribal trust accounts and funds strikes at the very core of the federal trust responsibility to Indian tribes.

The United States unilaterally assumed fiduciary trusteeship of tribal trust accounts and funds in 1820. Since then Congress has delegated responsibility for the fiduciary trusteeship of tribal trust accounts and funds primarily to the Departments of the Interior and the Treasury. Last month the Government Accountability Office testified

before the House Natural Resources Committee that the United States presently holds about $2.9 billion in about 1,450 trust accounts for over 250 tribes. *See* U.S. Government Accountability Office, Testimony before the Committee on Natural Resources, House of Representatives, Department of the Interior Major Management Challenges 10, GAO-07-502T (Feb. 2007).

With respect to tribal trust accounts and funds, the United States is like a bank with a trust department. In fact historically under federal law tribes have had no choice but to bank with the United States. Tribes' economic well-being hinges upon proper fiduciary care of their monies by the government, just as private investors, states, and local governments depend on banks, savings and loan companies, and investment houses to ensure that their assets are properly accounted for and managed. Imagine the widespread outcry if banks, savings and loan companies, and investment houses that were chosen by investors were to fail to meet their fiduciary obligations. Undoubtedly such harm would be corrected.

There are pending in federal courts against the government 108 tribal trust accounting and trust mismanagement lawsuits. Sixty-one (61) of these cases are in the U.S. Court of Federal Claims seeking money damages. Thirty-seven (37) cases are in the U.S. District Court for the District of Columbia seeking accountings and other forms of equitable relief. Another ten (10) cases seeking accountings and other forms of equitable relief are in other federal district courts. NARF has been tracking these cases. Attachment A to my testimony today shows these 108 cases. The U.S. Department of Justice also has been tracking these cases and has filed in court similar lists of "Current Tribal Trust Accounting and Trust Mismanagement Cases" as Exhibits to its Motions in

the cases. Attachment B to my testimony today is one of the Justice Department's lists. The Justice Department's count is five lower than ours apparently due to some case consolidations and categorization differences.

Many tribes have been affected by the alleged federal misaccounting for and mismanagement of their trust accounts and funds. Trust claim cases have been filed on behalf of over 285 federally-recognized tribes. Sixty-nine (69) tribes have filed their own cases. Of the 69 tribes that filed their own cases, twelve (12) filed cases only in federal district courts. Twenty-two (22) tribes filed cases only in the Court of Federal Claims. Thirty-five (35) tribes filed cases in both federal district court and the Court of Federal Claims. NARF filed a case in the U.S. District Court for the District of Columbia for full and complete trust fund accountings on behalf of eleven named plaintiff tribes, *Nez Perce Tribe, et al. v. Kempthorne, et al.,* which seeks class action status on behalf of all other tribes that did not file their own cases for full and complete accountings and that do not wish to exclude themselves from the class for their own reasons.

Over seventy (70) of these 108 tribal trust claim cases are relatively new. They were filed late last year. As you know, Congress has codified the inherent obligation of the United States as the trustee for tribal trust accounts and funds to provide "full and complete accountings" to tribal beneficiaries. *See Cobell v. Norton,* 240 F.3d 1081, 1102 (D.C.Cir. 2001). For the past twenty years Congress has told the government to provide full and complete trust accountings to tribes. *See, e.g.,* Pub. L. No. 100-202, 101 Stat. 1329 (1987); *see also* 25 U.S.C. Sec. 4044. NARF is extremely concerned that to date no tribe has received a full and complete accounting of its trust accounts and funds.

Back in the 1990s, unable to comply with these congressional mandates on its own, the Bureau of Indian Affairs (BIA) within the U.S. Department of the Interior contracted with the accounting firm of Arthur Andersen to examine transactions in tribal trust accounts for the limited time period of July 1972 through September 1992. In 1996 the BIA provided tribal account holders with Arthur Andersen "Agreed-Upon Procedures Engagement Reports" of their trust accounts for this limited time period.

Even though everyone – including Arthur Andersen itself, the BIA, the Office of the Special Trustee, and the Government Accountability Office – has admitted that the Arthur Andersen reports are not full and complete accountings, the government has tried to get tribes to agree that the Arthur Andersen reports are full and complete accountings.

