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1301 Connecticut Avenue, NW
Suite 200

Tex G. Hall
President, National Congress of American Indians
and
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Testimony before the United States Senate
Committee on Indian Affairs

Oversight Hearing on Trust Reform

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Introduction

Chairman McCain, Vice-Chairman Dorgan, and members of the Committee, thank you for your invitation to testify today. On behalf of the member tribes and individuals of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The National Congress of American Indians strongly shares the views of the leadership of this Committee that it is time for Congress to establish a fair and equitable process for settling the *Cobell v. Norton* litigation. Tribal leaders have consistently supported the goals of the *Cobell* plaintiffs in seeking to correct the trust funds accounting fiasco that has lingered for too long at the Department. At the same time, tribes are concerned about the impacts of the litigation upon the capacity of the United States to deliver services to tribal communities and to support the federal policy of tribal self-determination. Significant financial and human resources have been diverted by DOI in response to the litigation. The BIA has become extraordinarily risk averse and slow to implement the policies, procedures and systems to improve its performance of its trust responsibility. Perhaps most significantly, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Because of this, NCAI believes that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX-03-040.

We understand that Congress will be unwilling to settle the *Cobell* litigation unless there are significant reforms made to the DOI's trust management system and policies to ensure that the problems do not reoccur. With or without *Cobell*, trust reform is long overdue and tribal leaders strongly support the goal of fixing the trust system. These necessary changes to the future of the trust system are the subject of today's hearing, and they are the primary interest of tribal leadership in the *Cobell* settlement discussions.

I have been asked today to report on the background of the Tribal Leaders-DOI Trust Reform Task Force, and the areas of agreement and disagreement that arose during our collective efforts. In addition, I have been asked to discuss the formation of a working group of tribal leaders to work with Congress in developing trust reform legislation. I am truly appreciative that this Committee understands that a process of consultation with tribal leadership is necessary to develop a lasting solution to the trust reform problem, and I greatly look forward to working in close coordination with you on this issue that is so critical to the future of Indian country.

Background on the Tribal Leaders-DOI Trust Reform Task Force

As you know, the United States Government has committed to a broad trust relationship with Indian tribes that requires the federal government to protect tribal self-government, to provide services to Indian communities, and to exercise the highest degree of care with Indian lands and resources. In the period from 1887 to 1934 the federal government grossly violated its trust responsibilities and

imposed reservation allotment programs, largely in order to gain the advantage of the unallotted Indian lands which were opened for non-Indian homesteading, agriculture, mineral and timber development. Over time the Indian allotments have become highly fractionated through the inheritance laws, which has spawned the proliferation of millions of ownership interests and hundreds of thousands of individual trust fund accounts. It is well documented that the Department of Interior has mismanaged billions of dollars worth of the trust funds derived from Indian land, timber, oil & gas, and hard rock minerals.¹

The Trust Funds Management Reform Act of 1994 mandated specific responsibilities for the Department in accounting and management of Indian trust funds. Among other things, the Department is under a requirement to render an accurate accounting for all funds held in trust, develop integrated and consistent trust policies and procedures, and ensure that the trust fund accounting system is integrated with the land and asset management systems of the Bureau of Indian Affairs, the Bureau of Land Management and the Minerals Management Service. To date, the Department has achieved none of these objectives under the 1994 Act.

In November 2001, Interior Secretary Gale Norton announced her intention to establish a new agency, a Bureau of Indian Trust Asset Management (BITAM), to administer responsibilities for trust funds and resources and separate trust assets management from the Bureau of Indian Affairs. Tribal leaders throughout Indian country overwhelmingly rejected this idea and demanded that they be consulted on matters that would so profoundly affect the rights and interests of their tribes as well as their constituencies. We reached an agreement with the DOI to create a Trust Reform Task Force comprised of Tribal Leaders and representatives of the Department of Interior.

The Task Force was formally established in January 2002 and met every month until October of 2002 when the Department of Interior stopped its participation. The Task Force membership included 24 Tribal representatives (2 each from 12 BIA regions), a group of about a dozen federal representatives from the DOI, and was chaired by myself, Susan Masten, Chairwoman of the Yurok Tribe, Steven Griles, Deputy Secretary of Interior and Neil McCaleb, Assistant Secretary of Interior for Indian Affairs.

