Testimony of Tex G. Hall
Chairman, The Mandan, Hidatsa & Arikara Nation
Co-Chairman, Tribal Workgroup on Trust Reform

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Dosha. Good morning.

This is my third time testifying before you Chairman McCain, Vice-Chairman Dorgan and Committee members this Congress on the issue of Trust Reform. I am glad to say that each time we have met, we have done so under circumstances which have brought us all closer to our goal.

I am here not only as Chairman of the Mandan, Hidatsa & Arikara Nation, but also as the Co-Chairman of the National Tribal Work Group on Trust Reform and Cobell Settlement. On this panel, I am joined by the Co-Chairman of the Work Group, Chief Jim Gray, of the Osage Nation.

<u>Background</u>

In March of 2005, we testified before this committee that we had organized a workgroup comprised of the largest group of tribes with trust assets, individual allottees, and individual trust account holders. The purpose of this workgroup was to bring together Indian tribes, allottees, and account holders and provide Congress with a clear and concise roadmap to a trust reform that works, and a settlement that is fair. We did so, and in June of 2005, we released the 50 Principles for Trust Reform and Cobell Settlement.

Those 50 Principles remain today as the most definitive statement of the will of Indian Country on this matter.

Eight months ago, we testified before this Committee that we were pleased with the general thrust of the S.1439, the Indian Trust Reform Act of 2005, and that many of the bills provisions adhered to the 50 principles.

Later, we hosted further meetings of Indian tribes to review the Indian Trust Reform Act of 2005 and discuss amendments and settlement figures. Earlier this year in Bismarck, North Dakota, I hosted a regional meeting of Great Plains Tribes with staff from the Committee on Indian Affairs.

I believe that as we gather again today, many more of the pieces have fallen into place and we are nearing the finish line. The Committee's hearing earlier this month shed a great deal of light on reasonableness of picking a settlement number similar to the way

sums were determined in both the Holocaust Survivors' claims and the Japanese American Internment claims. In the case of the 120,000 Japanese American Internment victims, Congress passed the Civil Liberties Act of 1998 which provided for an apology and a sum of $20,000 to each surviving Japanese American victim for reparations, as well as $12,000 to each Alaska Native survivor.

The point is that the United States because of its greatness and because of its courage, has been strong enough to own up to its mistakes and provide redress compensation when its laws were broken.

This is such a time. This is the time for our Country, once again, to demonstrate its capacity for justice and wisdom. This is our chance to reform the system, once and for all, so it finally works. This is our chance to provide a historic justice to those who lost the chance to go to college, to get medical care, to open a store, or to pay their mortgage simply because the United States Government failed to take care of their money.

We can forge a legacy of justice, or we can leave a legacy of neglect.

The Indian Trust Reform Act of 2005

As I mentioned, I have worked over the years, as Chairman of my Tribe, as NCAI President, and as Co-Chairman of the Tribal Trust Reform Workgroup. Together we worked with tribes from across the country and held consultations in every single region of the country. And now, with the support of organizations like the Inter-Tribal Monitoring Association and the Council of Large Land Based Tribes, we represent approximately 70% of all tribal trust assets and the majority of all tribal trust account holders. As I have mentioned many times – I am one of those trust account holders.

But more importantly, like most tribal leaders, I have a constituency of thousands of Indian people who are dependent on their trust account payments coming through.

I want to take a minute to describe what happened to one of my tribal members. Her name was Carol Young Bear and she had diabetes. She was also an individual trust account holder. For a long time, her trust account checks never arrived. She used to come visit me and ask me what was happening with those checks. The reason is that she was in poor health and needed assistance getting around on her wheelchair. What she really wanted was to use those checks to buy an automated lift for her van that would allow her to get out of the house and travel around our beautiful reservation and visit her friends and family. I called and tried to get an answer for Carol with our local and regional and finally national BIA officers. By the time they had gotten back to me with their answer, poor Carol had passed away from her diabetes.

Every tribal leader here knows tribal members and even family members with similar stories. People who cannot afford to wait. People who need a system that they can depend upon. So what I am calling for on behalf of people like Carol and everyone in Indian Country who is or knows someone like them is this – "A Reform That Works."

In other words, I am talking about a reform of the United States trust system that does not require revisiting every 10 years. I am saying, that in order for this to work, it has to be done right.