More importantly, the general statute of limitations for claims against the government provides that civil actions against the government shall be barred unless filed within six years after the right of action first accrues. 28 U.S.C. Sec. 2401. In 2002, six years after the Arthur Andersen reports were sent to tribes, Congress enacted legislation to "Encourage the Negotiated Settlement of Tribal Claims, Public Law No. 107-153." This legislation provided, among other things, that, "Notwithstanding any other provision of law, for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statue of limitations, any such report provided to or received by an Indian tribe in response to section 304 of the American Indian Trust Fund Management Report Act of 1994 (25 U.S.C. 4044) shall be deemed to have been received by the Indian tribe on December 31, 1999." In 2005,

this legislation was amended to provide that the reports shall be deemed to have been received on December 31, 2000. Pub. L. No. 109-158.

But in the last congressional session, there was no further extension of the date in this legislation. By late last year, many tribes were concerned that their right to claim that the Arthur Andersen reports are not "full and complete accountings" sufficient to commence the running of any applicable statutory limitations period on their trust claims would be lost forever after December 31, 2006. Tribes feared that this would jeopardize their right to have the government ever provide full and complete accountings of their trust accounts and funds. The result of this predicament was a 200% increase in the number of trust claims filed by tribes against the government. As stated earlier, now there are 108 tribal trust claim lawsuits. This is a financial crisis in Indian country and for the United States.

This financial crisis is not new. The legislation to Encourage the Negotiated Settlement of Tribal Claims merely informed the timing of the many recently-filed tribal trust claims lawsuits. Tribes have been filing such lawsuits for years. With good reason. Scores of reports – some dating back to the early 1900s -- of the Government Accountability Office, the Interior Department's Office of the Inspector General, and the Office of Management and Budget, as well as reports of this Committee and other Committees of Congress have well-documented the tremendous problems of the government's misaccounting for and mismanagement of tribal trust accounts and funds. What is new is the phenomenal number of lawsuits. Not since the Indian Claims Commission have so many tribes filed lawsuits against the federal government about the same problem; in this instance fiduciary misaccounting and mismanagement.

The pending tribal trust claims in federal district courts seek various forms of equitable relief. They seek: 1) declarations that the government has fiduciary obligations to tribal beneficiaries; 2) declarations that the government is in breach of its fiduciary obligations; 3) full and complete accountings of tribal trust accounts and funds; 4) restatement of or restitution to trust account and trust fund balances as if there had been no breaches of trust; and, 5) declarations of future lawful and proper fiduciary accounting for and management of tribal trust accounts and funds.

The tribal trust claims pending in the Court of Federal Claims seek determinations of liability for misaccounting and mismanagement of tribal trust accounts and funds and determinations of money damages for the misaccounting and mismanagement. Exactly two years ago this month (March 2005), when he testified before the House Subcommittee on Justice Department Appropriations, Attorney General Gonzales at that time estimated that the government's liability for these tribal trust claims could be over $200 billion. *See* Statement of Alberto R. Gonzales, Attorney General of the United States before the U.S. House of Representatives, Committee on Appropriations, Subcommittee on Science, the Departments of State, Justice and Commerce, and Related Agencies (Mar. 1, 2005).

Over the years tribes have turned to the courts for resolution of their trust claims because the government historically and consistently has failed to perform its fiduciary trustee duties; ignored the mandates of Congress in laws like the American Indian Trust Management Reform Act of 1994; and, simply is unable or unwilling to resolve what is perhaps this nation's biggest financial crisis ever. As I will discuss next, this is still par for the course for this Administration.

2. The Administration's proposal of March 1, 2007 is unacceptable

NARF has reviewed carefully the Administration's proposal to settle Indian trust litigation as set forth in the letter from Secretary Kempthorne and Attorney General Gonzales to this Committee dated March 1, 2007. The March 1, 2007 proposal of the Administration is very sketchy. In many respects it is similar to a proposal that the Administration proposed to Congress five months ago (October 2006) in response to what was then Senate Bill 1439. There is, however, at least one glaring difference. The Administration's October 2006 proposal would have provided for resolution of all Indian trust litigation and other trust reform matters such as Indian land fractionation, presumably at a cost set by Congress of $8 billion. The March 1, 2007 proposal proposes to resolve all Indian trust litigation and other trust reform matters for an "investment" of $7 billion or less. In short, the new proposal offers to do at least much but for at least a full billion dollars less than the old proposal. Once again, we see the Administration taking a step backward.