Tribal leaders were greatly concerned that the BITAM proposal to separate all trust asset management into a separate Bureau would harm other areas of the trust relationship. The various aspects of the trust relationship -- tribal self-government, tribal services, and tribal land and resources -- are interrelated at the local level. Indian people live on trust land and every day we are going to school, building houses and roads, and making a living on trust land. Our strong tie to the land is an integral part of who we are. Tribal leaders did not want a "stove piped" bureaucracy that separated trust lands from all of the activities that we do on our lands. We knew that reorganization alone cannot solve problems; we knew that a two-headed bureaucracy could never get decisions made, and we knew it would inequitably shift resources away from other services and programs.

Unfortunately today it seems that we are living with the effects of BITAM, even though it goes by a different name. We were ultimately unable to come to agreement with the Department on the elements of trust reform, and driven by litigation concerns the Department imposed its own

¹ See *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 499, 102ND Cong., 2ND Sess. 1992, 1992 WL 83494 (Leg.Hist.), and *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results* (Letter Report, 05/03/96, GAO/AIMD-96-63).

reorganization where many of the trust functions have been shifted over to the Office of the Special Trustee.

We are seeing many of the concerns that we had about BITAM come to life today, as more and more resources and authority are shifted away from the BIA. The President's budget for FY06 proposes to cut \$108 million from the BIA budget, mostly from education construction, and add \$76 million to OST. This is on top of last year's shift in resources. The OST has created "Trust Officers" but these positions have no job description. They are just wandering around the reservations without knowing what to do. But their presence creates more bureaucracy, overlapping responsibilities, and conflicting decision-making authority. This is not an efficient way to spend federal money. Since the Department broke off discussions in 2002, all of this is being done without consultation with tribes, so we have great difficulty making the program work at the local level.

Despite the fact that we were ultimately unable to reach agreement in 2002, I believe that the Trust Reform Task Force held some very useful discussions and it is worthwhile to briefly revisit the major concepts of trust reform that we discussed, and the areas of agreement and disagreement between tribal leaders and the DOI:

1) Creation of an Independent Entity with Oversight Responsibility for Trust Reform.

The Indian trust within the Department of Interior is the only trust in the United States that is not subject to any type of external regulation or oversight. The Office of Special Trustee, which was created under the 1994 Act, was originally envisioned as an independent office, but was placed in a position subordinate to the Secretary of Interior at the Administration's insistence. Each of the Special Trustees has testified to this Committee that their ability to perform their duties has been impaired by the lack of independence.

The tribal leadership on the Task Force worked on a proposal to create an independent entity or commission that is capable of oversight authority over the Indian trust within the Department of Interior. We considered authorizing responsibilities for that Commission that would include auditing financial accounts, investigations and compliance, establishment of standards and regulations, and monitoring the DOI budget. The Office of Special Trustee would then be phased out over an identifiable timeframe.

The Department of Interior preferred that any oversight be advisory in nature and that it be subordinate to the Secretary of Interior. This was an area of substantial disagreement between the tribes and the Department. It should also be noted that tribes also had some serious debate over the authorities of an independent commission. There were concerns about creating another expensive bureaucracy that would have powers inconsistent with the goals of tribal self-determination. Tribes who manage trust function on their reservations do with the limited amount of money provided through federal contracts and compacts, and they were concerned about a sudden increase in demands on their systems that they are simply not funded for. At a minimum though, there was some agreement among tribes that the audit function could be independent, and the federal budget monitoring and reporting should be independent.

In the 108th Congress, Senator McCain introduced S. 1459, a bill which included the creation of an independent commission for trust reform, but one with limited powers. Essentially this

commission would review and assess federal laws and policies relating to the management of Indian trust funds and make recommendations (including legislative and administrative recommendations) relating to management of Indian trust funds. This may be a useful place to start discussions for this round of trust reform legislation.

2) High-Level Responsibility for Indian Affairs.