Title II – The Indian Trust Asset Management Policy Review Commission

This section would create a commission to review all federal laws and regulations and the practices of the Department of Interior relating to the administration of Indian trust assets. The Commission would recommend to Congress changes to federal law that would improve the management and administration of Indian trust assets. Importantly, the Commission must consult with Indian tribes and organizations representing individual Indian owners of trust assets.

The MHA Nation recommends that the entire, rather than two-thirds, of the commission be appointed by Congress. Instead of four Presidential appointments, we would recommend that the Chairman and Vice-Chairman of the Senate Committee on Indian Affairs make one appointment each, and so should the Chairman and Ranking Member of the House Committee on Resources.

We also recommend that the Commission reflect the importance of trust assets and management to Indian Country by requiring that at least 8 members of the Commission be members of an Indian Tribe.

Because grazing, timber, fishing and mineral rights are so important to the continued economic survival and growth of tribes, we strongly recommend that the Committee retain the requirement that at least half the Commission be from tribes with reservation lands managed for trust assets. At the January Great Plains roundtable on trust reform, the tribes recommended that at least three tribes be from large land-based tribes.

The tribes also voiced their strong recommendation that Congress and the Administration consult with tribes on the nomination process and that, further, the individuals have experience in trust asset management or ownership.

We also recommend that the Committee amend the bill to ensure that the Commission is bi-partisan in nature, with six members of each party serving.

Furthermore, we recommend that section 204(a) be amended at the end to include the authority of the Commission to review and assess the responsiveness of the Department of the Interior to the trust needs of Indian tribes and individuals.

We also recommend that the Commission review and assess the progress and implementation of the Indian Trust Asset Management Demonstration Project authorized under Title III of the bill.

In section 205, we would recommend providing the Commission with Subpoena power to obtain documents, records, and information, if necessary.

Finally, we would strongly recommend that the Committee add a new section 206 to this Title that provides authority for the Commission to make specific resource-specific, generic standards where possible much like the sustained yield requirements for Indian timber provided in the National Indian Forest Resources Management Act. This is in accordance with recommendations 15 and 31 of the 50 principles.

<u>Title III – The Indian Trust Asset Management Demonstration Project</u>

This section creates a demonstration project so that an Indian tribe establish its own "trust asset management plan" that is unique to the trust assets and situation of the tribe and its reservation. The plan would identify the trust assets, establish objectives and priorities, and allocate the available funding.

This section adheres to the goals and visions of the 50 Principles and we strongly support this Title.

The MHA Nation, however, strongly recommends that the Committee increase the number of tribes that can participate from 30 to 50. In the Great Plains Region alone, I believe that all 17 tribes that I believe would be willing and ready to submit their own trust asset management plans. Furthermore, the demonstration project should reflect the varied nature of tribes with large trust resources as well as their varied locations. Thus, the Committee may wish to provide that, in addition to timeliness, the Secretary may consider tribal size, land base, amount of resources, and region in selecting participants under section 303(b)(2)(B)(ii)(II).

The MHA Nation strongly supports the streamlined model for submission and approval of tribal plans under the bill.

The MHA Nation makes the following recommendations that it believes will enable tribes to more fully embrace this opportunity.

First, in the event that the Secretary disapproves a Trust Asset Management Plan under section 304(b)(2) then the Secretary's notice should specifically identify and offer assistance to the tribe to overcome the deficiency, similar to the Self-Governance and Self-Determination procedures.

Second, and in keeping with the Self-Governance and Self-Determination procedures, the Secretary should afford the tribe a hearing on the record to determine whether or not the tribe's application should be approved.

Third, and this is critical, if the Secretary does not approve or disapprove a tribe's application within 120 days, the tribe's application should be deemed approved, not

disapproved, under section 304(b)(3). This is exactly how Self-Governance and Self-Determination works and we see no reason to deviate from these processes.

Fourth, under section 304(b)(4), a tribe should have immediate access to judicial relief and not be forced to exhaust administrative remedies. Thus, this section should be amended to provide tribes with immediate access to the federal district courts which should be authorized to hear disputes arising under this Act and be further authorized to provide all necessary relief.

Fifth, we recommend that the Committee provide a burden of proof of "clear and convincing evidence" on the Department the Secretary when defending a decision to reject a tribe's application.

Sixth, we have performed our own needs assessment on the Fort Berthold Reservation and the results point to a clear need for more natural resource officers. For instance, we have not had a range assessment since 1982. Providing more local officers would not only assist with the actual trust management responsibility, but it would also enable the tribe to grow economically faster and more efficiently. But, as you know, officers cost money and therefore the MHA Nation strongly recommends that Congress specifically authorize a level of funding of at least $20 million annually for tribal assistance and local resource officers under this title.