In comparison to the Administration's parsimonious offer of up to $7 billion to address all of its own past, present, and future Indian trust misaccounting and mismanagement, in very recent times the government expended $125 billion to bail out the savings and loan institutions industry from a scandal in which the government had no fiduciary trust obligations. *See* Timothy Curry and Lynn Shibut, The Cost of the Savings and Loan Crisis: Truth and Consequences, FDIC Banking Review (Dec. 2000). The government's honor to vindicate its own neglect and mishandling of Indian trust accounts and funds that it chose to manage surely rises at least to the same level as extrication from a disgrace not of its own making.

Of course the Administration's March 1, 2007 proposal also is unacceptable for the same reasons that the October 2006 proposal was unacceptable. These reasons include: 1) the proposal was developed without consultation with tribal governments; 2) the proposal seeks to resolve arbitrarily trust claims which *never have been adequately analyzed or valued* due to the government's failure to provide full and complete accountings; 3) the proposal would set unprincipled and impractical limits on federal liability for any and all tribal claims of past and present federal neglect and mismanagement of tribal trust accounts and resources, and it would preclude any future liability for such claims; and, 4) the proposal would negate thirty-five years of federal law and policy promoting Indian self-determination and adhering to federal-tribal government-to-government relations by forcing on tribes involuntary termination of the federal trust responsibility.

Another reason that the Administration's proposal is fundamentally flawed stems from its comprehensive "packaging." For several reasons, efforts to settle the *Cobell* lawsuit, which involves the trust claims of individual Indians, and efforts to settle the trust claims of tribes, should be kept separate. Congress already treats the trust accounts and resources of individual Indians and tribes separately in its many Indian trust statutes. The *Cobell* lawsuit has its own history – over a decade long now. Before and after the *Cobell* lawsuit was filed, tribes have pursued their own trust claims, and they must be allowed to continue to do so. Combining resolution of the *Cobell* claims and tribal trust claims into a single legislative settlement is unrealistic and unwise.

Moreover, the Administration's March 1, 2007 proposal remarkably makes no reference to the over 70 new tribal trust claims filed in court since the October 2006

proposal. This 200% increase in the number of lawsuits and the potential accountability and liability of the federal government should give the Administration every reason to begin good faith negotiations directly with the tribal plaintiffs to develop trust claim settlement proposals which tribes can support. The Administration's March 1, 2007 proposal simply does not reflect a good faith effort. It blithely ignores the horrendous financial crisis that has prompted a whole-scale legal war being waged by tribes throughout the country to make the government accountable for its basic fiduciary obligations – obligations which have been rectified honorably when breached on the same level by financial institutions responsible for holding and managing the accounts and funds of non-Indians, states, and local governments on deposit and entrusted with their care and safe-keeping.

On behalf of its tribal trust claim clients, NARF hopes that, regardless of what the Administration does on this matter, the Senate Committee on Indian Affairs will play a responsible leadership role in acting on behalf of the United States to foster and support government-to-government and good faith settlement of tribal trust claims. I now will talk about how that can be accomplished.

3. Exploration of Legislative Settlement Efforts that Tribes can Support

NARF believes that NARF and many tribes and their attorneys have a wealth of experience in and expertise regarding tribal trust claims that could be valuable to the Committee. NARF strongly encourages a dialogue between the Committee and interested tribal trust claim attorneys to explore the viability of legislative measures that are constructive in facilitating resolution of these complex claims.

Just as the Administration attaches a list of "Key Facets of Acceptable Indian Trust Reform and Settlement Legislation" to its March 1, 2007 proposal, NARF believes that there may be consensus among tribal attorneys regarding at least a preliminary list of their "Key Facets of Acceptable Tribal Trust Claims Legislative Settlement." At this time this list includes the following:

- Tribes are committed to further educating the Committee about their trust claims, which are legitimate legal claims notwithstanding attempts to label them as "unreasonable;"
- Any legislative settlement effort must respect the claims, rights, and options of each tribe, including the prerogative of tribes to pursue their own claims in court, in alternative dispute resolution forums, in administrative settings, through negotiated settlements, or through other forms of claim resolution;
- As long as legislative settlement provisions are voluntary for each and every tribe, at least some tribes and their attorneys are willing to work together to help the Committee determine what, if anything, can be done legislatively to resolve tribal trust claims.

NARF strongly urges the Committee to consider the above tribal Key Facets as a foundation for approaching and resolving the national tribal trust accounts and funds crisis. NARF stands ready and willing to work with the Committee and other interested tribal attorneys to develop an informal process for exploring a role for Congress in resolving the tribal trust claims crisis.

Thank you for this opportunity to submit testimony. I am available to answer questions at this time.