The Department agreed with tribal leadership on the creation of an Under Secretary of Interior for Indian Affairs. This position would have direct line authority over all aspects of Indian affairs within the Department, including the coordination of trust reform efforts across all of the relevant agencies and programs. A similar proposal for a Deputy Secretary is included in S. 1459.

The creation of this position would address a major issue that has been raised in every significant study of trust management at Interior, including the EDS Report and by the Cobell court: the lack of clear lines of authority and responsibility within the Department to ensure accountability for trust reform efforts by the various divisions of the Department of Interior. The two major entities responsible for trust assets and accounting are the Bureau of Indian Affairs and the Office of Special Trustee. The lines of authority, responsibility and communication between these two entities has been uncertain and at times has come into direct conflict. In addition, the Minerals Management Service, the Bureau of Land Management, and the U.S. Geological Service all play important roles in trust management, and various responsibilities are spread throughout the Office of Hearings and Appeals, the Office of American Indian Trust, and the Office of Historical Accounting. Finally, nearly every agency in the Department of Interior has some significant trust responsibilities. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies. This absence has particularly hurt the progress of those issues that cut across agencies, such as the development of a system architecture that integrates trust funds accounting with the land and asset management systems of the BIA, BLM and MMS (as required by the 1994 Act).

3) Reorganization of the Bureau of Indian Affairs.

Tribes and the Department found some degree of agreement on an organizational realignment, but differed on the structure of decision-making at the local level. The principal goal of the Tribal Task Force members was to have the resources and decision making at the local level of the Bureau of Indian Affairs, coupled with an adequate internal oversight mechanism. Tribes had great concerns that a "stove piped" reorganization that sharply separates the ability to make decisions on trust resource management and trust services at the local level would put an unbearable level of bureaucracy into a system that is already overloaded with bureaucratic requirements. The Department preferred splitting the authority at the local level, which is what we are seeing today with the development of the Trust Officers. The tribally proposed structure would have been as follows:

- As noted above, the Task Force proposed to establish a new Undersecretary for Indian Affairs to coordinate and unify policy direction for the Bureau of Indian Affairs and all other agencies operating programs or providing services to Indians within the Department of Interior.

- An office of Self-Determination/Self-Governance would report to the Undersecretary to advance long-standing policies that support greater involvement of Indian tribes in managing programs for the benefit of their communities.
- A new office of Trust Accountability would report to the Undersecretary to provide internal control and quality assurance in trust administration throughout the Department as well as ensuring timely resolution of problems.
- Within the Bureau of Indian Affairs, a trust services section would provide technical support for field operations, train services for BIA and tribal staff, and controls to ensure that programs are administered in accordance with defined standards for trust administration, and help avoid problems before they reach serious proportions. The trust services section would also be responsible for operating trust fund accounting, cash management, and appraisal accountability functions.
- The structure would retain a single line of authority for delivering programs and services to tribal communities in accordance with overwhelming tribal preferences. Substantial changes to operations would be sought in adequate staffing, training and funding levels, technical assistance would need to be readily available, and performance standards reflecting modern practices of trust administration would need to be established and enforced.

4) Trust Standards and Legal Obligations of the Department.

During the Task Force, tribal leaders strongly supported the creation of trust standards and a clear right of action against the Department if they violate their trust responsibilities. Decades of trust reform efforts have produced little change in DOI's willingness to take corrective actions because the DOI and the Department of Justice view their primary role as ensuring that the U.S. is not held liable for its failure to properly administer trust assets. For this reason, they have never been willing to put standards into regulations that would govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new understanding of DOI's role in Indian trust management. Once the DOI understands that mismanagement will no longer be tolerated, the system will change and true reform will begin. In effect, the DOI is acting as a bank for Indian trust funds -- and just like every other bank in the U.S., the DOI must be subject to standards and accountability.

Not surprisingly, the DOI did not agree to standards and accountability. The conversations we had were illuminating, however. DOI did not so much object to the concept of trust standards, but from a more practical standpoint felt that they were not in a position to meet those standards in any near time frame and would not subject the Department to liability until it had a chance to put a new system into place. NCAI believes that this is ultimately an issue for Congress to determine, and that it is critical for Congress to substantively address the underlying issues of standards and accountability in fixing the trust system. This is an issue that S. 1459 would have resolved.