Seventh, the management plans in section 304(a)(2) should include specific functions such as appraisals.

Eighth, we recommend that all tribes, not just Self-Governance tribes be allowed to utilize the redesign provisions of section 304(a)(3) as long as the new elements meet the trust requirements of section 304(c). As you know, many large land-based tribes, which control a majority of the trust resources, are not Self-Governance tribes. They should not be penalized for their decision to adhere to direct service programs.

Title IV – Fractional Interest and Purchase Consolidation Program

This section would amend the Indian Land Consolidation Act to expand the program for acquisition of fractionated interests. As you know, there are about 4 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. We believe that an investment in land consolidation is critical to a reform that works.

We strongly support the new incentives for voluntary sales of fractionated interests by allowing the Secretary to offer more than fair market value.

We also recommend that the Committee consider adding an additional subsection that authorizes the issuance of guaranteed or low-interest loans to individuals to purchase fractionated land.

Based on testimony received at the January Great Plains Tribes roundtable, the MHA Nation further recommends that Indian families should have an opportunity to purchase lands under this Title. We recommend that the Committee consider directing the Department to establish a national ownership data bank and provide assistance to Indian families who wish to consolidate their land interests.

And that the notice requirements are not sufficient. Section 401 should be amended so that the notice provisions in section 213(e)(3)(B) of the Indian Land Consolidation Act include an express consent form. An offer should not be considered accepted simply because of the offeree does not sign the rejection notice. Rather the offer shall be considered rejected under section 213(e)(4)(B) if the offeree does not sign the consent form included in the notice package.

Finally, the MHA Nation recommends that the title should include a provision that ensures that the premium price for fractionated land shall not have an effect on the appraisal value which would otherwise place Indian tribes who want to buy back land at a disadvantage. The legislation should not unintentionally place tribes in a weaker position to buy lands than the federal government. We believe that ultimately, Indian tribes, not the federal government, make better landowners out West.

Title V – Restructuring Bureau of Indian Affairs and Office of Special Trustee

This title executes most of the actual reform at the Department of the Interior. This title would create a new Under Secretary for Indian Affairs who would replace the Assistant Secretary for Indian Affairs. The title would also sunset the Office of Special Trustee for American Indians at the end of 2008 and transfer the functions of the Special Trustee to the Under Secretary.

This title of the bill meets many of the goals of our 50 Trust Principles for reorganization, including the creation of a single line of authority and clear responsibility and accountability.

The MHA Nation has a number of additional recommendations to offer.

First, the MHA Nation supports the creation of the position of Under Secretary with the caveat that the Under Secretary be given clear authority over everyone in the Department except the Secretary, and Deputy Secretary. The Under Secretary should not be a glorified Assistant Secretary. Otherwise, the MHA Nation recommends that this position be created as one of Deputy Secretary.

Second, we recommend that the Under Secretary be given authority under section 503 over the U.S. Fish and Wildlife Service, the National Parks Service, the U.S. Geologic Service, the Office of Surface Mining and the Office of Surface Mining. The reason is that there are trust assets that are affected by these agencies and there is often conflict between Indian tribes and these agencies.

Third, we strongly recommend that the Under Secretary be charged with managing tribal trust assets in accordance with certain common law trust principles. Specifically, we recommend that the Committee include a new section in Title 5 that sets the standards for the administration of trust funds.

The importance of the Trust Responsibility to all Indian Tribes cannot be overstated. Almost nothing can be considered more sacred.

In 1985 the U.S. Supreme Court said in the Mitchell case,

> "Where the Federal Government takes on or has control or supervision over tribal moneys or properties, the fiduciary relationship normally exists with respect to such moneys or properties unless Congress has provided otherwise, even though nothing is said expressly in the authorizing or underlying statute or the fundamental document."

And in the 1942 Seminole case the Supreme Court said that the conduct of the United States as trustee for the Indians should "be judged by the most exacting fiduciary standards, not honesty alone, but the punctilio of an honor the most sensitive."

Thus, it is clear to me and to all the tribes who created the 50 Trust Principles that trust standards should apply. We reviewed the Restatement of Trust, case law, and sought expert advice from academics, litigators, and judges. Based on the advice we received, we recommended that Congress enact a number of well-known and understood trust standards that govern nearly all trust transactions.