5) Adequate Funding and Staffing for Trust Management.

The DOI and tribal leaders on the Task Force agreed that one of the primary issues in trust reform is getting adequate resources to perform the trust duties. The BIA has never been provided with an adequate level of financial and human resources to fulfill its trust responsibilities to Indian country. This chronic neglect of staffing and funding has contributed to dysfunctional management and financial systems at all levels of the BIA.

One of the primary concerns of Tribal Task Force members was that the trust reform effort not result in a shifting of resources to trust management away from critical tribal services such as law enforcement, education, alcohol & substance abuse prevention. There must be new appropriations for trust management. This is not what we have seen over the last two years as the Administration has proposed cannibalizing other BIA programs to pay for trust reform.

The 1994 Trust Reform Act provides that the Special Trustee is to review the federal budget for trust reform and certify that it is adequate to meet the needs of trust management. In practice, the Special Trustee has no independence, and simply certifies whatever budget is submitted by the Administration. Tribal leaders strongly supported the concept that an independent entity should have the job of reviewing the federal budget for trust management and provide an assessment to Congress of its adequacy. I believe this role may be more important than ever today, as the Administration moves to assess federal budgets under the Program Assessment Rating Tool (PART). We are going to have to show measurable result for trust programs, and we could greatly use an independent assessment of the appropriate ways to measure the effectiveness of trust asset management programs.

6) Participation in Trust Asset Management Activities by Indian Tribes.

The tribal leadership and the DOI found some agreement on further refining the relationship between trust reform and the laws and policies that underpin Tribal Self-Determination. I think I can say without fear of contradiction that all tribes around the country are increasing their capacity to manage their lands. Tribes are very interested in increasing their ability to make decisions about how the reservation lands will be used for the long term benefit of their people. We found support among tribes for legislation that would give tribes the option to establish a 10 year management plan that would establish management objectives for Indian trust assets, define critical values of the Indian tribe, and provide identified management objectives. This is obviously an issue that should be considered again in any trust reform package.

7) Core Business Systems

Tribes and the DOI found some agreement in focusing efforts on three core systems that comprise the trust business cycle: 1) Title; 2) Leases/Sales; and 3) Accounting. NCAI believes that this Congress should focus its oversight efforts on these core systems to ensure that reform efforts meet requirements for fiduciary trust fund administration. Correcting the DOI's performance in these core functions will also require the DOI to employ sufficient personnel, provide staff with proper training, and support their activities with adequate funds. We still have a terrible backlog in probate and title transactions that result in inordinate delays and extremely inefficient and repetitive use of BIA resources.

8) Fractionation of interests in land.

Perhaps the most significant success of the Trust Reform Task Force was that we did come to a lasting agreement with the DOI on the importance of land consolidation. Fractionation of ownership exponentially increases the complexity and cost of federal administration, deprives Indian beneficiaries of the full benefit of their resources, and jeopardizes tribal jurisdiction over our reservations. Even after the Task Force stopped meeting, both the Tribes and the DOI continued to work collaboratively on amendments to the Indian Land Consolidation Act. This legislation was completed and passed at the end of last year, and should be considered a success for all involved, including this Committee. At this time we are continuing to work with the Department in implementing the new law.

The new law will limit the growth of fractionation, and it creates some important tools for land consolidation. But the problem is far from fixed. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest. Management of this huge number of small ownership interests has created an enormous workload problem at the BIA. Now is the time for Congress to fully invest in land consolidation and fix this horrendous problem. We believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system. Land consolidation should be at the forefront of any settlement/trust reform package.

Formation of a Working Group of Tribal Leaders to Work with Congress in Developing Trust Reform Legislation

Tribal leaders met last week to discuss the need to organize for a consultation process with Congress on trust reform legislation. We have heard the messages from Chairman McCain, Vice Chairman Dorgan, and Chairman Pombo of the House Resources Committee. There is a sense of urgency as we understand that Congress would like to see these matters resolved as soon as possible.

I strongly believe that any legislative proposal concerning trust settlement/ legislation should be heavily influenced, if not developed, by tribes, prior to being introduced for consideration by Congress. Given the impending nature of this legislation, NCAI has created a special committee to work with Congress to develop trust reform/settlement legislation. I plan to serve as Co-Chair of the Special Committee along with Chief Jim Gray, of the Osage Tribe and the Chairman of the Intertribal Monitoring Association (ITMA).

We plan to reach out to all tribes and all national and regional tribal organizations. Advance notice of any meetings of the Special Committee will be broadcast by NCAI and we are going to work closely with the ITMA in facilitating the meetings. Any tribal leader or leader of any tribal organization that would like to attend these meetings to offer comments and provide input will be invited to participate. We plan to welcome and encourage participation at these meetings by all entities and individuals who have an interest in the legislation.

Objectives of a Settlement Process

It is critically important that the scope of any settlement process be determined clearly at the outset. Should the settlement:

- be limited to equitable resolution of liability for the failure to properly account and disburse the proceeds of Individual Indian Money accounts?
- provide for equitable resolution of claims for mismanagement of trust assets that generate income processed through trust accounts?
- attempt to address issues raised in tribal litigation?
- ensure efficiency and accountability in future trust administration?
- address fractionation?
- accept court determinations of issues already litigated?

These key questions will have to be answered. At this point, however, the focus should be on developing a process for settlement that will have sufficient legitimacy that it can be accepted by the litigants.

Guiding Principles for a Settlement Process

I would like to suggest a number of principles that I believe should be taken into account in developing any settlement process:

- 1) Involve all necessary parties and frame the settlement process. Timely and good faith consultation with the elected tribal leadership is essential in the settlement process. Tribes have a number of very important interests in the outcome:
 - a. Tribal lands are often co-owned or co-managed with individuals' lands.
 - b. Future delivery of all trust services is a key issue in the case.
 - c. Tribal regulatory authority, self-determination programs, and natural resource management could be affected.
 - d. The federal budget for tribal programs could be affected.
 - e. The settlement for individual account holders could set precedent for tribal claims.

I believe that the House Resources Committee and the Senate Committee on Indian Affairs should forge an alliance to work on this issue and participate in meetings to keep Congress informed of progress and keep the pressure on for settlement.

Formal consultations should be held to enable those not directly involved in the discussions to have an opportunity to comment before the settlement process is finalized.

- 2) Take the time to do it right. NCAI has witnessed the trust reform efforts since the 1980's as one quick fix after another has been proposed, implemented, and eventually fallen to the wayside. We have wasted over 20 years looking for a quick fix. We should allow the affected parties, to define the settlement process rather than quickly impose a process that may not be well received and will spell failure.

- 3) Establish a process that will keep the pressure on for settlement. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement.
- 4) Ensure that the settlement also fixes trust systems for the future. The historical record has shown that DOI will only move forward in improving Indian trust systems if there is exterior pressure from the courts or from Congress. There are two critical issues here that need to be addressed: (a) the establishment of account balances (historical accounting); and (b) the functionality of accounting systems. It would be disastrous to create a settlement that would resolve the past liability and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and accounting.
- 5) One size will not fit all. There is a great deal of diversity among account holders. Some have large stakes in very valuable natural resources, such as oil, gas, or timber. Others have only a small fractionated interest that is worth less than a dollar. Any settlement process must be able to deal with different classes of accounts and interests.
- 6) Account holders should have the opportunity to negotiate and make a choice. You cannot force a "settlement." In today's world, the hallmark of fairness is the ability to negotiate an arms length agreement based on a reasonable knowledge and understanding of the underlying facts and circumstances. Indian account holders must also have this ability. The settlement process should, however, contain incentives that would encourage participation.
- 7) Move quickly to bring relief to elder account holders. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to improve their financial conditions without delay.

Conclusion

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into the trust reform effort. If we maintain a serious level of effort and commitment, work to understand the viewpoints of all parties, and exercise leadership, we can make informed, strategic decisions on key policies and priorities necessary to bring about true reform in trust administration.