These standards should be added in a new section 503(10) and include the following:

- Duty of Loyalty and Candor
- Duty to Keep and Render Accounts
- Duty to Exercise Reasonable Care and Skill
- Duty to Administer the Trust
- Duty not to Delegate (this does not negatively impact compacting or contracting.)
- Duty to Furnish Information
- Duty to Take & Keep Control
- Duty to Preserve the Trust Property
- Duty to Enforce Claims and Defend Actions
- Duty to Keep Trust Property Separate
- Duty with Respect to Bank Deposits
- Duty to Make Trust Property Productive
- Duty to Pay Income to Beneficiaries
- Duty to Deal Impartially with Beneficiaries
- Duty with Respect to Co-Trustees
- Duty with Respect to Persons Holding Power of Control

Fourth, we recommend that the Committee provide access to the federal courts by authorizing a cause of action in federal district court for breach of fiduciary duties and granting of equitable and legal relief. The importance of this recommendation lies in the fact that it provides IIM account holders accountability and redress for failure. We understand that the Department strongly opposes this provision on the grounds that it could create the "Son of Cobell" and so on. We believe, however, that liability could be phased in over a period of years, in accordance with the recommendations of the Policy Commission and the independent review agency discussed below. At a minimum, the Committee should authorize the federal courts to order prospective relief when necessary.

Fifth, we recommend that the Committee amend Title 5 at the end to provide for an independent agency or office with the authority to review and report on the Department's administration of its trust management responsibilities.

Such an agency or office could be located an independent agency or could be housed in an investigative arm of the Justice Department. The important point is that there is an inherent conflict in self-regulation by the Department of the Interior, no matter how well meaning it may be. Thus, an independent entity with oversight and enforcement authority over the Department of Interior is needed.

In addition, 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. As you know, the Special Trustee has no independence, and simply certifies whatever budget is submitted by the Administration. It is likely that the Under Secretary would simply continue this practice. Thus, we strongly support the need for an independent agency or office vested with the responsibility to review the federal budget for trust management and report to Congress on the budget's adequacy.

Sixth, we recommend deletion of subsection 503(b)(2) which would allow the new Under-Secretary to avoid Senate confirmation and public scrutiny. The importance of this new position is such that all of Indian Country must be given an opportunity to have a voice on his or her appointment.

Seventh, Congress should direct the new Under Secretary to revise the current tribal consultation model within 100 days of enactment of the bill by amending section 503(c)(6).

Eighth, Congress should include tribe in a negotiated rulemaking process that guarantees that Indian tribes have a say in exactly how the Under Secretary reorganizes under sections 504(e), promulgates rules and regulations under section 504(f), and recommends new legislation under section 504(m). Congress should also create a similar rulemaking process for the reorganization of the functions of the Office of Special Trustee under section 505(f), promulgates rules and regulations under section 505(g), and recommends new legislation under section 505(n).

The message our recommendations send is clear – in order to have a reform that works, there have to be standards, accountability, and a price for failure to meet those standards. If our collective experience has taught us anything, it is that the federal bureaucracy is not going to reform the system if they don't have to. That means, tribes should have access to the courts if necessary to compel compliance with trust reform and trust standards.

But there is a bigger picture here. This is about justice and treating Indian people with fairness. Standards go to the very nature of the Trust Responsibility itself. Standards stand for the fact that Indian treaties are still the law of the land and that the United States' promises mean something.

Title VI – Audit of Indian Trust Funds

We support this title and recommend that the Committee direct the Comptroller General to enter into the contract with the independent auditor within 120 days of passage of the bill.

Conclusion

I am glad to be able to say that I have been privileged to work with the Chairman, Vice-Chairman, members and staff of this Committee on this most important of issues.

This is an issue that has a direct bearing on our tribal resources and assets – in other words, the bedrock for our future economic growth and opportunity. Today, we are not simply considering bank statements, checkbooks, and empty BIA desk drawers. What we are talking about is the chance to restart the economic engine of Indian Country. And what we are also talking about is – at the same time – to bring justice home to Indian Country.

This is the chance to say that, at the crossroads, we were men and women of vision and hope. That we worked together to make Indian Country a place of hope and that we honored the humanity and dignity of our Indian people.

As I have pledged before, I will work with you day and night to ensure that we get legislation that all of Indian Country can support.

Thank You.